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IN THIS ISSUE

FROM THE CHAIR.....	1
NOMINATING COMMITTEE REPORT.....	2
SECTION NOMINATING PROCESS.....	3
EDITOR'S COLUMN.....	4
ARTICLES	
<i>What Tax Filing Statuses Are Available During a Divorce?</i>	5
<i>Our Family Wizard</i>	6
<i>Supreme Court Rules Inherited IRAs Do Not Have Bankruptcy Protection</i>	7
<i>A Provision Mandating a Monetary Payment for Requesting Modification of a Custody Agreement Is Found Not to Be Against Public Policy in Huss v. Weaver</i>	8
<i>Christian Bible or Nothing Says Philadelphia Family Court</i>	10
FEDERAL/MILITARY CORNER	
<i>Taxes and Military Pensions: The Long and Short of It</i>	12
TECHNOLOGY CORNER	
<i>To Do's: Opening a Law Office</i>	15
LEGISLATIVE UPDATE.....	16
CASE NOTES	
a. <i>In the Interest of X.J.</i>	18
b. <i>T.A.M. v. S.L.M. and D.M.S.</i>	19
c. <i>In the Interest of M.T.</i>	21
d. <i>Uveges v. Uveges</i>	25
e. <i>In Re: M.M.</i>	26
f. <i>K.A.R. v. T.G.L.</i>	28
g. <i>J.K. v. W.L.K.</i>	30
<i>INDEX TO THE DUKE JOURNAL OF GENDER LAW & POLICY VOLS. 13-21</i>	32

FROM THE CHAIR

By J. Paul Helvy, Esq.
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Paul Helvy

Thanks to everyone who attended the Winter Meeting in Lancaster for their continued strong support of the Section. Our Programming Committee chairs, **Hillary Moonay** and **Kerri Cappella**, and the entire Programming Committee, which includes **Stephanie Winegrad**, **Jerry Shoemaker** and **Hilary Bendik**, spent countless hours organizing the CLE that was such an important part of the Meeting. I would also like to acknowledge Court of Common Pleas **Judges David R. Workman** (Lancaster), **Ann Marie Wheatcraft** (Chester), **Linda A. Cartisano** (Delaware), **Robert Matthews** (Philadelphia), **Leslie Gorbey** (Lancaster), **Joseph Adams** (York), **Jeannine Turgeon** (Dauphin), and **Thomas Doerr** (Butler County) for their

Paul Helvy is chair of the Family Law Practice Group at McNees Wallace & Nurick LLC, Harrisburg; Chair of the PBA Family Law Section; Past Chair, Dauphin County YLD; member, Dauphin, Cumberland and Lancaster Bar Associations; member, International Academy of Collaborative Professionals; and member, Central PA Collaborative Professionals.

hard work and participation in the CLE sessions. The comments we received confirmed that the judicial perspective on the various issues that we regularly confront in our practice is invaluable. A special thanks must also be made to our sponsors and exhibitors who help to make our Winter and Summer Meetings possible.

Finally, a special thanks to the PBA's **Pam Kance** and **Janell Klein** for all of their hard work "behind the scenes" to make our meetings successful, with record numbers of attendees.

At the meeting, I was presented with a CD containing an annotated version of the Custody Statute by **Judge Matthews**. This material has been added to the PBA Family Law Section website and is available to all Section members (See Page 11).

The Section continues to be incredibly active. **Julie Auerbach** is leading a team of attorneys that is diligently working on certification for Pennsylvania Family Law attorneys. This process includes the creation of an exam and we are fortunate that **Mark Ashton**, **Jonie Burner** and **Judge Gorbey** have agreed to draft that exam. Past Chairs **Carol Behers** and **Mary Cushing Doherty** are spearheading our

(continued on page 2)

FROM THE CHAIR

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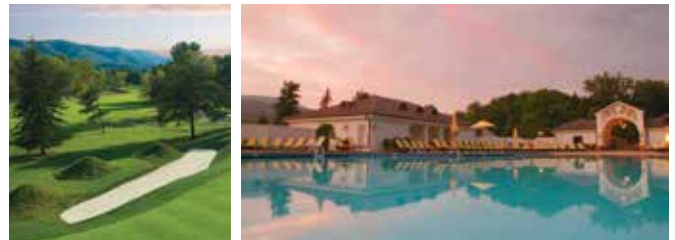
legislative efforts to reduce the statutory waiting period to obtain a nonconsensual, no-fault divorce from two years to one year. **Missy Boyd** and **Dawn Gull** have been actively working on several initiatives to ensure that the membership of the PBA Family Law Section will continue to be strong going into the future. Our Legislative Committee chairs, **Pam Purdy** and **Aimee Burton**, continue to provide Council with updates regarding pending legislation that could affect Pennsylvania family law practitioners and our clients. Our Rules Committee chairs, **Dave Schanbacher** and **Sally Miller**, continue to provide updates regarding proposed Rules and new Rules that have passed that affect our practice.

We are a very active Section and there is no shortage of opportunities to become actively involved. If you are reading this column and have considered taking a more active role in the Family Law Section, please contact me, the officers, council or any of the individuals listed above. I assure you we can find a way for you to become actively involved in your Family Law Section.

Planning for the Summer Meeting, scheduled for July 9-12 at the Greenbrier in White Sulphur Springs, W.V., is well underway. The programs look spectacular. The Summer Meeting will provide for many of us a once-in-a-lifetime opportunity to visit this historic and beautiful resort. It should be an exciting venue and a great meeting. I look forward to seeing you all at the Greenbrier!



PBA FAMILY LAW SECTION SUMMER MEETING



July 9-12, 2015 • The Greenbrier, West Virginia

PBA FAMILY LAW SECTION NOMINATING COMMITTEE REPORT

Article V of the PBA Family Law Section bylaws states in part that the Chair of the Section shall appoint a Nominating Committee comprised of the Chair-elect, the First Vice Chair, two members of Council and two Past Section Chairs, to be chaired by the immediate Past Chair.

The committee shall make and report nominations to the Section membership for officers and members of Council to succeed those whose terms will expire at the close of the annual meeting and members of Council to fill those vacancies for which there is a non-expired term and that the report shall be made in writing in a manner reasonably calculated to inform the membership, such as its inclusion in any regular publication of the Section.

On March 30, 2015, the committee met by conference call and have duly nominated the following individuals for the designated officer and council positions:

Chair: Mary E. Schellhammer
Chair-elect: Mark R. Ashton
First Vice Chair: Steven S. Hurvitz
Second Vice Chair: Gail C. Calderwood
Secretary: Michael E. Bertin
Treasurer: David C. Schanbacher

Council positions, terms to end in 2018, are:

Meredith Brennan
Lindsay Gingrich MacClay
Stephanie E. Murphy
Alita A. Rovito
Amy J. Phillips
Jessica F. Moyer
Stephanie Winegrad

Voting for officers and Council will be held July 12, 2015, during the Family Law Section's Summer Meeting at the Greenbrier, White Sulphur Springs, W.V..

Daniel J. Clifford
2015 Nominating Committee Chair

2015 Nominating Committee
Mary E. Shellhammer
Mark R. Ashton
David L. Ladov
David S. Pollock
Christina M. DeMatteo
Quintina M. Laudermilch

THE NOMINATING PROCESS FOR PBA FAMILY LAW SECTION LEADERSHIP BY MARK R. ASHTON

The Family Law Section is run by a Council of 21 lawyers and headed by a Chair, three Chairs-elect, a Secretary and a Treasurer. The Section's nominating committee is chaired by the Immediate Past Chair of the Section.

As I write this, we have just concluded selecting the attorney who will be voted on to become the next Treasurer. That person will likely become the Chair of the Section in 2020, after serving his or her way "up the chain." The Council is refreshed with seven new members each year.

We work on the basis of "self-nomination," so all a Section member need do is put his or her name into the hat. This time around we had four people ask to be nominated to the position of Treasurer and 18 people asked to be named to Council. One nominee had not been a member of the Section long enough to be considered and a second had the misfortune to have another person already on Council from his firm.¹ That left us with 16 viable nominations. Some of the nominees had already served on Council; however our bylaws stipulate that only three nominees can be "from the past" so that we continue to introduce fresh faces.

So what else do we look for in a council nominee? The easiest two benchmarks are diversity and attendance. If you don't regularly attend our Section meetings, you really aren't participating. The Council usually meets by phone, but twice a year we meet physically at the Section meetings. A huge part of what we do is put into these meetings. While we have excellent staff support on the logistical side, the success of the meetings correlates directly to the volunteer efforts of the programming committee. As for diversity, some of that is easy. This year, we had only two male candidates for Council. We had relatively few candidates from the west. There was a time when Allegheny, Philadelphia and Montgomery counties heavily dominated both Council and leadership. This year's nominating committee was pretty clear that we were looking for people from the "middle," meaning west of Chester County, east of Allegheny County and north of Maryland (which is not a county, yet). And that's nothing new: our current Chair is from Dauphin County, your next Chair is from Somerset County and soon after that, a lawyer from Centre County will be holding the gavel.

In the end however, the true driver to Council and leadership positions is talent and participation in the committee system. If you can write, *The Pennsylvania Family Lawyer* is always looking for people who can digest a case or report on a trend. If you can speak, ask to be part of the case law updates, which are the proverbial first step into more ambitious speaking opportunities. If you like to know about changes in the law or the rules, those committees are in constant need of fresh talent. If you think the

programming can be improved, start by submitting your own ideas and chances are good that you will quickly be invited to be part of that process. If you are committed to the process that has long made this one of the state bar's most populous and respected Sections, chances are good that your request to ascend to Council and leadership will be viewed with favor.

But don't be surprised if you don't make it the first time. We had four excellent candidates for Treasurer. And the pool of talented professionals seeking positions on Council was also impressive. We know that we have disappointed some qualified candidates as we made decisions to balance Section involvement, gender and geography in an effort to show the Section as a whole that we are trying to be inclusive and fair. Our current leadership got the message that in the past it was complained of that Philly and Pittsburgh ran the show. And at this time next year, seven new Council members will be nominated.

This is not our Section. It is *your* Section and many of us who have been doing these things for 30 or more years appreciate that the future is not in the past.

¹ An unwritten rule prohibits more than one lawyer from the same firm from holding seats on the Council at the same time.

The *Pennsylvania Family Lawyer* is no longer printed or mailed.

You must provide the PBA with an email address (office or home) in order to be notified when a new issue of the newsletter has been posted to the website.

Simply type "Member email address update" in the subject line of an email and send to jodi.wilbert@pabar.org, or login to the PBA website and update your information on the PBA Member Dashboard.

If you know of fellow Section members who have not supplied their email addresses, please urge them to do so.

FROM THE EDITOR

By David S. Pollock, Esq.
dpollock@pollockbegg.com

Spring forward into darkness! Why do we need to keep changing our times? I like to fall backward for more time in the fall. Oh, let it be. Let it go. Let us change no more ...

This issue begins our 20th year as an editorial board. *The Pennsylvania Family Lawyer*, with the able assistance of **David L. Ladov**, **Lori K. Shemtob**, **Harry M. Byrne Jr.**, **Robert D. Raver**, **Stephen F. Rehner** and **Gerald L. Shoemaker**, along with **Alicia A. Slade**, **Joel B. Bernbaum**, **Mark E. Sullivan** and **Joel H. Fishman**, has made a continually improving quarterly for our Section. The Case Notes and Articles/Comments and other writings have been excellent. We intend to keep up the great work.

We are pleased to provide the following interesting Articles and Comments in this issue:

- a. **Mitchell E. Benson, CPA, MT, CFF; Donna M. Pironti, CPA, MSA; Adam M. Poutasse, CPA, MAcc; Savran Benson LLP** — What Tax Filing Statuses Are Available During a Divorce?
- b. **Katrina Volker** — Our Family Wizard
- c. **Joan Ellenbogen, CPA** — Supreme Court Rules Inherited IRAs Do Not Have Bankruptcy Protection
- d. **Elizabeth J. Billies** — A Provision Mandating a Monetary Payment for Requesting Modification of a Custody Agreement is Found Not to be Against Public Policy in *Huss v. Weaver*
- e. **James W. Cushing** — Christian Bible or Nothing Says Philadelphia Family Court

Mark E. Sullivan has provided “Taxes and Military Pensions: The Long and Short of It.” **Joel B. Bernbaum** has provided another important technology practice item. The Legislative Update is dependably compiled by **Stephen F. Rehner**, counsel to the Pennsylvania Joint State Government Commission.

As always, we provide the following well-written and interesting Case Notes:

- a. **Maris J. Weiner** — *In the Interest of X.J.*
- b. **Stephanie E. Murphy** — *T.A.M. v. S.L.M. and D.M.S.*
- c. **Judith A. Algoe** — *In the Interest of: M.T., a Minor; Appeal of: C.T.III and M.T.; In the Interest of: C.T., IV, a Minor; Appeal of: C.T.III and M.T.; In the Interest of: M.J.T., a*

Minor; Appeal of: C.T.III and M.T.; In the Interest of C.E.T., IV, a Minor; Appeal of C.T.III and M.T.

- d. **Sara L. Slocum** — *Uveges v. Uveges*
- e. **Hilary A. Bendik** — *In Re M.M.*
- f. **Catherine A. Curcio** — *K.A.R. v. T.G.L.*
- g. **Darren K. Oglesby** — *J.K. v. W.L.K.*

Rita and I wish you good health and happiness this spring. We are looking forward to our trips to Brooklyn and Tallahassee to be with our sons, daughters-in-law and granddaughters, as well as other trips and adventures this year. Enjoy spring. Be well.

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David S. Pollock

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From time to time, the *Pennsylvania Family Lawyer* will publish articles that it receives for submission. The views expressed in those articles are solely those of the authors of the articles and do not reflect the views or policies of the editors, the *Pennsylvania Family Lawyer*, the Family Law Section or the Pennsylvania Bar Association, and no endorsements of those views should be inferred therefrom.

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WHAT TAX FILING STATUSES ARE AVAILABLE DURING A DIVORCE? BY MITCHELL E. BENSON, CPA, MT, CFF; DONNA M. PIRONTI, CPA, MSA; AND ADAM M. POUTASSE, CPA, MAcc

Yet another tax season has arrived and it is time to file tax returns. However, anyone in the process of getting divorced may wonder which federal filing status to use. Each financial circumstance and marital situation is unique and the filing status that is most beneficial for the parties should be discussed with an attorney and a CPA. However, there is clear guidance under the Internal Revenue Code as to which filing status is available under certain circumstances.

An individual's filing status is driven by whether he or she is considered married or unmarried at year end. If the individual is married at the beginning of the year, the only way he or she is considered unmarried at the end of the year is if there has been a legal separation or a divorce that is final by year end.

An individual's filing status is driven by whether he or she is considered married or unmarried at year end. If the individual is married at the beginning of the year, the only way he or she is considered unmarried at the end of the year is if there has been a legal separation or a divorce that is final by year end.

State law governs whether the individual is considered divorced or legally separated. And although every state can formally issue a divorce decree, not all states have a formal legal separation.

Pennsylvania does not provide for formal legal separation. Consequently, in Pennsylvania, if an individual is married at the

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beginning of the year and not divorced at year end, then he or she is still considered to be married. Pennsylvania tax rules are simple in that there are only two choices — either married filing jointly or married filing separately. As the tax rate is flat in Pennsylvania, and spouses cannot offset their separate income and losses within each income category, there are likely no tax consequences to choosing either filing method.

For federal tax filing purposes there are three filing status options that could be available — Married Filing Joint (MFJ), Married Filing Separately (MFS) and Head of Household (HOH) — depending on the answers to the following two questions. First, has the married couple been living in the same household for the last six months of the year and second, is there a dependent child or other dependent living in the household?

If the couple lived together during the last six months of the year, the only options for filing are MFJ and MFS. MFS tax rates are higher than MFJ (although sometimes the MFS overall tax is less), so the choice depends on each couple's circumstances.

If the parties lived apart during the last six months of the year and did not have a dependent child or other dependent living in their separate household, then the only choices are still MFJ and MFS. However, if there was a dependent living in one of the parties' household and the dependency requirements are met, then

(continued on page 6)

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(continued on page 6)

ARTICLES

(continued from page 5)

a third option is available for the parent with the majority of the time and support — HOH. The HOH tax brackets are lower than MFS and still afford the advantage of not filing with a spouse.

Filers should seek advice from an attorney and a CPA to choose the most beneficial tax filing status. To help determine the best option, it often makes sense to prepare a projection of each outcome since the confluence of types of income and deductions impacts rates (ordinary, capital gains, alternative minimum tax).

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OUR FAMILY WIZARD BY KATRINA VOLKER

For co-parents prone to conflict, long email exchanges and vague text messages often create ambiguity or miscommunication and make admissible records difficult for counsel to compile. As a result, courts routinely order parent communication on the OurFamilyWizard website (OFW) in cases spanning all 50 states, Washington, D.C., and five Canadian provinces. OFW is even ordered in domestic violence cases to keep parents informed while reducing opportunities for coercive control and harassment.

Lower courts' orders for communication with OFW are regularly upheld. In a sealed 2011 opinion Montgomery County Judge Carolyn Tornetta Carluccio wrote:

(Our)FamilyWizard is utilized by courts in cases involving litigious parents whose credibility is lacking and who are unable to communicate with each other. The tool protects each party against trivial or false contempt petitions by preserving evidence ... it facilitates communication between the parties in a non-hostile, non-confrontation, non-intrusive, monitored format. ... The tool is objective and applies equally to each party.

Now in its 14th year, OFW has helped more than 100,000 families maintain more amicable communication using secure mobile and web-based features for parents to communicate in a simple, well documented and highly organized manner. Along with their legal or mental health practitioners, co-parents are

linked together to share information using these main features:

- Free professional accounts that give practitioners access to simple, court-ready printouts.
- Text and email notifications that keep parents and professionals up-to-date on new activity.
- A calendar equipped with patented parenting time-modification requests, easy-to-use parenting schedules and protected journal entries for both parents.
- A message board that documents when messages are read by recipients for the first time. "Tonemeter" provides feedback that helps parents be mindful of their messages' tone and gives the author a chance to reframe a message before hitting "send."
- An information bank where parents store vital medical records, insurance information, emergency contacts, school work and more.
- An expense log where parents make reimbursements and requests for unreimbursed medical expenses, child support and other parenting expenses. Expenses and payments are easily categorized and reconciled. Parents banking information is not shared with their co-parent.
- Children, grandparents and other family members can also be included in the conversation with limited access to the calendar, journal and messages.

Mobile apps make OFW accessible even to those without a computer. Mobile and tablet applications for professional accounts will be released this year.

Family law professionals are offered an unfiltered window into co-parent communication via their free professional account.

Katrina Volker has been a professional liaison for the OurFamilyWizard website for three years. Her role includes educating judges, lawyers and other family law professionals on the online tools that can be used to benefit and monitor the parental communication process in high-conflict cases. kvolker@ourfamilywizard.com, 952-548-8129.

(continued on page 7)

ARTICLES

(continued from page 6)

The OFW Professional Account monitors parent activity without copying the practitioner on endless emails. Professionals use one account to create new accounts for clients, link to parents already using OFW and retrieve records. Parent coordinators/facilitators, guardian ad litem and others appointed to a case can even set up expense categories and parenting schedules for the family.

