Bloomberg BNA

Family Law Reporter®

VOL. 41, NO. 8 DECEMBER 23, 2014

HIGHLIGHTS

Mississippi High Court Settles Law on Prenuptial Agreements

Recognizing that ''confusion has arisen in Mississippi'' regarding whether judges should weigh a premarital agreement for substantive unconscionability, that state's supreme court says that such ''must'' be considered. Finding that its own case law may have caused the mix-up, the court directs that substantive unconscionability be measured as of the time of the agreement's execution. It also holds that the'' familial use'' of a bank account funded by a husband's paycheck converted the account into a marital asset. **Page 1091**

Grandmother Can't Intervene in Uncontested Stepparent Adoption

A judge overseeing a man's action to adopt his wife's child should not have allowed the child's paternal grandmother to intervene and seek visitation following her son's consent to the termination of his parental rights in that action, the Missouri Court of Appeals says. It emphasizes that neither custody nor visitation were at issue, and finds that the judge and the grandmother ''had operated under the erroneous assumption'' that the divorce code's third party intervention provision applied. **Page 1092**

Lack of "Reasonable Efforts" Doesn't Doom Termination Petition

The fact that the state did not undertake ''reasonable efforts'' to reunite an incarcerated father with his adjudicated dependent child is not a basis to reject its otherwise sufficient petition to terminate his parental rights, the Pennsylvania Supreme Court rules. Saying that nothing in the applicable statutes conditions termination on the provision of such efforts, it explains that the remedy for the state's failure to provide services is the financial penalty resulting from its loss of federal funds linked to that task. **Page 1094**

Desire That Half-Siblings Have Same Surname Doesn't Sway Court

Just because an unwed father wants his son have his last name so that the boy and his half-sibling (the father's daughter with another woman) share the same surname was no reason to grant his name-change petition, the Texas Court of Appeals decides. Using a balancing test developed by a sister court, it points out that the father does not have custody of either child, and that there was no evidence the name change would serve to more strongly associate the son with a family unit. **Page 1093**

Also . . .

Social Security payments that custodial mother receives on children's behalf because of their father's disability were properly omitted from his income in calculating support, California court holds (**Page 1097**) . . . Ohio court upholds property division in which hypothetical Social Security benefit was applied to wife who has state pension (**Page 1099**) . . . U.S. Supreme Court denies petition for stay of ruling striking down Florida's same-sex marriage ban (**Page 1100**)

IN THIS ISSUE

 ISSN 0148-7922

IN THIS ISSUE

Continued from previous page

DOMESTIC VIOLENCE: Fact that wife filed for divorce after seeking protection order against husband is no reason to limit duration of order, Ohio court holds. **Page 1098**

GRANDPARENTS' RIGHTS: Paternal grandmother shouldn't have been allowed to intervene in stepfather's adoption of child in order to seek visitation, Missouri court holds. **Page 1092**

NAMES: Maine court says father's desire that both his children (by different mothers) have his surname wasn't adequate reason for granting name change request. **Page 1093**

PARENTAL RIGHTS TERMINATION: State's failure to provide reasonable efforts toward reunification doesn't justify denial of otherwise sufficient termination petition, Pennsylvania court explains. **Page 1094**

PATERNITY: Indiana court rejects man's attempt to vacate paternity affidavit he signed over a decade ago while a minor in foster care. **Page 1099**

PENSIONS & RETIREMENT BENEFITS: Ohio court says judge properly applied hypothetical Social Security benefit to wife with state pension. **Page 1099**

PREMARITAL AGREEMENTS: Prenuptial agreements should be examined for substantive unconscionability, Mississippi Supreme Court holds. **Page 1091**

SUPREME COURT: Divided court denies stays of ruling striking down Florida's same-sex marriage ban. **Page 1100**

TABLE OF CASES

No Issue Next Week

The *Family Law Reporter* does not publish on the last Tuesday in December. The next issue will be published January 6, 2015.

Bloomberg BNA

THE FAMILY LAW REPORTER

THE BUREAU OF NATIONAL AFFAIRS, INC. 1801 S BELL STREET, ARLINGTON, VA 22202-4501 (703) 341-3000

Correspondence concerning editorial content should be directed to the managing editor at the above address (telephone: (703) 341-3860; e-mail: djackson@bna.com). For customer service (8:30 a.m. to 7 p.m. Eastern time, Monday-Friday), call 800-372-1033 toll-free in the United States (including Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands, and the metropolitan D.C. area) and Canada; Customer Service fax 800-253-0332; outside the United States and Canada, call (703) 341-3000, or contact BNA International, Inc., in London [44] (171) 22-8831.

Family Law Reporter (ISSN 0148-7922) is published weekly, except the last week in March, the week following July 4th, and the last week in December at the annual subscription rate of $1,494 per year, for a single print copy, by The Bureau of National Affairs, Inc., 1801 S. Bell St., Arlington, VA 22202-4501. **Periodicals Postage Paid at** Arlington, VA and at additional mailing offices. **POSTMASTER:** Send address changes to Family Law Reporter, BNA Customer Contact Center, 3 Bethesda Metro Ctr, Suite 250, Bethesda, MD 20814.

Court Decisions

Premarital Agreements

Agreement's Substantive Unconscionability When Signed May Be Considered in Divorce

Divorce courts faced with a contested prenuptial agreement should examine it for both procedural and substantive unconscionability as of the time it was signed, the Mississippi Supreme Court said Dec. 11. Finding that there was confusion over whether the substantive unconscionability of an agreement may be weighed, the court put the matter to rest with its ruling (*Sanderson v. Sanderson*, 2014 BL 348082, Miss., No. 2012-CA-01153-SCT, 12/11/14).

On a related issue, the court utilized the common-law familial use approach in finding that the agreement here—which provided that all property traceable to either spouse was his or her separate property—did not apply to a joint bank account used by the spouses that was funded solely by the husband's paychecks.

The parties married in 1994 after dating for two years. At that time the then 62-year-old husband was a business owner with assets valued at $3.5 million. The wife was then a 28-year-old clerical worker with a child and assets valued at $135,000. They decided to marry only a few weeks before the wedding ceremony, which was a small, casual event (no invitations were sent).

Two weeks prior to the wedding, the husband approached the wife regarding a prenuptial agreement, which was being prepared by his attorney. She saw the agreement for the first time the day before the ceremony, and he asked that she have an attorney review and sign it.

The lawyer consulted by the wife (her cousin) told her that the agreement was one-sided and that he needed more time to look it over. She convinced him to sign it after a 10-minute review.

The agreement waived both parties' right to spousal support and deemed that all property owned before the marriage and all property acquired during the marriage would remain separate if traceable. It provided that the wife would receive $100,000 from the husband's estate upon his death, and that he would receive $20,000 from hers upon her death.

When they filed for divorce after 17 years of marriage, the parties differed over whether all the financial disclosure forms were attached to the agreement at the time of signing. However, the trial court ultimately held that the agreement was enforceable.

The court awarded the wife her separate property—two financial accounts and gifts from the husband—that was valued at $424,597. The husband was awarded his separate property—corporate assets, real estate, six financial accounts, personal items—that was valued at $3.5 million.

The husband was also awarded a joint bank account that the parties had opened early in the marriage. It was used solely for his paycheck, which the wife deposited each month. The court found that the funds in the account were traceable to his salary.

Family Use Money. Weighing the wife's appeal, Justice Josiah Coleman said that the court erred in finding that the joint bank account funds were not commingled. The money deposited into the account became a marital asset subject to equitable division because of its familial use, he explained.

While it is true that the husband was the only one supplying funds for the account and that the funds could be traced solely to him, ''Mississippi's jurisprudence clearly establishes that property is presumed to be marital property *unless* it can be shown to have been exchange for a separate, and not a familial, asset or function,'' Coleman explained.

Finding that the court had failed to address the familial use of the account funds and the wife's contribution in helping to disburse the funds for familial purposes, Coleman ruled that ''her contribution and the familial use to which the money in the joint account was put changed the legal nature of the money [ ] from separate property subject to tracing to marital property.''

Because there is no provision in the prenuptial agreement indicating that the parties intended familial use monies to be separate and subject to tracing, the law regarding commingled family use money applies to the funds, which do not fall within the agreement's parameters, Coleman stated.

Procedurally Conscionable. As to the wife's argument that the agreement itself was procedurally and substantively unconscionable, Coleman observed that ''Mississippi law concerning prenuptial agreements is not well settled.'' However, he added, ''it is well settled that prenuptial agreements are enforceable like any other contract.''

Also noting that such agreements ''have the heightened requirement of being fair in the execution,'' Coleman said this meant that they must be entered into voluntarily, and each party must disclose his or her financial assets.

Going on to hold that the court below did not err in determining that the agreement here was voluntarily entered into with full disclosure, and thus was ''procedurally conscionable,'' Coleman said its finding that the financial statements were in fact attached to agreement at signing was not ''manifest error.''

''Although the agreement was signed in close proximity to the wedding, the informal nature and scope of the wedding, combined with the presence of independent counsel and the attachment of the financial disclosures, does not indicate a level of coercion or surprise that would make [the wife's] entry into the agreement involuntary,'' Coleman decided.

