MICHIGAN FAMILY LAW JOURNAL

A Publication of the State Bar of Michigan Family Law Section • Carol F. Breitmeyer, Chair

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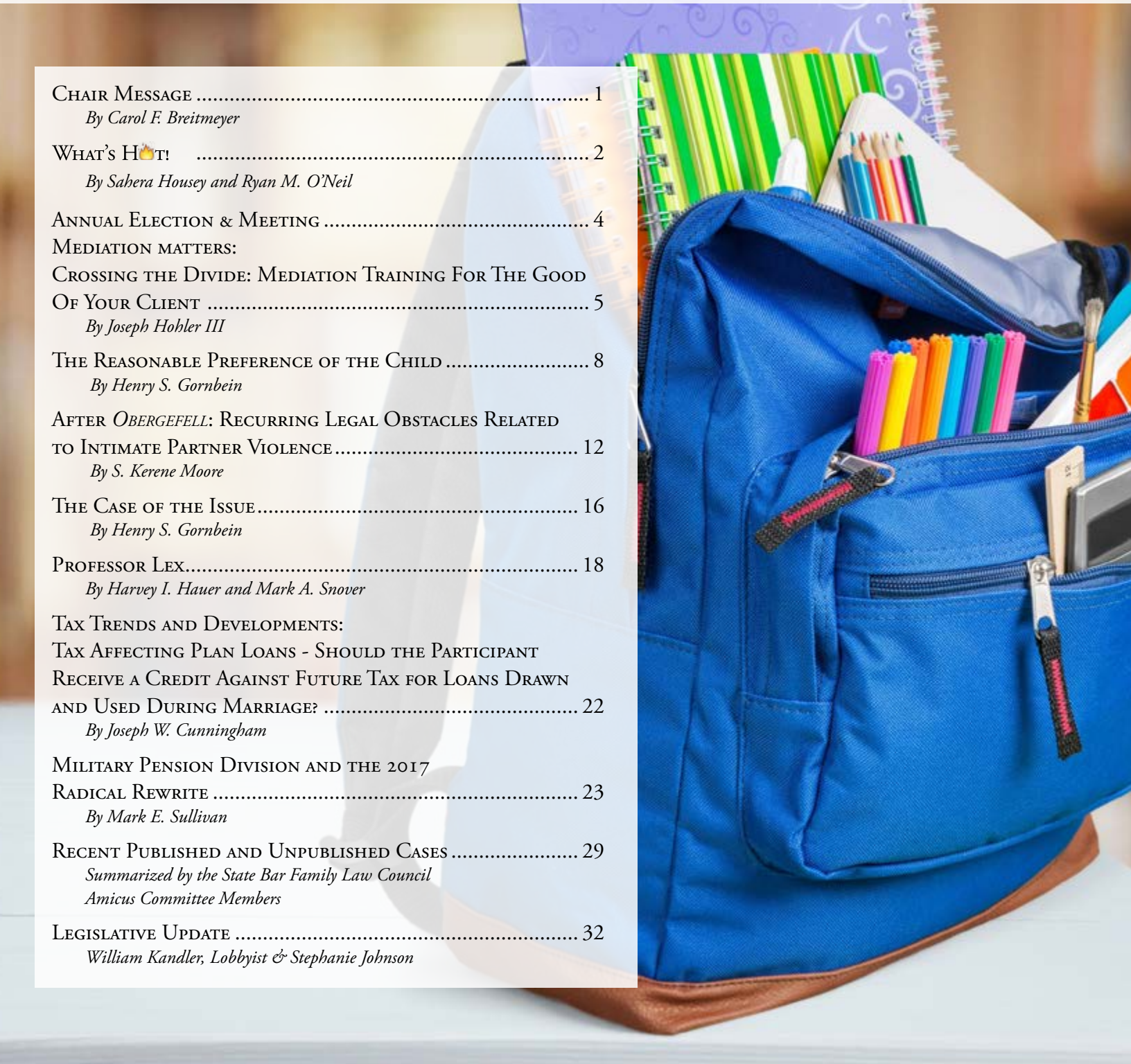

STATE BAR OF MICHIGAN
Family Law Section

Mission

The Family Law Section of the State Bar of Michigan provides education, information, and analysis about issues of concern through meetings, seminars, its website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan.

List of Council Meetings*

FLS Annual Dinner
September 21, 2016
Amway Hotel, Grand Rapids

Annual Meeting & Elections
September 22, 2016
DeVos Place, Grand Rapids

October 8, 2016
Weber's Inn, Ann Arbor

November 11, 2016
Following the
ICLE Family Law Institute
Suburban Collection Showplace
Novi

December 10, 2016
Double Tree, Novi

January 21, 2017
University Club, Lansing

FLS Winter Conference
February 4-11, 2017
No council meeting

March 4, 2017
Double Tree, Novi

April 1, 2017
Amway, Grand Rapids

May 6, 2017
Weber's Inn, Ann Arbor

June 3, 2017
University Club, Lansing

***All regular, monthly Council meetings start at 9:30 a.m. on Saturdays** and are preceded by a breakfast buffet starting at 9:00 a.m. The Annual Meeting customarily starts at 9:00 a.m. with breakfast buffet at 8:30 a.m. Family Law Section members who are not Council members are welcome at all Council meetings. However, if you know you are going to attend a meeting, kindly send an e-mail in advance so we are sure to have plenty of space and food. If a presenter or member wishes access to audio-video equipment, please let us know 7 days in advance. —Carol F. Breitmeyer; breitmeyer@bcfamlaw.com

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List of Advertisers

Letters to the Editor

The *Michigan Family Law Journal* welcomes letters to the Editor. Typed letters are preferred; all may be edited. Each letter must include name, home address and daytime phone number. Please submit your letters, in Word format, to the Chair of the Family Law Section, Carol F. Breitmeyer, c/o State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, MI 48933, soudsema@mail.michbar.org

FAMILY LAW SECTION "LISTSERV"

(E-mail Discussion Group)

The Family Law Section sponsors a "listserv," which is "geek-speak" for an e-mail discussion group. To be eligible to join, you must be a member of the Family Law Section or be a Michigan judge. If you are eligible and wish to participate (it is a wonderful opportunity to share ideas and solve problems, not to mention communicating with many fine colleagues), you may initiate your subscription to the Familylaw listserv by going to http://groups.michbar.org/ and click on FamilyLaw. Once there, fill out the form under "Subscribing to FamilyLaw" and follow the instructions. If you have questions, contact Elizabeth A. Sadowski at sadowski@mindspring.com, or call her at (248) 652-4000.

To All Prospective Family Law Journal Authors:

On behalf of the Family Law Council, I am encouraging our membership and readers to consider submitting an article to the *Family Law Journal*.

Article Contact Person: The primary contact person at the State Bar for *Journal* articles is Sue Oudsema (517) 367-6423 and soudsema@mail.michbar.org. Article submissions should be e-mailed to Sue in Word format. Please carbon copy me (aep@papistalaw.com) and Sahera Housey (houseys@oakgov.com) and write "Article for the Family Law Journal" in the subject line when you submit your article.

Article Deadlines: Please submit your articles to Sue Oudsema at her email address above no later than the last day of the month preceding the publication month. There are ten (10) published *Family Law Journal* issues each year. June/July and August/September are combined issues.

Formatting and Links: Consistent with the *Bar Journal's* practice, our formatting resource guide is *The Chicago Manual of Style* (see www.chicagomanualofstyle.org). Please use endnotes for citations. Feel free to include links in your endnotes, which will permit the reader to click — and then be directed to the original source or reference.

Peer Reviewed: Authors are expected to have engaged another attorney to carefully review, critique, and edit articles before sending to the Family Law Journal for consideration.

Bio & a Picture Please: All authors are requested to submit a short biography not to exceed 100 words (similar to the *Bar Journal*) and photo to Sue in conjunction with your article.

Please Notify: If you are a first time author and wish to submit an article for possible publication, please advise Sahera Housey or Anthea Papista. Please include a detailed description of your topic.

Editorial Board Discretion: The Editorial Board reserves the right to accept, reject, and edit all submitted articles and Letters to the Editor. We shall endeavor to communicate any necessary substantive changes to the author in advance of publication.

Very Truly Yours,

Anthea E. Papista
Journal Committee Chair

Chair Message

By Carol F. Breitmeyer - Family Law Section Chair 2015-2016

My term as Chair is nearly over. September brings the Annual Meeting and Election where our Chair-elect, the Honorable Richard Halloran, takes the helm. It has been an extraordinary privilege to interact with Council and section members this year. These leaders in our field devote hundreds of volunteer hours each month serving on and leading committees, creating and staffing work groups, writing amicus briefs, editing and writing our marvelous *Family Law Journal* and assisting to improve law and public policy affecting family life in Michigan. The intelligent and thoughtful approach by each participant is genuinely inspiring. Bravo! And many thanks for the opportunity to serve.

I have three thoughts to share for my last Chair message. These are topics which especially resonate with me and that I frequently mention when speaking. As practitioners we are invited into the most personal and private aspects of our clients lives. Really, the depth of personal information shared is rather staggering. As I mature I find the reality of this "sharing" more and more astonishing. It is not to be taken lightly. The trust level it takes for a virtual stranger to lay themselves bare is sobering; it is a solemn trust which is the special burden of a family law practitioner. However, the other side of the coin is that the burden of hearing and counseling folks relative to their painful stories can sometimes weigh on the mind. Even the most polished professional feels the pain of the client, and sometimes it can take a toll.

The second idea is just how hard it is to practice in family law. Our clients are at their worst, no one is really happy—even after a beautifully executed dissolution action there is no great happiness for the client, there is no celebration. Frequently, the end is simply the beginning of difficult transitions for the client and then the "housekeeping" of the division of retirement assets and other property brings its own set of headaches and confusion for the client. This is hard, hard work. Even mundane "administrative tasks" can loom large, a small misstep can cause dramatically dire problems for the client and attorney. This is often compounded by the pressures to find clients and obtain payment–problems that plague many practitioners. Do not underestimate this psychological burden. A constant balancing act or "dance" is undertaken between meeting your client's needs and taking care of yourself. If you are genuinely engaged in your practice, then it is definitely taking an emotional toll. Be mindful of this. Take care of yourself.

My third concern is in regards to the rapidly changing landscape of what "family" means relative to our practices. The future of our practices must necessarily become broader in scope and more inclusive. Given the dramatic shift in demographics and the new patterns of fewer "traditional" marriages there simply will not be enough "old style" divorces for practitioners. It is indeed a new day. Our practices will need to adapt to the shifts in society and accommodate the legal needs of a more diverse client base. A broad and deep knowledge base will be essential to any viable practice over the next 25 years. The complexity of the world is crystalized in our family law "transactions." Knowledge about same gender dissolutions, adoptions, paternity, the creation of marital and partnership contracts, estate planning, tax and business matters all will be even more critical to sustaining and succeeding in family law in the future. Good luck and thanks again from your outgoing Chair.

NEW COLUMN!

What's Hot!

Building Remedies into your Judgment or Settlement Agreement

If you have concerns about whether the other side will comply with the terms of the judgment or fully disclosed all assets (or even if you don't have such concerns—you can never be too careful), build your remedy for non-compliance/non-disclosure directly into the judgment.

For example, expressly provide that a party found to have violated the terms of the judgment shall pay the **actual** attorney fees and costs incurred by the non-violating party when seeking enforcement. This type of provision becomes a matter of contract the court must enforce. It is not subject to the discretion of the court or an analysis as to reasonableness.

Also, provide that any assets concealed or not disclosed will be forfeited to the other party. This is consistent with *Sands v Sands,* 442 Mich 30. Although the Supreme Court in *Sands* said there is no automatic forfeiture rule applicable in all cases, it did not prohibit (and implicitly allowed) agreements that provide for complete forfeiture of hidden assets if the parties agreed to that enforcement remedy.

There are probably many other matters that could be included, such as payment of additional child support for failure to exercise scheduled parenting time (because a parent who fails to exercise parenting time shifts much of the financial and psychological cost of parenting to the primary custodial parent).

Include provisions such as these in the property division section of the judgment to assure that they are a matter of contract the court is obligated to enforce.

— *Thank you to Scott Bassett* (scott@michiganfamilylawappeals.com) *for this contribution.*

New Ways to Pay Support

Children and families will benefit from a new service that makes Michigan child support payments more convenient across the state and nationwide.

The Michigan Department of Health and Human Services and its Michigan State Disbursement Unit are launching a partnership with electronic payment provider PayNearMe(r) that allows parents to make their child support payments with cash at more than 550 Michigan and 17,000 nationwide participating 7-Eleven(r) and Family Dollar(r) stores.

"Michigan is committed to offering child support customers a variety of convenient options to make their payments. We are continually adding innovative services that respond to customer preferences and needs," said Erin Frisch, director of the Office of Child Support within MDHHS. "If we make this process more convenient, children will receive the support that they need and deserve more quickly."