Rules built into OFW all but eliminate game playing. Each feature intuitively anticipates points of conflict and prompts parents for complete and timely information. Parents can never backdate entries or edit items created by others. Entries show who authored items and when, but, more importantly, show a history of edits, complete with content changes. Date and time stamps indicate how often parents see information, and a “sign-in history” is maintained for each member of the family.

Admissible, court-ready printouts help counsel document cooperation between parents, but OFW’s communication often helps

parents successfully resolve issues without returning to court. In *N.W. v. N.W.*, (West., 1555 WDA 2013 Pa. Super. 5/29/2014), the Superior Court of Pennsylvania wrote:

...Mother explained that Father had previously manipulated the dates and order of their electronic communications for his benefit. The court-mandated participation in OurFamilyWizard eliminated the mischief and hostile interactions.

While courts recognize how the website helps family communication, so do the families themselves. Thousands have chosen to sign up for OFW all on their own. To ensure these tools are available to those who need it most, OFW offers discounted and free accounts to those who qualify. Several thousand low-income parents have moved their families forward using scholarship accounts. In any case, OFW provides an effective, long-term solution for families and professionals alike by opening lines of communication in a secure, accessible and well-documented forum.

SUPREME COURT RULES INHERITED IRAS DO NOT HAVE BANKRUPTCY PROTECTION BY JOAN ELLENBOGEN, CPA

Retirement funds are protected from creditors even if the owner files for bankruptcy — with only a few limitations. This protection extends to funds in all government-qualified pension plans, including IRAs (traditional and Roth), 401(k)s, 403(b)s, Keoghs, profit-sharing, money-purchase and defined-benefit plans.

Joan Ellenbogen, CPA, is the Managing Partner of Crawford-Ellobogen LLC Certified Public Accountants in Pittsburgh, member of the boards of the International Network of Accountants & Auditors, Port Authority of Allegheny, Past President of Executive Women’s Council of Pittsburgh, Past President and Trustee of the Allegheny County Bar Foundation, Past President, Pittsburgh Chapter of Pa. ICPA and Pittsburgh Tax Club, Past Treasurer and Board of Governors, ACBA and PBA House of Delegates. She can be reached at 412-731-1500, or jellenbogen@cecpa.com.

A recent U.S. Supreme Court decision has held, however, that an inherited IRA is not a “retirement fund” and therefore does not qualify for bankruptcy protection.

An inherited IRA is a traditional or Roth IRA that a deceased owner has bequeathed to a beneficiary. It differs from a “true” retirement account in three ways:

1. The beneficiary is not allowed to contribute additional retirement funds to the inherited IRA.
2. The beneficiary, regardless of age, may withdraw funds from an inherited IRA in any amount and at any time without penalty.
3. The beneficiary, regardless of age, is required to take annual minimum distributions from any inherited IRA.

Based on the above characteristics, the Court unanimously concluded that with respect to beneficiaries, inherited IRAs are “not funds objectively set aside for one’s retirement” and instead constitute a “pot of money that can be used freely for current consumption.”

**A PROVISION MANDATING A MONETARY PAYMENT
FOR REQUESTING MODIFICATION OF A CUSTODY AGREEMENT
AGAINST PUBLIC POLICY BY PA. SUPERIOR COURT
IN *HUSS V. WEAVER*
(WITHDRAWN NONPRECEDENTIAL MEMORANDUM OPINION)
BY ELIZABETH J. BILLIES**

HUSS. V. WEAVER ___ A.3D (PA.SUPER 2104)

The Pennsylvania Superior Court has determined that a contract provision requiring father to pay mother \$10,000 every time that he filed to modify their custody agreement is valid and enforceable in the non-precedential decision of *Huss v. Weaver*. In making this determination, the Superior Court, in a panel decision authored by Judge Donohue (with Musmanno, J., joining), reversed the Washington County court's finding that such a provision was void against public policy. The Superior Court found that there was neither any appellate authority for such a determination nor was there any evidence that such a provision would bar these parties or a court from modifying the physical and legal custody terms of the agreement for the best interests of the child. In her dissent, Judge Allen argued that the \$10,000 provision does affect father's custodial rights and thus the court can and should nullify such an agreement if it is in the child's best interest to do so.

The facts of this case are as follows: Amy Huss (mother) and James P. Weaver (father) were never married. On Oct. 17, 2008, the parties entered into an agreement to set forth each party's respective custodial and financial rights and obligations should a child or children be born of their relationship (hereinafter referred to as the "agreement"). The impetus for the agreement was not provided. However the agreement specifically noted that mother was a real estate agent and that father was a practicing attorney. In fact, father's firm prepared the agreement (though father's role in same was not clear to the court) and father had represented mother in other legal matters. The opinion does not state whether mother had separate counsel in the preparation of the agreement.

The agreement stated, *inter alia*, that, in the event that the parties were no longer a couple (either by way of divorce or other termination of their relationship), mother would have primary custody of any children and that father would have partial physical custody every other weekend. The agreement also allowed mother to relocate and it set forth a custodial schedule for father should same occur. Finally, the agreement stated that, "In the event [father] files a complaint, motion, petition or similar pleading seeking the modification or amendment of the custody and/or visitation provisions set forth herein, [father] agrees to pay

[mother] \$10,000 for each modification or amendment sought."

The parties' only child was born in November 2010 and the parties terminated their relationship shortly thereafter. In December 2010, father filed a custody complaint and, since that time, the parties have been "embroiled in litigation," which has resulted in father filing several pleadings requesting modifications of the custody schedule set forth in the agreement. As a result of the ongoing litigation, in March 2013, mother filed a civil action against father in the Washington County Court of Common Pleas alleging breach of contract, negligent misrepresentation and fraud in connection with the parties' 2008 agreement. More specifically, mother averred that father has breached his contractual promise to her by failing to pay her \$10,000 for each of his custody filings. In addition, she alleged that father, as an attorney and, more notably, as someone who had acted as her attorney in the past and was involved in the preparation of the agreement, intentionally or, at best, negligently misrepresented to her his belief that the agreement was a valid and enforceable contract.

Father filed preliminary objections to mother's complaint, asserting that the \$10,000 provision was void against public policy and that the negligent representation and fraud counts should be barred because mother could not provide evidence of monetary damages. The trial court agreed with father and dismissed mother's complaint, finding that the \$10,000 provision was void against public policy. Washington County Judge Emery analogized this provision to agreements wherein a party agrees to give up his or her right to seek child support from the other. As a result, mother filed this appeal and raised two issues. First, did the trial court err in finding that the \$10,000 provision was against public policy and unenforceable. Second, should father, who is an attorney and was involved in the preparation of the agreement, be barred from asserting that the \$10,000 provision is unenforceable after he advised mother, prior to executing the agreement, that it was valid.

The Superior Court first addressed the validity of the \$10,000 provision and found that trial court's determination that it was void against public policy was in error. The court explained that, "it is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring [that the contract is against public policy]." *Ferguson v. McKiernan*, 940 A.2d 1236

(continued on page 9)

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ARTICLES

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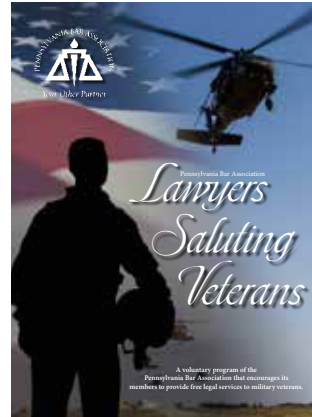
(Pa. 2007) (other citations omitted). The Superior Court then addressed the trial court's analogy of the \$10,000 provision to the child-support waiver provisions that have been invalidated by the Pennsylvania Supreme Court's decision in *Knorr v. Knorr*, 588 A.2d 503 (Pa. 1991) and its progeny. The Superior Court stated that such an analogy could not be properly made here. The court explained that, in support-waiver cases the appellate courts have found that because the right to support belongs to the child, the parents do not have the authority to bargain that right away. However, the Superior Court explained that custodial rights are not the same. They do not belong to the children but rather belong to their parents. Thus the parents have the right to enter into any contracts regarding same, including ones that involve monetary payments for modification requests.

After distinguishing the \$10,000 provision from child support waivers, the Superior Court then turned to the trial court's finding that the \$10,000 provision was against public policy in its own right because, "it substantially impairs the Court's power and the Commonwealth's duty to determine what is in the child's best interests" and would have a "chilling effect" on father's ability to file for custody modification. Again, the Superior Court disagreed. The court stated that there was nothing in the agreement generally or in the \$10,000 provision specifically that barred a court from modifying the physical and legal custodial terms of the agreement. The \$10,000 provision merely stated that if father should make a request for same, he must pay mother that sum. Next, the Superior Court noted that there was no evidence presented regarding the parties' respective finances or how they arrived on the \$10,000 figure. Rather, the agreement only stated that father is an attorney and mother is a realtor. Thus, the Superior Court explained that it has no way of knowing if \$10,000 would be a "significant barrier" that would preclude father from filing a petition to modify or even how the parties came to agree upon that amount (although mother stated in her pleadings that the purpose of the \$10,000 payment was for her to establish a litigation defense fund, same is not stated in the agreement). Thus, the court could not identify "any dominate public policy" or "violations of obvious ethical or moral standards" that dictated the invalidation of this provision.

Thus, the Superior Court found that, based on the above, mother's breach of contract claim was viable and her complaint should be allowed to proceed. The court also explained that, because mother's breach of contract claim was still valid, her claims for negligent misrepresentation and fraud were also still viable as she may now be able to provide evidence of monetary damages, i.e., father's failure to pay \$10,000 for each custody filing.

Editor's Note: This memorandum opinion and the dissent were withdrawn and reargued. We await the decision.

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The PBA is recruiting lawyer volunteers to handle pro bono cases in their areas of practice or expertise for Pennsylvania's military veterans as part of the PBA's "Lawyers Saluting Veterans" program.

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An initiative of PBA President Francis X. O'Connor, the "Lawyers Saluting Veterans" program is being coordinated by the PBA's Pro Bono Office and Military and Veterans' Affairs Committee.

For more information, call the program hotline at 800-932-0311, ext. 2570.

CHRISTIAN BIBLE OR NOTHING SAYS PHILADELPHIA FAMILY COURT BY JAMES W. CUSHING

In the recent custody matter of *Musaitef v. Musaitef*, Court of Common Pleas, Philadelphia County, Commonwealth of Pennsylvania, Case No.: 01202189, Judge Barbara Joseph ruled that a Muslim woman may not swear on a Koran while taking the oath before testifying at a hearing.

At a hearing in the *Musaitef* matter, the mother, a Muslim, requested that she be sworn in by putting her hand on a Koran instead of a Christian Bible when taking the oath before testifying. The father in the matter, who is also a Muslim, objected to the use of the Koran, arguing at the hearing and subsequently in a brief (discussed below), that it served as witness intimidation in that a Koran is not statutorily permitted to be used for administering oaths at a hearing. The mother remained resolute in wanting to use the Koran, so the judge asked the parties to brief the issue of whether the use of a Koran for swearing in at a hearing is legally permissible.

Father first argued that mother's request was a pretext for witness intimidation. Evidently, the alleged implication from mother was that father's Islamic faith included the belief that oaths taken on religious books outside of Muslim belief would not bind the speaker to tell the truth. Therefore, the witness intimidation was mother's subtle suggestion that father's use of a Christian Bible instead of a Koran for his oath, as contrasted by her insistence on using a Koran, indicated that father was going to lie during his testimony.

The primary arguments between the parties centered on 42 Pa.C.S. Section 5901 which states the following:

- (a) General rule. -- Every witness, before giving any testimony shall take an oath in the usual or common form, by laying the hand upon an open copy of the Holy Bible, or by lifting up the right hand and pronouncing or assenting to the following words: 'I, A. B., do swear by Almighty God, the searcher of all hearts, that I will [____], and that as I shall answer to God at the last great day.' Which oath so taken by persons who conscientiously refuse to take an oath in the common form shall be deemed and taken in law to have the same effect as an oath taken in common form.
- (b) Right to affirm.--The affirmation may be adminis-

tered in any judicial proceeding instead of the oath, and shall have the same effect and consequences, and any witness who desires to affirm shall be permitted to do so.

Father argued that the statutory language is plain, clear and unambiguous: It allows for two options for taking an oath before testifying: 1) swearing on a Bible or 2) affirmation. It simply does not provide for the use of a Koran. Therefore, according to father, if mother does not want to use a Bible for her oath, she can simply affirm. Further, father also argued that as both parties would be using a language interpreter, who used the statutory form for his oath, it would create confusion if different and innovative non-statutory oaths were used for one party but not others. Father pointed out that 42 Pa.C.S. Section 5902 prohibits inquiry into mother's religious beliefs in order to assess her credibility, so he cannot explore with her the potential religious and/or other implications for using a Koran over a Bible for the purposes of taking an oath at a hearing.

Mother's brief, by contrast, focused on religious liberty. Mother asserted that 42 Pa.C.S. Section 5901 must be read broadly enough to allow for the use of the Koran, otherwise it unconstitutionally prefers Christianity over other religions in violation of the religion clauses of the First Amendment to the U.S. Constitution. Mother pointed out that the affirmation option in the statute noted above is provided for people who do not wish to invoke the Christian God or Bible and/or employ religion for the oath and/or object to taking "an oath" (as opposed "affirming"). The obvious purpose of the oath, per mother, is to impose the significant nature of the proceedings on a witness and to ensure the truth of testimony. As a corollary, per mother, a way to impose the significant nature of the proceedings onto a witness is to allow that witness to swear upon something that witness respects and takes seriously, such as his or her preferred religious text; indeed, why else would the Bible be required for the oath if it did not reflect the prevailing significance of Christian beliefs when the statute was written and how they relate to not bearing false witness? From mother's point of view, if Christians receive the benefit of, and respect for, their religious beliefs when taking the oath on their Bible, ought not other religionists, in this case Muslims, receive the same benefit and respect and be permitted to take an oath on their Koran?

Due to the dearth of case law in Pennsylvania on this issue, mother relied upon case law in North Carolina, which ruled that oath statutes are flexible enough to allow for the use of religious books other than the Bible, per the religious preference of the witness, in order serve as a mechanism to ensure honesty for a witness' testimony (it should be noted that the language of the

(continued on page 11)

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ARTICLES

(continued from page 10)

North Carolina oath statute is vaguer than 42 Pa.C.S. Section 5901 and, therefore, more able to be read and understood more broadly).

Mother also argued that understanding 42 Pa.C.S. Section 5901 as restricting oaths to exclusively the Bible (or non-religious affirmation) is unconstitutional. Mother pointed out that by allowing for the use of the Bible but no other religious book for an oath, Pennsylvania impermissibly favors Christianity over other religions and, therefore, serves as an unconstitutional endorsement of Christianity over other religions.

The court held a subsequent hearing and ruled that the precise language of the statute applies: either mother is to take her oath on the Christian Bible or non-religiously affirm. The court made no allowances for other religions, for the potential to un-

derstand 42 Pa.C.S. Section 5901 as merely requiring a religious book weighty enough to persuade a witness to testify truthfully (as opposed to strictly a Bible), and/or the potential constitutional issues described above.

As an aside, there seems to be no discussion in the case of the curious final sentence of 42 Pa.C.S. Section 5901(a): “[w]hich oath so taken by persons who conscientiously refuse to take an oath in the common form shall be deemed and taken in law to have the same effect as an oath taken in common form.” This sentence would seem to imply that the statute ought to be read expansively as it appears to allow another form, other than the “common form,” to have the same effect as the common form. Unfortunately, it does not appear that this argument was explored in the case.

This case is still in progress and it will be interesting to see how it develops.

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TAXES AND MILITARY PENSIONS: THE LONG AND SHORT OF IT BY MARK E. SULLIVAN

Direct Payments When Possible

In a military divorce case, the nonmilitary spouse will often be concerned about pension-share payments and taxes. She will invariably want to receive pension-division payments directly from the retired pay center. For the Army, Navy, Air Force and Marine Corps, this is the Defense Finance and Accounting Service (DFAS) in Cleveland. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.

In the usual case, attempts to get the hypothetical service-member, Col. John Doe, to write a monthly pension share check to his ex-wife once he has retired may be an exercise in futility. Suppose he retires in another state. What if his retirement residence is in Germany or Japan? If he retires elsewhere or if he insists on moving around from place to place, it will be virtually impossible for the former spouse to collect her share each month.

Direct pension payments by garnishment benefit Col. Doe as well as his ex-wife. He needs to know that, with a garnishment, the military does the appropriate withholding before sending out checks. The ex-wife's share of his military pension is automatically excluded from his taxable income. He receives (as she does) a Form 1099-R each January showing what the taxable income is for the prior tax year. He doesn't need to keep track of writing a check every month to send it to his former spouse.

When Direct Payments Are Not Possible

But sometimes it is not possible to obtain payments through the military retired pay center. Pension garnishment payments for property division cannot be made through the pay center when there is not a 10-year overlap of the marriage and the period of creditable service.¹ In addition, there will be another gap of up to 90 days at the start of the pension garnishment process, to account

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for review and processing of the military pension division order (MPDO).² What good guidance can be given to Col. Doe and his former wife in these situations?

Good Guidance Needed

Don't expect that guidance from most lawyers. Few of them know much about the tax consequences of periodic payments from the former employee to the alternate payee in regard to division of a deferred compensation program. One premier family law attorney, when asked why she'd told her client there were no taxes due as to the receipt of monthly pension-share payments from a Navy retiree, replied to this author, "because the payments are part of property division, not alimony, and everyone knows that property division payments are not taxed under Section 1041 of the Internal Revenue Code." It is, of course, true that property transfers between spouses under 26 U.S.C. 1041 are not subject to capital gains taxes, but this has no relationship to the issue at hand, which is pension-share payments from a military retiree to a former spouse.

Don't expect guidance from appellate decisions in domestic cases involving pension division either. When higher courts mention tax aspects of pension-division payments, which is rarely, they usually get it wrong. Two state court decisions, from the highest court in each state, approved of the division of the pension payment received by the retiree *less taxes* for the proper distribution of marital retirement benefits upon divorce.³ The Utah Court of Appeals in 2012 ruled that the military pension should be divided after the deduction of federal and state taxes.⁴ In 1995 the Superior Court of New Jersey, Appellate Division, reviewed without criticism or comment a trial-level judgment for military pension division that allocated "the Husband's retirement pension less only Federal, State, or local Income Taxes properly withheld required by law. ..."⁵ In a 2011 decision, the Kentucky Court of Appeals affirmed a trial-level order that required the retiree to "withhold from the retirement benefits otherwise payable to [the former spouse] ... a sum sufficient to pay all taxes imposed on [the retiree]... for that portion of his retirement. ..."⁶ A rare exception is found in *Brown v. Brown*, a 2010 trial-level decision from Connecticut.⁷ At the end of the decision, the judge wrote that "the court is under the assumption that the plaintiff [the retiree] will be able to deduct the full amount of that payment from his 2010 income tax return and the defendant [the former spouse] will

(continued on page 13)

FEDERAL/MILITARY CORNER

(continued from page 12)

be required to pick up that full payment on her 2010 income tax return.”⁸

How to Do It

The *Brown* decision illustrates the correct approach. When the pension is divided in a written instrument and the payments end no later than the death of the payee, the military retirement payments are includable in the gross income of the payee and they are excludable from the payor’s income.