Substantively Conscionable? Next addressing whether the court erred in failing to consider the alleged substantive unconscionability of the agreement, Coleman acknowledged that ''[c]onfusion has arisen in Missis-

sippi as to whether courts should consider the substantive unconscionability of prenuptial agreements.'' (The court below had stated in the final decree that unlike other states, Mississippi does not look at both substantive and procedural unconscionability.)

Finding that this lack of clarity may have been caused by the use of phrase ''fundamental fairness'' instead of ''substantive unconscionability'' in *Mabus v. Mabus*, 890 So.2d 806 (Miss. 2003), Coleman said *Mabus*'s holding that the premarital agreement in that case was not fundamentally unfair ''falls far short of a blanket prohibition against considering substantive unconscionability in prenuptial agreements as a rule of law.''

Mabus also makes two further assertions that may have confused the law of prenuptial agreements, Coleman added, pointing to its statement that such agreements are contracts like any other contract and subject to the same rules of construction and interpretation applicable to contracts.

Prenuptial agreements cannot be contracts like any other if courts cannot consider whether they can be substantively unconscionable, Coleman explained. Second, he added, *Mabus* appears to have considered substantive unconscionability after stating that fundamental fairness was of no consequence.

Implicit Consideration. ''Thus,'' Coleman said, ''Mississippi has implicitly considered the substantive unconscionability of premarital agreements. We hold that, given the contract law on unconscionability, substantive unconscionability for premarital agreements must be considered by trial courts.''

After reviewing the law on contracts, Coleman further held ''that substantive unconscionability feasibly could be measured at the time the prenuptial agreement is made; measuring it at the time the agreement is made would maintain consistency in the law. It would also ensure that the Court does not 'relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated'.'' *Mabus* at 819.

Coleman said that because the court here operated under the erroneous conclusion that the agreement could not be analyzed for substantive unconscionability, it was necessary to remand for that inquiry.

Chief Justice William L Waller, and Justices Ann Hannaford Lamar, James W. Kitchens, Randy J. Pierce, and Leslie D. King concurred.

Dissenters. Justice Michael K. Randolph dissented in part, joined by Justice David A. Chandler. He argued that review for substantive unconscionability was not required under the facts of this case because the wife had signed the agreement after choosing to disregard her attorney's substantive advice.

Chandler also dissented in part with a separate written opinion, joined by Justice Jess H. Dickinson and in part by Randolph. Contending that because the contract formation here was procedurally conscionable, the facts did not warrant a review of the substantive conscionability of the property division provisions at the time of contract formation, he said that, at most, the court should consider whether to isolate the alimony waiver and review it for conscionability at the time of divorce.

Additionally, Chandler disagreed with the conclusion that the agreement's provision on traceability did not cover the funds in the joint account. Arguing that the common-law approach to marital use of property does not supersede the agreement, he said that ''[t]he contract should control.''

The wife was represented by Janelle Marie Lowrey, Booneville, and by Roy O. Parker, Tupelo. The husband was represented by Gregory M. Hunsucker and Jak McGee Smith. Both are from Tupelo.

Full text at http://www.bloomberglaw.com/public/document/Sanderson_v_Sanderson_No_2012CA01153SCT_2014_BL_348082_Miss_Dec_1

Grandparents' Rights

Third-Party Intervention Not Allowed In Uncontested Stepparent Adoption Case

A nonmarital child's paternal grandmother should not have been allowed to intervene and seek visitation in an uncontested stepparent adoption proceeding filed by the husband of the subject child's custodial mother, the Missouri Court of Appeals, Eastern District, ruled Dec. 9 (*In re Adoption of E.N.C.*, 2014 BL 344293, Mo. Ct. App., No. ED101311, 12/9/14).

Pointing out that the grandmother's son—the child's biological father—had consented to the termination of his parental rights to facilitate the adoption, the court emphasized that neither custody nor visitation were issues in the private adoption action. It explained that the judge erred in applying the divorce code's third-party intervention provision in permitting the grandmother to join the action for the purpose of obtaining visitation.

The child's unwed parents were estranged when she was born in 2003, and thereafter the mother had full custody. However, the child spent every other weekend with the father's family, and became very close to her paternal grandmother.

The father filed a paternity action in August 2012, but voluntarily dismissed it with prejudice following the mother's marriage to another man. When she and her husband filed a petition for his stepparent adoption of the child under Mo. Stat. ch. 453, the father consented to the termination of his parental rights (his paternity was determined in the adoption action).

After the trial court approved the father's consent to the adoption, the paternal grandmother petitioned to intervene pursuant to Mo. Stat. § 452.375 (third party intervention in dissolution proceedings) and for visitation. Despite the mother and stepfather's initial objection to her intervention and their opposition to her visitation request, the court granted both, saying that visitation was in the child's best interests. Thereafter it granted the adoption petition.

Modern Family Life. Considering the petitioners' appeal of the visitation order, Judge Roy L. Richter, joined by Judges Patricia L. Cohen and Robert M. Clayton III, remarked that this case ''poses a difficult question for this Court based on our current society and its 'modern' family life.''

Richter went on to noted that the divorce statutes, Mo. Stat. ch. 452, allow third party intervention with respect to custody/visitation issues and that the dependency statutes, ch. 211, provide for grandparent intervention in child abuse/neglect cases.

  FLR ISSN 0148-7922

Pointing out, however, that this adoption case was filed under ch. 453, Richter explained that it thus did not fit within the parameters of either ch. 452's dissolution of marriage context or that of ch. 211's custody determination when a child had been removed from the parents due to abuse or neglect.

Strategic Efforts. Richter determined that although the grandmother had made ''strategic efforts to use [all these] statutes'' to establish standing, she ''had no standing to intervene in Petitioners' adoption action to request visitation with Child after her son, Biological Father, signed away his parental rights and consented to the adoption.''

(The grandmother had filed her motion to intervene as a third party, for visitation and further investigation, pursuant to § 211.177 (''Grandparent's right to intervene in action, restrictions, termination''), and asked for reasonable visitation under § 452.402 (''Grandparent visitation rights'').)

Finding that the grandmother and trial court had ''operated under the erroneous assumption that Chapter 452 [ ] applies here,'' Ritcher notes that the child's court-appointed guardian ad litem (who supported grandparent visitation) had attempted to interject the issue of custody and visitation into the adoption proceeding by filing a cross-petition for a declaration of paternity pursuant to the Uniform Parentage Act.

''[I]t is significant that Biological Father already had voluntarily dismissed his paternity case with prejudice in connection with his consent to termination of his parental rights,'' Richter asserted in ruling that under these circumstances, the trial court erred in failing to dismiss the cross-petition, which ''served no purpose other than giving Grandmother a vehicle to enter an uncontested adoption case that raised no custody or visitation issues.''

Procedural Facts. After reviewing these ''unique procedural facts,'' Ritcher went on to say that because the grandmother was not named as a party to the stepparent adoption proceeding, Mo. Sup. Ct. R. 52.12 (governing motions to intervene) came into play.

Noting that a grandparent's biological relationship to a child, by itself, does not constitute the necessary ''interest in the subject matter'' under Rule 52.12(a) to require intervention in an adoption (see *In re H.M.C.*, 11 S.W.3d 81, 26 FLR 1188 (Mo. App. Ct. 2000)), Richter said that the grandmother thus did not have standing to intervene as a matter of right.

The grandmother fared no better under the Rule's permissive intervention prong, with Richter explaining that such intervention is permitted if: (1) a statute confers a conditional right on a particular party to intervene; or (2) the intervenor has a claim or defense that has common questions of law or facts to the issues in the case.

Neither of these Rule 52.12(b) grounds are present here, Richter said, noting that the grandmother's claim for visitation did not raise a question in common with the uncontested adoption petition, which presented no issue of custody or visitation for the court's determination.

No Enforceable Interest. Recognizing that grandparents have been allowed to intervene in ch. 211 cases where custody of the grandchild is at issue, Richter reiterated that this case was filed as a private adoption action under ch. 453 and did not raise custody as an issue. It also was never a divorce case, which is required for grandparent or third party visitation under ch. 452, he added.

Also pointing out that the issue here ''has been well addressed'' in *In re R.S.*, 231 S.W.3d 826, 831, 33 FLR 1490 (Mo. Ct. App. 2007) (ch. 452's third-party intervention provision ''does not give a grandparent a statutory right to visitation in an adoption proceeding commenced under Chapter 453''), Richter further noted that there was no previous award of custody or visitation to the grandmother that was subject to modification in the adoption proceeding.

Thus saying that the grandmother had no interest that could support visitation, Richter reversed and remanded with instructions to dismiss her motion for visitation and the GAL's cross-petition.

The petitioners were represented by Michael D. Quinlan, St. Louis, and the grandmother by Susan Ehrenwerth Block, St. Louis, Lisa Moore, Clayton, Mo., and Alan E. Freed, St. Louis.