The process is simple. Parents can:

1. Visit the *misdu.com* website and select the "Cash Payment" option.
2. Enter requested account information on the PayNearMe website.
3. Select whether they want the payment code sent to their phone or printed out.
4. Choose from the list of payment locations closest to them.
5. Visit the store and provide both the payment code and cash to the cashier.

Customers pay a $1.99 convenience fee and PayNearMe payments can take up to three business days to post, just like any other electronic payment made by a customer.

To better help parents provide for their children, MDHHS works collaboratively with local agencies, courts, county health and human services entities, employers and various state and federal agencies. As August is Child Support Awareness Month in Michigan, as proclaimed by Gov. Rick Snyder, and nationally, this new service helps Michigan parents support their children's many needs, allowing them to grow into thriving, self-sustaining adults.

The Michigan State Disbursement Unit within the MDHHS Office of Child Support, known as MiSDU, is the state's centralized payment processing center for collecting and distributing support payments. In 2015, the Michigan child support program collected and paid $1.36 billion in child support, with $1.2 billion sent to families.

While a majority of payments made to MiSDU are made by employers on behalf of their employees, a significant number of non-custodial parents still pay on their own. Customers can pay online, by phone or by mail using a credit card, check or money order.

Many customers pay by cash or money orders. Also, many customers have transportation or other challenges making it difficult for them to visit the local Friend of the Court office. With this new service these customers will now have a more convenient way to pay their child support with cash at a participating retail location near them or anywhere in the nation.

For more information about this and other payment options, or to make a payment online, visit *www.misdu.com*.

— August 8, 2016 Press Release from Michigan Department of Health and Human Services

Major Item Check List Before Entry Of USO's

Here is a list that Oakland County FOC has developed to assist attorneys and parties with preparing USO's. This is not mandatory and only created by our office for Oakland County. This is not mandated by the State.

1. Make sure the USO is filled out completely and accurately.

2. Payer and payee should be listed correctly.

3. Children's names, DOB & ***Overnights*** with payer.

4. Effective date should be indicated and begin the 1st of the month.

5. **Support Grid**:

   A. The numbers should ***add up*** correctly.

   B. Include tiered amounts for all children as they emancipate, i.e. for 3, 2 and 1. The Youngest child should be in column 1.

   C. Numbers should all be rounded off to dollars and add up correctly.

   D. OTHER—should include an explanation of what the amount is in sec 13. This is usually additional CURRENT support. Do not use for arrears payments or extra-curricular activities.

6. **Uninsured Health-Care Expenses**—make sure the % amounts are included and add up to 100%.

7. **Insurance**—Make sure that the box is checked to provide that plaintiff, defendant or both are responsible for providing health insurance. If a child is on Medicaid, the parent with the grant is then providing medical insurance.

8. **Ordinary Medical Support**: Should be a positive number but if it is $0, then the annual ordinary medical amount should also be $0, not $357.

9. **Post Majority Support**—Make sure the date support terminates at age 18 or after, never before 18.

10. **OPT OUT**—if parties opt out (must file motion, advice of rights & order) it should be done at motion call or contact the FOC support specialist to inquire if there is public assistance. If an Order is entered to allow parties to opt out of FOC, the "No Friend of the Court Services" USO should be used.

Submit your Hot Tip to Sahera Housey (houseys@oakgov.com) and Ryan O'Neil (ryano@bmpclaw.net).

Sahera Housey *is currently a Referee at the Oakland County Friend of the Court. Prior to becoming a Referee, Sahera specialized in Family Law, Estate Planning and Probate Law. She obtained her undergraduate degree from the University of Detroit and her Juris Doctor from the University of Detroit Mercy School of Law.*

*Sahera is a council member of the State Bar of Michigan Family Law Section; a member of the Oakland County Bar Association Family Law Section and former chair of the section; an Oakland County Bar Foundation member, State Bar of Michigan foundation member. Co-Liaison for the OCBA Legislative Committee; co-editor of the State Bar of Michigan F*amily Law Journal*; vice-President of the Referees Association of Michigan (RAM); President of the Michigan Inter-Professional Association on Marriage, Divorce and the Family, Inc.(MIPA); Former President of MIPA and current President of Referees Association of Michigan (RAM) and member of the Chaldean American Bar Association.*

Ryan M. O'Neil *is a 2005 graduate of the University of Michigan where he earned a B.A. in English and American History. Mr. O'Neil earned his Juris Doctorate from the Western Michigan University Cooley Law School and was admitted to the State Bar of Michigan in 2008. He is also licensed to practice law in the United States District Court - Eastern District of Michigan.*

Mr. O'Neil practices in the area of practices in the area of domestic relations law at Bowyer, Midtgard & Nacy. He is a former chairperson of the Oakland County Bar Association's Family Court Committee. He serves as a district court case evaluator for Oakland County. Mr. O'Neil is also a co-editor of the State Bar of Michigan's Family Law Journal. *He is a member of the Family Law section of the State Bar of Michigan, the Oakland County Bar Association, the Macomb County Bar Association, and the incorporated Society of Irish American Lawyers. Mr. O'Neil co-authored in the Oakland County Bar Association publication* Laches.

Annual Election & Meeting

Date: Thursday, September 22, 2016

Time: 9:00 a.m.–Noon

Location: DeVos Place, 303 Monroe Ave NW, Grand Rapids

Register as part of the SBM Annual Meeting by selecting this section event. There is no charge to attend any section meetings, but registration is requested.

This event is held in conjunction with the State Bar of Michigan Annual Meeting.

Family Law Council elections will be held on Thursday, September 22, at the Section's Annual Meeting held during the SBM Annual Meeting in Grand Rapids. There are twenty-one members of the Family Law Council who serve three-year terms. Seven Council seats expire and are subject to election each year. Other positions may become available under other circumstances.

If interested, kindly e-mail the chair-elect, Richard Halloran (Richard.Halloran@3rdcc.org)or Amy Spilman (mailto:spilman@aeslawfirm.com). All Family Law Section members are eligible for election to one of the twenty-one seats on the Family Law Council. The application is linked here (http://tinyurl.com/FLCelection).

Why become a member of the Family Law Section Council?

If you care about family law and molding the shape of the practice, Council membership will provide that opportunity. You will stay up to date on the latest legislation, proposed legislation, and court rules. The Council regularly files amicus briefs with the Supreme Court and the Court of Appeals and has lively discussions on the issues before the court. You can bring fresh ideas to the Section and the practice of family law. You will meet smart and engaged colleagues from around the state. The privilege of membership requires a significant investment of time and energy, and includes at minimum the following commitments:

1. Attendance and active participation at the monthly Council meetings. There are nine meetings usually held on the 1st Saturday of the month (schedule varies during winter months) at various locations throughout Michigan and at the Family Law Section's annual meeting, usually held in conjunction with the State Bar Annual Meeting in September of each year.
2. Publication of at least one article for the *Family Law Journal* during a member's three-year term.
3. Active participation in one or more committees established by the Council and regular participation in committee meetings in person or by telephone as necessary.

There are no regularly scheduled meetings during the summer months although issues may be raised occasionally through the listserv. Under current bylaws, Council members are permitted only two absences per year from the monthly meetings; the third absence will result in automatic removal from the Council. The Council looks forward to applications from members who have the time and energy to make these commitments. Prospective applications will also wish to review the Family Law Section bylaws (http://connect.michbar.org/familylaw/council).

Crossing the Divide: Mediation Training For The Good Of Your Client

By Joseph Hohler III

With trial becoming rare in family law cases, mediation is no longer 'alternative dispute resolution' – it's the norm. Given this, the absence of a concerted effort to prepare attorneys for mediation practice is baffling. Further, many attorneys are not trained to know how it runs, what to expect and, particularly, *how* to mediate on behalf of clients.[1] It's time to take the *practice* of mediation seriously and train attorneys for it, for our own good, and *especially* for the good of our clients.

How Did I Get Here?

I have been a solo practitioner since law school. My early years were defined by trial and error because I lacked *practical* knowledge, and had to learn everything the hard way.[2] So, when my first divorce was ordered to mediation, I had no idea what to expect, and the only tools I had were some negotiation exercises from a first year contracts class and unlimited moxie. Mercifully, the negotiation exercises were useful enough to help me keep my client from giving away the farm. The moxie had no value.

Unfortunately, while a settlement was reached, it was much later that I realized that what transpired that day was not an effective mediation at all: The mediator offered no opening statement; no explanation of the process or its purpose; and did not mention that settlement was completely voluntary. Instead, what happened was a trial substitute. Instead of a judge, there was a mediator, and rather than treat the parties as people, with emotions, needs and voices, they were seen as obstacles— separated quickly and ridden hard toward the mediator's resolution. Thus, it was no surprise that they reached an 'agreement'. Because many mediators run their mediations this way, many attorneys believe *this* is what mediation is *supposed* to be. Fortunately, they're wrong.

Every Lawyer Should Learn To Mediate

Every lawyer should learn mediation advocacy, but classes for it seem non-existent. Fortunately, there are many courses for mediator training.[3] Some are pricier than others, and each has a significant time commitment,[4] but no matter the individual differences, each teaches the basic skills to work as the mediator, which also serves to teach attendees how to advocate in mediation.

Obviously, being a good mediator or advocate in mediation is not something that can be learned in school. One can learn the rules, but not the necessary temperament or commitment to neutrality. The only way to acquire these skills is through constant practice. Even so, learning *what* mediation is and the *process* of it from the mediator's perspective is a good first step toward better client representation.[5]

If They're Heard, They'll Own It

Mediation is meant to serve the parties' needs, whatever they may be. Too often though, mediation is used to serve other needs, such as (1) what an *attorney* perceives as the client's interests (frequently wrong); (2) to serve an *attorney's* interests (e.g., separation from a difficult or slow-paying client); or (3) becoming yet another 'settled' case for the mediator. In other words, rather than focusing on client service, resolution is all that matters.

Successful mediation involves a respectful, productive process, as well as resolution. When *resolution* is the focus, to the exclusion of all else, we sometimes see unsatisfactory or questionable outcomes and the deepest feelings of buyer's remorse. Certainly, some remorse can be due to outcomes which are distasteful, often when expectations are not realistic. Likely, the problem is not with the outcome, but rather with procedure, i.e. a breakdown of the process.

As it stands, the vast majority of litigants will never see trial, leaving mediation as the only opportunity to be heard by anybody *not* their own lawyer— by the mediator, for one, but *particularly* by the other side. As it happens, being heard is key because, when people truly feel *heard* they'll more readily accept the outcome, no matter how lousy they feel about it.

Before I trained as a mediator, nearly all of the mediations I led clients through lacked the *purpose* of mediation. The process was not structured to serve their interests, and so, in retrospect each one is regretful, as even the most difficult and unreasonable client deserves a voice in the process. In such a case, at the first and only point at which my client could have been heard and had her *feelings* validated, nobody listened to her. The mediator was the worst offender, separating the parties from the start and pummeling them into submission. But I was just as guilty for not understanding that it is the *journey* of mediation—the process and *communication* – which makes

it work. If I'd understood, I could have protected her and given her a voice. But, being untrained I knew no better and simply followed the mediator's lead, thinking he knew what he was doing. So, instead of reaching a resolution in which my client felt included, she only felt abused.

It was only after training to *be* a mediator I came to understand where I went wrong – I allowed the focus to be on the outcome and not the communication. Now that I *am* a mediator, I insist on communication first and am constantly surprised to find that some of the most successful mediations actually reached *no* agreement.[6] Whether or not an agreement was reached, they succeeded because the parties communicated and made progress toward *their* resolution, not mine. And even if they did not get there, facilitating the dialog was key.

In Short—

In the end, if there are no courses to train us as mediation advocates, we'll just have to train to be mediators. To be clear, I don't suggest we should all turn into mediators—that would be lunacy. Rather, training as mediators will help us become better *advocates*, and being better advocates for our clients should be the goal. After all, when we show them our value, they value us.

About the Author

Joseph Hobler III *is a family law attorney and mediator, practicing in and around Michigan's greatest city – Kalamazoo. He is a member of the Kalamazoo Metropolitan Planning Commission, a member of the State Bar's Member Service's Committee, regularly volunteers at the Family Law Clinic in Kalamazoo and is an avid runner. His personal best in the 5k is 18:42; in the 10k is 38:56; and in the half-marathon is 1:28.44.*

Endnotes

1 In fairness, my law school did, and does, offer a variety of courses in ADR. In fact, it has an ADR clinic. However, none are required and space is limited. See *http://www.law.msu.edu/academics/curriculum.html*, and *http://www.law.msu.edu/adr/program.html*.

2 And I mean *everything*. While law school excels at trying to turn us into appellate judges, it is pretty poor at imparting the practical aspects of practicing the law. See my article 'Flying Blind," at *http://www.michbar.org/file/barjournal/article/documents/pdf4article1311.pdf*.

3 For examples of the available trainings, see *http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Pages/Mediation-Training-Dates.aspx*. I personally recommend any courses by Brian Pappas, who taught my mediation training. See, *http://www.law.msu.edu/faculty_staff/profile.php?prof=616*.

4 Domestic relations mediator training, with the required domestic violence screening protocol, is a 48-hour course, usually taught over the course of a week.