A tax court case in 2000 confirms this. In *Baker v. Commissioner*,⁹ the ex-husband was a military retiree. He was ordered in the divorce decree to pay his ex-wife 50 percent of his military retired pay each month as part of property division. He made payments to her and deducted same as alimony on his Form 1040; she did not report the payments as income, claiming that “the payments she received ... were in furtherance of a division of property and should be excluded from her income” under IRC Section 1041. The tax court ruled against her, stating that:

1. IRC Section 61 defines gross income as all income from whatever source, including alimony;
2. Whether a payment is alimony is determined by reference to Section 71;
3. Section 71(a) states that any amount received as alimony is included as income;
4. Sec. 71(b)(1) defines alimony as payment under the following terms –
 - a. Any cash payment
 - b. Received by a spouse under a divorce or separation instrument
 - c. Which doesn’t designate the payment as *non-includable* within gross income under Section 71 and *non-deductible* under Section 215
 - d. And the parties are not members of the same household when the payment is made, and
 - e. There is no liability to make any payment after death of the payee spouse.

Thus if a payment satisfies all these factors, it is alimony. Here the tax court found that the direct payments from the retiree to his ex-wife were alimony (as tax rules define it), even though intended as property division, and they were includable in the ex-wife’s gross income.

The *Baker* case is not unique. Numerous other cases make the same point — the periodic pension-share payments made from the retiree to his former spouse are included in her income and excluded from his.¹⁰

When the retired pay center does not make direct payments to the former spouse, Col. John Doe will need to make the payments to his ex-wife directly. He will have tax withheld on the entire amount that he received. He can exclude from his income

any amount he paid her pursuant to the decree or agreement. His ex-wife is liable for taxes on the share of the pension that she received, and she should include the payments in her gross income.

How is this done? The payor’s payment may be entered as a negative number on the face of Form 1040 at Line 21 as “Other income,” as a negative at Line 16a, “Pensions and annuities” or at Line 31a, “Alimony paid.”¹¹ He should, of course, attach to the tax return an explanatory note, along with appropriate documents to back up his position.

What about income for recipient? John Doe’s ex-wife will complete her own Form 1040 and this would show the payments that she received from Col. Doe, pursuant to a written instrument, which are the division of this defined benefit program. She would reflect the gross amount paid to her by John under “Pensions and annuities,” which is Line 16a.

To cover these contingencies, consider a clause in the court order or settlement document that says:

Periodic payments made by Husband directly to the Wife which are not done by garnishment through the military retired pay center will be included in Wife’s income under Sections 61 and 71 of the Internal Revenue Code, and these payments are likewise excluded for Husband from his gross income.

At the end of this paragraph, the drafting attorney may choose to insert the citations shown herein as authority for this clause.

State Income Taxes

While military retired pay is always subject to federal income taxation, one should not make the same conclusion in regard to state taxation. The states of Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming have no individual income tax, while New Hampshire and Tennessee only tax income derived from interest and dividends. Of the remaining states, about 16 have special rules for exemptions regarding military pensions. North Carolina, for example, grants a full exemption for retired military personnel who have five years of service as of Aug. 12, 1989, and otherwise there is a deduction of up to \$4,000 (for joint tax filers the limit is \$8,000). The chart at Appendix 1 showing the special exemption rules is taken from www.military.com.

Attorney Fees

On a related tax note, a former spouse receiving or trying to get a share of military retired pay should always be advised about the possible deduction of legal fees for work done on obtaining a portion of the military pension. After all, the pension payments are taxable income for the former spouse. And the legal work was done, and fees paid, toward the production of taxable income.¹² The former spouse should be sure to ask her tax preparer as to whether this is a deductible expense and, if so, how much may legitimately be claimed as a deduction.

(continued on page 14)

Appendix 1: States with Special Military Retirement Pay Exemptions

The following states have special provisions for military or public pensions:

Alabama	Hawaii	Illinois
Kansas	Kentucky***	Louisiana
Massachusetts	Michigan*	Mississippi
Missouri++	New Jersey	New York
North Carolina+	Ohio	Pennsylvania
Wisconsin		

* = Exempts USPHS and NOAA retired pay as federal employment.

*** = Exempt depending on date of retirement - prior to 1998; after this date, some may be exempt.

+ NC allows full exemption for retirees with five years of service as of Aug. 12, 1989; otherwise a deduction of up to \$ 4,000 (\$ 8,000 for joint filers) is allowed.

++Missouri has a Public Pension Exclusion that covers a portion of pension income.

1. 10 U.S.C. § 1408 (d)(2).
2. *Id.*
3. *Hodgins v. Hodgins*, 126 N.H. 711, 716, 497 A.2d 1187, 1190 (1985); *Majauskas v. Majauskas*, 61 N.Y.2d 481, 487-88, 474 N.Y.S.2d 699, 702, 463 N.E.2d 15, 18 (1984).
4. *Johnson v. Zoric*, 2012 UT App. 22, ¶22-23, 270 P.3d 556 (2012), *aff'd in part Johnson v. Zoric*, 2014 UT 21, 330 P.3d 704 (2014).
5. *Torwich v. Torwich*, 282 N.J. Super 524, 525, 660 A.2d 1214 (1995).
6. *Guest v. Smith*, 2011 Ky. App. Unpub. LEXIS 913 at *5, 2011 WL 6412065 (2011).
7. *Brown v. Brown*, 2010 Conn. Super. LEXIS 1348; 2010 WL 2698272 (2010)
8. *Id.* at *14.
9. *Baker v. Commissioner*, T.C. Memo 2000-164.
10. *Pfister v. Comm'r*, 359 F.3d 352 (4th Cir. 2004), *aff'g.* T.C. Memo. 2002-198; *Proctor v. Comm'r*, 129 T.C. 12 (2007); *Mitchell v. Comm'r*, T.C. Summary Opinion 2004-160; *Weir v. Comm'r*, 82 T.C.M. 281 (2001); *Mess v. Comm'r*, T.C. Memo 2000-37; *Eatinger v. Comm'r*, T.C. Memo 1990-310.; and *Lowe v Comm'r*, 42 T.C.M. 334 (1981).
11. *See, e.g.*, Bruce M. Bird and Marcia Sakai, "Structuring Payments as Deductible Alimony" The CPA Journal (New York Society of CPAs), August 2008.
12. Reg 1.162-2(b)(7): "Generally, attorney's fees and other costs paid in connection with a divorce, separation, or decree for support are not deductible by either the husband or the wife. However, the part of an attorney's fee and the part of the other costs paid [by the wife] in connection with a divorce,

legal separation, written separation agreement, or a decree for support, which are properly attributable to the production or collection of amounts includible in gross income under section 71 are deductible by the wife under section 212."

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TO-DO'S: OPENING A LAW OFFICE BY JOEL BERNBAUM, ESQ,

I recently decided to become a solo practitioner and moved my office to Bala Cynwyd. This required, as many of you know, many obstacles and tasks that are time consuming and somewhat labor intensive. Thank goodness the first person I contacted (after the movers) was Ellen Freedman, law practice management coordinator for the Pennsylvania Bar Association (lawpractice@pabar.org). Ellen provided a wealth of information and support throughout the transition process.

Decisions, decisions, decisions...

Name? Check, Bernbaum Family Law.

Email, web hosting, domain purchase? Check. I went with Go Daddy (godaddy.com): funny name, good service and reasonable prices. I decided to purchase a package that included Microsoft Exchange Services and Office 365 (online and desktop applications). This provided me with easy email, MS Office document access from all platforms (smartphone, tablet and desktop) and compatibility with my existing email, files and documents.

Confirmed my **telephone number** with Vonage, allowing me to have my **voice mail**, among other services, recorded and sent to my email address for remote access. No need for a **fax** machine, Maxemail (maxemail.com) provides me with a local phone number to use as a virtual fax machine. Faxes are sent to my email address and viewed (and saved) as a PDF. I send faxes by going to the Maxemail website and uploading the file to be sent and then off it goes to the recipient. I get an email confirmation to file away in the client's folder (paper or digital).

Now that I had the essentials confirmed — phone number, address, email, fax, etc. — I was able to order **business cards**. At Ellen's suggestion, I chose Vistaprint, who more than satisfied my needs at a great price. Service was fast and I even ordered **coffee mugs** with my new firm imprint. My **stationary, envelopes, etc.**

Joel Bernbaum is the founder of the Bala Cynwyd family law firm of Bernbaum Family Law Group. He is a Fellow of the American Academy of Matrimonial Lawyers, serving as President of the Pa. Chapter in 2007. He is a member of the American, Pennsylvania, Illinois and Montgomery Bar Associations with active participation in their respective family law sections and/or committees. He was formally Co-Chair of the PBA's Technology Taskforce. He is a former Director and Chair of the Family Law Section of the Montgomery Bar Association and served two terms on Council of PBA Family Law Section. He can be reached by email (above) or 610-667-7902.

are printed directly from my printer on plain paper. After some trial and error (mostly error) at design, I was ready to get to work.

Time and billing software, the backbone of our practice, took some time to decide on. I wanted an easy-to-use, reasonably priced package that allowed me to log my billing, track my operating income and expenses and **trust accounting** from all platforms. I wanted to be able send my bills via email in addition to paper mailing. After testing (most packages allow free 30-day trials), I subscribed to Cosmolex (cosmolex.com). I am able to enter my time from my phone, tablet or desktop since the software is cloud-based. My bills are prepared within the software package and take no more than 15 minutes to generate and send. The company provides excellent support and service. There is a monthly or annual fee, but no need to install software or updates, etc. I also signed up with LawPay so that **clients can pay their fees via credit cards**. Again, it was easy to set up and use, at a reasonable monthly fee. In fact, this month I received a credit card payment within minutes of the client receiving the emailed bill.

I use Stamps.com for **postage** — cheaper than Pitney and very user friendly. They even give me a digital scale as part of my opening my account.

With most of my **filing** done by "e-filing" and **correspondence** done via email with attachments, my goal of a "paperless office" has been reasonably satisfied. The end result is a more productive practice and a better bottom line. Please update your contact information for me and keep those questions and comments coming!

Joel Bernbaum, Esq.

Fellow, American Academy of Matrimonial Lawyers

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Legislative Update:

Steve Rehrer, Esq.
srehrer@legis.state.pa.us

This article summarizes several domestic relations bills introduced in the 2015-16 legislative session of the Pennsylvania General Assembly. Status of each bill is provided as of Feb. 11, 2015. Find the full text of the bills, as well as their legislative history at www.legis.state.pa.us/cfdocs/legis/home/bills.

ADOPTION

House Bill 155 (Printer's No. 132), in the House Judiciary Committee, amends Section 2511(a) of the Adoption Act (grounds for involuntary termination) by adding a new paragraph (10) as follows: "The repeated and continued abuse of alcohol or a controlled substance by the parent has placed the health, safety or welfare of the child at risk and the abuse of alcohol or a controlled substance cannot or will not be remedied by the parent." The bill also amends Section 6351(f) and (f.2) of the Juvenile Act to specify that 1) at each permanency hearing, the court must determine whether the parent's use of alcohol or a controlled substance places the health, safety or welfare of the child at risk and 2) the failure of, or the refusal to participate in, a drug test requested by the county agency constitutes prima facie evidence of the use of alcohol or a controlled substance that places the health, safety or welfare of the child at risk. This bill is a reintroduction of the provisions contained in 2013 House Bill 339.

Senate Bill 163 (Printer's No. 99), in the Senate Judiciary Committee, amends Section 2511 of the Adoption Act to specify that the rights of a parent may not be terminated solely on the basis of parental incarceration. The bill also amends Section 6351(f)(9) of the Judicial Code to provide that a compelling reason not to file a petition to terminate parental rights may include parental incarceration for a period exceeding 15 months if 1) the parent makes efforts to the extent feasible to comply with the family service plan requirements and otherwise maintain a meaningful role in the child's life during the time of incarceration and 2) termination of parental rights is not otherwise necessitated by the needs and welfare of the child. Finally, the bill adds a new chapter (arrest protocols) to Title 44 of the Pennsylvania Consolidated Statutes (Law and Justice), which provides, among other things, that a law enforcement officer who arrests an individual must at the time of the arrest inquire as to whether the individual is a parent or guardian of a minor or dependent child whose safety or well-being may be at risk as a result

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of the arrest. The law enforcement officer must make reasonable efforts to ensure the safety or well-being of the child in accordance with established guidelines. This bill is a reintroduction of the provisions contained in 2013 Senate Bill 112.

CUSTODY

House Bill 338 (Printer's No. 360), in the House Judiciary Committee, adds a new subsection (b) to Section 5325 of the Domestic Relations Code. The new subsection provides that a sibling (or, if a sibling is a minor, a parent, guardian or legal custodian of the sibling) may file an action for partial physical custody or supervised physical custody. The bill also adds a new subsection (d) to Section 5328 (factors to consider when awarding custody) specifying that in ordering partial physical custody or supervised physical custody to a sibling, the court must consider the amount of personal contact between the child and the sibling prior to the filing of the action, whether the award interferes with any parent-child relationship, whether a voluntary agreement for continuing contact exists for the child and whether the award is in the best interest of the child. The bill defines sibling under Section 5322 as "[a] brother or sister of a child, related to the child by blood, adoption or marriage." As a result of these amendments, technical amendments are made to various sections of the Domestic Relations Code. This bill is a reintroduction of the provisions contained in 2013 House Bill 642, with only minor changes.

CUSTODY AND SUPPORT

House Bill 410 (Printer's No. 445), in the House Judiciary Committee, adds several new provisions to the Domestic Relations Code regarding support and custody. New Section 4321(2.1) provides that paragraph (2) ("Parents are liable for the support of their children who are unemancipated and 18 years of age or younger.") applies whether or not parental rights of the parent have been terminated due to a conviction for any of the following, if the other parent is the victim: rape; statutory sexual assault, sexual assault, institutional sexual assault or incest. In the case of the last three convictions listed, the offense must involve sexual intercourse. Paternity of the child under this new paragraph (2.1) may be established through blood, genetic or other type of paternity test acceptable to the court. New Section 5329(b.1) states that, in general, if a parent who is a victim of any of the foregoing offenses objects, a court may not award any type of custody to the other parent of a child who was conceived as a result of any of the offenses for which the other parent has been convicted. However, the court may award custody to a parent, notwithstanding the objection of

(continued on page 17)

LEGISLATIVE UPDATE

(continued from page 16)

the victim-parent if the child is of suitable age and consents to the custody order and the court determines that the award is in the best interest of the child. In addition, the custody provisions also specify that paternity of the child shall be established by blood, genetic or other paternity testing acceptable to the court, but the bill provides that the cost of the testing must be borne by the parent who was convicted of the offense. This bill is substantively the same as 2013 HB 945 (Printer's No. 3721).

DIVORCE

House Bill 12 (Printer's No. 30), in the House Judiciary Committee, amends Sections 3301 and 3302 of the Divorce Code. Under the bill, new Section 3301(b.1) provides that the court may grant a divorce if 1) an irretrievably broken marriage is alleged, 2) 90 days have elapsed from the date that the divorce action was commenced and 3) a party files an affidavit along with any other relevant supporting documentation evidencing that the other party has been convicted of or has pleaded guilty or no contest to a "crime against spouse" (defined in new subsection (f) as an offense under the Crimes Code where the party filing the affidavit was the victim of the offense). If grounds for divorce are thereby established, the court must grant a divorce without requiring a hearing on any other grounds. Amended Section 3302(c) provides that the court may not order counseling sessions if a party files an affidavit along with any other relevant supporting documentation evidencing that 1) the party was or is protected by a protection from abuse order in which the other party is the named defendant or 2) the other party was convicted of or has pleaded guilty or no contest to a "crime against spouse." This bill is a reintroduction of the provisions contained in 2013 House Bill 1560.

House Bill No. 380 (Printer's No. 417), in the House Judiciary Committee, amends Section 3301(d)(1) of the Divorce Code (grounds for divorce involving irretrievable breakdown), to shorten from two years to one year the requisite time period in which the parties have lived separate and apart. This bill is a reintroduction of the provisions contained in 2014 House Bill 2517.

LIABILITY FOR THE TORTIOUS ACTS OF CHILDREN

House Bill 314 (Printer's No. 321), in the House Judiciary Committee, adds a new subsection (c) to Section 5503 of the Domestic Relations Code to provide that any order for restitution entered against a parent for the tortious acts of a child shall terminate when the child becomes 21 years old. This bill is a reintroduction of the provisions contained in 2013 House Bill 560.

MARRIAGE

House Bill 308 (Printer's No. 304), in the House Judiciary Committee, amends Section 1503(a)(2)(i) of the Marriage Law to allow all former judges in good standing, elected or appointed, regardless of length of service, to solemnize marriages. This bill is a

reintroduction of the provisions contained in 2014 House Bill No. 2462.

Senate Bill No. 372 (Printer's No. 329), in the Senate Judiciary Committee, eliminates the waiting period for a marriage license in Pennsylvania. The bill repeals Section 1303 (waiting period after application) of the Marriage Law, which provides that a marriage license may not be issued prior to the third day after an application is made, except in the case of emergency or extraordinary circumstances or if the applicant is a member of the Pennsylvania National Guard or other reserve component of the armed services and is called or ordered to active duty. The bill also makes comparable amendments to Section 1307 (issuance of license). This bill is substantively the same as 2014 House Bill 1765.

RELATIVES' LIABILITY

House Bill 242 (Printer's No. 242), in the House Judiciary Committee, repeals Section 4603 of the Domestic Relations Code, which provides that an indigent person's spouse, child or parent has "the responsibility to care for and maintain or financially assist an indigent person." Section 4603 also specifies exceptions to this general rule, the amount of liability, who may file a petition, and contempt proceedings. This bill is a reintroduction of the provisions contained in 2013 House Bill 224.

SUPPORT

House Bill 27 (Printer's No. 32), in the House Judiciary Committee, adds a new paragraph to Section 4321 of the Domestic Relations Code (liability for support). This new paragraph impacts on current paragraph (2), which provides that "[p]arents are liable for the support of their children who are unemancipated and 18 years of age or younger." New paragraph (2.1) specifies that paragraph (2) applies whether or not parental rights of the parent have been terminated due to a conviction for any of the following, if the other parent is the victim: rape, statutory sexual assault, sexual assault, institutional sexual assault or incest. In the case of the last three convictions listed, the offense must involve sexual intercourse. Paternity of the child may be established through blood, genetic or other type of paternity test acceptable to the court. This bill is a reintroduction of the provisions contained in 2013 House Bill 836 (Printer's No. 2148).

Senate Bill 39 (Printer's No. 22), in the Senate Judiciary Committee, amends Chapter 43 of the Domestic Relations Code. The bill proposes the addition of a new subsection in Section 4303 to provide that an obligor who is subject to a support order may petition the court as part of the court's support order to direct the domestic relations section to provide periodic information to a consumer reporting agency that includes the record of payment of support. The bill also amends Section 4305(a) to add a new paragraph specifying that subject to court approval and upon petition of an obligor, the domestic relations section may provide monthly reporting to a credit reporting agency concerning timely payments of support. An additional amendment is made to Section 4342(g). This bill is a reintroduction of the provisions contained in 2013 Senate Bill 301.

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INVOLUNTARY TERMINATION OF PARENTAL RIGHTS OVERTURNED BECAUSE MOTHER WAS NOT INFORMED OF HER RIGHT TO COUNSEL BY MARIS J. WEINER, ESQ.