Full text at http://www.bloomberglaw.com/public/document/In_re_Adoption_of_ENC_No_ED101311_2014_BL_344293_Mo_App_ED_Dec_09

Names

Father's Desire That Both of His Children Have His Surname Doesn't Support Change

A trial court abused its discretion in granting a father's petition to change his nonmarital child's surname from that of the custodial mother to his own on the ground that his other child (by another woman) has his surname, the Texas Court of Appeals, First District, held Dec. 16 (*In re A.E.M.*, 2014 BL 352881, Tex. Ct. App., No. 01-14-00123-CV, 12/16/14).

Adopting a balancing test enunciated by the state's 14th District appellate court, the court said that because the father did not have custody of either child, and there was no evidence that his visitation with them overlapped, giving the subject child his last name would not serve to more strongly associate the child with a family unit per the 14th District's test.

After their son A.E.M. was born, the unwed parents met with an officer from the Office of the Attorney General, Child Support Division. (Tex. Fam. Code ch. 233 authorizes the Attorney General (the state's ''Title IV-D'' agency) to attempt expedited administrative actions relating to paternity and child support.)

The parents reached an agreement on custody and child support, but could not agree on A.E.M.'s last name. The father wanted the child to carry his surname, the custodial mother wanted the boy to retain her name.

The father took the issue to court, where he testified that he had a daughter—A.E.M.'s half-sister—who had his last name, and that he wanted his two children have the same surname. (He had visitation rights with both children.)

The custodial mother testified that her surname held respect in the community because her father had run a business for 33 years in the small town where she lived. She appealed the court's order changing the child surname to the father's last name.

Jurisdiction. Justice Laura Carter Higley, joined by Justice Jim Sharp, first considered the mother's claim that the trial court lacked subject-matter jurisdiction to order the name change because the dispute over the child's surname arose during an administrative process.

Determining that the thrust of the mother's argument was that because the Office of the Attorney General lacked the authority to negotiate the child's name during the administrative process, the trial court thus lacked jurisdiction to consider the matter in the subsequent hearing, Higley was not swayed by her claim.

The law on changing a child's surname is contained in Fam. Code ch. 45 and, accordingly, ''it is undisputed that the family court generally has jurisdiction to determine the child's last name,'' Higley pointed out.

Finding nothing in ch. 233 that excluded consideration of the child's name from the trial court's jurisdiction, Higley stated that even if such was not generally intended to be part of a post-administrative hearing, ''we see no negative consequences that might arise from holding any limitations on the hearing are not jurisdictional.''

Higley also noted that making the matter jurisdictional ''would open it to indefinite collateral attack and [lead] to uncertainty[.]''

Whose Best Interest? Next addressing the mother's claim that the evidence was legally insufficient to support the name change, Higley observed that the name change statute (§ 45.004) permits a change when it is ''in the best interest of the child.''

''Accordingly, the only facts relevant to our review of the trial court's determination are the facts concerning the child's best interest; the best interests of the parents are not relevant,'' Higley asserted.

Higley noted that in reviewing the various balancing tests used to determine whether a name change was warranted, the 14th District in *In re H.S.B.*, 401 S.W.3d 77 (Tex. Ct. App. 2011), rejected factors unrelated to the best interest of the child—embarrassment, inconvenience, or confusion suffered by custodial parent; delay in requesting change; financial support.

Balancing Test. ''We agree with our sister court that these factors do not belong in a balancing test focused on determining the best interest of the child,'' Higley declared in adopting the six-factor test announced in *H.S.B.*

Higley found that the father's main argument in support of a name change—that his two children should get to know each other and have the same last name—was covered by the *H.S.B.* factor addressing the child's associational identity with a family unit.

Noting that *H.S.B.* recognized that sharing a last name with a full or half-blood sibling was relevant to the name-change determination, Higley observed that *H.S.B.* held that the child there should have the same last name as his custodial mother and her other child, where both children lived with her, were close in age, and attended the same church and school.

Family Unit. In contrast, the father here does not have custody of either of his children, Higley pointed out, also noting that there was no testimony as to whether his visitation times with the children overlapped. She further noted that the parents here do not live in the same town, and there was no evidence regarding where the father's daughter lived or her age.

''In short, there is little evidence that giving A.E.M. the same last name as his half-sister 'would more strongly associate [him] with a family unit','' Higley stated.

Recognizing that the dissenter in this case, Justice Jane Bland, ''would hold that the mere existence of another child bearing a parent's last name would be enough to warrant the child's name to be changed,'' Higley asserted that ''[s]uch holding stands in stark contrast to the long-standing 'general rule [ ] that courts will exercise power to change a child's name reluctantly and only when the substantial welfare of the child requires it'.'' *In re Guthrie*, 45 S.W.3d 719, 724, 27 FLR 1253 (Tex. Ct. App. 2001).

''The simple existence of another child who bears the father's last name and who might periodically see A.E.M. does not establish that the substantial welfare of A.E.M. requires a name change,'' Higley stated.

Concluding that the father had failed to carry his burden of establishing that the substantial welfare of the child required the name change, Higley reversed the trial court.

Objective Evidence. In her dissent, Bland argued that ''one objective piece of evidence—that of a sibling relationship with another child—[ ] standing alone favors the trial court's ruling.'' Noting that unlike the custodial parent in *H.S.B.*, the mother here has no other children, Bland chided the majority for ''dismiss[ing] the notion of importance of the child's sibling relationship with another child.''

Contending that the trial court could reasonably have found that a shared surname with a half-sibling would further the sibling relationship, Bland said that ''[w]ith objective evidence of a sibling relationship, the evidence is legally sufficient to support the trial court's ruling.''

Jay M. Wright, Conroe, Tex., appeared for the father. The mother was represented by Lianna Garza and Timothy A. Hootman. Both are from Houston. The Office of Attorney General was represented by Rande K. Harrell, John B. Worley, and Deterrean Gamble.

Full text at http://www.bloomberglaw.com/public/document/In_re_AEM_No_011400123CV_2014_BL_352881_Tex_AppHouston_1st_Dist_D

Parental Rights Termination

Agency's Lack of ''Reasonable Efforts'' Isn't Basis for Denial of Termination Petition

A county social services agency's failure to employ reasonable efforts to reunify an adjudicated dependent child with her incarcerated father was no reason to deny its otherwise sufficient petition to terminate his parental rights, the Pennsylvania Supreme Court held Dec. 15 (*In re D.C.D.,* 2014 BL 351262, Pa., No. 56 MAP 2014 (J-79-2014), 12/15/14).

Saying that ''harming an innocent child'' is not the proper remedy for the agency's shortcoming, the court explained that the correct remedy was for the judge to conclude on the record that the agency had failed in its duty to provide reasonable efforts, with the resulting sanction being the financial penalty imposed on the

  FLR ISSN 0148-7922

agency through the loss of federal funding under the Adoption and Safe Families Act.

The agency removed the child from her mother at birth in March 2011. Her father is serving an aggregate prison sentence on drug and firearm charges of 93 to 192 months imprisonment; his earliest release date is in July 2018 (the latest date is October 2026).

Thereafter, the agency petitioned to terminate both parents' rights to facilitate the child's adoption by her foster parents. Finding that it had ''failed to assist Father'' with his efforts to establish a relationship with the child, and chiding it for essentially pursuing only adoption despite the court-ordered goal of reunification, the court refused to extinguish his rights.

The agency filed a second petition the following year, and presented evidence that the father's only contacts with the child had been a video visit, two brief visits after court proceedings, and a ''flawed'' visit at the prison.

While recognizing that despite the agency's ''seeming disinterest,'' the father had attempted to establish a relationship with child, the court nevertheless granted the termination petition on the statutory ground that he lacked the capacity to parent his child (23 Pa. Cons. Stat. § 2511(a)(2)). See *In re Adoption of S.P.*, 47 A.3d 817, 38 FLR 1355 (Pa. 2012) (parent's incarceration may by itself be sufficient to terminate rights due to parental incapacity).

Reversing, the superior court said that the judge had erred as a matter of law by terminating the father's rights in spite of a finding that the agency had failed to provide him with reasonable efforts to promote reunification prior to petitioning for termination.

In so deciding, the court read § 2511 of the Adoption Act (grounds for termination) in conjunction with § 6351 of the Juvenile Act (disposition of dependent child). (See 91 A.3d 173 (Pa. Super. Ct. 2014)). The agency appealed.

Statutory Language. Addressing the intermediate court's ruling that pursuant to the Adoption Act and the Juvenile Act, termination cannot be granted absent the provision of reasonable efforts to the parent, Justice Max Baer said that ''we reject this holding as inconsistent with the language of both statutes.''

Baer pointed out that § 2511 does not mention reasonable efforts, and that the subsection applicable here ((a)(2)) provides that parental rights may be terminated due to the parent's incapacity to provide essential parental care. He noted that if this subsection (a) ground is demonstrated, then the court next considers whether termination is in the child's best interest under subsection (b).

''Neither subsection (a) nor (b) requires a court to consider the reasonable efforts provided to a parent prior to termination of parental rights,'' Baer stated.