5 Consider mediation training as a football player would consider ballet: it's about sharpening useful skills, not a change in professions. In the same way that ballet training can help a football player with speed, agility, flexibility, etc., mediation training benefits the attorney, even when he, or she, has no intention of being a mediator.

6 Remember, failure is always a valid option.

Pensions and retirement accounts are often the largest assets divided in a divorce; don't trust your orders to just anyone…
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The Reasonable Preference of the Child

By Henry S. Gornbein

In child custody cases one of the twelve factors that must be considered is MCLA 722.23(i) - the reasonable preference of the child. In this article I will discuss the realities of the application of this statute from a family court judge's perspective. I recently spoke on this issue at the Michigan Chapter of the American Academy of Matrimonial Lawyers (AAML) seminar.

The law requires that a judge talk to the child or children when there is a child custody dispute in order to help make a determination consistent with the best interests of the child. Key cases on this issue include:

- *Molloy v. Molloy*, 247 Mich. App. 595 (2001), which stands for the proposition that *in camera* interviews of children in custody disputes are proper and serve a public purpose in not allowing a child to be cross-examined. In addition, the law now requires that all interviews be recorded in some fashion and sealed to protect the privacy of the child, but also to provide some sort of record for possible appellate review.
- *Maier v. Maier*, 311 Mich. App. 218 (2015), in which the court declined to interview an eight-year-old child and was upheld by the Court of Appeals. Here, the child had been coached by one parent and had also gone through a lot of emotional trauma including four unsubstantiated Child Protective Services evaluations. The court determined that the eight-year-old child would not be able to state a reasonable preference.
- *Breneman v. Breneman*, 92 Mich. App. 336 (1979), in which an eleven-year-old was allowed to testify regarding child abuse allegations involving one of the parents.
- *Thompson v. Thompson*, 261 Mich. App, 353 (2004), in which the court discussed whether a judge can go beyond the scope of the child's preference. The key is that an interview cannot be conducted in a vacuum, but that the interview should not be used to determine any of the other eleven factors of the best interests statute.

In preparation for my presentation to the AAML Seminar, I sent a form survey with nine questions to each of the family court judges in Wayne, Oakland and Macomb Counties. My goal was to obtain and provide a view of what happens behind the scenes where no one is present except the child, the judge, and, in most cases, another person connected with the court and gain some insight into the judges' decision making process in these difficult cases. Of the twenty-three judges, fourteen provided written responses and one declined to participate. I would like to share my findings of this unscientific survey with you, which reflect the judges' actual comments and statements:

Question 1: What is the youngest age that you will talk to the child?

Answers: Ages ranged from four years of age to ten or eleven years of age with the majority saying five or six years of age. One judge responded by saying "only children who know the difference between telling the truth and telling a lie" but never recalled having an interview with a preschool-aged child.

Question 2: Do you have any other person present when you interview a child?

Answers: Nine judges said they always have someone present when they do the interview. One judge stated they do not but do make a video record of the interview. One judge said "usually not."

Question 3: If so, who is with you?

Answers: The answers ranged from "my court reporter," to "members of my staff, my clerk or GAL, research attorney, family counselor or GAL." In some cases, it was a secretary who would takes notes for the confidential court file. Or, according to one judge, it could be a deputy if the judge was worried about safety due to the child's age/size/or mental health status.

Question 4: Are there any specific questions that you ask a child?

Answers: There was a wide variety of responses including questions to "break the ice," and general life questions. One judge responded that he or she would explain that "it is my job to help your parents when they don't agree."

One response was that there would be four to five questions to establish the child's ability.

There were also general questions about home, school and

family as well as about age, grade and other basic information.

One response was "general questions to determine reasonable preference" and also "do you know why you are here" to get the rehearsed stuff out of the way.

Two judges responded "No."

Question 5: If so, what are they?

Answers: Specific answers included the following:

"Where do you go to school? How are your grades? Do you play sports? Clubs/activities? I also explain why we are here talking."

"Can you accept what I decide? Is there anything you want me to consider before I make a decision?"

"Tell me the good things about each parent, whether there is anything they want to tell me, and whether there is anything I can help them with."

"Name, age, pets, livings arrangements, school, friends, siblings, music, sports, arts, video games – how are things going."

"What would you like to know about what's going on? What do you think I need to know to make a good decision?"

"I ask the child if she/he knows the difference between telling the truth and a lie. I also ask to tell me "anything special." If I believe the child hasn't been coached, I will ask their preference. Most children/teenagers want the process over quickly."

"Do you know why you are here? What do you like best/least about being at mom/dad's? What else did mom and dad tell you to tell me?"

"What do they do at each parent's home? Who do they go to with their problems and successes? Who picks them up from school when they are sick?"

"How do they like living with mom and dad? What types of activities do they do at each home? How do they like spending time with mom or dad?"

"I always ask them to tell me one thing they like about each parent."

"Who lives at mom/dad's house? How do you get along with everyone there? What do you do for fun there? Discipline? Schoolwork? Do you have your own bedroom? What activities do you like to do? Who does them with you? Is there anything else you "are supposed" to tell me?"

"Who gets you up in the morning; prepares breakfast; gets you to school; gets you home; helps with homework; goes to soccer/baseball? What are your chores; nighttime routine; bedtime; weekends?"

Question 6: Do you ever ask a child to state his or her preference?

Answers: "Always, but rephrase it as "if you could live anywhere you want, or have any schedule with your parents, what would it be?""

"Not in those words. I ask open-ended questions."

"Depending on the age of the child. I reassure them their response is confidential and won't be disclosed but I have to follow the law and might not do exactly what they say they want."

"Not directly. I don't make them choose."

"Yes—not in those words. Usually, "in a perfect world, where would you like to go to school/want your schedule to be?""

"Yes. The issue then becomes for the court to determine whether the child is mature enough to express a helpful opinion."

"Sometimes – but usually they don't want to be responsible for the decision. I let them know I'm helping mom and dad decide how much time at each home."

"Most of the time, but not in a direct way. I may ask if they got to make the decision, where would they spend their time?"

"Yes – if mature enough to understand the nature of our discussion."

"Yes, in a round- about way. Not directly."

Question 7: At what age does a child's preference carry significant weight in your decision-making process?

Answers: "Depending on what the child tells me it may not matter – but usually 9 or 10."

"Older than 10 depending on child and maturity."

"Depends on child's maturity level – typically age 12 and up."

"It varies. Generally 12 or older carries more weight."

"15-16"

One judge said between "the ages of 15-17."

"As a general rule, the older the better – but maturity is a big factor."

"It depends on the child."

"Child's developmental stage and ability to understand and communicate their preference is far more important."

"As the child ages, she or he has better ability to express a preference that is useful to the court."

"Depends on age and maturity."

"Many factors are considered. You may have children who have been alienated by one parent, so age is less important than circumstances sometimes."

Question 8: How important is the preference of a teenager?

Answers: "Significant, especially if the teenager is able to articulate solid reasons for their preference."

"Pretty important – but one must remember the incentives at the different homes – i.e., girlfriend/boyfriend, staying out late, driving, cell phone, freedom, etc."

"Carries more weight than younger children but cautious about the true reasons – i.e., is one parent more lenient, boyfriend/girlfriend, etc."

"Depends entirely on the child and the situation."

"Very significant, as long as they seem to be speaking their own mind."

"Every family presents a unique set of circumstances. The older the child, the better the child's ability to express a preference."

"Depends on age and maturity."

"Very important."

"Significant, but I try to discern if there is coaching and/or if the child's preference is for reasons in the child's best interest."

"Preference is considered and weighed in conjunction with other best interest factors."

"Always considered, but it is truly only one factor."

"Very important."

"Depends on the situation – if a discipline issue results in a child wanting to live with the other parent due to leniency, then it's not that relevant."

Question 9: Is there anything else that you can add that would be of importance or of interest to our seminar audience?

Answers: "Don't coach the kids ahead of time. It's not hard to figure out which parent is "coaching" the kid."

"Always interview children alone, not with their siblings."

"I always video record the interview."

"I can't determine what is in the child's best interest if I don't know them. The purpose of the interview is to get to know them, learn about what I need to know, and help the parties settle the case."

"Children rarely say what their parents think they will – they are usually very direct."

"I only interview the child after all the testimony is complete to help provide better insight to the child's response. Also, don't be shy to ask the court or staff about details of the interviews, but limit discussions with the child to the very basics of who they will meet, where it will occur, and when."

"Most children don't want to choose, and just want their parents to stop fighting."

"Interviews are case/child specific."

"Always inform the children that the interviews are confidential."

"I always tell children that I make the decision so they don't feel something they did or said is why they live with one parent or the other."

"Many times it is apparent that a child has been coached. It is not helpful to the "coaching" parent. Once, I asked a child if there was anything else he was "supposed" to tell me… He ticked off all his points on his fingers to make sure he covered them all!"

I found this survey and the judges' responses and comments to be fascinating and very informative. In closing, I remember a judge telling me a number of years ago that he did not care how old the child was, he was not going to allow a teenager to tell him how to run his court room. A reminder to us all of the challenging and difficult job each family court judge is faced with in a custody case when tasked with determining the reasonable preference of the child.

These are some of my thoughts along with fourteen of our esteemed family court judges.

About the Author

Henry S. Gornbein *is a partner with the law firm of Lippitt O'Keefe Gornbein, PLLC in Birmingham, Michigan. His practice is exclusively devoted to family law. He is a former chairperson of the Family Law Section of the State Bar of Michigan; a former president of the Michigan Chapter of the American Academy of Matrimonial Lawyers; former Chair of the Long Range Planning Committee for the National American Academy of Matrimonial Lawyers; member of the Oakland County Friend of the Court Citizens Advisory Committee; winner of the Professionalism Award from the Oakland County Bar Association in 2004; author of the "Spousal Support" Chapter of* Michigan Family Law*; author of "Case of the Issue" for the* Michigan Family Law Journal*, State Bar of Michigan; blogger for the* Huffington Post*; creator and host of the award-winning cable television show,* Practical Law*, now entering its 17th year; and Podcaster for DivorceSourceRadio.com. His new book,* Divorce Demystified, Everything You Need to Know Before Filing for Divorce*, is available on Amazon as a softcover or eBook.*

After *Obergefell*: Recurring Legal Obstacles Related to Intimate Partner Violence

By S. Kerene Moore

The Supreme Court's ruling in *Obergefell v. Hodges* requires states to recognize and perform same-sex marriages,[1] but providing the best advocacy to the lesbian, gay, bisexual, transgender, or queer (LGBTQ) community means doing more than analogizing the heterosexual experience to that of same-sex couples. This is particularly important when handling family law cases that involve intimate partner violence. Due to the unique dynamics of the LGBTQ community, attorneys, mediators, judges, and other court personnel may not be aware of the impact or even the existence of intimate partner violence in these cases. Though the media has heavily publicized the benefits of marriage equality, there is little coverage of what happens when intimate partner violence causes a breakdown in these family units. In one rare instance, the media highlighted the recent breakup of WNBA players Brittney Griner and Glory Johnson, providing a glimpse into how legal and systemic issues impact these newly legally recognized families where one partner uses violence and other controlling tactics. By taking a closer look at this case and having a general awareness of the impact of domestic violence in the LGBTQ community, practitioners can gain helpful insight and better serve clients.

Brittney and Glory's problems were first thrust into the spotlight while they were engaged to be married. In June 2015, both were arrested following a domestic violence incident in their Maricopa County Arizona home. Though no one was seriously injured, Brittney's sister called the police when the two could not be physically separated after arguing for hours.[2] Despite appearances, just three weeks after the incident, Brittney and Glory reconciled and went forward with a wedding ceremony. *People Magazine* shared exclusive footage and the two appeared to be back on the road to a healthy marriage. Less than a month into the marriage, Glory announced that she was carrying the couples' child.[3]

In a surprising turn of events, Brittney filed for an annulment the day following Glory's pregnancy announcement. In pleadings, Brittney alleged that Glory had been sexually involved with an ex-boyfriend throughout the dating relationship and engagement. Brittney also claimed that she entered the marriage under duress.[4] Unable to annul the marriage, Brittney would later refuse to pay child support until Glory produced medical records showing that the unborn children (Glory was carrying twins) were the product of donor insemination and not Glory's ex-boyfriend. Though not biologically related, Brittney, whose annual earnings were calculated at $1.1 million, eventually agreed to pay substantial child support to Glory. Although most LGBTQ clients are unlikely to carry the double-edged sword of publicity, this case brings to light many of the unique legal and systemic issues faced by LGBT individuals where domestic violence is an added factor.