IN THE INTEREST OF X.J., 105 A.3d 1 (Pa. Super. 2014)

SUMMARY

In *In The Interest of X.J.*, the Superior Court of Pennsylvania (Lazarus, Mundy and Stabile, JJ.) vacated a Court of Common Pleas of Lancaster County (Gorbey, J.) decree involuntarily terminating mother's parental rights where mother was unrepresented by counsel during the termination proceedings and was not provided with notice of her right to counsel.

FACTUAL AND PROCEDURAL HISTORY

The minor child, X.J., was removed from mother's care as a result of mother's alleged drug use and following an incident in which X.J. was left unsupervised for an extended period of time. Because of mother's neglect, X.J. fell out of a bassinet/playpen and fractured his arm. The Lancaster County Children and Youth Social Service Agency (Agency) filed a petition for temporary custody of X.J., along with a shelter-care application and motion for a finding of aggravated circumstances. X.J. was adjudicated dependent on May 29, 2013. Mother appealed, and a panel of the Superior Court affirmed the juvenile court's order on Nov. 7, 2013. Mother did not file a petition for allowance of appeal with the Supreme Court.

Meanwhile, on July 25, 2013, the Agency filed a petition to terminate mother and father's parental rights to X.J. The Orphans' Court held a termination hearing on March 17, 2014. Mother did not appear at said hearing. The Orphans' Court issued a decree terminating mother's parental rights, dated March 17, 2014, and entered April 21, 2014. Also on April 21, 2014, mother filed a Notice of Appeal, along with a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of

Appellate Procedure 1925(a)(2)(i). Concurrently, mother's counsel, Attorney Bunting, filed a petition to withdraw, together with an *Anders* brief, averring mother's appeal to be frivolous.

The Superior Court vacated the order of the Lancaster County court, which terminated mother's rights to her son. Additionally, the Superior Court denied mother's counsel's request to withdraw. The Superior Court in its opinion noted the requirement to conduct an independent review of the record and found that mother had not been advised of her right to appointed counsel in the termination proceeding. Neither the termination petition nor the preliminary decree contained any type of notice provision as required by law. Absent this notification, appellant could not be charged with failure to request counsel. Even though mother had been represented by counsel in the dependency proceedings, absent formal notice (mother had never even received a copy of the pleadings), continuation of that representation could not be assumed or take the place of actual notice for the termination proceedings. Accordingly, the matter was remanded for a new hearing so that mother could be properly notified of her right to counsel.

CASE NOTE AND AUTHOR'S COMMENT

The Superior Court's holding as it relates to the procedural application of 23 Pa.C.S.A §2313(a.1) is straightforward. That is, in a termination proceeding, the Orphan's Court must give notice to a parent as to the proceedings against him/her, his/her right to counsel and/or the appointment of counsel. What baffles this author is the *Anders* brief filed by Attorney Bunting (the court-appointed counsel for the dependency action). An *Anders* brief, or a no-merit brief, comes as a result of the U.S. Supreme Court case *Anders v. California*, 386 U.S. 738 (1967). In *Anders*, a court-appointed attorney filed a motion to withdraw from a court-

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(continued on page 19)

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CASE NOTES

(continued from page 18)

[I]n a termination proceeding, the Orphan's Court must give notice to a parent as to the proceedings against him/her, his/her right to counsel and/or the appointment of counsel.

appointed criminal appeal, based upon his belief that any grounds for appeal were frivolous. The U.S. Supreme Court ruled that any such motion must be accompanied by a brief outlining: 1) the procedural history and facts of the case, with citations to the re-

cord; 2) anything in the record that counsel believes are *possible* grounds for appeal, even if potentially frivolous; 3) counsel's conclusion that the appeal is frivolous and 4) counsel's reasons for concluding that the appeal is frivolous, all of which must be based upon controlling case law and/or statutes on point that have led to similar conclusions. In order for counsel to submit an *Anders* brief, he or she must file the Notice of Appeal on behalf of the client, petition for a transcription of the record, review the record, prepare a detailed motion and brief as described above and then serve the appellant, after which the court-appointed attorney will undoubtedly file for fee. After all the work of reviewing the entire record and making the determinations about places of *possible* error and writing a brief about same, isn't it just as easy to represent a client than to tell the appellate court how horrible a client's position really is?

MODIFICATION STATE COURTS ARE AUTHORIZED TO DETERMINE THAT ORIGINAL-DECREE STATE HAS LOST JURISDICTION WHEN THE CHILD AND ALL PARTIES NO LONGER RESIDE IN THE ORIGINAL DECREE STATE BY STEPHANIE E. MURPHY, ESQ.

T.A.M. v. S.L.M. and D.M.S., 104 A.3d 30 (Pa. Super. 2014)

SUMMARY

In *T.A.M. v. S.L.M. and D.M.S.*, the Superior Court (Ford Elliott, Allen and Strassburger, JJ.) vacated the order of the Erie County Court of Common Pleas (Kelly, J.) and reinstated appellant-father's complaint for custody. The primary issue in this case is jurisdiction for modification of a custody order under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

FACTUAL AND PROCEDURAL HISTORY

From the time of the child's birth in 2004, T.A.M. (father) and S.L.M. (mother) shared custody of their child and resided in Tennessee. On Feb. 28, 2011, mother dropped off the child at father's residence for his custodial time and mother was never seen thereafter. Mother's disappearance has been investigated as a homicide and father has been identified as a person of interest.

Following mother's disappearance in 2011, D.M.S. (mater-

nal grandmother) initiated a custody action in Tennessee and was granted custody of the child and permission to relocate the child to maternal grandmother's home in Erie County. Initially, the Tennessee court granted father supervised visits with the child. However, in October 2012, as a result of an emergency petition filed by maternal grandmother, father's visits with the child were suspended because father had urged the child to burn maternal grandmother's home and provided the child with matches to assist the child in doing so.

On Dec. 6, 2013, father filed a custody action in the Erie County Court of Common Pleas. In his complaint, father asserted that Pennsylvania should assume jurisdiction of the custody case because none of the parties continued to reside in Tennessee. (Father had relocated from Tennessee to Florida, and the child had been exclusively residing with maternal grandmother in Pennsylvania since 2011.) Maternal grandmother challenged jurisdiction, citing, *inter alia*, the fact that Tennessee had already scheduled a review hearing and claiming that mother could possibly still reside in Tennessee, as her death had not been proven with certainty. The Erie County Court of Common Pleas stayed the Pennsylvania case pending the completion of the Tennessee review hearing.

At the review hearing, the Tennessee court declined to relinquish jurisdiction. The Tennessee court's reasoning was not

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(continued on page 20)

CASE NOTES

(continued from page 19)

provided in the Superior Court opinion. Therefore, the Erie County Court of Common Pleas dismissed father's custody complaint, holding that the Pennsylvania court lacked jurisdiction to modify the Tennessee order. The Court of Common Pleas further noted in its opinion that it "is incapable of making a finding that mother does not presently reside in Tennessee."

Father appealed, noting in his appellate brief that mother's missing status and likely demise was the only basis on which maternal grandmother had been granted standing in the Tennessee custody case. Father further noted that mother is not currently a party in either proceeding.

ANALYSIS

The Superior Court applied the UCCJEA, which prioritizes the home state of the child for jurisdiction in custody matters. The UCCJEA defines "home state" as the following:

The state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child six months of age or younger, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

23 Pa.C.S.A. §5402.

The UCCJEA further provides that:

Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth may not modify a child custody determination made by a court of another state unless a court of this Commonwealth has jurisdiction to make an initial determination under section 5421 (a)(1) or (2) (relating to initial child custody jurisdiction) and:

the court of the other state determines it no longer has exclusive, continuing jurisdiction under section 5422 (relating to exclusive continuing jurisdiction) or that a court of this Commonwealth would be a more convenient forum under section 5427 (relating to inconvenient forum); or

a court of this Commonwealth or a court of the other state determines that the child, the child's parents and any person acting as a parent do not presently reside in the other state.

23 Pa.C.S. §5423.

The comment to 23 Pa.C.S. § 5423 provides, that [t]he modification state is not authorized to determine

that the original decree state has lost its jurisdiction. *The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other state.* In other words, a court of the modification state can determine that all parties have moved away from the original state.

23 Pa.C.S. § 5423 (Comment) (emphasis added).

The Superior Court, relying on the above, found that proper jurisdiction of the present matter is in Pennsylvania, despite the fact that Tennessee declined to relinquish jurisdiction, as none of the parties continued to reside in Tennessee and as Pennsylvania is the child's home state, and thus preferred jurisdiction, under the UCCJEA. For this reason, the Superior Court vacated the Erie County Court of Common Pleas order dismissing father's complaint, and father's complaint for custody was reinstated.

CASE NOTE AUTHOR'S EDITORIAL COMMENT

The primary focus of this case is the application of the UCCJEA in a circumstance where the court that made the initial custody determination declined to relinquish jurisdiction, despite the fact that jurisdiction is no longer proper in that state under the UCCJEA.

Initially, one may question why maternal grandmother would resist the transfer of jurisdiction to Pennsylvania, when she and the child reside in Pennsylvania. However, the second comment in the Superior Court's opinion was quite informative with regard to the motives of the parties. Maternal grandmother believed and averred that father was "judge-shopping." Father's history with the Tennessee court in this custody matter was extensive, given his suspected role in mother's disappearance. According to the Superior Court opinion, the Tennessee judge that previously heard this custody case found father to be a "despicable individual." Father clearly had motive to transfer the custody matter out of the initial jurisdiction.

Despite the "judge shopping" allegations, the Superior Court correctly focused on the jurisdiction criteria set forth in the UCCJEA and found the answer in Section 5423, which gives the modification state the authority to determine that the initial decree state has lost jurisdiction when none of the parties continue to reside in that state and when jurisdiction in the modification state is otherwise proper under the UCCJEA. The Superior Court further noted in the comment referenced above that Pennsylvania's courts are "fully capable of discerning the facts applicable to the child's best interests," thereby addressing maternal grandmother's concerns.

SUPERIOR COURT AFFIRMS TRIAL COURT’S DECISION TO TERMINATE PARENTAL RIGHTS AND CHANGE PLACEMENT GOAL TO ADOPTION WHERE CHILDREN WERE BONDED WITH FOSTER PARENTS AND DUE TO THE BIOLOGICAL PARENTS’ ABUSE AND UNDERDEVELOPED REASONING SKILLS
BY JUDITH A. ALGEO, ESQ.

IN THE INTEREST OF: M.T., 101 A.3d 1163 (Pa. Super. 2014)

SUMMARY

The Superior Court of Pennsylvania in an *en banc* decision, affirmed the decision of the Blair County Court of Common Pleas (Sullivan, J.), which changed the placement goal of appellants’ two children, who had previously been adjudicated dependent minors, from family reunification with their parents to adoption. The Superior Court also affirmed the involuntary termination of the appellants’ parental rights to these children by the same Blair County Court.

FACTUAL AND PROCEDURAL HISTORY

The subject children, C.E.T. IV, at age 18 months, and M.J.T., at age 8 months, were the subjects of a Childline Report in June 2012. M.J.T. had suffered severe burns, bruising and broken bones in her leg and hand while in the care of her paternal grandfather and possibly parents. As a result of this investigation, both parents signed voluntary placement agreements in June 2012 with the Blair County Children and Youth agency (hereinafter BCC&Y) placing the children in the agency’s custody. C.E.T. was placed in the “M” foster home on that date and his sister, M.J.T., was placed in the same foster home upon her release from the hospital.

On July 5, 2012, BCC&Y filed a dependency petition alleging that the children were without proper parental care and control and that a dependency adjudication was appropriate. In the subsequent adjudication of dependency in September 2012, Judge Sullivan cited as *prima facie* evidence the bruising on M.J.T.’s face, head and extremities, abrasions to her nose, lip and chin, fractures to her leg and hand along with burns to her feet, ankles and thighs. Judge Sullivan noted the fact that the parents and the paternal grandparents were the only known caretakers of the children. The children remained in the “M” foster home, a goal of family reunification was determined, and the court ordered intensive social services to assist the family in the achievement of this goal.

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At the six-month permanency review hearing in December 2012, Judge Sullivan noted that the parents had made slow progress relative to the intense social services provided and the parents needed to come to an understanding and appreciation of the grave injuries that their child had suffered. The agency worker noted the extreme dependency that the parents had on the paternal grandparents for their daily living tasks and the parents’ lack of acknowledgment that the injuries to their daughter had occurred while she was in the care of the paternal grandfather.

As a result of the parents’ minimal progress and their continued dependence on the paternal grandparents, the agency requested a psychological evaluation be completed on the parents. Judge Sullivan then ordered complete psychological evaluations on both parents, which were subsequently conducted in February 2013.

At the March 2013 nine-month interim review hearing, Judge Sullivan noted that the psychological testing results showed mother to be functioning at the intellectual level of a 14-year old and father to be functioning at the intellectual level of a nine-year old. Both parents had significant limits on their abstract reasoning and were found not to be fully attentive to keeping the children safe during their supervised visits. The psychologist testified that the parents were unable to remedy the circumstances that brought the children into care as a result of their limited intellectual capacity, despite the significant social services provided to the parents.

Judge Sullivan heard additional testimony from the agency provider that there were serious doubts that the parents would ever be able to properly parent these children and keep them safe. When Judge Sullivan inquired whether the parents would be able to remedy the current situation, the response from the service provider was that even though the parents were cooperative, they were easily distracted, inconsistent and continued to be unable to keep the children safe during their supervised visits.

At the 19-month permanency review hearing in June 2012, the agency requested that the current goal of family reunification be changed to adoption. The order of court dated June 10, 2013, summarized the testimony presented that the parents had actually regressed in the area of consistently recognizing and addressing safety concerns for the children. Judge Sullivan noted that in the past year, despite the parents attending all meetings, all supervised visits and all programs offered by the agency, after one year of intensive services, the parents had been unable to make any

(continued on page 22)

CASE NOTES

(continued from page 21)

significant progress and shown no insight as to how to protect the children. In fact, it was noted that the parents were continuing to regress in their ability to consistently recognize and address safety concerns. Finally, the agency provider was unable to project a time frame when the parents would be able to achieve a level of unsupervised visits with the children because of the parents' lack of progress to date. As a result of this testimony, the court found that the children would not be protected and safe in their parents' care.

Judge Sullivan also noted that the foster parents were a current adoptive resource and the children, who were now 2-½ years and 1-½ years of age, had developed a "parent-child" relationship with "Mr. and Mrs. M." Although Judge Sullivan acknowledged the children also had a "parent-child" relationship with their biological parents; the children looked to the foster parents to provide for their needs. Judge Sullivan found no compelling reason not to pursue adoption on the children's behalf because the parents had not made any progress toward reunification, could not give a plausible explanation as to the cause of the child's serious injuries and had not demonstrated any ability to keep the children safe in spite of the "parent-child" relationship. Judge Sullivan, therefore, changed the goal from family reunification to adoption.

The parents timely appealed the goal change to the Superior Court. Specifically the parents challenged the goal change based on their compliance with all offered services and attendance at all visits and their belief that too much weight had been placed by Judge Sullivan on their inability to explain the injuries that their daughter had suffered and what they felt was insufficient evidence that they had previously placed their children at risk.

On Nov. 21, 2013, there was a combined 18-month review hearing and a termination of parental rights hearing. Testimony was presented from the BCC&Y social worker who believed that it was in the children's best interest to terminate the parents' parental rights. The social worker testified that the children had lived in the foster home for over 18 months, which was over half their lives. The children were bonded with the foster parents, they were thriving in that home and all their needs were being met. The supervised visits with the parents generally went well although the children looked to the foster parents as their parental figures. The agency believed that it was in the best interests of the children to terminate parental rights so that the children could achieve permanency.

On Nov. 27, 2013, the trial court issued an order that confirmed the goal change to adoption but deferred the decision on termination of parental rights until the Superior Court had decided the goal-change appeal.

On March 3, 2014, the Superior Court affirmed the goal change and on March 5, 2014, the trial court issued its order terminating the parents' parental rights. The parents once again timely appealed the termination order.

On April 14, 2014, the Superior Court granted the parents' request for en banc re-argument and withdrew the March 3, 2014, decision affirming the goal change. The Superior Court noted that there was no error here in that action. Finally on June 3, 2014, the Superior Court denied the BCC&Y motion to consolidate the two appeals but did list the appeals as related.

ANALYSIS

The Superior Court, *en banc*, declined to consolidate the separate appeals on the goal change and the termination but still considered the appeals together, noting the issues were interrelated. The Superior Court noted the distinction between the two hearings, clarifying that in a goal-change proceeding the best interests of the child must guide the trial court and not the parent's interests. The parent's interests are secondary. *In re A. K.*, 936 A. 2d 528, 532-533 (Pa. Super. 2007) Further the burden is on the Agency to prove that the goal change is in the child's best interests. *In the Interest of M.B.*, 674 A. 2d 702,704 (Pa. Super. 1996) In contrast, the Superior Court wrote, during a termination of parental rights proceedings, the focus is on the conduct of the parent under 23 Pa. C.S.A. § 2511.

In the matter of the goal change appeal, the issues the parents presented before the Superior Court were:

1. Did the trial court abuse its discretion when the trial court ordered the placement goal for the two dependent children be changed from family reunification to adoption with insufficient evidence that the children were at risk in their parents' care and the court not accounting for the parent-child relationship and
2. Did the trial court abuse its discretion when changing the goal from family reunification to adoption by not acknowledging the bond between the parents and the children and when the parents exhibited compliance with the permanency plan by attending nearly all visits and participating in or completing all recommended services and the trial court failing to fully consider the bond between the parents and the children and
3. Did the trial court abuse its discretion by putting an improper amount of weight on the fact that the parents were unable to explain the child's injuries although the parents acknowledge that some injury did occur without their knowledge

The Superior Court began its analysis of the appeal issues by reiterating the standard of review in both child-dependency cases and in matters involving the involuntary termination of parental rights. The Superior Court must always defer to the trial court's decision as to the findings of fact and the credibility of the witnesses. In this case the trial court wrote well-reasoned decisions after every three-month review of the case. The trial court detailed the extraordinary number of services offered to the parents and

(continued on page 23)

CASE NOTES

(continued from page 22)

the testimony of the service providers, giving all the witnesses credibility in their opinions and observations of the parents' inability to change their behaviors and become more protective towards the children

The Superior Court restated the definition of a dependent child for the adjudication of dependency and the process by which the trial court must find by clear and convincing evidence that a child is dependent when the child is without the proper parental care or control, subsistence, education as required by law or other care or control necessary for his or her physical, mental or emotional health or morals. 42 Pa.C.S.A. §6302(1). A further clarification of this definition appeared in *In Re G.T.*, 834 A.2d 870 (Pa. Super. 2004) when the court simplified the question of dependency to two questions: first is the child presently without proper parental care and control and second, if so whether such care and control are immediately available.