Recognizing that *In re Adoption of S.E.G.*, 901 A.2d 1017 (Pa. 2006), said that the provision or absence of reasonable efforts may be relevant to a court's consideration of both the grounds for termination and the child's best interest, Baer explained that this ''does not transform the provision of reasonable efforts to reunite parents and children into a requirement for termination. Nothing in the law goes so far, and the superior court erred in so holding.''

Judicial Fiat. Baer acknowledged that other states have included reasonable efforts as either an element or merely a factor in their termination provisions, but pointed out that ''the Pennsylvania legislature has not incorporated reasonable efforts into the language of 23 Pa.C.S. § 2511(a)(2), and it would be improper and, indeed, unwise, for this Court to add such an element to the statute by judicial fiat.''

In contrast, Baer noted that lawmakers included consideration of the reasonable services available to the parent in regard to another ground for termination (§ 2511(a)(5)).

''We also do not find reasonable efforts are required prior to termination'' when § 2511 of the Adoption Act is read in conjunction with § 6351 of the Juvenile Act, Baer continued, saying that ''[r]ather, we conclude that the Superior Court and Father conjured a requirement in Section 6351(f)(9), when none exists.''

Explaining that the language of that provision ''does not support such a reading,'' Baer said that it simply ensures that termination petitions are timely filed in order to avoid ''foster care drift,'' and requires that if a child has been in state custody for 15 of the prior 22 months the court must inquire whether the parents have been provided necessary services.

''Accordingly, while reasonable efforts should be considered and indeed, in the appropriate case, a trial court could insist upon their provision, we hold that nothing in the language or the purpose of Section 6351(f)(9) forbids the granting of a petition to terminate parental rights, under Section 2511, as a consequence of the agency's failure to provide reasonable efforts to a parent,'' Baer wrote.

Remedy. Recognizing that agencies must provide reasonable efforts to enable parents to work toward reunification when ordered to do so by a court, ''regardless of the legal correctness of that order,'' Baer stressed, however, that ''the remedy for an agency's failure to provide services is not to punish an innocent child, by delaying her permanency through denying termination, but instead to conclude on the record that the agency has failed to make reasonable efforts, which imposes a financial penalty on the agency of thousands if not tens of thousands of dollars under federal law''—the Adoption and Safe Families Act and related statutes.

Federal law, Baer explained, provides that states must make reasonable efforts to reunify families in order to be eligible to receive federal foster care and adoption assistance funds. See 42 U.S.C. § § 671, 672; 45 C.F.R. 1356.21.

Thus concluding that the superior court erred in reversing the termination order due to the alleged lack of reasonable efforts, Baer acknowledged its suggestion that such efforts must be provided by an agency to safeguard a parent's fundamental right to the care, custody and control of his child.

Finding, however, that the state's duty to demonstrate the grounds for termination by clear and convincing evidence was sufficient to protect the parent's fundamental right, Baer agreed with the trial court that the agency had established grounds for terminating the father's rights due to his continued incapacity to care for the child.

Chief Justice Ronald D. Castille, and Justices Thomas G. Saylor and Justice Debra McCloskey Todd concurred. Justice J. Michael Eakin, joined by Justice Correale F. Stevens, also concurred but opined that the majority's discussion of remedies ''serves only as *dictum*;

it is inapposite to the instant case and beyond the scope of the issues we granted.''

Clinton County Child and Youth Services was represented by Michael D. Angelelli, Clinton County Domestic Relations Department. The father was represented by David A. Strouse, and the child's guardian ad litem by David I. Lindsay, of Hall & Lindsay. All are from Lock Haven, Pa.

Full text at http://www.bloomberglaw.com/public/document/In_re_DCD_No_56_MAP_2014_2014_BL_351262_Pa_Dec_15_2014_Court_Opin

Attorneys

Sex With Ex-Clients, Potential Clients Isn't Unethical Under Louisiana Rules

A Louisiana lawyer didn't violate any ethics rules by having sexual relationships with several former divorce clients and a prospective divorce client who decided not to hire him, a divided Louisiana Supreme Court held Dec. 9 (*In re Fuerst*, 2014 BL 349720, La., No. 14-B-0647, 12/9/14).

The majority rejected the argument that the ethical prohibition against attorney-client sexual relationships should be extended to former clients and prospective clients. ''We find no support for this position in the Rules of Professional Conduct,'' the per curiam opinion states.

However, the lawyer got a six-month suspension from practice, with three months deferred, for having sex with one current client during the waiting period before her divorce became final, and for shifting another client's case to someone else in his firm when the client expressed interest in dating him.

In separate concurrences, Justices Jeannette Theriot Knoll and John L. Weimer contended that it's unethical for lawyers to begin an intimate relationship with a former client whose legal case is still pending and could be harmed.

Chief Justice Bernette J. Johnson concurred without a written opinion.

'Professional Boundary Issues.' Disciplinary charges against Randy F. Fuerst were lodged after a former client's ex-husband filed a complaint against him.

During the disciplinary proceeding, it came out that in the years after Fuerst and his wife divorced, he became involved in consensual sexual relationships with six women who had at one time either retained his services or consulted with him about their divorce cases.

The hearing committee found that, with one exception, these sexual relationships did not occur while the attorney-client relationship was ongoing. Some of the women described their relationship with Fuerst as positive or beneficial and said they did not feel he had taken advantage of them. The relationships typically ended amicably, according to the court.

An evaluation that Fuerst underwent at an addiction treatment center indicated that he ''is neither a sex addict nor a sexual predator but does have professional boundary issues,'' the court said.

Violations in Two Matters. The court found no misconduct in Fuerst's relationships with five women who were not his current clients when he had a sexual relationship with them.

Contrary to disciplinary counsel's argument, Louisiana's ethics rules do not forbid attorney-client sexual relationships with former clients, or with prospective clients where no attorney-client relationship is formed, the court found.

However, the court held that Fuerst committed misconduct by engaging in a sexual relationship with one woman who was a current client at the time. With regard to that client, the hearing committee found that Fuerst violated Rule 1.7(a)(2) (conflict of interest with current client) and Rule 8.4(d) (conduct prejudicial to justice). The board also found that Fuerst violated Rule 2.1 (duties as advisor) in that matter. Louisiana does not have any specific rule on sex with clients.

The court also found that Fuerst violated Rule 1.10 (imputation of conflicts) when he referred a client's matter to another lawyer in a law firm with which he had an of counsel relationship, after the client decided to change counsel when Fuerst told her that he could not date a current client.

When Fuerst was discharged by that client, he was obligated to refer her divorce case to a lawyer outside his law firm before becoming involved in a personal relationship with her, the court said.

The court decided that a six-month suspension, with half of it deferred, was the appropriate sanction for Fuerst's misconduct. ''While respondent's misconduct did not cause actual harm, the potential for harm was great,'' the opinion states.

The court deferred all but three months of that sanction in light of what it said were significant mitigating factors: clean disciplinary record, no dishonest or selfish motive, full disclosure and cooperation, character and remorse.

Harm to Ex-Client. In her concurrence, Knoll agreed with the decision to suspend Fuerst but gave different reasons. ''I strongly disagree with the majority's finding respondent committed no misconduct with regard to his relationships with his former clients,'' she wrote.

A lawyer's specific duties to former clients under Rule 1.9 are premised partly on a duty of loyalty that includes an obligation not to actively harm the former client's best interests after the professional relationship ends, Knoll said.

Knoll pointed out that Fuerst commenced a sexual relationship with two clients after his representation ended but before the underlying proceedings were concluded.

Doing so, she said, can create a range of problems that may harm the client's best interests, such as raising fault issues, impairing the ex-client's ability to seek support, transforming the lawyer into a witness, influencing financial issues and increasing acrimony between the spouses.

''Considering these factors, I would find respondent had a duty to refrain from entering into a sexual relationship with his former clients until the underlying proceedings are concluded,'' Knoll wrote. By not doing so, she said, Fuerst put his personal interests ahead of his professional obligations, potentially jeopardized his clients' legal matters and burdened them by forcing them to find new legal representation.

  FLR ISSN 0148-7922

''The frequency of respondent's sexual involvement with numerous female clients evidences a pattern of conduct by means of his practice which degrades his obligations to the client and demeans our time-honored profession,'' Knoll stated.

Harm to Legal System. In a separate concurring opinion, Weimer said he agreed with Knoll's concurrence but added his view that an attorney's duty to refrain from entering into a sexual relationship with a former client stems from the prohibition against conduct prejudicial to the administration of justice in Rule 8.4(d).

''This duty would terminate when the underlying proceedings are concluded or when the sexual relationship would pose no adverse legal consequences to the client,'' Weimer said.

Here, Weimer said, ''the respondent was required to refrain from post-representation sexual conduct with the client that could foreseeably and negatively impact the legal proceeding for which the client had retained the respondent's representation.''

Fuerst was represented by Fuerst & Godley; Law Offices of James E. Boren; and Vamvoras, Schwartzberg & Hinch LLC.

Chief Disciplinary Counsel Charles B. Plattsmier and Deputy Disciplinary Counsel G. Fred Ours, Baton Rouge, La., represented their office.