Intimate Partner Violence in the LGBT Community

In 2013, the Center for Disease Control released the National Intimate Partner and Sexual Violence Survey (NISVS), one of the first studies that covered victimization by sexual orientation. The data showed that women who identify as lesbian or bisexual, experience rape, physical violence, and stalking by an intimate partner at higher rates than other surveyed groups. Specifically, 43.8 percent of lesbians and 61.1 percent of bisexual women report victimization compared to 35 percent of heterosexual women. However, it is important to note that the overwhelming majority of bisexual and heterosexual women victimized (89.5% and 98.7%, respectively) reported only male perpetrators, while 67 percent of self-identified lesbians reported having only female perpetrators.[5] Bisexual men also experience intimate partner violence at higher rates than other groups with 37.3 percent of bisexual men reporting an incident of rape, physical violence, or stalking, compared to 29 percent of heterosexual men and 26 percent of gay men. Finally, transgender survivors were twice as likely to face threats and intimidation within relationships and 1.8 times more likely to experience harassment within violent relationships.[6] The individuals behind these stories present in a myriad of different contexts in family law cases; however, many are unlikely to be visible to the court for a number of reasons explained below.

Underreported and Unacknowledged

The perpetrator of domestic violence in a same-sex relationship may not be as easy to identify as in a heterosexual relationship. As we saw in the case of Brittney and Glory, the

police are more prone to arrest both parties in the absence of the traditional male-female power dynamic. The Griner case is somewhat of an anomaly, however, as LGBTQ domestic violence is vastly underreported. Studies indicate that not only is LGBTQ domestic violence underreported, when it is reported, it is often coded as something other than intimate partner violence.[7] For example, both Brittney and Glory ended up pleading guilty to disorderly conduct (as opposed to actual *domestic violence* offenses). Moreover, where both are arrested, charged, convicted, and sentenced to diversion programs–as was the case with Brittney and Glory[8]–the criminal case provides little guidance to a family court trying to determine the presence of power and control in the relationship.

Notwithstanding the advent of marriage equality, many people, including those in law enforcement, simply do not take domestic violence seriously when it occurs between two women. In one Michigan family law case, an opposing party repeatedly complained during mediation that his children were exposed to fights between his ex-wife and her female roommate. It took hours before any of the practitioners understood that his ex-wife was in a same-sex relationship. Unfortunately, the realization was not necessarily followed by an assessment of severity or concern. Instead, there was a tendency to dismiss the client's behavior as something less concerning. To best serve our clients, attorneys must follow-up on these red flags. The physical and verbal severity of the incidents and whether they are witnessed by the children are relevant to a custody determination. At minimum, the client may need support establishing a safety plan.

Power and Control within the Larger Context of Social Isolation

Though LGBTQ relationships include many aspects of power and control similar to heterosexual relationships, social marginalization of the LGBTQ community allows a perpetrator to exert control in ways that are not traditionally available to heterosexual couples. For example, community members often fear exposure of their non-traditional relationships to employers and family members.[9] The most common example of this is a partner who threatens to out his or her closeted same-sex partner to an employer. However, we can look to the Griner case to see related but unanticipated consequences of law enforcement's inability to identify a perpetrator. Prior to the domestic violence allegations, Brittney was not closeted; in fact, she was a role model, winning the prestigious Best Female Athlete Espy Award in 2012.[10]

In response to the arrests, the WNBA immediately suspended both players for seven games. There are several issues that practitioners should keep in mind when clients express concerns related to their employers and law enforcement. First, your client may be afraid to call the police for protection where there is a risk that both the assailant and victim will be arrested or charged. Second, be aware that your client may rightfully fear being outed to an employer as Michigan does not protect employees from discrimination based on gender identity or sexual orientation.[11] Finally, though a closeted party is understood to be more vulnerable than a non-closeted party, a wrongfully arrested victim – whether or not closeted – may be subjected to the criminal justice system, penalized by an employer, and humiliated before friends, family members, or other relevant social groups. Regardless of who may have been the aggressor, both Brittney and Glory were penalized by their employer and the criminal justice system.

In the event that an LGBTQ client does disclose intimate partner violence, practitioners should be careful not to offer a Personal Protection Order (PPO) as a one-size-fits-all solution. Other than the risk of being outed to an employer, a client might also fear isolation from a mutual social group for taking legal action.[12] LGBTQ individuals generally operate within smaller social groups with mutual friends. A perpetrator might try to alienate the victim from the support network, and group members might perceive a PPO to be too severe a remedy. Practitioners should be sensitive to the significance of a client's network, as this group often replaces unsupportive family members. Help your client work through the legal options, which could include a PPO, restraining order or "cease and desist" letter, and be supportive of their decision. For less severe cases that do not include threats of imminent harm and may be mediated safely, an LGBTQ mediator who is attentive to the dynamics involved may be able to identify a compromise that works for both parties. Moreover, the parties may feel more accountable to another community member than an advocate or third-party.

Invisibility and Bisexuality

Although it is estimated that 287,000 LGBTQ individuals reside in Michigan,[13] not all will be visible in our court system for a number of reasons. To make sure a client's needs are met, practitioners should not assume anything about a client's sexuality. For example, individuals who identify as bisexual may not disclose their sexual orientation to their attorneys and many individuals who engage in same-sex relationships do not identify as LGBTQ. Although statistics are not available, many women who identify as lesbians have children from prior heterosexual marriages. When the legal issue is centered on issues related to the prior marriage, the client's LGBTQ status or its relevance to the case may not be readily apparent. Clients may not disclose LGBTQ status for a number of reasons. However, the lack of disclosure is not a clear indication that a same-sex relationship is not a factor in a family law case. For example, Brittney's ex-wife Glory maintained that she was heterosexual throughout the entire relationship, and after the divorce was final, returned to dating men.[14] Like Glory, many do not find sexual orientation to be central or important to

their identity at all; others do not believe that engaging in a same-sex relationship is indicative of bisexuality. As a result, practitioners cannot depend on a client to self-identify or disclose what he or she may perceive to be irrelevant information. However, as an alarming percentage of bisexual women (61%) and men (47%) report experiencing intimate partner violence[15], another factor impacting a client's failure to disclose may be fear. And as stated earlier, 89% of bisexual women who report intimate partner violence identify only male perpetrators.[16] A client may fear that a former abusive male partner will use her sexual orientation against her in court. A client may not disclose abuse that he experiences at home with his current same-sex partner for fear that it will negatively impact his case custody case with his former wife. He may simply wish to avoid the negative social implications that too often attach to LGBTQ status.

Knowing a client's history or current LGBTQ status informs trial preparation and strategy. For example, a client's choice of romantic partners is often used as a distraction in a custody battle. An adverse party with power and control issues may argue that the other party's nontraditional relationship is a negative influence on the children. Although an argument based solely on morals may not carry much weight with courts, bullying experienced by the children due to a parent's sexuality may be compelling. Practitioners must be prepared to confront these dynamics. Where the other party insists on using the strategy as a means of exercising power and control, a practitioner will need to show the court how the allegations are part of a larger pattern of abuse.

Using the Children

Some perpetrators use children as weapons, deliberately neglecting or endangering them, or actively undermining their former partners' relationships with the children to intimidate a former partner. Using the children as a controlling tactic in a same sex relationship may take on a different meaning when the partner's legal claim to the children is tenuous. The systemic barriers that allow a parent to deny a former same-sex partner access to a child that the parties intended to raise together can be used as a form of power and control.[17] With the exception of reciprocal in vitro fertilization where after insemination, a woman's eggs are implanted and carried by her partner to term, most same-sex couples do not have a biological connection to minor children born during a relationship like heterosexual couples. Moreover, state sanctioned same-sex marriage bans that prevented many same-sex couples from jointly adopting children prior to a breakdown of the relationship only adds to the manipulation and control used by the other parent.

Strong political and social objections to same-sex marriage continue to be an obstacle to parental rights in contested cases involving LGBTQ parents. One example is the Alabama Supreme Court's recent refusal to acknowledge a second parent adoption from another state. Though the U.S. Supreme Court reversed that decision earlier this year,[18] the fact that the highest court of the land had to intervene is indicative of the negative impact that state-sanctioned inequality can have on a same-sex couple in the legal system. In many states, including Michigan, legally denying an intended parent's access to the parties' children can be an insurmountable form of power and control that courts are bound by law to respect. In same-sex relationships, perpetrators may be able to control a partner by reminding her that she has no legal right to custody.[19]

Though we generally think of using the children in the context of one parent denying the other access, perpetrators may use the children in a number of different ways. A same-sex parent may abandon a child conceived under a co-parenting plan to control or retaliate against their partner. Brittney attended appointments with Glory at the fertility clinic and was a party to the donor insemination contract. Arizona statute provides that a child is entitled to the support of the mother, as well as the mother's spouse where the spouse is the biological father or consented to the insemination.[20] However, that did not stop Brittney from demanding proof of parentage. While she did so before the children were born, a parent who has acted as a parent for an extended period may deny parentage or a relationship with the child to retaliate against the partner or cause the partner to be fearful about possible emotional harm to the child. Where a relationship is marked by tactics of power and control, the abusive parent could be using the child to punish the other party. The non-biological parent could threaten to deny or outright deny the children; the custodial parent could attempt to undermine the other parent's relationship with the child; or a biological parent might threaten to file for child support for a child that her same-sex partner did not intend to parent. Where additional legal steps must be taken before parental rights are solidified (e.g., adoption after surrogacy), an abusive party could simply choose not to complete that process. As the obstacles to justice are part of our legal structure, attorneys must be prepared to creatively navigate these issues and work through multiple levels of advocacy before a just resolution may be reached.

Intersectionality and the Transgender Community

Because the transgender community faces heightened social barriers, legal barriers are more pronounced. The NISVS report found that transgender survivors were two times as likely to face threats or intimidation within violent relationships, and nearly two (1.8) times more likely to experience harassment within violent relationships.[21] Like members of the LGB community, transgender individuals often have families with children. All parties involved may not be supportive of the person's identity, and engaging the court process is often

humiliating, intrusive, and punitive for the transgender individual. Thus, transgender clients may be even less willing than LBG individuals to risk disclosing their sexual identity to attorneys or others in the judicial system. Practitioners will need to work to increase the cultural competency of everyone involved. This usually means educating Child Protective Services, the Friend of the Court, judges, and other related court officials throughout a case.

Similarly, certain intersectional subgroups are at an increased risk of violence and systemic discrimination. Not only are transgender survivors over four times (4.4) more likely to face police violence than those who did not identify as transgender, but transgender individuals of color and transgender women experienced this violence at even higher rates as part of intimate partner violence.[22] Both Brittney and Glory are African-American, a group that reports not calling the police to report crimes including domestic assaults due to historical barriers, including police misconduct and mis-arrest.[23] Immigrant communities also report facing violent profiling, policing, and deportation due to hostile anti-immigrant programs and policies.[24] Practitioners must be aware that a client's failure to report a crime may be rooted in systemic distrust due to negative interactions with police and others in the justice system. Establishing a client's case as far as whether intimate partner violence occurred can be instrumental to obtaining a fair decision from the court. Expert testimony that provides cultural context for a client's decision-making rationale may improve a client's credibility.

Overall, becoming familiar with social and structural barriers and how those barriers impact LGBTQ victims of intimate partner violence plays a large role in advocating for clients. *Obergefell* laid important groundwork, but social barriers and legal limitations make intimate partner violence in LGBTQ relationships more difficult to remedy. As the landscape continues to change quickly, practitioners should see these cases as not only opportunities to provide the best possible results for clients, but also to educate courts and make the law more inclusive and protective of all families.

About the Author

S. Kerene Moore *is currently a supervising attorney for the Michigan Advocacy Program where and has represented underserved clients in civil legal matters for the past 9 years. She is a graduate of the University of Michigan Law School, and has a strong commitment to increasing access to justice for LGBTQ community members. She serves on the Ann Arbor Human Rights Commission, the Board of Directors for Equality Michigan, as Co-Chair of the Washtenaw County Bar Association's LGBTQ Rights Section, and as Vice President of the Jim Toy Community Center. She will be presenting two workshops and honored at the 2016 National LGBT Bar Association's annual Lavender Law Conference as one of the Best LGBT Attorneys Under 40.*

Endnotes

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10 Jackson, Naomi, *On Loving Broken Women and Brittney Griner*, ESPNW, June 3, 2016, *available at http://espn.go.com/espnw/voices/article/15909246.*

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13 Gates, GJ, Newport, F. 2013. LGBT Percentage Highest in D.C., Lowest in North Dakota. Gallup, Inc.

14 Reinhart, Mary K, *A Complicated Match Made on the Hardwood*, N.Y. Times, May 17, 2015 at ST1.

15 NIPSVS, *supra*.

16 Reinhart, *supra*.

17 Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence, A Report from the National Coalition of Anti-Violence Programs, 2013, at 9, *available at http://www.avp.org/storage/documents/ncavp_2012_ipvreport.final.pdf*

18 *V.L. v. E.L.*, 577 *U.S.* ___ (2016).

19 Though Michigan's judiciary recently expanded the equitable parent doctrine to include children born to same-sex married lesbian couples, where parents raising a child together failed to marry or obtain a joint adoption prior to marriage equality rulings, the parent with a legal or biological connection may choose to undermine the other party's relationship with the child. *See Stankevich v Milliron*, 313 Mich App 233 (2015); *cf Lake v. Putnam*, 2016 Mich. App. LEXIS 1297 (Mich. Ct. App. July 5, 2016).