The Superior Court reviewed the factors to be addressed at each permanency review hearing, held every three months for dependent children under the age of 5 years, as detailed in 42 Pa.C.S.A. §6300 *et. seq.*, specifically noting that the trial court must examine the extent of progress a parent makes in alleviating the circumstances that necessitated the child's placement, along with the assurance that the child is safe. Additionally the court must then determine if the goal for the child is appropriate; when the child will be returned to the parent, custodian or guardian and if not, if and when the child will be placed for adoption if a return to the parent, guardian or custodian is not in the child's best interest. The Superior Court also addressed the need for the trial court to consider the bond between a child, and the child's parents and the child and the foster parents. *In re H.V.*, 37 A. 3d 588, 594-595 (Pa. Super. 2012)

The trial court heard from the county agency and the service provider agency that both agencies continued to be greatly concerned about the parents' inability to keep the children safe and, in fact, the parents had developed no insight on safely parenting their children. The Superior Court noted the trial court gave great weight to the credibility of the agency workers and the service-provider worker, who had all been intensely involved in attempts to teach the parents how to parent with absolutely no progress by the parents but rather only regression on the parents' part. The Superior Court affirmed the trial court's decision to change the goal for the children from reunification to adoption based on the record of credibility determinations and the weight of the evidence presented.

In the matter of the involuntary termination of parental rights, the issues presented by the parents before the Superior Court were:

1. Did the trial court err and abuse its discretion in terminating the parental rights where there was insufficient evidence that the termination was in the

children's best interest and insufficient evidence that the parents' conduct had put the children at risk;

2. Did the trial court err and abuse its discretion when there was insufficient evidence that the parents' repeated and continued incapacity, abuse, neglect and/or refusal had caused the children to be without the proper parental care and control and the parents could not or would not remedy the conditions that brought the children into care and those conditions continued to persist;
3. Did the trial court err and abuse its discretion by terminating the parental rights to the child C.T. when no abuse or neglect was alleged relative to that child;
4. Did the trial court err and abuse its discretion in terminating the rights to the child M.T. when the parents could not identify injuries that may have occurred when the child was not under their care.

In a termination of parental rights case, the trial court must engage in a bifurcated process where first the court must look at the behavior of the parents while the party seeking to terminate parental rights must prove by clear and convincing evidence that the parent's behaviors satisfies the statutory grounds outlined in 23 Pa.C.S. 2511(a), after which the court must determine if termination of parental rights will meet the needs and welfare of the child as stated in 23 Pa. C.S. 2511(b).

In this case, the agency proved by clear and convincing evidence that the termination of parental rights was appropriate because the repeated and continued incapacity, abuse, neglect or refusal of the parents had caused the children to be without proper parental care and control and the parents were not able or could not remedy these conditions. 23 Pa.C.S. 2511(a)(2). Additionally the agency had proved by clear and convincing evidence that the children had been in care for more than 12 months and the conditions that led to the removal of the children from their parents' care continued to exist and the termination would best serve the needs and welfare of the children. 23 Pa.C.S. 2511(a)(8)

The trial court noted the length of time that the children had been in care, the nature and extent of the injuries to the child and the prima facie evidence that either the paternal grandparents or the parents were the perpetrators of the abuse. The trial court set out in detail the number of services offered to the parents to help them in achieving reunification and the inability of the parents to make any progress whatsoever despite taking part in all services and attending most visits. At no time when the parents were with the children were any of the supervisors able to relax the supervision because of the parents' inability to keep the children safe and to recognize safety issues. The parents with their mental incapacities would not be able to remedy any of the existing safety concerns at any time. The Superior Court affirmed the trial court's reasoning for the termination of parental rights under both

(continued on page 24)

CASE NOTES

(continued from page 23)

23 Pa.C.S. 2511(a) (2) and (8).

The Superior Court addressed 23 Pa.C.S. 2511(b), which requires an examination of the needs and welfare of the children that will be served by a termination of parental rights. The trial court's decision noted that while the parents argued for more time, along with additional services for reunification with their children, the children were thriving in the current placement and all their needs were being met. The parental bond was with the foster family and not with the biological parents. Further, the trial court wrote that the children were entitled to permanency. The Superior Court affirmed the trial court's decision to terminate parental rights, citing the fact that the trial court had taken into consideration the developmental, physical and emotional needs of the children.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS

Practitioners in dependency law must make note of the fact that there is no requirement for a goal change from reunification to adoption in order for the county agency to proceed to an involuntary termination of parental rights hearing. The Superior Court was clear on this point and, frequently, parents in dependency matters fail to understand that this step is not a requirement before the local child welfare agency moves to terminate their parental rights.

The Superior Court noted that the case goal is set by the agency and then approved or disapproved by the dependency court. The Juvenile Act provides that the county agency must ensure that a child receives a placement review or a "permanency hearing" at least once every six months or within 30 days in certain cases involving aggravated circumstances. 42 Pa.C.S.A. §6351. The child's placement goal is set by the child welfare agency in

the family service plan or single case plan and is approved or may be changed by the court. The purpose of the permanency hearing is to determine or review the plan, the date by which the plan is expected to be achieved and whether placement continues to be best suited for the child's safety and welfare. Section 6351 lists a number of factors the court must determine during the permanency hearing including the appropriateness, feasibility and extent of compliance with the permanency plan and the appropriateness and feasibility of the current placement goal.

Best practice suggests that cases have concurrent goals, for example for reunification and adoption as was applied by the county agency in *M.T.* If reasonable efforts failed to achieve the primary goal but the child is still in care and the goal is no longer feasible, the *Pennsylvania Judicial Deskbook* recommends that the court should consider a goal change to the concurrent goal (or another goal if the concurrent goal is not possible). *Pennsylvania Judicial Deskbook* at p.97. Both the trial court and the appellate review in *In re M.T.* took this approach.

After considering the factors listed in §6351(f) and (f.1) of the Juvenile Act, the court should determine whether the current goal or some other goal is in the best interest of the child. Specifically §6351(g) makes clear that the "disposition" ordered by the court is the "goal" determined by the court to be in the best interest of the child.

Finally the trial court conducted a combined goal-change termination hearing in *M.T.*, an approach that is emerging across the commonwealth. Note that while the fact presentations and trials are combined, legal argument must address and the court must still apply the separate statutory and constitutional standards (i.e., preponderance standard for the dispositional-change goal and clear and convincing on the termination). The court must make findings on each standard.

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FEDERAL DISABILITY BENEFITS LEGALLY GARNISHED TO SATISFY ALIMONY OBLIGATION BY SARA L. SLOCUM, ESQ.

UVEGES V. UVEGES, 103 A.3d 825 (Pa. Super. 2014)

SUMMARY

On Nov. 5, 2014, the Superior Court of Pennsylvania (Bowes, Allen, and Strassburger, JJ.) affirmed the Court of Common Pleas of Greene County's (Nalitz, J.) decision ordering the attachment of husband's disability benefits for the purpose of fulfilling his agreed-upon permanent alimony obligation to his former wife.

FACTUAL & PROCEDURAL HISTORY

On Jan. 21, 2010, Samuel L. Uveges (husband) and Betty Uveges (wife) agreed to an award of \$2,500 per month as permanent alimony, modifiable only by remarriage, cohabitation or wife's receipt of Social Security Disability payments. Two years later, wife sought to enforce that agreement when husband failed to make any payments after Jan. 1, 2012.

Judge Nalitz found husband in contempt, issued a bench warrant and ordered the attachment of his Longshore & Harbor Workers Compensation Act (LHWCA) wages. Husband's former employer, Consolidated Coal Company, filed a petition in special relief claiming that the benefits were exempt from attachment. On Oct. 26, 2012, Judge Nalitz enforced the obligation by other means after two separate findings of contempt, namely, providing attachment of pension benefits and transferring real estate awarded to husband to wife. A subsequent contempt petition was filed on Sept. 27, 2013, by wife, again requesting the attachment of the LHWCA benefits. Upon review of applicable law, Judge Nalitz concluded that LHWCA benefits were able to be attached upon a finding of contempt. Husband appealed on the basis that LHWCA benefits are exempt from attachment.

ANALYSIS

The issue on appeal is whether the trial court committed an error of law in attaching husband's LHWCA benefits via court order.

The LHWCA has an anti-attachment clause titled "Assignment & Exemption from Claims of Creditors." Husband argues this clause prevented wife from attaching his benefits. The trial court cited the Superior Court decision of *Parker v. Parker* in its ratio-

nale, which held that a similarly worded anti-attachment clause did not prevent a court from considering income from Veteran's Administration benefits in calculating alimony pendente lite. 484 A.2d 168 (Pa. Super. 1984). The court reasoned that the purpose of the clause was to protect against creditors; however, the clause was inapplicable since wife was not a "creditor" and the alimony was not a "debt."

In further support of its ruling, the trial court cited the federal 9th Circuit decision in *Moyle v. Director Office of Worker's Compensation Programs*, which held that LHWCA benefits could be attached to collect on a past-due spousal-support obligation. 147 F.2d 1116 (9th Cir. 1998), *certiorari denied*, 1999 U.S. LEXIS 2578 (1999). The *Moyle* Court held that a 1975 statute, 42 U.S.C. §659 (SSA garnishment provision), repealed the LHWCA anti-attachment clause enacted previously in 1927. Specifically, the SSA garnishment provision states: "moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States ... (including any agency ... thereof) to any individual ... shall be subject ... to enforce the legal obligation of the individual to provide child support or alimony." Thus, the trial court reasoned that the benefits are "remuneration for employment" subject to garnishment to fulfill an alimony obligation. Further, that alimony is not money owed to a "creditor" for payment of a "debt" under the LHWCA and all relevant provisions. The Superior Court noted that *Moyle* was a federal court decision, therefore controlling with regard to benefits made pursuant to federal law and agreed with the analysis of the trial court.

The Superior Court (Allen, J.) discounted husband's attempt to distinguish the "Special Fund" portion of his account stating that the argument failed because it was funded by private employers constituting remuneration for employment. The Superior Court further noted that Pennsylvania courts have allowed the attachment of other federally governed benefits, such as pension benefits established under ERISA in support of the decision at bar. *See generally, Holman v. Holman*, 528 A.2d 146 (Pa. 1987); *Com. ex rel, Magrini v. Magrini*, 398 A.2d 179 (Pa. 1979). Finally, the decision is generally supported by Pennsylvania case law, which has consistently held that alimony is not a debt noting the inability to discharge support obligations in bankruptcy. *See generally, Hogg v. Hogg*, 816 A.2d 314, (Pa. Super 2003).

The Superior Court noted that this analysis was also in line with two Florida decisions on the same issue that supported the conclusion that the SSA garnishment provision repealed the earlier parts of the LHWCA statute. Specifically, the court in *Ruiz* held

(continued on page 26)

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CASE NOTES

(continued from page 25)

that a child support obligation is not a debt and LHWCA benefits could be attached for enforcement purposes. *Cigna Property & Casualty v. Ruiz*, 834 So.2d 234, 236 (Fla. 3rd DCA 2002).

In summary, the anti-attachment clause would prevent the attachment of LHWCA benefits from creditors. However, due to later-enacted legislation, the court held that an alimony obligation is an obligation at law and not a debt owed, making the clause inapplicable. Further, LHWCA benefits paid pursuant to federal law should be treated similarly to other federal benefits, such as

pension benefits paid pursuant to ERISA. The decision of the trial court was, therefore, affirmed.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS

This case demonstrates the broad range of powers the court has in remedying contempt of a property-settlement agreement. The trial court in this case ordered the transfer of real property to wife, ordered counsel fees, attached husband's pension benefits and Social Security benefits. This case further solidified the court's ability to attach federal benefits for the purpose of satisfying an alimony obligation, including pension benefits paid pursuant to ERISA and LHWCA benefits.

SUPERIOR COURT AFFIRMS TRIAL COURT'S TERMINATION OF PARENTAL RIGHTS BASED, IN PART, ON FINDING THAT THE CHILDREN'S SAFETY OUTWEIGHED THE CHILDREN'S BOND WITH MOTHER

BY HILARY A. BENDIK, ESQ.

IN RE: M.M., 106 A.3d 114 (Pa. Super. 2014)

On Dec. 2, 2014, the Superior Court of Pennsylvania (Gantman, Bender and Lazarus, JJ.) affirmed an Allegheny County Court of Common Pleas' (Hens-Greco, J) decision to involuntarily terminate the appellant-mother's parental rights to her three children. Mother had been involved with Children Youth and Families (CYF) on and off over a period of nine years, with several criminal convictions for endangering the welfare of children resulting. Judge Hens-Greco terminated mother's parental rights, finding that the evidence clearly supported mother's failure to provide for the children's basic needs, the level of her failure was criminal and that the children's need for safety was outweighed by any bond they had to mother.

FACTUAL AND PROCEDURAL HISTORY

Mother appealed the termination of her parental rights to her children: M.M. (born November 2003); T.M. (born November

2002); and I.M. (born December 2005). CYF was first involved with mother's family in 2003, related to allegations that mother was abusing the children's elder sibling, not a party in this instant case. CYF opened its first case in January 2004 and the family began receiving services. A second case was opened in June 2004 after T.M. and M.M. were left with maternal aunt and grandmother. That August, the two children were adjudicated dependent, with the adjudication partially based on mother's use of crack cocaine and marijuana, her alleged maltreatment of the children, and unlivable housing. CYF established a Family Service Plan with specific goals to address these concerns, and input services. By December 2005, mother had achieved the goals set, albeit with limited progress. In March and April 2006, the children were returned to mother.

In January 2009, Judge Hens-Greco issued an emergency custody authorization for I.M., who was found wandering alone outside, in just a diaper. The family's home was found to be in a deplorable condition, and the children displayed various injuries consistent with infliction by a cord or belt, along with M.M. displaying burn marks. The children were placed with maternal grandmother, who was also residing in the home, and mother was forbidden from residing at the home. Mother was charged with simple assault and endangering the welfare of the children. She was convicted and sentenced to two years' probation. The children were adjudicated dependent on March 4, 2009. Once again services and a Family Service Plan were implemented. On Aug. 17, 2009, both CYF and the court closed their cases.

A third case was opened in February 2010, after the children had missed a week of school. CYF investigated and found impropr-

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CASE NOTES

(continued from page 26)

er supervision and lack of clothing. Again, further services were put into place to assist mother, but in December 2010, Childline claims were filed against mother and mother was charged with endangering the welfare of the children. Mother plead guilty and was sentenced to five years' probation. Again, a Family Service Plan and services were put into place. The case was closed May 2011.

In May 2012, the family was again referred to CYF for lack of supervision and deplorable living conditions. CYF did not immediately make the court case active; however, it did a month later when mother was not compliant with her mental health and drug program. At this point, the home was in worse condition than a month prior, with no running water or beds, and the children were in dirty clothing.

The children were removed on June 29, 2012, after unsuccessful family group decision making. Mother was charged and convicted of endangering the welfare of the children and sentenced to two to five years in prison. The children were adjudicated dependent on July 31, 2012, and the TPR Petition was then filed in November 2013.

Judge Hens-Greco held hearings in April and May of 2014, and terminated mother's parental rights based on the evidence and testimony presented. Mother's appeal followed.

ANALYSIS

Mother's only issue raised on appeal was whether CYF met its burden in proving by clear and convincing evidence that the termination would best serve the needs and welfare of the children pursuant to 23 Pa.C.S. § 2511(b). In affirming Judge Hens-Greco's decision, the Superior Court stated that although termination of parental rights cases typically require a bifurcated process under 23 Pa.C.S. § 2511, where the court must first focus on the conduct of the parent under Section 2511(a), and then,

if the court determines such conduct warrants termination, move onto a best interests of the child analysis under Section 2511(b), mother's appeal was limited to only the best interests of the children.

Under 23 Pa.C.S. § 2511(b), the court is to consider:

(b) Other considerations.--The court in terminating the rights of a parent shall give primary consideration to the developmental, physical and emotional needs and welfare of the child. The rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent.

The court noted that it must also take into account whether any bond exists between the natural parent and the children, and whether the termination would destroy an existing, necessary and beneficial relationship. *In re C.S.*, 761 A.2d 1197, 1202 (Pa. Super. 2000)(en banc).

The Superior Court (Bender, P.J.E.), in its opinion, referred to the testimony of Dr. Bernstein, who testified in support of adoption. Dr. Bernstein found that although there was a bond between mother and children, it was not necessarily meaningful and healthy. He also found that the children seemed most concerned with losing all contact with mother, which he felt was not likely, given that her sister was now their caregiver and would be adopting the children. Dr. Bernstein's testimony supported that maternal aunt was providing for the children's basic needs and safety, which mother was never able to do on an ongoing basis. The court found that the children were growing and developing under the stability maternal aunt was providing. The court in its finding felt that the children's need for safety was more important than the loss of the bond, especially since it was not likely that they would lose complete contact with mother under maternal aunt's care. The Superior Court found this ruling to be supported by the evidence presented at the hearings, and affirmed the trial court.

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**SUPERIOR COURT OF PENNSYLVANIA UPHOLDS TRIAL COURT'S DENIAL OF
WIFE'S CLAIM TO ENFORCE MARRIAGE SETTLEMENT AGREEMENT SEVEN
YEARS AFTER ALLEGED BREACH OCCURRED
BY CATHERINE A. CURCIO, ESQ.**

K.A.R. v. T.G.L., 107 A.3d 770 (Pa. Super. 2014)

SUMMARY

The Superior Court of Pennsylvania (Donohue, Ott, and Musmanno, JJ.) affirmed the Allegheny County Court of Common Pleas' (Walko, J.) Sept. 6, 2013, order of court, which dismissed in part wife's exceptions to the master's report and recommendation and granted the exceptions filed by husband. The Superior Court held, per Ott, J., that 1) husband's statute of limitations defense barred wife's action to enforce the parties' equitable distribution agreement and 2) that husband's laches defense barred wife's action to enforce the parties' equitable distribution agreement.

FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on June 17, 1988. Two children were born of the marriage, both of whom are noted as emancipated. The divorce action was initiated by wife on Jan. 29, 2000. A decree in divorce was entered on Aug. 5, 2003.

On Aug. 22, 2003, the parties participated in the first day of a two-day equitable distribution hearing. At that time, the parties' equitable distribution agreement (agreement) was read into the record. Pursuant to the parties' agreement, husband agreed to pay wife a percentage of the net after-tax proceeds from the sale of the stock of his business, which was referred to by the Superior Court as "Business-1." Further, this payout to wife was supposed to occur upon the sale of the Business-1 stock.

In January 2004, husband sold a portion of Business-1 stock. In April 2004, and as a result of the sale, husband made a \$300,000 payment to wife and a second payment of \$150,000 was made to wife on Sept. 15, 2005.

On Jan. 20, 2005, wife filed a writ of summons. The trial court's record indicated that the writ was filed to protect wife's ability to bring a fraud action in relation to an underlying malpractice suit against wife's former attorney. However, wife contended that the writ was filed to preserve all of her legal claims against husband.

Wife filed a petition to enforce the agreement and for sanctions on or about March 21, 2011 (petition to enforce). In the petition to enforce, wife asserted, *inter alia*, that husband sold a

portion of his Business-1 stock in January 2004. Wife averred that husband made one payment to her on April 9, 2004, and a second payment to her on Sept. 15, 2005; however, wife contended that she was owed additional money, representative of her share of the net sale proceeds of Business-1 pursuant to the parties' agreement. In support of her claims, wife contended that the agreement was a continuing contract because husband was not fully compensated for the sale of the Business-1 stock in 2004 and therefore he had a continuing obligation to pay wife additional sale proceeds as they were received by husband.

Husband filed an answer to the petition to enforce, new matter and counter-petition on March 30, 2011 (answer). In his answer, husband asserted that wife's action was barred by the statute of limitations and the doctrine of laches. Husband further stated that the terms of the agreement were clear and that wife was not owed any additional funds as a result of the sale of the Business-1 stock and, in fact, that wife was overpaid by husband by approximately \$150,000, for which husband sought reimbursement.