Full text at http://www.bloomberglaw.com/public/document/In_re_Fuerst_No_14B0647_2014_BL_349720_La_Dec_09_2014_Court_Opini.

In Brief

Child Support—Abatement—Extended Visitation—Day-Care Expense Reimbursement

A trial court properly found that the purpose of child support abatements would not be served if a divorced obligor were allowed to claim partial abatements for the period for which his child's custodial mother is paying a share of day-care expenses during the child's extended visitation with him, the Wyoming Supreme Court held Dec. 17. The mother had been ordered to pay the father $1,772 annually to reimburse the day-care expenses he incurred during their child's 60-day summer visit. However, the court denied his request to abate his support payments by half during the period he was receiving the day-care reimbursements from the mother. He appealed.

Affirming, Chief Justice E. James Burke noted that the father's monthly support obligation was $724, and that if support were abated by 50% during his 60 consecutive days of visitation, the mother would net only $362 in monthly support. Pointing out that during the same period she was liable for his day-care expenses up to a maximum of $1,772, he observed that in ''practical terms, Mother's child care expense obligation exceeds her child support income by nearly $1,000. In the meantime, she must maintain the custodial home. As the district court correctly observed, the purpose of the abatement statutes would not be served if that situation were allowed to continue.'' Burke noted that *Plymale v. Donnelly*, 157 P.3d 933, 941, 33 FLR 1306 (Wyo. 2007), acknowledged that the purpose of abating support payments is to ''reallocate those costs that decrease for the custodial parent and increase for the non-custodial parent during times of extended visitation'' but also recognized that many of the custodial parent's costs are fixed and do not decrease while the child is away visiting the other parent. Finding that here, if the father were permitted to receive the 50% abatement of his support obligation, the mother's financial ability to care for the child would be ''indisputably compromised,'' Burke rejected his argument that the district court lacked authority to address abatement.

Justices William U. Hill, Marilyn S. Kite, Michael K. Davis, and Kate M. Fox concurred.

The father appeared pro se. The mother was represented by Douglas W. Bailey, of Bailey, Stock & Harmon, Cheyenne, Wyo. (*Jensen v. Milatzo-Jensen*, 2014 BL 354016, Wyo., No. S-14-0085, 12/17/14)

Full text at http://www.bloomberglaw.com/public/document/Jensen_v_MilatzoJensen_2014_WY_165_Wyo_2014_Court_Opinion

Child Support—Calculation—Children's Derivative Social Security Disability Benefits

A trial court calculating a disabled father's child support obligation correctly omitted from his income derivative Social Security payments that his children's custodial mother receives on their behalf because of his disability, the California Court of Appeal, First District, held Dec. 15. The father's income is his monthly Social Security disability check. Ordering him to pay a portion of that to the mother as child support, the court found that pursuant to 42 U.S.C. § 402(d), she received $796 per month in derivative Social Security disability benefits as the children's representative payee based on his disability. In rejecting her argument that those benefits should be treated as part of the father's income for purposes of calculating support, it concluded that the derivative benefits were the income of the children, not the father. It thus said that the benefits would partially satisfy his support obligation. The mother appealed, pointing out that Cal. Fam. Code § 4058(a) provides that a parent's gross income ''means income from whatever source derived [ ] and includes [ ] social security benefits[.]''

Rejecting the mother's argument, Justice Maria P. Rivera, joined by Justices Ignazio J. Ruvolo and Timothy A. Reardon, noted that she did not challenge the father's receipt of a credit for the amount of the children's benefits. ''[I]ndeed, such a contention would necessarily fail,'' Rivera observed, because Cal. Fam. Code § 4504(b) directs that such a credit ''shall'' be given. Saying that the trial court here ''did precisely what [§ 4504(b)] contemplates: it credited the amount of the derivative disability benefits toward [the father's] child support payments *without* taking the payments into account in determining the amount of support he should pay,'' Rivera found that the mother offered no authority for her contention that the derivative benefits constitute the father's income for purposes of § 4058(a); ''and,'' she said, ''we are aware of none. As stated in *In re Marriage of Henry* [23 Cal.Rptr.3d 707 (Cal. Ct. App. 2005)], '[a]lthough the language of section 4058 is expansive, it is not limitless. Every type of income specified by section 4058 [ ] is money actually received by the support-paying parent'[.]'' Pointing out that the payments at is-

sue here were received not by the father but by the mother as the children's representative payee, Rivera also emphasized that § 402(d) of the federal Social Security Act provides that the qualifying children of a disabled person ''shall be entitled'' to derivative benefits. Thus, she said, the father ''was not entitled to the payments, his children were.'' (See also 20 C.F.R. 404.350 et seq.; *In re Unisys Corp. Long-Term Disability Plan ERISA Litig.*, 97 F.3d 710 (3rd Cir. 1996)).

The parents appeared pro se. The Napa County Department of Child Support Services was represented by Kamala D. Harris, Attorney General, Julie Weng-Gutierrez, Senior Assistant Attorney General, Linda M. Gonzalez, Supervising Deputy Attorney General, and Sharon Quinn, Deputy Attorney General. (*Daugherty v. Daugherty*, 2014 BL 351104, Cal. Ct. App., No. A138872, 12/15/14)

*Full text at http://www.bloomberglaw.com/public/document/Daugherty_v_Daugherty_No_A138872_2014_BL_351104_Cal_App_1st_Dist_*

Child Support—Calculation—Voluntary Underemployment—Imputed Income

A trial court did not abuse its discretion in finding that a parent was voluntarily underemployed, and in imputing her earning capacity as her gross income, in calculating her support obligation, the Maine Supreme Judicial Court ruled Dec. 18. The parent, Eve Sotiriou, had adopted the subject child overseas in 2007. A year later, she and her same-sex partner, Cynthia Stacey-Sotiriou, jointly adopted the child in Maine. Eve sought to annul Cynthia's adoption following their separation in 2009, and absconded with the child when her petition was denied. (See *In re Adoption of J.S.S.*, 2 A.3d 281, 36 FLR 1492 (Me. 2010)). After she and the child returned pursuant to the women's agreement, Cynthia was named primary residential parent. Eve was granted unsupervised contact and ordered to pay $180 per week in child support. Eve appealed the support order, which calculated her earning capacity based on a finding that she was ''voluntarily underemployed'' and imputed to her an earning capacity of $62,061 per year, based on her earnings in the prior 10 years.

Justice Donald G. Alexander noted that the support statute provides that ''[g]ross income may include the difference between the amount a party is earning and that party's earning capacity when the party voluntarily becomes or remains unemployed or underemployed, if sufficient evidence is introduced concerning the party's earning capacity.'' Me. Rev. Stat. Ann. 19-A, § 2001. If a parent is voluntarily underemployed, it is within the court's discretion to impute income or apply the parent's earning capacity rather than use his or her current income, he added. Alexander found that here, the court considered evidence that Eve (1) had a B.A. in sociology and/or anthropology; (2) worked as an insurance adjuster for 20 years; (3) made $62,061 per year in a job she held for 10 years before absconding with the child in 2010; (4) did not seek employment in the insurance industry after returning with the child; and (5) started a cleaning business and estimated that she would earn $15,000 in 2013. Determining that there thus was competent evidence supporting the trial court's finding that Eve was voluntarily underemployed, Alexander said she had failed to show that it abused its discretion by imputing her earning capacity in determining her support payments. Also rejecting Eve's challenge to the custody order, he said that it was supported by the trial court's findings that, among other things, primary residence with Cynthia would allow both parties to have a healthy relationship with the child whereas primary residence with Eve would not.

Chief Justice Leigh I. Saufley, and Justices Warren M. Silver, Andrew M. Mead, Ellen A. Gorman, Joseph M. Jabar, and Jeffrey L. Hjelm concurred.

Eve was represented by Jeanette M. Durham and Amy L. Fairfield, of Fairfield & Associates, Lyman, Me., and Cynthia by Teresa M. Cloutier, of Lambert Coffin, Portland. (*Stacey-Sotiriou v. Sotiriou*, 2014 BL 356023, Me., No. And-14-7, 12/18/14)

Full text at http://www.bloomberglaw.com/public/document/StaceySotiriou_v_Sotiriou_2014_ME_145_Court_Opinion

Child Support—Modification—Obligor's Subsequent Children

A trial court erred in granting an adjudicated father a downward modification of his child support obligation based on the fact that he had fathered three more children with another woman after having fathered the subject child, Florida's Third District Court of Appeal held Dec. 17. Writing for the court, Chief Judge Frank A. Shepherd, joined by Judges Richard J. Suarez and Leslie B. Rothenberg, explained that it is ''settled law'' that a party moving for a downward modification has the burden of proving (1) a substantial change of circumstance, (2) not contemplated at the time of the final judgment, (3) that is sufficient, material, involuntary and permanent in nature.