20 A.R.S. § 25-501.

21 *See supra,* Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Intimate Partner Violence.

22 *Id.* at 9.

23 *Id.* at 6.

24 *Id.* at 5.

The Case of the Issue

By Henry S. Gornbein

Cindy Kay Maier -vs- Daniel Clayton Maier
For Publication June 25, 2015

The Issue

Review of the trial court's decision granting sole legal and sole physical custody to Defendant father.

Statement of Facts

The parties were married in 2002 and had a child three years later. This was a contentious divorce with numerous show cause hearings and several child protective services (CPS) investigations instigated by Plaintiff mother.

At the close of a lengthy custody hearing, the trial court granted Defendant father sole legal and physical custody of the nine-year-old child, and the Plaintiff was granted unsupervised parenting time with a standard visitation schedule. After an initial visit between Plaintiff mother and the child that was cacophonous, the trial court modified its order requiring that Plaintiff mother's visitation be supervised until and unless a psychological evaluation recommended otherwise.

The Court of Appeals

In her appeal, Plaintiff mother argued that the trial court's custody determination was erroneous for numerous reasons:

The reasonable preference of the child

The first issue was that the court failed to consider the reasonable preference of the child.

The Court stated that the right to have a reasonable preference considered attaches to the best interest of the minor, not to the rights of the contestants in the custody battle. An interview is merely one avenue from which to adduce a minor's capacity for preference.

It is not uncommon for children in the midst of family reorganization to be under the care of trained mental health care professionals from the trial judge can seek input on many of the best interest factors including preference.

In this case the trial judge did not interview the minor, but did make an implicit fact finding that this particular child could not formulate or express a reasonable preference, one that was not based upon the inherently indefensible basis of coaching and emotional distress. Court had before a record including the child's diagnosis of both depressive disorder and ADHD. In addition the record contained evidence of four unsubstantiated CPS complaints, testimony from therapists who opined that the minor was being coached in a traumatic visitation exchange that the minor perceived to be a kidnapping. While the court found the child was of sufficient age to be able to form an express a preference, his fragile emotional state, coupled with significant efforts to influence his preference, rendered him unable at the time to form a reasonable preference. The Court of Appeals held that the trial court had fulfilled its statutory duty.

Psychological evaluation

Plaintiff's next issue was that the trial court abused its discretion by reaching a custody decision without considering a psychological evaluation. The Court of Appeals disagreed because the failure to consider psychological evaluations cannot be the sole basis for overturning a trial court's decision on custody. The Court reiterated that psychological evaluations are not clues about any one issue or child custody factor and that the ultimate resolution of any child custody dispute rests with the trial court.

Failure to abide by court orders

Plaintiff further argued that the court erred in its consideration of her repeated failure to abide by court orders to obtain a psychological evaluation. The trial court determined that these were against her under MCL section 722.23, factor (f) and (l) any other factor. The Court of Appeals found that these were errors but harmless because four factors favored Defendant without any indication of error and none favored Plaintiff mother.

Bias

The Court of Appeals determined that there was no bias by the judge against Plaintiff mother.

In modifying the parenting time schedule after an emergency hearing and only a week after the trial court's initial ruling granting unsupervised visitation the Court of Appeals ruled that there was adequate evidence based upon the fact

that Plaintiff mother "cannot separate her own emotional distress and anxiety from her son's, cannot act in a manner that is in his best interest at this time and is clearly trying to undermine the defendant as a parent." Thus, the trial court's grant of parenting time was in the child's best interests.

Conclusion

For the reasons already stated the trial court was affirmed.

Comments

This case is worth reading in its entirety with regard to the fact the reasonable preference of a child can be learned without actually talking to a child as well as the fact that a psychological evaluation does not have to be considered in reaching a custody determination. It is also an example of parental alienation and a mother who cannot let go and move forward in a constructive manner.

About the Author

Henry S. Gornbein *is a partner with the law firm of Lippitt O'Keefe Gornbein, PLLC in Birmingham, Michigan. His practice is exclusively devoted to family law. He is a former chairperson of the Family Law Section of the State Bar of Michigan; a former president of the Michigan Chapter of the American Academy of Matrimonial Lawyers; former Chair of the Long Range Planning Committee for the National American Academy of Matrimonial Lawyers; member of the Oakland County Friend of the Court Citizens Advisory Committee; winner of the Professionalism Award from the Oakland County Bar Association in 2004; author of the "Spousal Support" Chapter of* Michigan Family Law*; author of "Case of the Issue" for the* Michigan Family Law Journal*, State Bar of Michigan; blogger for the* Huffington Post*; creator and host of the award-winning cable television show,* Practical Law*, now entering its 17th year; and Podcaster for DivorceSourceRadio.com. His new book,* Divorce Demystified, Everything You Need to Know Before Filing for Divorce*, is available on Amazon as a softcover or eBook.*


Professor Lex

By Harvey I. Hauer and Mark A. Snover
Hauer & Snover

Dear Professor Lex,

I have just been brought into a case in which the parties were divorced during their child's minority. The Judgment of Divorce entered by consent of the parties provided that both parties would share equally the cost of the child's college tuition until the child obtained a bachelor's degree. Subsequent to entry of the judgment, after the child obtained the age of majority, father incurred substantial medical expenses and is unable to meet his obligation relative to the tuition payments. Do you believe there is a basis to seek modification of his tuition obligation?

Dear Practitioner,

You should review the case of *Ovaitt v Ovaitt*, 43 Mich App 628, 204 NW2d 753 (1972). We believe the answer lies in said case. Therein the parties entered into a consent Judgment of Divorce. The judgment incorporated verbatim the terms of a written stipulation and property agreement. The pertinent provision of the judgment that is at issue in that case states:

> B. It is further ordered and adjudged that when the cross-defendant's obligation to support Wendy J. Ovaitt and Myron M. Ovaitt terminates as described in subparagraph A hereof, the said cross-defendant shall pay to the cross-plaintiff, through the office of the Friend of the Court for Genesee County, Michigan, for the support and maintenance of Wendy J. Ovaitt and Myron M. Ovaitt while attending college as follows: the sum of one hundred ($100.00) dollars for each child, on the first day of each term or semester of college, and in addition thereto, the sum of one hundred ($100.00) dollars for each child, on the first day of each month that said child is in attendance at an accredited college or university; provided, however, that this provision shall limit the cross-defendant's obligation for support to a total of three (3) terms per year, if said college is on a term basis, or two (2) semesters per year, if said college is on a semester basis. Said support payments as heretofore described shall continue so as to provide four (4) years of college for each child. Thereafter, the cross-defendant shall be relieved of all obligations to support said children. Said support payments shall include the defrayment of ordinary health expenses incurred in behalf of Wendy J. Ovaitt and Myron M. Ovaitt. *Id*. at 630.

The husband filed a motion to terminate his obligation, as set forth above, to pay for his daughter's college expenses upon her reaching the age of majority, yet the daughter, at that time, was still attending college. The wife filed a motion to find the husband in contempt of court for failing to follow the above provision. The trial court terminated the husband's obligation to pay for the above college expenses. The wife appealed as of right.

The Court of Appeals narrowed the issue to *"whether the agreement between the parties providing for post-majority support, which is incorporated into the Divorce Judgment, serves to provide the court with enforcement power which it would not have in the absence of such agreement." Id. at 632.*

As this issue was of first impression for Michigan, the Court of Appeals looked to out-of-state law and cited an Ohio case. The Court of Appeals stated, in part, that:

> In the absence of Michigan decisions, several cases from other jurisdictions have been cited as authority. We deem *Robrock v Robrock*, 167 Ohio St 479; 150 NE2d 421 (1958), most worthy of analysis because of its recent date and the fact that it is most closely in point with the case at bar. Further, Ohio's applicable statutes in this respect are similar to ours.
>
> The Ohio Supreme Court by a four to three decision in that case held that where a husband agreed to pay college expenses and insurance premiums for his children and the agreement was incorporated into a divorce decree, said decree was binding upon the husband even though the required performance might extend beyond the children's *635 minority. Further, the decree could be enforced by the court even though the court, in the absence of an agreement between parties, would not have had the power to make the decree. *Id.* at 634-635.

After concluding its analysis, the Michigan Court of Appeals then held:

> As we read MCLA 552.17a; MSA 25.97(1), we believe that the court has jurisdiction to make an order or judgment for support and college expenses for the children of the parties who are minors at the time of entry of such order or judgment. We find no statutory prohibition against continuing such order or judgment provisions for support and other benefits beyond minority. Further, we believe in the present technological age in which we live that it is not unreasonable to extend support to include provisions for a college education for the minor children of the parties even though such requirement would extend beyond the children's minority. Having reached that conclusion, we believe that the provisions of the judgment of divorce as originally entered by the court providing for support and college expenses to a completion of the college education, even though it would extend beyond the children's minority, was a valid exercise of the court's discretion and within its power under the statutory authority allowing such provision for minor children.
>
> Under the facts of this case, where the parties entered into an agreement that was incorporated by the court in its judgment, and the parties concede they knew at the time that the terms were not subject to performance fully within the minority of the children, it would be an invitation to chaos to hold that such provision was not enforceable. It would permit parties to divorce actions to play fast and loose with the court and with the other parties to the action by entering into agreements which they had no intention of performing.
>
> Plaintiff's conduct indicates a deliberate and willful misrepresentation to the court and opposing party at time of agreement and entry of judgment with respect to post-minority expenses of the children. As a matter of public policy, this should not be permitted and the parties should be required to live up to the terms of their voluntary agreement. The judgment entered here pursuant to the agreement of the parties did not violate the statute in that, at the time of its entry, the children were minors.
>
> Having reached the conclusion that the support and college expenses provision as originally entered in the judgment was proper, we take another look at MCLA 552.151; MSA 25.151, which deals with the enforcement of support provisions of a judgment of divorce. The language of this section also indicated that if the order was entered during the minority of the child that its terms are enforceable by contempt proceedings. We see no bar or prohibition to such enforcement in any of our statutes nor in the cases decided thus far. *Id.* at 638-639.

The above case illustrates that a court does have the authority to enforce such a provision. It further demonstrates that it will not modify such a provision. Nonetheless, it must be noted that the parties in this case entered into their Judgment of Divorce by consent and stipulated and incorporated their agreement regarding the payment of post majority college expenses relative to their children into their Judgment of Divorce.

The above response is not meant to serve as a solution to a case. That would require complete disclosure of all facts in the case, including client consultation. Rather, the intent is to provide informal guidance based upon the facts that have been presented. The inquiring lawyer bears full legal responsibility for determining the validity and use of the advice provided herein.

Please send questions for Professor Lex to *Hhauer@hauersnover.com*. Include "Professor Lex" in the e-mails subject line.

About the Authors

Harvey I. Hauer, *Hauer & Snover, PC, is a Fellow of the American Academy of Matrimonial Lawyers and the former president of the Michigan Chapter. He has also served as chairperson of the State Bar of Michigan Family Law Section, the Michigan Supreme Court Domestic Relations Court Rule Committee and the Oakland County Bar Association Family Law Committee. He has been named by his peers to Best Lawyers in America, Super Lawyers and Leading Lawyers. He is a co-author of Michigan Family Law.*

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The Family Law Section

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The Family Law Section

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TAX TRENDS AND DEVELOPMENTS

Tax Affecting Plan Loans -

Should the Participant Receive a Credit Against Future Tax for Loans Drawn and Used During Marriage?

By Joseph W. Cunningham, JD, CPA

Consider the following example:

1. Parties - A and B - were married on 7/1/96 and divorced 20 years later on 6/30/16
2. B has been a particpant in her employer's 401(k) plan since before marriage. At marriage, the account balance was $30,000.
3. B had no plan loan balance at time of marriage, but she drew a $50,000 loan from the plan during marriage to provide funds for a family vacation home in northern Michigan.
4. At divorce, the 401(k) account consisted of $100,000 in investments and a remaining loan balance of $20,000.
5. Since the loan funds were used for marital purposes, the unpaid plan loan is a marital debt.
6. Based on these facts, A and B will divide the $70,000 net increase in the account during marriage. A's $35,000 will be paid from non-loan plan assets.
7. B will also receive $35,000 of non-loan assets as well as the $20,000 plan loan receivable for which she is responsible to repay (essentially, to herself).
8. The following presents the division of the account value, including the plan loan receivable.