By order of court dated Sept. 6, 2013, the Court of Common Pleas of Allegheny County dismissed in part wife's exceptions and granted the exceptions filed by husband, and, in doing so, held that husband's defenses of statute of limitations and laches barred enforcement of the agreement. Wife appealed to the Superior Court.

ANALYSIS

The Pennsylvania Superior Court affirmed Judge Walko's dismissal of wife's exceptions and grant of husband's exceptions. At issue was whether the trial court erred in ruling that the statute of limitations barred wife's present action to enforce the parties' agreement and that husband's laches defense similarly barred wife's petition to enforce. Wife argued that the parties' agreement is a continuing contract because husband was not fully compensated for the sale of the Business-1 stock in a single, lump-sum payment. Husband contended that wife was on the wrong side of the statute of limitations based upon the completion of the transaction in 2004.

Thus, the main questions before the Superior Court were 1) whether the statute of limitations defense barred wife's petition to enforce the agreement; 2) whether the discovery rule tolled the statute of limitations and 3) whether the doctrine of laches was applicable.

The subject agreement required husband to make a payment in January 2004, when husband sold the Business-1 stock. Per 42

(continued on page 29)

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CASE NOTES

(continued from page 28)

Pa.C.S. §5528(a)(8), the statute ran four years later in January 2008.

It was wife's position that all parties were on notice regarding her discontent with the payment and that by filing a writ of summons in January 2005, she had effectively preserved her claims and tolled the statute. In support of her claim, wife relied on case law that allows a party to file an enforcement action under 23 Pa.C.S. § 3105. Wife failed, however, to cite authority that supported the application of a writ of summons in a civil action to an enforcement proceeding brought under the Divorce Code. The Superior Court held that wife's filing a writ of summons did not preserve her claims under 23 Pa.C.S. § 3105.

In her second argument, wife asserted the discovery rule as a defense and claimed that the statute of limitations could not have begun to run until she obtained copies of the 2011 and 2012 tax returns, which, according to wife, allowed her to verify the amount of the 2004 sale of the Business-1 stock. Wife advanced this argument despite the fact that husband provided her with closing binders for the 2004 sale within one year of the completed transaction. The Superior Court again disagreed with wife, and, in doing so, held the statute would have begun to run on the date the closing binders were provided to wife.

Finally, wife argued that the trial court erred in ruling that husband's laches defense barred wife's petition to enforce. In disposing of this argument, the Superior Court, citing *In re Estate of Bowman*, 797 A.2d 973, 977 (Pa.Super. 2002), noted that the doctrine of laches is applicable when two conditions are satisfied: "the complaining party must be guilty of a want of due diligence in failing to assert his rights and the failure must have worked to the prejudice of the party seeking its application."

The Superior Court found the applicability of the defense of laches on the basis that wife did not exercise due diligence in pursuing her claim until five years after the events in question, and because husband was prejudiced by wife's actions because he made a payment of \$150,000 in an effort to completely settle the matter, only for wife to continue to seek funds from husband. Accordingly, the two-prong test was met and wife's claims were properly barred by laches.

The Superior Court concluded that the subject agreement was not a continuing contract. The express terms of the parties' agreement established a specific amount and a date certain by which husband was to perform to pay wife and, accordingly, was not a continuing contract immune from the application of the statute of limitations.

CASE NOTE AUTHOR'S COMMENT

This case is the most recent in a line of cases that have addressed similar facets of the statute-of-limitations defense. That said, *K.A.R.*'s more recent predecessors have come down differently on the issue and have rebuffed statute-of-limitations defenses in enforcement actions. This case serves as a reminder that strict application of contract-law defenses is dependent upon the nature of the property settlement provision(s) a party seeks to enforce. Where a divorce agreement does not provide for a specific deadline for performance, the contract is continuing and thus escapes a statute of limitations defense. Here, the express terms of the parties' agreement established a specific amount and a date certain by which husband was to perform (or pay wife) and was not a continuing contract, distinguishing this set of facts in *K.A.R.*

Editor's Note: Husband's Exceptions that were dismissed were not appealed: 1) Master failed to rule on validity of agreement and 2) Master did not award Husband counsel fees.

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SUPERIOR COURT CLARIFIES VENUE AND FORUM NON-CONVENIENS ISSUES BY DARREN K. OGLESBY, ESQ.

J.K. v. W.L.K., 102 A.3d 511 (Pa. Super. 2014)

SUMMARY

Father appealed a decision of the Court of Common Pleas of Chester County (Wheatcraft, J.) denying his petition to transfer venue of the custody matter between father and mother to the Court of Common Pleas of Montgomery County. The Superior Court of Pennsylvania (Ford Elliott, P.J.E., Lazarus and Platt, JJ.) reversed Judge Wheatcraft, clarifying the intersection of the custody venue rule (Pa.R.C.P. 1915.2) with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), and distinguishing venue and forum non-conveniens issues.

FACTUAL AND PROCEDURAL HISTORY

Father and mother are the parents of two minor children born of their marriage in Chester County. In 2011, Mother filed a divorce action in Chester County, and father raised a claim for custody. The parties entered a stipulated custody order in 2011; later, both parties separately relocated to Montgomery County. The parties and the children had resided in Montgomery County for two years when, in 2013, father filed a “petition to transfer jurisdiction” to Montgomery County.

ANALYSIS

The Chester County Court, applying a forum *non conveniens* analysis, denied father’s petition. Father filed an appeal raising two questions:

Did the trial court err as a matter of law and abuse its discretion in continuing to exercise jurisdiction over the custody matter in light of the Uniform Child Custody Jurisdiction and Enforcement Act, 23 Pa.C.S.A. § 5401 et seq.?

Did the trial court err as a matter of law and abuse its discretion when it found that Chester County was not an inconvenient forum under Pennsylvania Rule of Civil Procedure 1915.2?

As the Superior Court (Ford Elliott, P.J.E.) noted, the Pennsylvania Legislature has determined that the provisions of the UCCJEA allocating jurisdiction and functions among courts of different states shall also allocate jurisdiction and functions among the courts of common pleas of the commonwealth. All

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counties maintain subject-matter jurisdiction over custody disputes. However, Pennsylvania *Rule of Civil Procedure* 1915.2 governs venue, and Rule 1915.2 is a restatement, in rule form, of the provisions of Section 5421 of the UCCJEA regarding initial child custody jurisdiction.

Rule 1915.2 provides, in part:

(a) An action may be brought in any county

(1)(i) which is the home county of the child at the time of commencement of the proceeding, or

(ii) which had been the child’s home county within six months before commencement of the proceeding and the child is absent from the county but a parent or person acting as parent continues to live in the county; or

(2) when the court of another county does not have venue under subdivision (1), and the child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with the county other than mere physical presence and there is available within the county substantial evidence concerning the child’s, protection, training and personal relationships; or

(3) when all counties in which venue is proper pursuant to subdivisions (1) and (2) have found that the court before which the action is pending is the more appropriate forum to determine the custody of the child; or

...

(c) The court at any time may transfer an action to the appropriate court of any other county where the action could originally have been brought or could be brought if it determines that it is an inconvenient forum under the circumstances and the court of another county is the more appropriate forum...

Father argued that while Chester County was the correct county to make the initial custody determination, it no longer held continuing exclusive jurisdiction because neither party resided there; both had been in Montgomery County for two years. Pursuant to Rule 1915.2, when no county has venue under Section (a)(1), a county may assume venue under Section (a)(2). However, Montgomery County met the provisions of Section (a)

(continued on page 31)

CASE NOTES

(continued from page 30)

(1) of Rule 1915.2, thus the analysis never reached Section (a)(2). When Montgomery County gained venue under Rule 1915.2 (a) (1), Chester County lost exclusive, continuing venue.

The Superior Court examined Section 5422 of the UCCJEA, stating that a court has exclusive, continuing jurisdiction until:

(a) General rule.—Except as otherwise provided in section 5424 (relating to temporary emergency jurisdiction), a court of this Commonwealth which has made a child custody determination consistent with section 5421 (relating to initial child custody jurisdiction) or 5423 (relating to jurisdiction to modify determination) has exclusive, continuing jurisdiction over the determination until:

(1) a court of [the county which made the initial custody order] determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with [its county] and that substantial evidence is no longer available in [its county] concerning the child's care, protection, training and personal relationships; or

(2) a court of [the county which made the initial custody order] or a court of another [county] determines that the child, the child's parents and any person acting as a parent do not presently reside in this [county which made the initial custody order].

(b) Modification where court does not have exclusive, continuing jurisdiction.—A court of [a county] which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under section 5421.

J.K. at 2014 WL 5140279, 3, citing 23 Pa.C.S.A. § 5422(a) (language in brackets added by the Superior Court). In this case, Chester County no longer met the requirements of Section 5422(a) or (b). It could not modify the custody order because it no longer had exclusive, continuing jurisdiction/venue under Section 5422 of the UCCJEA. Moreover, even if the Superior Court applied a significant connections test under Section 5422(a)(1) of the UCCJEA, there was no finding by the trial court that there existed in Chester County more evidence of the children's protection, training and personal relationships than in Montgomery County. Chester County therefore no longer had exclusive, continuing venue.

While not essential to the court's holding, it also addressed father's second question, wherein he argued that Chester County was an inconvenient forum. The court quickly disposed of the issue: the court determining inconvenient forum must have venue

in the first instance, but in this matter, Chester County did not have venue, and thus could not decide the forum *non conveniens* issue.

CASE NOTE AUTHOR'S EDITORIAL COMMENTS

Although father sought a change in venue, he styled his action as a petition regarding jurisdiction. Although it appears the issue was not addressed in the trial court, there was no doubt that Montgomery County had both subject-matter jurisdiction over the custody matter and personal jurisdiction over the litigants. Accordingly, the Superior Court in this case first reiterated that, “[f]requently, the terms jurisdiction and venue are used interchangeably although in fact they represent distinctly different concepts. Subject matter jurisdiction refers to the competency of a given court to determine controversies of a particular class or kind to which the case presented for its consideration belongs. Venue is the place in which a particular action is to be brought and determined, and is a matter for the convenience of the litigants. Jurisdiction denotes the power of the court whereas venue considers the practicalities to determine the appropriate forum.” *J.K.* at 2014 WL 5140279, 2, citing *In re R.L.L.'s Estate*, 487 Pa. 223, 409 A.2d 321, 322 n. 3 (1979) and *Commonwealth v. Bethea*, 574 Pa. 100, 828 A.2d 1066, 1075 (2003). However, the court stated, at least tacitly, that this is a distinction without a difference, because issues of venue under Rule 1915.2 are to be decided in analogous matter to jurisdictional issues arising under the UCCJEA. The court quoted the Pennsylvania Supreme Court: “Rules of venue recognize the propriety of imposing geographic limitations on the exercise of jurisdiction.” *J.K.* at 3, citing *Commonwealth v. Gross*, 101 A.3d 28, 33 (Pa. 2014).

Of additional note is the fact that the court held that Chester County automatically lost the ability to make any determination as to a convenient forum once the parties relocated and it lost exclusive, continuing venue. What the practitioner may glean from this is that in a circumstance where the litigants have both moved to and resided in a new county, any further action in their custody matter may be brought in the new county without consultation with or approval from the prior county. On one hand, it seems the only step that would be necessary would be to file a praecipe in the prior county to transfer the case and docket to the new county. On the other hand, there would remain, at least initially, the question of fact as to where the parties actually did reside. The question remains as to whether the original county could make that determination.

INDEX TO THE *DUKE JOURNAL OF GENDER LAW & POLICY*
VOLUMES 13-21 (2006-2013)
COMPILED BY JOEL FISHMAN, LORI J. HAGEN, AND MELINDA YOKE

In previous issues of the *Pennsylvania Family Lawyer*, the lead author has brought to the readership publications of the past decade from family-law related periodicals. The *Duke Journal of Gender Law & Policy* provides another interdisciplinary journal covering various family-law, gender, social and policy issues. For this journal, we have identified the symposium name in brackets following the title of the articles. All articles are available online at the *Journal's* website, at http://scholarship.law.duke.edu/djglp/all_issues.html.

I. AUTHOR INDEX

Alexander, Sharon E., Tim Bakken, Robert C. Bordone, Jennifer G. Brown, Stuart F. Delery, Brian Fricke, Elizabeth L. Hillman, Elena Kagan, Lawrence J. Korb, Joe Lopez, Diane H. Mazur, Denny Meyer, Martha Minow, C. Dixon Osburn, Joseph C. Steffan, Susan Sommer & Laurence H. Tribe, Harvard Law School Lambda Second Annual Gay and Lesbian Legal Advocacy Conference: "Don't Ask, Don't Tell." [Gender, Sexuality & the Military]. 14:1173 (2007).

Alexandre, Michele. Dance Halls, Masquerades, Body Protest and the Law: The Female Body as a Redemptive Tool against Trinidad's Gender-Biased Laws. [Women in the Workplace]. 13:177 (2006).

Aloni, Erez. Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage. 18:105 (2010).

Avery, Dianne & Marion Crain. Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism. [Makeup, Identity Performance & Discrimination]. 14:13 (2007).

Barnes, Mario L. "But Some of [Them] Are Brave": Identity Performance, the Military, and the Dangers of an Integration Success Story. [Gender, Sexuality & the Military]. 14:693 (2007).

Beiner, Theresa M. Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases? [Makeup, Identity Performance & Discrimination]. 14:125 (2007).

Belknap, Joanne, Ann T. Chu, & Anne P. DePrince. The Roles of Phones and Computers in Threatening and Abusing Women

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Bigayer, Jamie. Voir Dire for Dummies: Using visual Land Authority Cues and Question Design to Avoid the Pitfalls of Bunk Science, Gender Stereotypes, Perceptual Errors. And the Social Disability Bias. 21:369 (2014).

Bitar, Kara N. The Parental Rights of Rapists. [Gender and Criminal Law & Policy]. 19:275 (2012).

Blecher-Prigat, Ayelet. Rethinking Visitation: From a Parental to a Relational Right .16:1 (2009).

Brake, Deborah L and Joanna L. Grossman. Unprotected Sex: The Pregnancy Discrimination Act at 35. 21:67 (2013).

Broussard, Patricia A. Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention against Torture. [Gender and Religious Conservatism]. 15:19 (2008).

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Browne-Marshall, Gloria J. A Cautionary Tale: Black Women, Criminal Justice, and HIV. [Gender and Criminal Law & Policy]. 19:407(2012).

(continued on page 33)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 32)

Bumgarner, Ashley. A Right to Choose: Sex Selection in the International Context. 14:1289 (2007).

Buzuvis, Erin E. Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics. 17:1 (2010).

Carbado, Devon, Catherine Fisk, Mit Gulati. Foreword: Making Makeup Matter. [Makeup, Identity Performance & Discrimination]. 14:1 (2007).

Carle, Susan D Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harrassment Cases. [Women in the Workplace]. 13:85 (2006).

Conner, Dana Harrington. Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence. [The Changing Face of Families]. 18:223 (2011).

Corbett, William R. The Ugly Truth about Appearance Discrimination and the Beauty of Our Employment Discrimination Law. [Makeup, Identity Performance & Discrimination]. 14:153 (2007).

Correll, Michael. Getting Fat on Government Cheese: The Connection between Social Welfare Participation, Gender, and Obesity in America. 18:45 (2010).

Cossman, Brenda Censor. Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada. 21:45(2013).

Cox, Walter T., III Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed, [Gender, Sexuality & the Military]. 14:791 (2007).

Cruz, David B. Getting Sex Right: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship. 18:203 (2010).

Dana, Anne R. The 'State' of Surrogacy Laws: Determining Legal Parentage for Gay Fathers. 18:353 (2011).

Davenport, Erin P. Court Ordered Cesarean Sections: Why Courts Should Not be Allowed to Use a Balancing Test. 18:79 (2010).

de Silva de Alwis, Rangita. Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a

New Paradigm for Egalitarian Legislation. [The Changing Face of Families].18:305 (2011).

Dillard, Carter. Future Children as Property 17:47 (2010).

Donnelly, Elaine. Constructing the Co-Ed Military. [Gender, Sexuality & the Military].14:815 (2007).

Duncan, Emily J. The Positive Effects of Legalizing Polygamy: "Love Is a Many Splendored Thing". 15:315 (2008).

Dysart, Tessa L. Child Victim or Prostitute? Justice through Immunity Prostituted Children 21:255 (2014).

Editors. Introduction. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body and the Law]. 16:211 (2009).

Fischel, Joseph J. Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary Domestic Violence and Sexual Violence. [Domestic Violence and Sexual Violence]. 17:277 (2010).

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Fisk, Catherine L. Foreword . Looking for a Miracle? Women, Work, and Effective Legal Change. [Women in the Workplace]. 13:1 (2006).

Flagg, Barbara J. An Essay for Keisha (and a Response to Professor Ford). [Makeup, Identity Performance & Discrimination].14:179 (2007).

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Gan, Orit. Third-Party Consent to Search: Analyzing Triangular Relations. [Gender and Criminal Law & Policy]. 19:303 (2012).

Garcia, Kelli K. The Gender Bind: Men as Inauthentic Caregivers. 20:1 (2012).

Garcia, Maria E. In with New Families, Out with Bad Law: Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements. 21:197 (2013).

(continued on page 34)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 33)

Gely, Rafael. The Law and Economics Identity. [Makeup, Identity Performance & Discrimination]. 14:229 (2007).

Gilreath, Shannon. Sexually Speaking “Don’t Ask, Don’t Tell” and the First Amendment after Lawrence v. Texas. [Gender, Sexuality & the Military]. 14:953 (2007).

Greer, Sharra E. et al. National Lesbian and Gay Law Foundation Lavendar Law 2006 “Rum, Sodomy, and the Lash”: What the Military Thrives on and How It Affects Legal Recruitment and Law Schools. [Gender, Sexuality & the Military]. 14:1143 (2007)..

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Hébert, L. Camille Divorcing Sexual Harassment from Sex. 21:1(2013).

Janus, Kathleen Kelly. Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory. 20:255 (2012).

Keller, Elisabeth A. & Judith B. Tracy. Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-examining Supreme Court Precedent. [Gender and Religious Conservatism]. 15:247 (2008).

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Knaplund, Kristine S. The New Uniform Probate Code’s Surprising Gender Inequities. [The Changing Face of Families]. 18:335 (2011).

Kohm, Lynne Marie. A Christian Perspective on Gender Equality, 15:339 (2008).

Kolinsky, Heather M.. Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States. [Women in Non-Traditional Roles and Occupations]. 17:333 (2010).

Leary, Mary Graw. Fighting Fire with Fire: Technology in Child Sex Trafficking. 21:289 (2014).

Lee, Rebecca K. Implementing Grutter’s Diversity Rationale: Diversity and Empathy in Leadership .19:133 (2011).

Lens, Vicki. Work Sanctions Under Welfare Reform: Are They Helping Women Achieve Self-Sufficiency? 13:255 (2006).

Lester, Toni. “Talking about Sexual Orientation, Teaching about Homophobia”–Negotiating the Divide Between Religious Belief and Tolerance for LGBT Rights in the Classroom. 15:399 (2008).

Levi, Jennifer L. Some Modest Proposals for Challenging Established Dress Code Jurisprudence. [Makeup, Identity Performance & Discrimination]. 14:243 (2007).