Pointing out that ''[b]egetting a child is not an involuntary act,'' Shepherd said that ''absent some special circumstance, the presence of subsequent children will not justify a deviation from the support guidelines. *See* § 61.12(b) Fla. Stat. (2013)[.]'' Noting that upward modifications of support are treated differently (see § 61.12(b); *Pohlmann v. Pohlmann*, 703 So.2d 1121, 24 FLR 1057 (Fla. Dist. Ct. App. 1997)), Shepherd reversed the trial court's order and remanded.

The mother was represented by Evan J. Langbein, of Langbein & Langbein, Hialeah, Fla., and the father by Anaysa Gallardo Stutzman, of Cozen O'Connor, Miami. (*Gimeno v. Rivera*, 2014 BL 354213, Fla. Dist. Ct. App., No. 3D14-774, 12/17/14)

*Full text at http://www.bloomberglaw.com/public/document/Gimeno_v_Rivera_No_3D14774_2014_BL_354213_Fla_3d_DCA_Dec_17_2014_*

Domestic Violence—Civil Protection Order—Duration—Impact of Divorce

A trial court abused its discretion when, after a woman requested a five-year protection order against her husband, it limited the order to a one-year period because she had instituted divorce proceedings, the Ohio Court of Appeals, First District, ruled Dec. 17. The woman filed for divorce after petitioning for a civil protection order against her estranged husband. The court found that she was in danger of further violence by the husband, but issued a protective order effective only for one year. It simply said that ''[a]s the parties are divorcing, [her] request for a five year CPO is denied.''

Considering the woman's appeal, Judge Penelope R. Cunningham, joined by Judges Lee Hildebrandt and

   ISSN 0148-7922

Patrick F. Fischer, pointed out that ''[b]ecause violence against a former spouse may not stop with separation, and because that violence often escalates once a battered woman attempts to end the relationship, the Ohio Supreme Court has recognized 'strong policy reasons' for courts to issue, when necessary, protection orders extending even after a divorce has become final.'' Cunningham said that the woman here ''correctly argues'' that she should not be denied a civil protection order of sufficient duration simply because she had concurrently sought other legal remedies to remove herself from the danger of domestic violence. Cunningham also noted that Ohio Rev. Code 3113.31(G) expressly provides that the remedies and procedures in the domestic violence statutes ''are in addition to, and not in lieu of, any other civil or criminal remedies.'' Saying that this included divorce proceedings, Cunningham found that the Fourth District faced a nearly identical situation in *Sinclair v. Sinclair*, 914 N.E.2d 1084 (Ohio Ct. App. 2009), and she said ''[w]e adopt the sound reasoning of the *Sinclair* court and reject the contention that divorce proceedings automatically alleviate the need for a protection order.'' Finding no ''sound reasoning process'' in the trial court's decision, she remanded for entry of a new protection order.

The husband appeared pro se. The woman was represented by Kenyatta Mickles, University of Cincinnati Law School. (*Parker v. Parker*, 2014 BL 355047, Ohio Ct. App., No. C-130658, 12/17/14)

Full text at http://www.bloomberglaw.com/public/document/Parker_v_Parker_2014Ohio5516_App_1st_Dist_2014_Court_Opinion

Paternity—Affidavit—Rescission—Execution by Minor—Child Support

A trial court did not abuse its discretion in denying a father's petition to rescind or vacate the paternity affidavit he had executed in 1998 when he was 17 years old, in foster care, and residing in a group home, the Indiana Court of Appeals held Dec. 16. The father signed the affidavit while visiting the mother in the hospital the day after the child's birth. He successfully petitioned for visitation in 2000, and was ordered to pay child support in 2002. His 2008 request for court-ordered paternity testing was denied, with the court explaining that his attempt to challenge the decade-old paternity affidavit was ''too late.'' The father appeared at a state-initiated support hearing in 2012. In 2013, he was ordered to obtain part-time employment and to pay the court-ordered support. Shortly thereafter, he filed a petition to rescind or vacate the paternity affidavit on the grounds of coercion, duress, and mistake of fact. (Ind. Code § 16-37-2-2.1 provides that a paternity affidavit may not be rescinded more than 60 days after execution except in cases of fraud, duress, or material mistake of fact.)

Considering the father's appeal from the denial of his petition, Judge Patricia A. Riley, joined by Chief Judge Nancy H. Vaidik and Judge John G. Baker, was not swayed by his asserting that at the time he signed the affidavit he was a minor, acting without legal representation, and was put under duress by the child's mother and maternal grandmother. The mother's testimony that upon handing the affidavit to the father for his signature the nurse ''explained everything'' to ''both of them,'' and that he telephone his mother prior to signing, ''dispelled Father's contentions that he was unaware of what he was signing and did not have the opportunity to consult with a parent or guardian,'' Riley said. Noting that ''[t]ime and again, we have emphasized that allowing a party to challenge paternity when the party has previously acknowledged himself to be the father should only be allowed in extreme and rare circumstances,'' Riley asserted that ''[t]his is not one of those circumstances.'' Observing that at no point during the proceedings did the father enunciate a belief that he was not the child's biological father and ''never once stated that he doubted [the child's] paternity,'' she noted that he readily admitted to having had sexual relations with the mother ''and, at the time of birth, clearly fostered no doubt that he was the child's biological father. [ ] Despite numerous court appearances since 2000, Father did not raise the issue of rescinding the paternity affidavit until [ ] after all his requests for modification of child support fell for naught. Stripped to its bare essence, Father's argument boils down to an invitation to reweigh his and Mother's credibility, and to find in his favor—this task which is not reserved for us,'' Riley concluded.

The father was represented by Brooke N. Russell, Indianapolis, and the mother by Gregory F. Zoeller, Attorney General, and Kathy Bradley, Deputy Attorney General. (*In re T.H. (Hutchins v. Kelly)*, 2014 BL 352818, Ind. Ct. App., No. 84A05-1404-JP-161, 12/16/14)

*Full text at http://www.bloomberglaw.com/public/document/Hutchins_v_Kelly_In_re_Paternity_of_TH_No_84A051404JP161_2014_BL_*

Pensions & Retirement Benefits—Public Employee—Hypothetical Social Security Benefit

A divorce court considering a couple's retirement benefits did not abuse its discretion in applying a hypothetical Social Security benefit, where the wife was not entitled to federal Social Security retirement benefits but the husband was, the Ohio Court of Appeals, 11th District, held Dec. 15. The wife was a county employee during the marriage and thus did not contribute to Social Security. Instead, she was eligible for benefits though the Ohio Public Employees Retirement System. The husband, on the other hand, was eligible for Social Security benefits upon his retirement. The marital portion of the wife's divisible PERS benefits was valued at $200,832. Using a hypothetical calculation, it was determined that her nondivisible Social Security benefits for that same period would equal $116,058. The court subtracted the hypothetical Social Security benefits from her PERS benefits, yielding a net value for the latter of $84,774, which it considered to be divisible marital property.

The husband appealed, arguing that the court abused its discretion by adjusting the marital portion of the wife's PERS account by deducting a hypothetical Social Security benefit. Acknowledging that unlike a PERS account, Social Security benefits are not subject to division in divorce, Judge Diane V. Grendell, joined by Judges Timothy P. Cannon and Thomas R. Wright, pointed out that the method employed by the trial court was expressly approved in *Thompson v. Thompson*, 968 N.E.2d 525 (Ohio Ct. App. 2011). She then turned to the husband's claim that although courts have discretion to consider hypothetical Social Security benefits, such consideration produced an inequitable result in this case. Finding that he ''provides little argument in sup-

port of his contention,'' Grendell was not swayed by his claim that the hypothetical Social Security benefit method ''is antiquated and inequitable and should be retired[.]'' She observed that ''[o]n the contrary, it is recognized that consideration of such benefits is mandated by statute.'' See *Williams v. Williams*, 996 N.E.2d 533, 39 FLR 1451 (Ohio Ct. App. 2013).

The wife was represented by Richard A. Hennig, of Hennig, Szeman & Klammer, Painesville, Ohio, and the husband by David A. Patterson, Willoughby, Ohio. (*Hutchison v. Hutchison,* 2014 BL 350583, Ohio Ct. App., No. 2014-L-048, 12/15/14)

Full text at http://www.bloomberglaw.com/public/document/Hutchison_v_Hutchison_2014Ohio5471_App_11th_Dist_2014_Court_Opini

Supreme Court

Order In Pending Case

On Dec. 19, the U.S. Supreme Court declined to stay the ruling of a federal district court in Florida striking down that state's ban on same-sex marriage (see 40 FLR 1499); the district court had stayed its ruling until Jan. 5.

No. 14A650 Armstrong v. Brenner

The application for stay presented to Justice Thomas and by him referred to the Court is denied.

Justice Scalia and Justice Thomas would grant the application.