Overall Summary	Value of Investments	Loan Balance	Total Account Balance
June 30, 2016	100,000	20,000	120,000
July 1, 1996	30,000	0	30,000
Increase	70,000	20,000	90,00

Activity During Marriage "Partnership"	A	B	Total
Investment Value Increase	35,000	35,000	70,000
New Loans	25,000	25,000	50,000
Loan Repayments	(15,000)	(15,000)	(30,000)
Sub-Total	45,000	45,000	90,000
Net Loan to be Paid	(10,000)	(10,000)	(20,000)
Net Value to Divide	35,000	35,000	70,000

Division of the $70,000 Net Value	A	B	Total
Investment Value Increase	35,000	35,000	70,000
Plan Loan Receivable		20,000	20,000
Loan Repayment Obligation		(20,000)	(20,000)
	35,000	35,000	70,000

Comments

1. As the above indicates, the $70,000 increase in the account occured during marriage.
2. B will be responsible to pay the $20,000 loan balance. But, she is essentiality paying this to herself, with the caveat noted below.
3. **Caveat:** She'll be using after-tax dollars to repay pre-tax dollars in her 401(k) account. The $20,000 loan balance represents funds received tax free into the "marital pot" that were used to acquire a marital asset.
4. Since B will repay the $20,000 with after-tax dollars, essentially she is paying A's tax on half the $20,000 - that is, $10,000. At a 25% combined federal-state rate - it's $2,500. Shouldn't B receive a credit for this assumption of A's half of tax that is, substantively, a marital obligation?
5. We often tax affect retirement benefits when they are divided unequally. But, that is not typically done if a retirement benefit is divided equally - as in the example.

Take Away

Give the above due consideration if representing a plan participant who will be responsible for repaying a plan loan which provided funds spent for marital purposes.

About the Author

Joe Cunningham *has over 25 years of experience specializing in financial and tax aspects of divorce, including business valuation, valuing and dividing retirement benefits, and developing settlement proposals. He has lectured extensively for ICLE, the Family Law Section, and the MACPA. Joe is also the author of numerous journal articles and chapters in family law treatises. His office is in Troy though his practice is statewide.*

Military Pension Division and the 2017 Radical Rewrite

By Mark E. Sullivan

Introduction

The 2017 Department of Defense Appropriation bills from the House and the Senate have similar provisions for rewriting entirely the process of military pension division upon divorce in a majority of the states. Upon passage, the law would require *all* military retired pay to be divided according to the rank and years of service at the time of the pension division order. This new nationwide standard would overrule pension division requirements in all but half a dozen states. Here are some questions to clarify the issues and the problems.

What's Happening?

What do you mean, a "radical rewrite"? Give me an example of what the changes would do.

Let's say that John Doe just retired as a sergeant major (E-9) in the Army with 30 years of service under his belt. He was divorced from Mary Doe ten years ago; they married when he entered the Army. The pension division order was entered on the date of divorce, when he was a sergeant first class (E-7) with 20 years of creditable service.

In 90% of the states, the way it works is that John's actual retired pay would be divided, but Mary's share would be discounted to give John the benefit of the last ten years of post-divorce longevity and promotions. In virtually every state, Mary would receive 50% of 20/30 of John's *actual retired pay*.

The "new rule" would require the court to order for Mary 50% of *the retired pay of a sergeant first class* with 20 years of service (as if he'd retired on the date of the pension order). That would be a federal government requirement, regardless of what state law says her share should be. Mary would still be receiving half of the marital share, but her share would be frozen as of the date of the MPDO (military pension division order).

What problems would occur if this approach becomes law?

Since there have been no hearings, and there is no extensive committee analysis, we can only guess what the problems will be. Here are three which will certainly occur –

- **COLAs.** There is no mention of COLAs (cost-of-living adjustments) for Mary to allow her share to rise over time from John's pension division date to his actual retirement. Her dollar share will be fixed as of the date of the decree, like a fly frozen in amber. All of the COLAs would go to the military member or retiree.
- **"One Size Fits All."** In addition, there's no provision for settlements and agreed orders so that the parties could decide on a different method of pension division. About 90-95% of all military pension orders are done by settlement. Unless a consent order rigidly complies with the "fixed benefit" requirement, it will be rejected by the retired pay centers (Defense Finance and Accounting Service, or DFAS, for cases involving the Army, Navy, Air Force and Marine Corps, and the Coast Guard Pay and Personnel Center for pension division orders as to the U.S. Coast Guard and the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration). The parties are no longer free to settle their cases in their own way—they have to comply with the decree of Congress.
- **Immediate Payment.** In California and all of the western community property states, the law allows a spouse's share to be determined based on the rank of the military member when the retired pay begins or else – upon the spouse's choice – at the time of divorce with pay based on that rank and years of service, with payments to begin immediately. Yes, that's right—immediate payments, even though the member has not yet retired. Well, the logical result of this new rule will be for every spouse to demand immediate payments, since the rank and years of service must be frozen at the time of the MPDO. Why should a spouse wait till the day that pension payments start? All spouses will demand immediate payment, rather than postpone the monthly pension share.
- **Removal to Federal Court.** Plus there is no reason why the disgruntled spouse/retiree can't open the door to federal court if he or she is not satisfied with how the state court divided the pension. When federal law establishes the test, then federal law preempts any contrary substantive provision in state law. If there were an issue or challenge on pension division, why wouldn't a party have

the right to remove the case to federal district court on *federal question jurisdiction*? When a state court judge (against the claims and wishes of a litigant) makes a determination that is at odds with the statute, or writes the order incorrectly and refuses to correct it, then the aggrieved party would be able to petition to remove the case to federal court.

- **No Time for Adjustment.** The new rule will require legislative changes in most of the states, but there's no decent interval set out to allow the states to write up, propose and enact laws consistent with the "new rule." Enough time must be allowed to let the states implement the new rule, yet none is granted. As a result, a warped formula will occur in most of the state MPDO's, one that imposes a double discount on the spouse. First of all, her share will be fixed and frozen at the rank and years of service at the time of the order. In addition, since state laws have not been rewritten to revise the "marital fraction," it will still be calculated based on years of marital pension service divided by total pension service years (marital years/total years), rather than marital pension service years divided by the years of pension service up to the date of the order. It is essential to stop the clock for the denominator at the date of the MPDO since the benefit is also fixed at that date. Anything else would doubly dilute the pension benefit granted to the spouse. See *Douglas v. Douglas*, 2014 Tex. App. LEXIS 12398 (holding that, in a "hypothetical clause," the denominator is months of creditable service during marriage up to the date of divorce, rather than the date of retirement, citing *Berry v. Berry*, 647 S.W.2d 945, 946-47 (Tex. 1983); accepting the husband's proposition that denominator should be total years of service would impermissibly dilute the ex-wife's share acquired during parties' marriage). Yet no time is allowed for state legislatures to adjust to the change and rewrite the state laws.

Is anyone in Congress even aware of all these problems?

Probably not. These time bombs and landmines show clearly the error in trying to insert into the U.S. Code a new national standard for military pension division when this issue hasn't been studied, has received no hearings, and in reality should be left for state court decisions. State lawmakers have far more knowledge about these matters than members of Congress, who have never before enacted substantive rules on how to divide the military pension.

This bill represents a huge expansion of Congressional power over family law issues. When it was passed in 1982, the Uniformed Services Former Spouses' Protection Act wisely avoided the intrusion issue; it created a structure that is a respectful acknowledgment of state laws and courts, which have preeminent powers and expertise in this area.

"Tighten Up" – The Federal Straightjacket

Why would Congress want to dictate to the states how they are to divide pensions for military personnel?

That's the "24-carat question." The expertise of Congress in division of federal pensions is best described as NONE. That's because Congress makes the broad general laws allowing the division of the six federal pensions (military, Foreign Service, CIA, federal civil service [CSRS or FERS] or Railroad Retirement). Pension provisions in the U.S. Code do not "get down in the weeds" to tell the states how to do their job.

These proposals intrude in a field which has always been reserved for the states. Why should *Uncle Sam* step in, take over and dictate the outcome? Each case is unique, and a single national standard would tie up military cases involving pension division into a federal straightjacket.

State Expertise vs. "A National Standard"

How are the states doing in this arena?

Fewer than ten states (including Texas, Florida, Oklahoma, Tennessee, Kentucky and Maine) require the "Frozen Accrued Benefit" method, which is another name for this method of pension division. This approach "fixes the retirement benefit" that was earned as of the date of separation or divorce.

All the rest, either by statute or by court decision, use the "Time Rule" in dividing a defined benefit plan, whether it's civil service, state government, military, local government or a private pension.

- The *time rule* approach involves the presumptive share of 50% for the spouse or former spouse times the actual retired pay of the retiree.
- Then, to discount the benefit and give the member credit for post-divorce longevity and promotions. This is multiplied by the *marital fraction,* which is years of marriage during employment divided by total years of employment. This reduction factor makes sure that the former spouse will not be overpaid.

Over the last 30+ years, the states have entered hundreds of thousands of orders for the division of military retired pay. They have built up a substantial body of case law and statutory rules regarding how the division is done. The pension order is required to be fair, neutral and even-handed, regardless of whether the retiree or employee is the *husband* or the *wife*, whether it's a "safe job" like an office worker, or one fraught with danger, such as a soldier, policeman, CIA agent or firefighter. The states have the responsibility, and they're doing their job.

The *time rule* in the vast majority of states would be cast aside in favor of ONE SIZE FITS ALL. The "federal rule" for military pension division – all without hearings in Congress – will require that the pension divided would be fixed at the rank and years of service of the military member at the time of the court order making the division.

How about the other five federal retirement systems? Does Congress dictate how they do the division of the pension?

No. Congress has left the job to the states for how to divide these five other federal pensions.

Where's the current law found regarding division of military pensions?

It's contained in the Uniformed Services Former Spouses' Protection Act ("FSPA"), which is found at 10 U.S.C. § 1408. At the time FSPA was passed, there was a clear understanding in Congress that the states would be granted the power to divide military pensions (or refuse division). The federal government was accorded limited powers, such as the power to enforce orders through garnishment and the duty to ensure that federal jurisdiction tests were met.

Where's The Beef?

So who is claiming that FSPA needs radical surgery?

You be the judge. Here's an April newspaper piece - 4/28 article by Tom Philpott -- *Northwest Florida Daily News*:

> **Ex-Spouse Law Tweaked** — The 1982 Uniformed Services Former Spouses Protection Act allows divorce courts to divide military retired pay as property jointly earned in marriage.
>
> Congress hasn't considered even modest changes to the USFSPA for more than a decade. But on Wednesday freshman congressman Steve Russell, R-Okla., a combat veteran and retired infantry officer, won bipartisan support for a USFSPA amendment to benefit members who divorce after the defense bill is enacted into law.
>
> Russell took aim at a "windfall" feature of the USFSPA that retirees have criticized for decades. If a member is not retired when divorced, state courts often award the ex-spouse a percentage of future retired pay.
>
> In effect, that allows the value of the "property" to rise based on promotions and longevity pay increases earned after the divorce. In 2001, the Armed Forces Tax Council said this was inconsistent with treatment of other martial assets by divorce courts.
>
> The amendment would end the windfall in future divorce cases by directing that an ex-spouse's share of retirement must be based on a member's grade or rank at time of divorce.
>
> Making such a change retroactive would force recalculation of tens of thousands of divorce settlements, an unpopular idea with ex-spouses. So the change is prospective only. But both Republicans and Democrats praised the amendment as fair. It cleared committee on an uncontested voice vote.

What's this business about a "windfall"?

That's anyone's guess. In the "zero-sum game" of divorce, *everything* can be labelled a windfall if it benefits one side to the detriment of the other. If the husband gets the house, the wife claims that he got a windfall. If the wife receives a share of the husband's 401K plan, he's sure to shout about the windfall that she received. As a practical, factual matter, there are NO windfalls in the world of military divorce and pension division. But lots of people write to Congress about their own divorce and how unfair certain things are, and they may not like how certain state rules apply to them.

Thus, for example, California and several other community property states allow the pension to be divided based on final retired pay, or else divided at the time of divorce with payouts commencing immediately (based on the rank and years of service of the military member at that time). Is that a "windfall" for the former spouse?

On the other hand, Puerto Rico does not allow the dividing of military pensions at all. Indiana and Arkansas require the pension to be "vested" to be divided, which means the spouse gets nothing when there's less than 20 years of service. North Carolina requires the spouse to get expert testimony on valuation of the military pension, or else it cannot be divided at trial, making it a steep, uphill battle for the non-military partner. Alabama requires the pension to be vested and evaluated and obtained through ten years of military service concurrent with ten years of marriage. Maine does not allow the apportionment of COLAs (cost-of-living adjustments) to the former spouse. Are all of these state rules "windfalls" for the military member?

Congress has done nothing to eliminate any of these alternative methods found in the 50 states. It now proposes, however, to create a single nationwide standard – the "Frozen Accrued Benefit" approach – to require that the division of retired pay always and everywhere be based on the rank and years of service of the member at the time of the court order for division.

Is this new? Has Congress tried this before?

There have been attempts to rewrite FPSA (or to remove it entirely from the federal law landscape) going back decades. Every time someone in Congress has tried to change the law in this area, the American Bar Association and other critics have asked, "Where's the beef?" What is the problem?

A Solution in Search of a Problem

So what is the problem that this proposal is supposed to be solving?

There is no reported case in which a court determined that the *time rule*, the present system of pension division in most states, created a "windfall" for the former spouse. The bill is *a solution in search of a problem*. Where is the problem which would allegedly be solved by such legislation? There's a simple answer – no such problem exists. With no defined problem as the reason for these bills, one has to wonder why we would want to change the law in most of the states, thus creating unfortunate, costly and easily foreseeable new consequences in military pension division cases.