Levinson, Justin D. & Danielle Young. Implicit Gender Bias in the Legal Profession: An Empirical Study. 18:1 (2010).

Lin, Chih-Chieh. Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan has Been Unsuccessful. 18:163 (2010).

Ludsin, Hallie. Relational Rights Masquerading as Individual Rights. [Gender and Religious Conservatism]. 15:195 (2008).

Mahoney Frandina, Michael. A Man’s Right to Choose His Surname in Marriage: A Proposal. 16:155 (2009).

Maninan, Maya. The Irrational Woman: Informed Consent and Abortion Decision-Making. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. 16:223 (2009).

Manley, Katie. The BFOQ Defense: The Title VII’s Concession to Gender Discrimination. 16:169 (2009).

Matambanadzo, Saru M. Embodying Vulnerability: A Feminist Theory of the Person. 20:45 (2012).

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Mazur, Diane H. Military Values in Law. [Gender, Sexuality & the Military]. 14:977 (2007).

McClain, Linda C. From Romer v. Evans to United States v. Windsor Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act. 20:351 (2012).

McGinley, Ann C. Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes. [Makeup, Identity Performance & Discrimination]. 14:257 (2007).

McMullen, Judith G. Alimony: What Social Science and Popular

(continued on page 35)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 34)

Culture Tells Us about Women, Guilt, and Spousal Support after Divorce. 19:41 (2011).

McSally, Martha. Women in Combat: Is the Current Policy Obsolete? [Gender, Sexuality & the Military]. 14:1011 (2007).

Moreno, Jennifer Bonilla. ¿Only English?: How Bilingual Education Can Mitigate the Damage of English-Only. 20:197 (2012).

Munjal, Diksha. Intimate Partner Violence—Is There a Solution. [Gender and Criminal Law & Policy]. 19:347 (2012).

Murnane, Linda Strite. Legal Impediments to Service: Women in the Military and the Rule of Law. [Gender, Sexuality & the Military]. 14:1061 (2007).

Murray, Christopher R. Comment Grappling with Solicitation: The Need for Statutory Reform in North Carolina after Lawrence v. Texas. [Makeup, Identity Performance & Discrimination]. 14:681 (2007).

Musselman, James L. What's Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples. 16:37 (2009).

Nagle, Mary Kathryn. Abortion Post-Glucksberg and Post-Gonzalez: Applying an Analysis That Demands Equality for Women Under the Law. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. 16:293 (2009).

Needham, Jayesh. After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy? 20:287 (2012).

Niedwiecki, Anthony. Save Our Children: Overcoming the Narrative that Gays and Lesbians are Harmful to Children 21:125 (2013).

Oberman, Michelle Kelly. Eva and Her Baby (A Story of Adolescent Sex, Pregnancy, Longing, Love, Loneliness, and Death. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. 16:213 (2009).

Oderda, Gina. Opposition at the Water Cooler: The Treatment of Non-Purposive Conduct under Title VII's Anti-Retaliation Clause. 16:241 (2009).

Oldham, J. Thomas. With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act after Three Decades. 19:83 (2011).

Pi, Vanessa L. Regulating Sperm Donation. Why Requiring Exposed Donation Is Not the Answer. 16:379 (2009).

Pizer, Jennifer C. Facial Discrimination: Darlene Jespersen's Fight against the Barbie-Fication of Bartenders. [Makeup, Identity Performance & Discrimination]. 14:285 (2007).

Ponte, Lucille M. & Jennifer L. Gillan. Gender Performance over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine. [Makeup, Identity Performance & Discrimination]. 14:319 (2007).

Porter, Nicole Bounocore. Re-Defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace. [Women in the Workplace]. 13:55 (2006).

Powers, Courtney A. Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny. [Current Developments Regarding LGBTs and the Law]. 17:385 (2010)

Rabin-Margalioth, Sharon. Love at Work. [Women in the Workplace]. 13:237 (2006).

Redding, Richard E. It's Really about Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust. [Gender and Religious Conservatism]. 15:127 (2008).

Reder, Candice Marie. Framing Preglimony: Exploring the Implications of Pregnancy Support Models through Family Law Values. 20:325 (2012).

Rimalt, Noya. Women in the Sphere of Masculinity: The Double-Edged Sword of Women's Integration in the Military. [Gender, Sexuality & the Military]. 14:1097 (2007).

Roberts, Laura Morgan & Darryl D. Roberts. Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethic Ramifications of Cultural Profiling at Work. [Makeup, Identity Performance & Discrimination]. 14:369 (2007).

Rose, Leslie M. The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind? 17:81 (2010).

Rosette, Asleigh Shelby & Tracy L. Dumas. The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity. [Makeup, Identity Performance & Discrimination]. 14:407 (2007).

(continued on page 36)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 35)

Ross, Megan. A Diamond in the Rough: The Transnational Duty to Prevent Human Trafficking in the Protocol. 21:325 (2014).

Rublin, Amy. The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law. 19:179 (2011).

Rutledge, Colleen Theresa. Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom. 15:297 (2008).

Rutledge, Njeri Mathis. Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims. 19:223 (2011).

Scheper, Jeanne; Nathaniel Frank, Aaron Belkin, Gary J. Gates. The Importance of Objective Analysis on Gays in the Military: A Response to Elaine Donnelly's Constructing the Co-Ed Military. 15:419 (2008).

Schipani, Cindy A., Terry M. Dworkin, Angel Kwolek-Folland, Virginia G. Maurer. Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking. 16:89 (2009).

Schmall, Lorraine. Birth Control as a Labor Law Issue. [Women in the Workplace]. 13:139 (2006).

Schneider, Andrea Kupfer, Catherine H. Tinsley, Sandra Cheldelin, Emily T. Amanatullah. Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers. [Women in Non-Traditional Roles and Occupations]. 17:363 (2010).

Seaman, Julie A. The Peahen's Tale, or Dressing Our Parts at Work. [Makeup, Identity Performance & Discrimination]. 14:423 (2007).

Sekreta, Ellen. Sexual Harassment, Misconduct, and the Atmosphere of the Laboratory: The Legal and Professional Challenges Faced by Women Physical Science Researchers at Educational Institutions. [Women in the Workplace]. 13:115 (2006).

Selmi, Michael Many Faces of Darlene Jespersen, The Makeup, Identity Performance & Discrimination. 14:467 (2007).

Selmi, Michael & Naomi Cahn. Women in the Workplace: Which Women, Which Agenda? [Women in the Workplace]. 13:7 (2006).

Shin, Patrick S. Vive la Difference? A Critical Analysis of the Justification of Sex-Defendant Workplace Restrictions on Dress and Grooming. [Makeup, Identity Performance & Discrimination]. 14:491 (2007).

Shmueli, Benjamin. Love and the Law, Children against Mothers and Fathers: Or, What's Love Got to Do With It? 17:131 (2010).

Spreng, Jennifer E. The Private World of Juvenile Court: Mothers, Mental Illness and the Relentless Machinery of the State. 17:189 (2010).

Southerl, Harold P. "Love for Sale"—Sex and the Second American Revolution. [Gender and Religious Conservatism]. 15:49 (2008).

Stark, Barbara. Women's Convention, Reproductive Rights, and the Reproduction of Gender. [The Changing Face of Families]. 18:261 (2011).

Steverson, Janet W. & Traci Rieckman. Legislating for the Provision of Comprehensive Substance Abuse Treatment Programs for Pregnant and Mothering Women. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. 16:315 (2009).

Stoddard, Thayne D. Male Prostitution: An Enforcement Dilemma. 21:227 (2013).

Stopler, Gila A. "A Rank Usurpation of Power"—The Role of Patriarchal Religion and Culture in the Subordination of Women. 15:365 (2008).

Strand, Palma Joy. Do We Value Our Cars More than Our Kids? The Conundrum of Care for Children. 19:1 (2011).

Strasser, Mark. Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context. [Gender and Religious Conservatism]. 15:223 (2008).

Strasser, Mark. Life After DOMA. 17:399 (2010).

Stueckle, Jared D. Title VII, Voluntary Compliance and Ricci: Rescuing Municipalities from a Legal 'Backdraft.' 17:259 (2010).

Thompson, Scott. Abbott, AIDS, and the ADA: Why a Per Se Disability Rule for HIV/AIDS is both Just and a Must. [Gender and Religious Conservatism]. 15:1 (2008)

Vargas, Michael. Prosecuting Domestic Violence after Giles: Why a Categorical Approach to the Forfeiture Doctrine Threatens Female Autonomy. 20:173 (2012).

(continued on page 37)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 36)

Wang, Shirley Kohsin. Violence & HIV/AIDS: Violence against Women and Girls as a Cause and Consequence of HIV/AIDS. [Domestic Violence and Sexual Violence]. 17:313 (2010).

Weissman, Deborah M. Law, Social Movements, and the Political Economy of Domestic Violence. 20:221 (2012).

Westcott, Kathi & Rebecca Sawyer. Silent Sacrifices: The Impact of “Don’t Ask, Don’t Tell” on Lesbian and Gay Military Families. [Gender, Sexuality & the Military]. 14:1121 (2007).

Williams, Joan C. & Elizabeth S. Westfall. Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Careers” in the Workplace. [Women in the Workplace]. 13:31 (2006).

Wilson, Justin T. Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion Makeup, Identity Performance & Discrimination. 14:561 (2007).

Yefet, Karin Carmit. What’s the Constitution Got To Do With It? Regulating Marriage in Pakistan. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. 16:347 (2009).

Yelnosky, Michael J. What Do Unions Do about Appearance Codes? [Makeup, Identity Performance & Discrimination]. 14:521 (2007).

Zalesne, Deborah. Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes. [Makeup, Identity Performance & Discrimination]. 14:535 (2007).

Zimbhoff, Jennifer. Cultural Differences in Perceptions of and Responses to Sexual Harassment. 14:1311 (2007).

Zisk, Nancy. In the Wake of Ledbetter v. Goodyear Tire & Rubber Company: Applying the Discovery Rule to Determine the Start of the Limitations Period for Pay Discrimination Claims. 16:137 (2009).

Zug, Marcia. Lonely Colonist Seeks Wife: The Forgotten History of America’s First Mail Order Brides. 20:85 (2012).

II. TITLE INDEX

Abbott, AIDS, and the ADA: Why a Per Se Disability Rule for HIV/AIDS is both Just and a Must. [Gender and Religious Conservatism]. Scott Thompson. 15:1 (2008).

Abortion Post-Glucksberg and Post-Gonzalez: Applying an Analysis That Demands Equality for Women Under the Law. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. Mary Kathryn Nagle. 16:293 (2009).

Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harrassment Cases. [Women in the Workplace]. Susan D. Carle. 13:85 (2006).

After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy? Jayesh Needham. 20:287 (2012).

Alimony: What Social Science and Popular Culture Tells Us about Women, Guilt, and Spousal Support after Divorce. Judith G. McMullen. 19:41 (2011).

Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes. [Makeup, Identity Performance & Discrimination]. Ann C. McGinley. 14:257 (2007).

Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence. [The Changing Face of Families]. Dana Harrington Conner. 18:223 (2011).

The BFOQ Defense: The Title VII’s Concession to Gender Discrimination. Katie Manley. 16:169 (2009).

Birth Control as a Labor Law Issue. [Women in the Workplace]. Lorraine Schmall. 13:139 (2006).

Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism. [Makeup, Identity Performance & Discrimination]. Avery, Dianne Avery & Marion Crain. 14:13 (2007).

”But Some of [Them] Are Brave”: Identity Performance, the Military, and the Dangers of an Integration Success Story. [Gender, Sexuality & the Military]. Mario L. Barnes. 14:693 (2007).

Caught in the Crossfire: How Catholic Charities of Boston was Victim to the Clash Between Gay Rights and Religious Freedom. Colleen Theresa Rutledge. 15:297 (2008).

A Cautionary Tale: Black Women, Criminal Justice, and HIV. [Gender and Criminal Law & Policy]. Gloria J. Browne-Marshall. 19:407(2012).

Censor. Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada. Brenda Cossman. 21:45(2013).

(continued on page 38)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 37)

Child Victim or Prostitute? Justice Through Immunity Prostituted Children. Tessa L. Dysart. 21:255 (2014).

A Christian Perspective on Gender Equality. Lynne Marie Kohm. 15:339 (2008).

Consensual Sex Crimes in the Armed Forces: A Primer for the Uninformed, [Gender, Sexuality & the Military]. Walter T. Cox, III. 14:791 (2007).

Constructing the Co-Ed Military. [Gender, Sexuality & the Military]. Elaine Donnelly. 14:815 (2007).

Court Ordered Cesarean Sections: Why Courts Should Not be Allowed to Use a Balancing Test. Erin P. Davenport. 18:79 (2010).

Cultural Differences in Perceptions of and Responses to Sexual Harassment. Jennifer Zimbroff. 14:1311 (2007).

Dance Halls, Masquerades, Body Protest and the Law: The Female Body as a Redemptive Tool against Trinidad's Gender-Biased Laws. [Women in the Workplace]. Michele Alexandre. 13:177 (2006).

Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Careers" in the Workplace. [Women in the Workplace]. Joan C. Williams & Elizabeth S. Westfall. 13:31 (2006).

Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context. [Gender and Religious Conservatism]. Mark Strasser. 15:223 (2008).

A Diamond in the Rough: The Transnational Duty to Prevent Human Trafficking in the Protocol. Megan. Ross. 21:325 (2014).

Divorcing Sexual Harassment from Sex. L. Camille Hébert. 21:1(2013).

Do We Value Our Cars More than Our Kids? The Conundrum of Care for Children. Palma Joy Strand. 19:1 (2011).

Embodying Vulnerability: A Feminist Theory of the Person. Saru M. Matambanadzo. 20:45 (2012).

Emerging Victimhood: Moving towards the Protection of Domestic Juveniles Involved in Prostitution. Nikki J. Hasselbarth. 21:401 (2014).

An Essay for Keisha (and a Response to Professor Ford). [Makeup, Identity Performance & Discrimination]. Barbara J. Flagg. 14:179 (2007).

Eva and Her Baby (A Story of Adolescent Sex, Pregnancy, Longing, Love, Loneliness, and Death. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. Michelle Kelly Oberman. 16:213 (2009).

Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation. [The Changing Face of Families]. Rangita de Silva de Alwis. 18:305 (2011).

Facial Discrimination: Darlene Jespersen's Fight against the Barbie-Fication of Bartenders. [Makeup, Identity Performance & Discrimination]. Jennifer C. Pizer. 14:285 (2007).

Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan has Been Unsuccessful. Chih-Chieh, Lin. 18:163 (2010).

Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention against Torture. [Gender and Religious Conservatism]. Patricia A. Broussard. 15:19 (2008).

Fighting Fire with Fire: Technology in Child Sex Trafficking. Mary Graw Leary. 21:289 (2014).

Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory. Kathleen Kelly Janus. 20:255 (2012).

Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny. [Current Developments Regarding LGBTs and the Law]. Courtney A. Powers. 17:385 (2010).

Foreword: Making Makeup Matter. [Makeup, Identity Performance & Discrimination]. Devon Carbado, Catherine Fisk, Mit Gulati. 14:1 (2007).

Foreword . Looking for a Miracle? Women, Work, and Effective Legal Change. [Women in the Workplace]. Catherine L. Fisk. 13:1 (2006).

Framing Preglimony: Exploring the Implications of Pregnancy Support Models through Family Law Values. Candice Marie Reder. 20:325 (2012).

(continued on page 39)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 38)

From *Romer v. Evans* to *United States v. Windsor* Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act. Linda C. McClain. 20:351 (2012).

Future Children as Property. Carter Dillard. 17:47 (2010).

The Gender Bind: Men as Inauthentic Caregivers. Kelli K. Garcia. 20:1 (2012).

Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins. [Makeup, Identity Performance & Discrimination]. Joel Wm. Friedman. 14:205 (2007).

Gender Performance over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine. [Makeup, Identity Performance & Discrimination]. Lucille M. Ponte, & Jennifer L. Gillan. 14:319 (2007).

Getting Fat on Government Cheese: The Connection between Social Welfare Participation, Gender, and Obesity in America. Michael Correll. 18:45 (2010).

Getting Sex Right: Heteronormativity and Biologism in Trans and Intersex Marriage Litigation and Scholarship. David B. Cruz. 18:203 (2010).

Grappling with Solicitation: The Need for Statutory Reform in North Carolina after *Lawrence v. Texas* Makeup, Identity Performance & Discrimination. Christopher R. Murray. 14:681 (2007).

The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity. [Makeup, Identity Performance & Discrimination]. Asleigh Shelby Rosette & Tracy L. Dumas. 14:407 (2007).

Harvard Law School Lambda Second Annual Gay and Lesbian Legal Advocacy Conference: “Don’t Ask, Don’t Tell.” [Gender, Sexuality & the Military]. Alexander, Sharon E. Alexander, Tim Bakken, Robert C. Bordone, Jennifer G. Brown, Stuart F. Delery, Brian Fricke, Elizabeth L. Hillman, Elena Kagan, Lawrence J. Korb, Joe Lopez, Diane H. Mazur, Denny Meyer, Martha Minow, C. Dixon Osburn, Joseph C. Steffan, Susan Sommer & Laurence H. Tribe. 14:1173 (2007).

Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-examining Supreme Court Precedent. [Gender and Religious Conservatism]. Elisabeth A. Keller & Judith B. Tracy. 15:247 (2008).

Implementing Grutter’s Diversity Rationale: Diversity and Empathy in Leadership. Rebecca K. Lee. 19:133 (2011).

Implicit Gender Bias in the Legal Profession: An Empirical Study. Justin D. Levinson & Danielle Young. 18:1 (2010).

The Importance of Objective Analysis on Gays in the Military: A Response to Elaine Donnelly’s *Constructing the Co-Ed Military*. Jeanne Scheper, Nathaniel Frank, Aaron Belkin, Gary J. Gates. 15:419 (2008).

In the Wake of *Ledbetter v. Goodyear Tire & Rubber Company*: Applying the Discovery Rule to Determine the Start of the Limitations Period for Pay Discrimination Claims. Nancy Zisk. 16:137 (2009).

In with New Families, Out with Bad Law: Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements. Maria E. Garcia. 21:197 (2013).

Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage. Erez Aloni. 18:105 (2010).

Intimate Partner Violence—Is There a Solution. [Gender and Criminal Law & Policy]. Diksha Munjal. 19:347 (2012).

Introduction. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body and the Law]. Editors. 16:211 (2009).

The Irrational Woman: Informed Consent and Abortion Decision-Making. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. Maya Maninan. 16:223 (2009).

It’s Really About Sex: Same-Sex Marriage, Lesbigay Parenting, and the Psychology of Disgust. [Gender and Religious Conservatism]. Richard E. Redding. 15:127 (2008).

Joe Camel Explains It to the Board: Corporate Law, Women in the Workforce, and the Exploitation of Children. [Women in the Workplace]. Theresa A. Gabaldon. 13:203 (2006).

Law, Social Movements, and the Political Economy of Domestic Violence. Deborah M. Weissman. 20:221 (2012).

The Law and Economics Identity. [Makeup, Identity Performance & Discrimination]. Rafael Gely 14:229 (2007).

(continued on page 40)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 39)

Legal Impediments to Service: Women in the Military and the Rule of Law. [Gender, Sexuality & the Military]. Linda Strite Murnane. 14:1061 (2007).