  FLR ISSN 0148-7922

BNA Insights

Premarital Agreements

Same-Sex Marriage

Same-Sex But Not Same Old, Same Old: Special Considerations for Drafting Same-Sex Prenuptial Agreements

By Jeffrey N. Greenblatt and
Roberta Oluwaseun Roberts

Introduction

It has been a roller-coaster ride of judicial opinions recently, as courts across the country have been striking down (or, less frequently, upholding[1]) bans on same-sex marriage. The number of states allowing same-sex marriage (or in which bans have been struck down) increased from 19 to 35 in October and November 2014 alone.[2] As the laws on same-sex marriage rapidly change, the way same-sex couples approach marriage must also change—and the way lawyers craft prenuptial agreements will have to change along with it. Laws regarding same-sex marriage (and divorce) vary from state to state, and not all states' jurisprudence has kept up. Lawyers and couples alike will have to be prepared to navigate this evolving system. This article will highlight areas of the law that will be of particular importance to same-sex married couples, including differing state residency requirements for obtaining a divorce, obsolete definitions in divorce law that only apply to heterosexual activity, availability of federal employment benefits in states that do not recognize

Attorney Jeffrey N. Greenblatt is a principal at Joseph, Greenwald & Laake, P.A. He handles all types of family law cases with a focus on complex divorce, asset valuation, complex property division, as well as international custody and visitation, retirement and pension division orders, and post-divorce modifications. Other family law issues Mr. Greenblatt handles include prenuptial agreements, divorce, alimony, child custody and support, and domestic violence. Known for his passion for representing the ''underdog'' in family law cases, Mr. Greenblatt has received several awards for his work. He has earned the highest rating available to attorneys (AV) from Martindale Hubbell and was named and profiled as one of the Top Divorce Attorneys by Bethesda Magazine in May 2010 and again in 2013. He has been selected by his peers, each year, for inclusion in Maryland Super Lawyers, as well as each edition of The Best Lawyers in America by Woodward/White to date. His success has led him to be named one of the top 25 divorce attorneys in the Washington D.C. metropolitan area.

Roberta Oluwaseun Roberts is a law clerk at Joseph, Greenwald & Laake, P.A., where she primarily works in the firm's family law practice group. Roberta is a third-year law student at The George Washington University Law School and a Fall 2014 student attorney in the Jacob Burns Community Legal Clinics Family Justice Litigation Clinic at GW Law.

[1] On November 6, 2014, the U.S. Court of Appeals for the Sixth Circuit upheld bans on same-sex marriages in Kentucky, Michigan, Ohio and Tennessee. CNN Library, *Same Sex Marriage Fast Facts*, CNN (Nov. 24, 2014, 3:40 PM), http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/.

[2] Same-sex marriage is also legal in the District of Columbia. *Id.*

same-sex marriage, and child custody and parental rights issues in states that do not recognize *de facto* parent status.

Residency Requirements

As states increasingly began to legalize same-sex marriages, same-sex couples who lived in non-legalizing states traveled across state borders to get married in states that would let them do so. Just as in the past heterosexual couples traveled, for example, to Las Vegas to marry, many same-sex couples made the trip to states that had legalized same-sex marriage. Although a couple may spend as little as a few hours in a state to get married, the procedure to get divorced is much more protracted in most states.[3] State residency requirements to file for divorce range from six weeks to more than a year, except in Alaska, Iowa and Louisiana, which have no minimum residency requirement.[4]

The range of state residency requirements for divorce is important for same-sex couples to consider, because if they currently or later reside in a state that does not recognize same-sex marriage, then they cannot obtain a divorce in that state. This means that the couple (or at least one of the spouses) would have to travel to another state that recognizes same-sex marriage and meet the residency requirements of that state before one could file for a divorce there. Additionally, that state would maintain jurisdiction over the suit while it was pending, necessitating traveling to that state every time there was a hearing, trial, deposition, or some other kind of court proceeding. This could become very expensive, stressful and inconvenient for a couple in this situation. Thus, a prenup may need to include provisions delineating who will pay for transportation, lodging, and/or moving costs to a state that can grant a divorce in the event the couple lives in a state that does not recognize same-sex marriage.

However, there are a few states that have recognized this emerging dilemma and enacted legislation to address it. These states allow same-sex couples who married in their jurisdiction but live in a non-recognition state to obtain a divorce in the state they were wed, even if they do not meet the state's residency requirements. These states include California, Delaware, Hawaii, Illinois, Minnesota, and Vermont.[5] The District of Columbia also has one of these statutes, which specifically reads:

(b)(1) An action for divorce by persons of the same gender, even if neither party to the marriage is a *bona fide* resident of the District of Columbia at the time the action is commenced, shall be maintainable if the following apply:

(A) The marriage was performed in the District of Columbia; and

(B) Neither party to the marriage resides in a jurisdiction that will maintain an action for divorce.

(2) It shall be a rebuttable presumption that a jurisdiction will not maintain an action for divorce if the jurisdiction does not recognize the marriage.

(3) Any action for divorce as provided by this subsection shall be adjudicated in accordance with the laws of the District of Columbia.

D.C. Code § 16-902(b)(1)-(3).

While same-sex couples may not know where they will end up living, a couple considering same-sex marriage should investigate the various laws and procedural rules in their potential state(s) of residence before tying the knot, as this section has shown that trying to untie it across state lines may be more complicated than expected.

Obsolete Definitions

Assuming a same-sex couple has been able to successfully file for divorce, a spouse's actions that serve as grounds for the divorce may also need to fit within a narrow set of definitions which have not changed as fast as same-sex marriage laws. For example, adultery, a ground for divorce in states which grant fault-based divorces, is defined as voluntary sexual intercourse between a married person and a person other than the married person's spouse. However, '' '[s]exual intercourse,' judicially defined, 'means actual contact of the sexual organs of a man and woman and an actual penetration into the body of the latter.' ''[6] Thus, depending on the jurisdiction, same-sex sexual relations technically may not fall within the definition of adultery because penile-vaginal penetration is not present. While some courts have recognized that same-sex sexual relations constitute adultery,[7] others, such as the Supreme Court of New Hampshire in 2003, have expressly ruled that ''adultery, as a statutory ground for divorce, does not include homosexual relationships'' because of the absence of ''intercourse'' or, as some define it, penile-vaginal penetration.[8]

Same-sex couples should pay special attention to the often ambiguous and antiquated definitions of terms

[3] *See Chart 4: Grounds for Divorce and Residency Requirements*, *A Review of the Year in Family Law*, Family Law Quarterly 530-33, Vol. 46, No. 4 (Winter 2013), American Bar Association, available at http://www.americanbar.org/content/dam/aba/publications/family_law_quarterly/vol46/4win13_chart4_divorce.authcheckdam.pdf.

[4] *Id.*

[5] *Divorce for Same-Sex Couples Who Live in Non-Recognition States: A Guide For Attorneys*, National Center for Lesbian Rights (Dec. 2013), http://www.nclrights.org/wpcontent/uploads/2013/07/Divorce_in_DOMA_States_Attorney_Guide.pdf.

[6] *Robert v. State*, 220 Md. 159, 164, 151 A.2d 737, 739 (1959).

[7] *See, e.g.*, *Owens v. Owens*, 274 S.E.2d 484, 485-486 (Ga. 1981) (holding ''[a] person commits adultery when he or she has sexual intercourse with a person other than his or her spouse'' and that ''extramarital homosexual, as well as heterosexual, relations constitute adultery''); *S.B. v. S.J.B.*, 609 A.2d 124, 127 (N.J. 1992) (holding that ''adultery exists when one spouse rejects the other by entering into a personal intimate sexual relationship with any other person, irrespective of the specific sexual acts performed''); *RGM v. DEM*, 410 S.E.2d 564, 567 (S.C. 1991) (holding adultery constitutes ''explicit extra-marital sexual activity . . . regardless of whether it is of a homosexual or heterosexual character.'').

[8] *In re Blanchflower*, 834 A.2d 1010 (N.H. 2003) (holding that ''adultery, as statutory ground for divorce, does not include homosexual relationships,'' where husband brought divorce proceedings against wife and wife's alleged female paramour, claiming adultery as a ground for divorce); *Glaze v. Glaze*, No. HJ-1323-4, 1998 WL 972306, at *1 (Va. Cir. Ct. Aug. 31, 1998) (holding wife could not engage in adultery with another woman, reasoning ''[p]ersons of the same sex can engage in sexual relations. Fellatio, cunnilingus, anal intercourse are examples. Sexual intercourse, however, can only take place between persons of the opposite sex.'').