Even if there WERE a problem, where does it say that Congress gets to do this? Can Congress tweak, change and correct anything in state procedures that it thinks might be "unfair"?

Congress has never held the power to reach out and correct what it thinks should be changed in the laws of the states. Our nation has, as it should, a vast variety of methods of reaching a fair and just division of marital or community property. FSPA was meant to protect these varied methods of dividing military retired pay, since they have been developed in state courts and legislatures over the last 30+ years.

Who's So Special?

Why are *military pensions* to be given such special treatment?

No one knows. The new rule will require statutory or case law revisions in 90% of the states because it makes the military pension *super-special.* And it does so without any recognition of terms for state court division of all the other defined benefit plans (e.g., IBM, state government, local government) or even the federal defined benefit plans which Congress has enacted (i.e., FERS, CSRS, CIA, Foreign Service, Railroad Retirement).

Perhaps some readers will be reminded of the text from George Orwell's *Animal Farm* – "All animals are equal; but some animals are more equal than others." Thus military retirees are so super-special that they have to have their pensions divided by a Congressional edict, unlike every other federal, state or private pensioner. For example, no one who's retired from the State Department, the Federal Marshal's Service or the CIA is treated to this type of federal division requirement upon divorce. It's reserved for only military retirees.

I thought that the courts could give consideration to how the efforts of "Mary Doe" and her husband during the marriage could benefit him in terms of future promotions.

That's right. The *time rule* is based on the "marital foundation theory," which recognizes that the individual's final retired pay is based on a foundation of marital effort; a servicemember would never have attained the rank of sergeant major (with 30 years of service) if it hadn't been for the efforts expended during the marriage up to the rank of sergeant first class over 20 years, when the parties divorced. That's one reason why a large majority of states have adopted the time rule for dividing pensions of all kinds and stripes – it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., Mary Doe's inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

How are pensions divided now at the retired pay centers?

The military pension award may be a –

- Fixed dollar amount;
- Percentage of retired pay;
- Formula clause (e.g., 50% of 120 months of marital pension service divided by X total months of creditable service times final retired pay); or
- Hypothetical award, fixing the benefit at a specific time for rank and years of service purposes (such as "the pay of a sergeant first class with over 20 years of service at the date of divorce/separation").

State courts may, depending on what is fair and equitable, use any of these approaches as allowed by state law. The FSPA revision would torpedo this "state law approach." It would dictate the use of the hypothetical award (above) or "fixed benefit" approach for every case, whether settled or tried, and regardless of whether it produces a fair or unjust result.

Helping (or Hindering!) the Servicemember

Is the fixed benefit clause easy to do?

"Fixed benefit" division is the hardest to handle of the four pension clauses mentioned above. But everyone will have to know how to do it. Since almost no one now can write one competently without a lot of research and a handful of Excedrin, this means the cost of military divorce will go up once again, with rejection letters flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval.

Then it's back to the drawing board for another crack at it, or else farm it out to some expert who can do it properly (IF there's enough information available to figure it out, including the member's "High-3" annual compensation) (and an expert can be located) (and enough money is left to pay the expert draftsman for the next stab at this!).

Where can I find an explanation of the "time rule" and the "fixed benefit" approaches to pension division?

For an explanation of the difference between these approaches, see—

- Brett R. Turner, *Equitable Distribution of Property* § 6.26 (3d ed. 2005 and 2015 Supp.)
- *Prescott v. Prescott*, 736 So. 2d 409 (Miss. Ct. App. 1999)
- *In re Marriage of Hunt and Raimer,* 909 P.2d 525 (Colo. 1996).

The *Hunt and Raimer* case contains a limited summary of "Time Rule" states –

> "The "time rule" formula has been approved by a number of jurisdictions. *See, e.g., Cooper v. Cooper,* 167 Ariz. 482, 808 P.2d 1234, 1242 (Ct.App.1990), *review denied,* (Ariz. May 7, 1991); *In re Marriage of Freiberg,* 57 Cal.App.3d 304, 127 Cal.Rptr. 792, 796 (1976); *Stouffer v. Stouffer,* 10 Haw.App. 267, 867 P.2d 226, 231 (1994); *Warner v. Warner,* 651 So.2d 1339, 1340 (La.1995); *Lynch v. Lynch,* 665 S.W.2d 20, 23-24 (Mo.Ct.App.1983); *Rolfe v. Rolfe,* 234 Mont. 294, 766 P.2d 223, 226 (1988); *Gemma v. Gemma,* 105 Nev. 458, 778 P.2d 429, 431 (1989); *Berry v. Meadows,* 103 N.M. 761, 713 P.2d 1017, 1023 (Ct.App.1986); *Welder v. Welder,* 520 N.W.2d 813, 817 (N.D.1994); *Woodward v. Woodward,* 656 P.2d 431, 433-34 (Utah 1982)."

Where are these House and Senate provisions located?

The terms in the Senate bill, S. 2943, are found at Sec. 642; the House equivalent is H.R. 4909, Sec. 625. Sen. John McCain of Arizona is the sponsor for the Senate Bill and Rep. Mac Thornberry of Texas is the sponsor for the House Bill.

American Bar Association Opposition

Where does the ABA stand on rewriting FSPA? The American Bar Association has been on record for over three decades on the role of Congress and the states in the division of military retired pay. As stated in the 1998 Congressional testimony of Las Vegas attorney Marshal Willick, representing the ABA:

> There are two formal statements of policy by the ABA. One was in 1979, urging that all forms of deferred compensation be allowed to be subject to State dissolution laws, and the other one in 1982, in the wake of *McCarty* [*McCarty v. McCarty*, 453 U.S. 210 (1981)], and that was a formal policy, again, strongly urging specifically that military retirement be made divisible as would any other asset so that military members are treated like civilian employees of the Federal Government, employees of State governments, and private citizens all throughout the United States.

The ABA is on record opposing any attempt to "federalize" the means of dividing military retired pay.

And the American Bar Association has made it clear that complex family matters are best reserved to the states, which over the course of time have developed appropriate expertise and mechanisms to make fact-driven determinations regarding military pension division. Federal efforts to legislate the division of military retired pay depart from the long-standing history of deference to state laws in matters involving property division.

What can I do to stop this?

If you are opposed to such a radical rewrite of FSPA and the removal of the powers, duties and abilities of the states to handle military pension division, then write your Senators and your Representative to urge them to stop this ill-advised scheme… or at least to conduct hearings on the issue (as happened when Congress passed FSPA in 1982) so that the voices of those affected—attorneys and their clients—may be heard.

Conclusion

These FSPA rewrite proposals contain serious flaws. Passage in the Department of Defense Authorization Act for Fiscal Year 2017 would lead to a major intrusion into federal court for courts, lawyers, servicemembers, former spouses and retirees. It will certainly cost them dearly in time and money spent in court and with attorneys. Family law attorneys should contact their representatives in the House and the Senate. State bars and bar associations should let their voices be known regarding this a radical revision of federal law, by means of clear and strong resolutions and statements on the record. If enough voices are heard in Washington, these unnecessary and harmful changes may *never* become federal law.

About the Author

Mr. Sullivan *is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of* The Military Divorce Handbook *(ABA, 2nd Ed, 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.*

Recent Published and Unpublished Cases

(Summarized by the State Bar Family Law Council Amicus Committee Members)

Published Cases

Lake v Putnam, ___ Mich App ___,
No. 330955 (Jul. 5, 2016)

This same sex couple had a relationship from 2001-2014, and about five years into the relationship, Putnam gave birth to the minor child at issue. Shortly after the parties' relationship ended, Putnam denied Lake's requests to spend time with the child. Lake filed for parenting time, and Putnam filed a motion for summary disposition, arguing that Lake was an unrelated third party who lacked standing to seek parenting time. The trial court denied the motion and ordered supervised parenting time.

The Court of Appeals stated that under the Child Custody Act, the Legislature has limited standing for third parties to two circumstances"— under MCL §722.26b (involving third-party guardians or limited guardians) or MCL §722.26c(1)(b) (involving scenarios where the minor child's biological parents never married, where one of the child's parents has died or is missing and the other parent does not have legal custody, and where the third person is related to the child). Noting that Lake is a third person under MCL §722.22(k) (defining "third person" as "an individual other than a parent"), and not a parent under MCL § §722.22(i) (defining "parent" as "the natural or adoptive parent of a child"), the Court held that Lake simply does not satisfy one of the limited circumstances for standing under the third party statutes.

The Court rejected Lake's claim of standing under Michigan's equitable-parent doctrine. The Court reasoned that a crucial, and dispositive, requirement for the equitable-parent doctrine to apply is that the child must be born in wedlock, citing *Van v Zahorik*, 460 Mich 320, 330; 597 NW2d 15(1999) (the equitable parent doctrine applies only "to a child born or conceived during the marriage"). The Court also stated that it is not within courts' discretion to retroactively transform an unmarried couples' past relationship into marriage for custody proceedings in light of the United States Supreme Court's decision in *Obergefell v Hodges*, ___ US ___; 135 S Ct 2584; 192 L Ed 2d 609 (2015).

The Court stated that Lake's due-process and equal-protection claims appears to be an argument that she is being treated unfairly due to her sexual orientation. The Court held that such an assertion is not factually supported by the record or legally supported by existing authority, because had she been married to the child's biological parent, regardless of whether the biological parent was male or female, the outcome of this appeal would have been different. The Court also noted that there was no evidence that the parties intended to marry, the parties never made an effort to marry in another jurisdiction, and the parties chose not to have plaintiff adopt the child when they resided in Florida despite being legally able to do so. The Court further stated that Lake cannot assert constitutional rights on behalf of the child.

Concurring, Judge Shapiro stated that the facts as alleged by Lake do not fully test the scope of *Obergefell's* application to Michigan's equitable-parent doctrine, and that under different facts a different result may be required. He would adopt the Oregon approach and hold that a party is entitled to seek equitable parental rights arising out of a same-sex non-marital relationship where the evidence shows by a preponderance of the evidence that but for the ban on same-sex marriage in the parties' state of residency, they would have married prior to the birth of the child.

Mabry v Mabry, Mich Sup Ct No. 153082
(Aug. 2, 2016, amended Aug. 3, 2016), and
Kolailat v McKennett, Mich Sup Ct No. 153075
(Aug. 2, 2016).

Addressing legal issues similar to that in *Lake v Putnam*, the Supreme Court issued orders denying leave to appeal, in *Mabry v Mabry* and *Kolailat v McKennett*. Justice McCormick, joined by Justice Bernstein, dissented stating that leave should be granted to consider whether *Obergefell v Hodges* compels Michigan to apply the equitable-parent doctrine to custody disputes between same-sex couples who were unconstitutionally prohibited from becoming legally married.

Tyler v Tyler, ___ Mich App ___,
No. 32676 (Jun. 30, 2016)

The Court of Appeals affirmed a dismissal of a complaint for divorce where the parties had had children together before the marriage, and the complaint indicated there were no children "from this current marriage," because MCR 3.206(A)(5)(b) requires that a complaint state whether the parties have minor children ("whether there are minor children of the parties or minor children born during the marriage").

Unpublished Cases

Rozmiarek v Rozmiarek, unpublished
Mich Ct App No. 330980 (Jul. 26, 2016)

The Court of Appeals affirmed the trial court's finding of no changed circumstances or proper cause to revisit custody of a toddler where the plaintiff was convicted of assaulting her 17-year-old daughter from a previous relationship, HM, while plaintiff was driving under the influence of morphine. In an earlier order, the trial court found no changed circumstances or proper cause where the defendant had raised those allegations (and others) while the allegations were under CPS investigation, because those allegations were known to defendant before entry of the prior order. The defendant did not appeal that earlier order. A couple of months later the defendant filed another motion alleging that the plaintiff had been charged with child abuse, and pleaded no contest to attempted child abuse, with defendant claiming this was an escalation of the original circumstances, authorizing a finding of changed circumstances or proper cause under *Dailey v Kloenhamer*, 291 Mich App 660,666; 811 NW2d 501 (2011).

The Court of Appeals affirmed the trial court's determination that defendant had failed to establish proper cause or a change of circumstances because, at the time of the earlier order, he could have sought adjournment of the pending the CPS investigation, and the plaintiff did not receive jail time or other conditions of her sentence that would affect her ability to parent.

Judge Jansen dissented on the ground that the criminal charges and no contest plea arising from plaintiff's abuse of her 17-year-old daughter established proper cause and a change of circumstances warranting modification. The charge and no contest plea constituted an escalation of the issue that existed when the court entered the last custody order because the claims against plaintiff went from speculative to concrete once the charges were filed, in that, while defendant knew about plaintiff's altercation, he did not know that plaintiff initiated the incident, nor what the CPS investigation entailed. The fact that plaintiff abused her other child significantly affected the toddler's well-being as it indicated a heightened chance that the toddler would also be abused.

Crater v Crater, unpublished
Mich Ct App No. 327250 (Jul. 19, 2016)

The Court of Appeals affirmed the trial court's refusal to allow mother to change a child's residence from Traverse City to New York City where, *inter alia*, the facts favoring mother under two of the factors under MCL §722.31(4) were wholly dependent on the ephemeral nature of financial benefits received from mother's boyfriend, who had no legal duty to continue his financial support.