Legislating for the Provision of Comprehensive Substance Abuse Treatment Programs for Pregnant and Mothering Women. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. Janet W. Steverson, & Traci Rieckman. 16:315 (2009).

Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes. [Makeup, Identity Performance & Discrimination]. Deborah Zalesne. 14:535 (2007).

Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver. Jill Maxwell. 20:127 (2012).

Life After DOMA. Mark Strasser. 17:399 (2010).

Likeability v. Competence: The Impossible Choice Faced by Female Politicians, Attenuated by Lawyers. [Women in Non-Traditional Roles and Occupations]. Andrea Kupfer Schneider, Catherine H. Tinsley, Sandra Cheldelin, Emily T. Amanatullah. 17:363 (2010).

Lonely Colonist Seeks Wife: The Forgotten History of America's First Mail Order Brides. Marcia Zug. 20:85 (2012).

Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims. Njeri Mathis Rutledge. 19:223 (2011).

Love at Work. [Women in the Workplace]. Sharon Rabin-Margalioth. 13:237 (2006).

Love and the Law, Children against Mothers and Fathers: Or, What's Love Got to Do With It? Benjamin Shmueli. 17:131 (2010).

"Love for Sale"—Sex and the Second American Revolution. [Gender and Religious Conservatism]. Harold P. Southerl. 15:49 (2008).

Male Prostitution: An Enforcement Dilemma. Thayne D. Stoddard. 21:227 (2013).

A Man's Right to Choose His Surname in Marriage: A Proposal. Michael Mahoney Frandina. 16:155 (2009).

Many Faces of Darlene Jespersen, The Makeup, Identity Performance & Discrimination. Michael Selmi. 14:467 (2007).

Military Values in Law. [Gender, Sexuality & the Military]. Diane H. Mazur. 14:977 (2007).

Military Sex Scandals from Tailhook to the Present: The Cure Can Be Worse than the Disease. [Gender, Sexuality & the Military]. Kingsley R. Browne. 14:749 (2007).

National Lesbian and Gay Law Foundation Lavendar Law 2006 "Rum, Sodomy, and the Lash": What the Military Thrives on and How It Affects Legal Recruitment and Law Schools. [Gender, Sexuality & the Military]. Sharra E. Greer, et al. 14:1143 (2007)..

The New Uniform Probate Code's Surprising Gender Inequities. [The Changing Face of Families]. Kristine S. Knaplund. 18:335 (2011).

¿Only English?: How Bilingual Education Can Mitigate the Damage of English-Only. Jennifer Bonilla Moreno. 20:197 (2012).

Opposition at the Water Cooler: The Treatment of Non-Purposive Conduct under Title VII's Anti-Retaliation Clause. Gina Oderda. 16:241 (2009).

The Parental Rights of Rapists. [Gender and Criminal Law & Policy]. Kara N. Bitar. 19:275 (2012).

Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking. Cindy A. Schipani, Terry M. Dworkin, Angel Kwolek-Folland, Virginia G. Maurer. 16:89 (2009).

The Peahen's Tale, or Dressing Our Parts at Work. [Makeup, Identity Performance & Discrimination]. Julie A. Seaman. 14:423 (2007).

The Positive Effects of Legalizing Polygamy: "Love Is a Many Splendored Thing". Emily J. Duncan. 15:315 (2008).

Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion Makeup, Identity Performance & Discrimination. Justin T. Wilson. 14:561 (2007).

The Private World of Juvenile Court: Mothers, Mental Illness and the Relentless Machinery of the State. Jennifer E. Spreng. 17:189 (2010).

(continued on page 41)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 40)

Prosecuting Domestic Violence after Giles: Why a Categorical Approach to the Forfeiture Doctrine Threatens Female Autonomy. Michael Vargas. 20:173 (2012).

“A Rank Usurpation of Power”—The Role of Patriarchal Religion and Culture in the Subordination of Women. Gila A. Stopler. 15:365 (2008).

Re-Defining Superwoman: An Essay on Overcoming the “Maternal Wall” in the Legal Workplace. [Women in the Workplace]. Nicole Bounocore Porter. 13:55 (2006).

Regulating Sperm Donation. Why Requiring Exposed Donation Is Not the Answer. Vanessa L. Pi. 16:379 (2009).

Relational Rights Masquerading as Individual Rights. [Gender and Religious Conservatism]. Hallie Ludsin. 15:195 (2008).

Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States. [Women in Non-Traditional Roles and Occupations]. Heather M. Kolinsky. 17:333 (2010).

Rethinking Visitation: From a Parental to a Relational Right . Ayelet Blecher-Prigat. 16:1 (2009).

A Right to Choose: Sex Selection in the International Context. Ashley Bumgarner. 14:1289 (2007).

The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law. Amy Rublin. 19:179 (2011).

The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse. [Gender and Criminal Law & Policy]. Joanne Belknap, Ann T. Chu, & Anne P. DePrince. 19:373 (2012).

Save Our Children: Overcoming the Narrative that Gays and Lesbians are Harmful to Children Anthony Niedwiecki. 21:125 (2013).

Sexual Harassment, Misconduct, and the Atmosphere of the Laboratory: The Legal and Professional Challenges Faced by Women Physical Science Researchers at Educational Institutions. [Women in the Workplace]. Ellen Sekreta. 13:115 (2006).

Sexually Speaking “Don’t Ask, Don’t Tell” and the First Amendment after Lawrence v. Texas. [Gender, Sexuality & the Military]. Shannon Gilreath. 14:953 (2007).

Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases? [Makeup, Identity Performance & Discrimination]. Theresa M. Beiner. 14:125 (2007).

Sidelined: Title IX Retaliation Cases and Women’s Leadership in College Athletics. Erin E. Buzuvis. 17:1 (2010).

Silent Sacrifices: The Impact of “Don’t Ask, Don’t Tell” on Lesbian and Gay Military Families. [Gender, Sexuality & the Military]. Kathi Westcott & Rebecca Sawyer. 14:1121 (2007).

Some Modest Proposals for Challenging Established Dress Code Jurisprudence. [Makeup, Identity Performance & Discrimination]. Jennifer L. Levi. 14:243 (2007).

Special Considerations in Estate Planning for Same-Sex and Unmarried Couples. Hallie Fisher. 21:177 (2013).

The ‘State’ of Surrogacy Laws: Determining Legal Parentage for Gay Fathers. Anne R. Dana. 18:353 (2011).

The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind? Leslie M. Rose. 17:81 (2010).

“Talking about Sexual Orientation, Teaching about Homophobia”—Negotiating the Divide Between Religious Belief and Tolerance for LGBT Rights in the Classroom. Toni Lester. 15:399 (2008).

Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethic Ramifications of Cultural Profiling at Work. [Makeup, Identity Performance & Discrimination]. Laura Morgan Roberts & Darryl D. Roberts. 14:369 (2007).

(Trans)Forming Traditional Interpretations of Title VII: “Because of the Sex” and the Transgender Dilemma. Mary Kristen Kelly. 17:219 (2010).

Third-Party Consent to Search: Analyzing Triangular Relations. [Gender and Criminal Law & Policy]. Orit Gan. 19:303 (2012).

Title VII, Voluntary Compliance and Ricci: Rescuing Municipalities from a Legal ‘Backdraft.’ Jared D. Stueckle. 17:259 (2010).

Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary Domestic Violence and Sexual Violence. [Domestic Violence and Sexual Violence]. Joseph J. Fischel. 17:277 (2010).

(continued on page 42)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 41)

The Ugly Truth about Appearance Discrimination and the Beauty of Our Employment Discrimination Law. [Makeup, Identity Performance & Discrimination]. William R. Corbett. 14:153 (2007).

Unholy Troika: Gender, Race and Religiosity in the 2008 Presidential Contest. Barbara L. Bernier. 15:275 (2008).

Unprotected Sex: The Pregnancy Discrimination Act at 35. Deborah L. Brake and Joanna L. Grossman. 21:67 (2013).

Violence & HIV/AIDS: Violence against Women and Girls as a Cause and Consequence of HIV/AIDS. [Domestic Violence and Sexual Violence]. Shirley Kohsin Wang. 17:313 (2010).

Vive la Difference? A Critical Analysis of the Justification of Sex-Defendant Workplace Restrictions on Dress and Grooming. [Makeup, Identity Performance & Discrimination]. Patrick S. Shin. 14:491 (2007).

Voir Dire for Dummies: Using visual Land Authority Cues and Question Design to Avoid the Pitfalls of Bunk Science, Gender Stereotypes, Perceptual Errors. And the Social Disability Bias. Jamie Bigayer. 21:369 (2014).

What Do Unions Do about Appearance Codes? [Makeup, Identity Performance & Discrimination]. Michael J. Yelnosky. 14:521 (2007).

What's Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples. James L. Musselman. 16:37 (2009).

What's the Constitution Got To Do With It? Regulating Marriage in Pakistan. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. Karin Carmit Yefet. 16:347 (2009).

With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act after Three Decades. J. Thomas Oldham. 19:83 (2011).

Women in Combat: Is the Current Policy Obsolete? [Gender, Sexuality & the Military]. Martha McSally. 14:1011 (2007).

Women in the Sphere of Masculinity: The Double-Edged Sword of Women's Integration in the Military. [Gender, Sexuality & the Military]. Noya Rimalt. 14:1097 (2007).

Women in the Workplace: Which Women, Which Agenda? [Women in the Workplace]. Michael Selmi & Naomi Cahn. 13:7 (2006).

Women's Convention, Reproductive Rights, and the Reproduction of Gender. [The Changing Face of Families]. Barbara Stark. 18:261 (2011).

Work Sanctions Under Welfare Reform: Are They Helping Women Achieve Self-Sufficiency? Vicki Lens. 13:255 (2006).

III. SUBJECT INDEX

Abortion

Bumgarner, Ashley. A Right to Choose: Sex Selection in the International Context. 14:1289 (2007).

Davenport, Erin P. Court Ordered Cesarean Sections: Why Courts Should Not be Allowed to Use a Balancing Test. 18:79 (2010).

Maninan, Maya. The Irrational Woman: Informed Consent and Abortion Decision-Making. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. 16:223 (2009).

Nagle, Mary Kathryn. Abortion Post-Glucksberg and Post-Gonzalez: Applying an Analysis That Demands Equality for Women Under the Law. [The Symptoms of Public Health Policy: Invisible Injuries, the Gendered Body, and the Law]. 16:293 (2009).

Abused Women

Belknap, Joanne, Ann T. Chu, & Anne P. DePrince. The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse. [Gender and Criminal Law & Policy]. 19:373 (2012).

Adoptions

Strasser, Mark. Deliberate Indifference, Professional Judgment, and the Constitution: On Liberty Interests in the Child Placement Context. [Gender and Religious Conservatism]. 15:223 (2008).

AIDS

Browne-Marshall, Gloria J. A Cautionary Tale: Black Women, Criminal Justice, and HIV. [Gender and Criminal Law & Policy]. 19:407(2012).

Thompson, Scott. Abbott, AIDS, and the ADA: Why a Per Se Disability Rule for HIV/AIDS is both Just and a Must. [Gender and Religious Conservatism]. 15:1 (2008).

(continued on page 43)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 42)

Wang, Shirley Kohsin. Violence & HIV/AIDS: Violence against Women and Girls as a Cause and Consequence of HIV/AIDS. [Domestic Violence and Sexual Violence]. 17:313 (2010).

Birth Control

Schmall, Lorraine. Birth Control as a Labor Law Issue. [Women in the Workplace]. 13:139 (2006).

Caregivers

Garcia, Kelli K. The Gender Bind: Men as Inauthentic Caregivers. 20:1 (2012).

Child Custody

Conner, Dana Harrington. Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence. [The Changing Face of Families]. 18:223 (2011).

Child Support

Reder, Candice Marie. Framing Preglimony: Exploring the Implications of Pregnancy Support Models through Family Law Values. 20:325 (2012).

Civil Rights

Williams, Joan C. & Elizabeth S. Westfall. Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Careers” in the Workplace. [Women in the Workplace]. 13:31 (2006).

Collective Bargaining

Yelnosky, Michael J. What Do Unions Do about Appearance Codes? [Makeup, Identity Performance & Discrimination]. 14:521 (2007).

Constitutional Law

Gilreath, Shannon. Sexually Speaking “Don’t Ask, Don’t Tell” and the First Amendment after Lawrence v. Texas. [Gender, Sexuality & the Military]. 14:953 (2007).

Powers, Courtney A. Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court’s Application of Heightened Scrutiny. [Current Developments Regarding LGBTs and the Law]. 17:385 (2010).

Rose, Leslie M. The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind? 17:81 (2010).

Contracts

Gan, Orit. Third-Party Consent to Search: Analyzing Triangular Relations. [Gender and Criminal Law & Policy]. 19:303 (2012).

Garcia, Maria E. In with New Families, Out with Bad Law: Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements. 21:197 (2013).

Courts

Spreng, Jennifer E. The Private World of Juvenile Court: Mothers, Mental Illness and the Relentless Machinery of the State. 17:189 (2010).

Divorce Settlements

Oldham, J. Thomas. With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act after Three Decades. 19:83 (2011).

Domestic Violence

Conner, Dana Harrington. Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence. [The Changing Face of Families]. 18:223 (2011).

Fischel, Joseph J. Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary Domestic Violence and Sexual Violence. [Domestic Violence and Sexual Violence]. 17:277 (2010).

Munjal, Diksha. Intimate Partner Violence—Is There a Solution. [Gender and Criminal Law & Policy]. 19:347 (2012).

Rutledge, Njeri Mathis. Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims. 19:223 (2011).

Vargas, Michael. Prosecuting Domestic Violence after Giles: Why a Categorical Approach to the Forfeiture Doctrine Threatens Female Autonomy. 20:173 (2012).

Wang, Shirley Kohsin. Violence & HIV/AIDS: Violence against Women and Girls as a Cause and Consequence of HIV/AIDS. [Domestic Violence and Sexual Violence]. 17:313 (2010).

Weissman, Deborah M. Law, Social Movements, and the Political Economy of Domestic Violence. 20:221 (2012).

Dress Codes

Gely, Rafael. The Law and Economics Identity. [Makeup, Identity Performance & Discrimination]. 14:229 (2007).

Levi, Jennifer L. Some Modest Proposals for Challenging Established Dress Code Jurisprudence. [Makeup, Identity Performance & Discrimination]. 14:243 (2007).

(continued on page 44)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 43)

McGinley, Ann C. Babes and Beefcake: Exclusive Hiring Arrangements and Sexy Dress Codes. [Makeup, Identity Performance & Discrimination]. 14:257 (2007).

Zalesne, Deborah. Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes. [Makeup, Identity Performance & Discrimination]. 14:535 (2007).

Education

Buzuvis, Erin E. Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics. 17:1 (2010).

Election Law

Bernier, Barbara L. Unholy Troika: Gender, Race and Religiosity in the 2008 Presidential Contest. 15:275 (2008).

Employment Discrimination

Corbett, William R. The Ugly Truth about Appearance Discrimination and the Beauty of Our Employment Discrimination Law. [Makeup, Identity Performance & Discrimination]. 14:153 (2007).

Keller, Elisabeth A. & Judith B. Tracy. Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-examining Supreme Court Precedent. [Gender and Religious Conservatism]. 15:247 (2008).

Kelly, Mary Kristen. (Trans)Forming Traditional Interpretations of Title VII: "Because of the Sex" and the Transgender Dilemma. 17:219 (2010).

Manley, Katie. The BFOQ Defense: The Title VII's Concession to Gender Discrimination. 16:169 (2009).

Maxwell, Jill. Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver. 20:127 (2012).

Oderda, Gina. Opposition at the Water Cooler: The Treatment of Non-Purposive Conduct under Title VII's Anti-Retaliation Clause. 16:241 (2009).

Selmi, Michael & Naomi Cahn. Women in the Workplace: Which Women, Which Agenda? [Women in the Workplace]. 13:7 (2006).

Stueckle, Jared D. Title VII, Voluntary Compliance and Ricci: Rescuing Municipalities from a Legal 'Backdraft.' 17:259 (2010).

Zisk, Nancy. In the Wake of Ledbetter v. Goodyear Tire & Rubber Company: Applying the Discovery Rule to Determine the Start of the Limitations Period for Pay Discrimination Claims. 16:137 (2009).

Employment Benefits

Musselman, James L. What's Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples. 16:37 (2009).

English Only Movement

Moreno, Jennifer Bonilla. ¿Only English?: How Bilingual Education Can Mitigate the Damage of English-Only. 20:197 (2012).

Equal Protection

Donnelly, Elaine. Constructing the Co-Ed Military. [Gender, Sexuality & the Military]. 14:815 (2007).

Mahoney Frandina, Michael. A Man's Right to Choose His Surname in Marriage: A Proposal. 16:155 (2009).

Murray, Christopher R. Comment Grappling with Solicitation: The Need for Statutory Reform in North Carolina after Lawrence v. Texas Makeup, Identity Performance & Discrimination: 14:681 (2007).

Murray, Christopher R. Comment Grappling with Solicitation: The Need for Statutory Reform in North Carolina after Lawrence v. Texas Makeup, Identity Performance & Discrimination: 14:681 (2007).

Estate Planning

Fisher, Hallie. Special Considerations in Estate Planning for Same-Sex and Unmarried Couples. 21:177 (2013).

Feminist Jurisprudence

Janus, Kathleen Kelly. Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory. 20:255 (2012).

Matambanadzo, Saru M. Embodying Vulnerability: A Feminist Theory of the Person. 20:45 (2012).

Foreign & International Law

Alexandre, Michele. Dance Halls, Masquerades, Body Protest and the Law: The Female Body as a Redemptive Tool against Trinidad's Gender-Biased Laws. [Women in the Workplace]. 13:177 (2006).

(continued on page 45)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 44)

Cossman, Brenda Censor. Resist, Repeat: A History of Censorship of Gay and Lesbian Sexual Representation in Canada. 21:45(2013).

Lin, Chih-Chieh. Failing to Achieve the Goal: A Feminist Perspective on Why Rape Law Reform in Taiwan has Been Unsuccessful. 18:163 (2010).

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(continued on page 46)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 45)

Challenges Faced by Women Physical Science Researchers at Educational Institutions. [Women in the Workplace]. 13:115 (2006).

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Prostitution

Dysart, Tessa L. Child Victim or Prostitute? Justice through Immunity Prostituted Children 21:255 (2014).

(continued on page 47)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 46)

Hasselbarth, Nikki J. Emerging Victimhood: Moving towards the Protection of Domestic Juveniles Involved in Prostitution. 21:401 (2014).

Stoddard, Thayne D. Male Prostitution: An Enforcement Dilemma. 21:227 (2013).

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(continued on page 48)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 47)

Levi, Jennifer L. Some Modest Proposals for Challenging Established Dress Code Jurisprudence. [Makeup, Identity Performance & Discrimination]. 14:243 (2007).

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Sexual Minorities

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(continued on page 49)

**INDEX TO THE DUKE JOURNAL OF GENDER LAW
AND POLICY**

(continued from page 48)

Social Sciences

McMullen, Judith G. Alimony: What Social Science and Popular Culture Tells Us about Women, Guilt, and Spousal Support after Divorce. 19:41 (2011).

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Knaplund, Kristine S. The New Uniform Probate Code's Surprising Gender Inequities. [The Changing Face of Families]. 18:335 (2011).

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