  FLR ISSN 0148-7922

such as ''adultery'' and ''sexual intercourse'' because prenups often foreclose the payment of spousal support, formerly known as alimony, if a spouse commits adultery, re-marries, or engages in co-habitation with another partner. ''Cohabitation'' is another term that is interpreted differently among different courts, as some courts define cohabitation as between only an unmarried man or woman,[9] while other courts use a more expansive definition that applies to unmarried persons of the same gender as well.[10] Still, a number of nationally used legal resources, such as the third edition of American Jurisprudence Proof of Facts, refers to cohabitation as only being between ''two persons of the opposite sex''.[11]

As one 2004 Pennsylvania case, *Kripp v. Kripp*, 849 A.2d 1159 (Pa. 2004), highlights, it would be in a same-sex couple's best interest to agree upon their own operational definitions for terms like ''adultery,'' ''sexual intercourse,'' and ''cohabitation'' and include those definitions in their prenuptial agreement. In so doing, a judge adjudicating the divorce or spousal support matter would have an operational definition clearly governing these terms of art. In *Kripp*, the property settlement agreement stated that alimony payments to the wife would end if the wife were to ''cohabitate.'' As the court in *Kripp* said:

> [The term ''cohabitate'' in the settlement agreement was] ambiguous as to whether it referred to or included the wife living with a person of the same sex, and thus, parol evidence was admissible; ''cohabitate'' was not defined in the agreement nor was there an incorporation of a definition from an outside source such as the Divorce Code, ''cohabitate'' was not followed with any language that clarified the specific person or persons with whom wife could or could not cohabit for purposes of continuing to receive alimony payments, and in common usage, as various dictionaries reflected, ''cohabit'' had several definitions and was not necessarily limited to that which occurred between a man and a woman.[12]

So, same-sex couples (and really, any couple) and their attorneys should educate themselves on the prevailing definition of terms like these in their state or possible state of residence, and include clarification of these terms in the prenup agreement if necessary.

Availability of Employment Benefits

In addition to conditions regarding spousal support, prenuptial agreements often include provisions addressing the amount or percentage of employment benefits, such as retirement and pension accounts, that a spouse may be entitled to upon dissolution of the marriage. Before June 2013, same-sex spouses were often not recognized as spousal beneficiaries for a variety of benefits, including health insurance, life insurance, and Social Security. Then, the U.S. Supreme Court held in its landmark decision, *United States v. Windsor*, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013),[13] that same-sex couples, married in states where same-sex marriage is legal, must receive the same federal benefits that heterosexual married couples receive.[14] However, *Windsor* included the qualifier that the decision only applied to states that legalized same-sex marriage.[15] This meant that spouses in same-sex marriages residing in states that did not recognize same-sex marriages may not qualify as a spousal beneficiary for federal benefits.[16]

To address this issue, several federal agencies that manage benefits programs, including the Internal Revenue Service (''IRS''), the U.S. Department of the Treasury (''Treasury''), and the Employee Benefits Security Administration (''EBSA''), which is a division of the U.S. Department of Labor (''DOL''), have released regulatory guidance to help employers and plan administrators comply with *Windsor*. Guidance released by the IRS and Treasury Department in August 2013 explicitly states that these agencies will recognize *all* lawfully married same-sex couples for federal tax purposes, whether the married couple resides in a state that recognizes same-sex marriage or not.[17] The EBSA fol-

---

[9] *See, e.g., Bergeris v. Bergeris*, 217 Md. App. 71, 77-78, 90 A.3d 553, 557 (2014) (citing *Gordon v. Gordon,* 342 Md. 294, 308, 675 A.2d 540 (1996)) (defining cohabitation as ''a relationship of living together 'as man and wife', and connotes the mutual assumption of the duties and obligations associated with marriage''); *J.L.M. v. S.A.K.*, 18 So. 3d 384 (Ala. Civ. App. 2008), *cert. denied*, (Mar. 6, 2009) (holding ''[s]tatute, which required the termination of an alimony obligation upon proof that the former spouse was cohabitating with a member of the opposite sex, did not apply to warrant termination of former husband's alimony obligation, where former wife was cohabitating with a member of the same sex''); *In re Marriage of Edwards,* 73 Or.App. 272, 698 P.2d 542, 547 (1985) (''[C]ohabitation' . . . refers to a domestic arrangement between a man and woman who are not married to each other, but who live as husband and wife. . . .'').

[10] *See, e.g., In re Marriage of Weisbruch*, 304 Ill. App. 3d 99, 710 N.E.2d 439 (1999) (holding ''paying spouse's maintenance obligation under divorce judgment may be terminated because receiving spouse is engaged in an ongoing relationship with a member of the same sex'').

[11] ''Generally, it can be said that courts consider cohabitation to mean a relationship between two persons of the opposite sex who reside together in the manner of husband and wife, mutually assuming those rights and duties usually attendant upon the marriage relationship.'' 765 Am. Jur. 3d Proof of Facts § 2 (last updated Dec. 2014). Under the ''cohabitation'' entry in Black's Law Dictionary (9th ed. 2009), ''illicit cohabitation'' is defined as ''1. The offense committed by an unmarried man and woman who live together as husband and wife and engage in sexual intercourse'' and ''2. The condition of a man and a woman who are not married to one another and live together in circumstances that make the arrangement questionable on grounds of social propriety, though not necessarily illegal.''

[12] *Id.*

[13] See the full decision here: http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

[14] Robert Barnes, *Supreme Court strikes down key part of Defense of Marriage Act*, The Washington Post, (June 26, 2013), http://www.washingtonpost.com/politics/supreme-court/2013/06/26/f0039814-d9ab-11e2-a016-92547bf094cc_story.html.

[15] ''This opinion and its holding are confined'' to couples ''joined in same-sex marriages made lawful by the State.'' *United States v. Windsor*, 133 S. Ct. 2675, 2696, 2695, 186 L. Ed. 2d 808 (2013).

[16] *See id.*

[17] *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples*, Internal Revenue Service (Aug. 29, 2013), http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes%3B-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples.

lowed suit in September 2013, issuing guidance on the Employee Retirement Income Security Act of 1974 (''ERISA'') stating that ''in general, the terms 'spouse' and 'marriage' in Title I of ERISA and in related department regulations should be read to include same-sex couples legally married in any state or foreign jurisdiction that recognizes such marriages, regardless of where they currently live.''[18]

This is great news for same-sex couples, as agency guidance like these has increased the number of same-sex married couples that can now receive federal benefits after *Windsor*. However, not every type of benefit is administered under this ''place of celebration'' approach rather than by state residency.[19] Although DOL's EBSA, which administers ERISA benefits, follows this place of celebration approach, the DOL has not yet extended this definition to the Family and Medical Leave Act (''FMLA''). In June 2014, the DOL announced proposed rulemaking to amend the definition of ''spouse'' in FMLA to include legally married same-sex couples wherever they reside.[20] The commenting period ended in August 2014, but a final amendment or effective date for a new definition of ''spouse'' has yet to be made. Thus, the state residency rule still applies for some employment benefits, such as FMLA. Consequently, if a same-sex couple married in a state that recognized same-sex marriage but thereafter moved to a state that did not, it would be wise to have anticipated that issue in the prenup.

Parental Rights and Child Custody

Prenuptial agreements usually address the distribution of monetary assets and property, and generally do not mention child custody. Still, it is important for same-sex couples to consider how they might address the issue should they become parents during the marriage. *De facto* parent status is not recognized in some states, including Maryland,[21] New York, Vermont, Tennessee and Utah.[22] This means that, in such states, although a spouse may have taken care of a child since birth or adoption, that spouse would not be recognized as a legal parent unless there were a blood relationship or he or she had legally adopted the child. This being the case, it is not enough for only one spouse to birth or adopt a child; both spouses need to adopt the child in order to be recognized as a custodial parent with all the attendant rights in the case of divorce, such as child custody or visitation rights.

However, this may be easier said than done if a same-sex couple lives in Mississippi, the only state that expressly forbids adoption by same-sex couples in its statute regulating the adoption of minors.[23] But, as same-sex marriage rapidly becomes legal in more states, the ability for same-sex couples to adopt should likewise become easier.

Conclusion

As of today, drafting a prenuptial agreement for a same-sex couple includes these special considerations that attorneys for heterosexual couples do not have to think about. The laws and legal definitions governing same-sex marriage and related areas are changing every day— faster than many legislatures and judiciaries can keep up with—but a couple (and the family law attorney) with an eye toward the future can craft a same-sex prenup that can be enforced in court as ''same old, same old'' business as usual even in the speedily changing times ahead.

---

[18] *New guidance issued by US Labor Department on same-sex marriages and employee benefit plans*, United States Department of Labor (Sept. 18, 2013), http://www.dol.gov/opa/media/press/ebsa/EBSA20131720.htm.

[19] ''Place of celebration'' refers to a rule based on where the marriage was entered into rather than where the couple lives. *See Family and Medical Leave Act Notice of Proposed Rulemaking to Revise the Definition of ''Spouse'' Under the FMLA,* United States Department of Labor (June 27, 2014), http://www.dol.gov/whd/fmla/nprm-spouse/.

[20] *Fact Sheet: Proposed Rulemaking to Amend the Definition of Spouse in the Family and Medical Leave Act Regulations*, United States Department of Labor (June 2014), http://www.dol.gov/whd/fmla/nprm-spouse/factsheet.htm.

[21] *Janice M. v. Margaret K.*, 404 Md. 661, 685, 948 A.2d 73, 87 (2008) (''We will not recognize *de facto* parent status . . . as a legal status in Maryland'').

[22] *De Facto Parent Recognition*, Family Equality Council (Dec. 3, 2014), http://www.familyequality.org/get_informed/equality_maps/de_facto_parenting_statutes/.

[23] ''Adoption by couples of the same gender is prohibited.'' Miss. Code. Ann. § 93-17-3(5).

  FLR ISSN 0148-7922