With regard to attorney fees, the Court affirmed the trial court's findings regarding the parties' ability to pay fees, and need for a fee award, but remanded for a determination of the amount of fees incurred in the divorce proceeding, including submission of the attorney's invoices or other evidence.

Skindell v Skindell, unpublished
Mich Ct App No. 326574 (Jul. 19, 2016)

The clear and convincing standard applies when weighing the minor child's best interests, under the Revocation of Paternity Act, MCL §722.1443(4), in determining whether to revoke plaintiff's paternity. While *Demski v Petlick*, 309 Mich App 404; 873 NW2d 596 (2015), did not explicitly adopt this standard, it suggested that the trial court had indeed used the clear and convincing evidentiary standard when rendering a best interest determination. The Court also found that the trial court erred in barring admission of any evidence prior to the 2009 judgment of divorce, but the Court indicated that this ruling did not mean that all pre-judgment information was necessarily admissible, noting specifically allegations in the divorce parties' pleadings.

Judge Boonstra concurred in part, but dissented with regard to reaching the issue of the evidentiary standard to be applied on remand.

Zawilanski v Marshall, unpublished
Mich Ct App No. 330495 (Jul. 12, 2016)

The Court of Appeals vacated an interim order awarding petitioner grandmother grandparenting time in an amount equivalent to the parenting time awarded a noncustodial parent. Given that plaintiff was denying some, but not all, grandparenting time, in order to overcome the fit-parent presumption, petitioner had to show that plaintiff's denial of the amount of grandparenting time that exceeded her recommendation created a substantial risk of harm to the child. See MCL §722.27b(4). No evidence was presented on this question. The Court found that the plaintiff-mother was deprived of the benefit of the fit-parent presumption because the court had ignored the fact that plaintiff had agreed to grandparenting time and had offered petitioner a grandparenting-time schedule, and also by concluding against the great weight of the evidence that petitioner rebutted the fit-parent presumption.

Richardson v Pearson, unpublished
Mich Ct App No. 326251 (Jun 21, 2016)

The Court of Appeals affirmed the property division in a judgment of divorce, noting with respect to the plaintiff's military pension, that, while 10 USC §1408(d)(2) precludes entry of a Domestic Relations Order unless the party meets the 10/10 rule (10 years of marriage during 10 years of military service), it does not prevent division of the military pension in the divorce, and distribution of the military pension by other means than a DRO.

Family Law Political Action Committee

In 1997, a voluntary Political Action Committee (PAC) was formed known as the Family Law Political Action Committee. The PAC advocates for and against legislation that directly affects family law practitioners, and the PAC lobbyist has contact with, and access to, legislators involved with family law issues. Contributions to the PAC are one way for you to help influence legislation that directly affects your practice as a family lawyer. The Family Law PAC is the most important PAC, since it affects the lives of so many people, adults and children alike. Your assistance and contribution is needed to ensure that this PAC's voice will continue to be heard and valued by the legislators in both the State Senate and House of Representatives.

Please help the PAC by making a contribution today!

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J. Matthew Catchick, Esq., Catchick Law PC, 29829 Greenfield Rd, Ste 101, Southfield, MI 48076

Attached is my check payable to the *Family Law PAC* in the amount of:

$50 $100 $150 Other

Name and P–number

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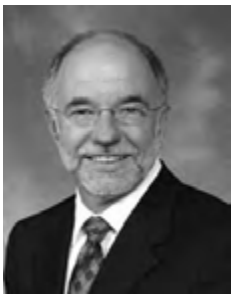
City State Zip

Telephone Fax E –mail

Please make your check payable to **Family Law PAC**.

Please, no corporate checks. Thank you for your assistance!



Legislative Update

By William Kandler, Lobbyist & Stephanie Johnson
Kandler Reed Khoury and Muchmore

Lansing has been relatively quiet since the last FLJ Legislative Update with the legislature in recess for the summer. Earlier in July, we were saddened to hear of the sudden passing of Representative Julie Plawecki (D-Dearborn Heights). She was an outstanding lady and represented her constituents very well. She took on many significant issues such as domestic violence and environmental protection and she will be greatly missed.

For the 2016 election cycle the State House, two seats for the State Board of Education, two Michigan Supreme Court seats, several judgeships across the state, U.S. Congress and the President are all up for election. The majority of House members are currently in their home districts actively campaigning and gearing up for the August 2 primary election. As you may know, the outcome of the majority of House races is decided in the primary as many districts are drawn in such a way as to virtually guarantee the political party affiliation of the chosen representative.

This election cycle, the House will have forty open seats due to legislators being termed out of office and the death of Rep. Plawecki. Only a handful of these seats are considered competitive, meaning the voters in the district could elect either a republican or a democrat. These seats are crucial to both political parties as the outcome of these races in the November 8th general election will determine which party will control the House for the next two years.

Obviously, another wild card in this year's House elections is the influence of the presidential candidates on races further down the ballot. This year's presidential races have been slightly unorthodox and what impact national politics will have on local and state races is largely unknown.

As August 2 approaches, KRKM will be tracking the outcome of the primary elections in preparation for the Nov. 8th General election and the upcoming 2017-2018 legislative session.

HJR L	SAME-SEX MARRIAGE (Moss) Repeals constitutional prohibition of same-sex marriage and civil unions. Bill Text Introduced (3/24/2015; To Families, Children and Seniors) Position: Support
SJR I	SAME-SEX MARRIAGE (Warren) Repeals constitutional prohibition of same-sex marriage and civil unions. Repeals section 25 of article I of the state constitution of 1963 to allow the recognition of marriage or similar unions of two people Bill Text Introduced (3/24/2015; To Judiciary) Position: Support
HB 4023	CHILD CARE (Kosowski) Limits hours children can be left in child care. Am. 1973 PA 116 (CL 722.111 to 722.128) by adding Sec. 1b. Bill Text Introduced (1/15/2015; To Families, Children and Seniors) Position: Oppose
HB 4024	NEWBORN LEAVE TIME (Kosowski) Creates Birth of Adoption Leave Act to give new parents certain time off work. Bill Text Introduced (1/15/2015) Position: No Position
HB 4028	RESPONSIBLE FATHERS (Kosowski) Creates Responsible Father Registry to provide putative fathers with notice of certain proceedings. Am. Sec. 2805, 1978 PA 368 (CL 333.2805) as amended by 1996 PA 307; adds Secs. 2893, 2893a, 2893b, 2893c, 2893d and 2893e. Bill Text Introduced (1/15/2015; To Families, Children and Seniors) Position: Support
HB 4071 (PA 50)	CHILD CUSTODY (Barrett) Modifies requirement to file motion for change of custody or parenting time order when parent is called to active military duty. Amends 1970 PA 91 by amending section 7a (MCL 722.27a), as amended by 2012 PA 600. Bill Text Signed by the Governor (6/10/2015; Signed: June 8, 2015; Effective: September 7, 2015) Position: Support

HB 4132	FAMILY LAW (Geiss) Provides for right to first refusal of child care for children during other parent's normal parenting time. Amends 1970 PA 91 (MCL 722.21 to 722.31) by adding section 7c. Bill Text Introduced (2/3/2015; To Families, Children and Seniors) Position: Oppose
HB 4133	SECOND PARENT ADOPTION (Irwin) Provides for second parent adoption. Amends 1939 PA 288 by amending sections 24, 41 and 51 of chapter X (MCL 710.24, 710.41 and 710.51), section 24 as amended by 2012 PA 614, section 41 as amended by 1994 PA 222 and section 51 as amended by 1996 PA 409. Bill Text Introduced (2/3/2015; To Families, Children and Seniors) Position: Support
HB 4141	FAMILY LAW (Runestad) Mandate joint custody in every custody dispute between parents except in certain circumstances. Amends 1970 PA 91 by amending sections 5 and 6a (MCL 722.25 and 722.26a), section 5 as amended by 1993 PA 259 and section 6a as added by 1980 PA 434. Bill Text Introduced (2/5/2015; To Families, Children and Seniors) Position: Oppose
HB 4170	VETERAN COMPENSATION (Franz) Excludes veteran disability compensation from marital estate. Amends 1846 RS 84 by amending section 18 (MCL 552.18), as amended by 1991 PA 86. Bill Text Committee Hearing in House (10/13/2015) Position: Oppose
HB 4188 (PA 53)	RELIGIOUS CONVICTIONS (LaFontaine) Allows objection to placements by child placing agency based on religious or moral convictions. Amends 1973 PA 116 (MCL 722.111 to 722.128) by adding sections 14e and 14f. Bill Text Signed by the Governor (6/11/2015, Presented 6/10/2015; Signed: June 11, 2015; Effective: September 9, 2015; earlier Presented) Position: Oppose
HB 4189 (PA 54)	RELIGIOUS CONVICTIONS (Santana) Allows objection to placements by child placing agency based on religious or moral convictions. Amends 1999 PA 288 (MCL 710.21 to 712B.41) by adding section 23g to chapter X. Bill Text Signed by the Governor (6/11/2015, Presented 6/10/2015; Signed: June 11, 2015; Effective: September 9, 2015; earlier Presented) Position: Oppose
HB 4190 (PA 55)	RELIGIOUS CONVICTIONS (Leutheuser) Allows licensure of child placing agency that objects to placements on religious or moral grounds. Amends 1939 PA 280 (MCL 400.1 to 400.119b) by adding section 5a. Bill Text Signed by the Governor (6/11/2015, Presented 6/10/2015; Signed: June 11, 2015; Effective: September 9, 2015; earlier Presented) Position: Oppose
HB 4223	ADOPTION LEAVE (Kosowski) Requires businesses with 50 or more employees to offer adoption leave. Bill Text Introduced (2/19/2015; To Commerce and Trade) Position: No Position
HB 4374	SAME-SEX MARRIAGE (Irwin) Removes prohibition on same-sex marriage. Amends 1846 RS 83 by amending sections 2, 3 and 9 (MCL 551.2,551.3 and 551.9), sections 2 and 3 as amended by 1996 PA 324 and to repeal acts and parts of acts. Bill Text Introduced (3/24/2015; To Families, Children and Seniors) Position: Support
HB 4375	SAME-SEX MARRIAGE (Zemke) Removes prohibition of same-sex marriage from foreign marriage act. Amends 1939 PA 168 by amending section 1 (MCL 551.271), as amended by 1996 PA 334 and to repeal acts and parts of acts. Bill Text Introduced (3/24/2015; To Families, Children and Seniors) Position: Support
HB 4376	SAME-SEX MARRIAGE (Wittenberg) Allows issuance of marriage license to same-sex couples without publicity. Amends 1897 PA 180 by amending section 1 (MCL 551.201) as amended by 1983 PA 199. Bill Text Introduced (3/24/2015; To Families, Children and Seniors) Position: Support

HB 4411	DOMESTIC VIOLENCE VICTIMS (Singh) Prohibits housing discrimination for domestic violence victims. Amends 1976 PA 453 by amending the title and section 502 (MCL 37.2502), the title as amended by 1992 PA 258 and section 502 as amended by 1992 PA 124. Bill Text Introduced (3/26/2015; To Judiciary) Position: Support
HB 4412	DOMESTIC VIOLENCE VICTIMS (Irwin) Creates exception from disqualification from receiving benefits when leaving employment for domestic violence victim. Amends 1936 (Ex Sess) PA 1 by amending sections 17 and 29 (MCL 427.17 and 421.29), section 17 as amended by 2011 PA 269 and section 29 as amended by 2013 PA 146 and by adding section 29a. Bill Text Introduced (3/26/2015; To Commerce and Trade) Position: Support
HB 4413	DOMESTIC VIOLENCE VICTIMS (Hovey-Wright) Creates address confidentiality program for victims of domestic violence crimes. Bill Text Referred in House (11/10/2015; To Criminal Justice) Position: Support
HB 4414	SICK LEAVE (Brinks) Expands criteria use of sick leave. Bill Text Introduced (3/26/2015; To Commerce and Trade) Position: Support
HB 4476 (PA 93)	DOMESTIC RELATIONS (Santana) Limits mediation in certain domestic relations actions. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 1035. Bill Text Signed by the Governor (5/3/2016; Signed: May 3, 2016; Effective: August 1, 2016) Position: Support
HB 4477 (PA 91)	APPEALS (Kesto) Provides for alternative service of papers if party is protected by protected order. Amends 1961 PA 236 by amending sections 227 and 316 (MCL 600.227 and 600.316). Bill Text Signed by the Governor (4/26/2016; Signed: April 26, 2016; Effective: July 25, 2016) Position: Oppose
HB 4478 (PA 94)	PERSONAL PROTECTION ORDERS (Kosowski) Includes harming animals owned by the petitioner in acts that may be enjoined. Amends 1961 PA 236 by amending section 2950 (MCL 600.2950), as amended by 2001 PA 200. Bill Text Signed by the Governor (5/3/2016; Signed: May 3, 2016; Effective: August 1, 2016) Position: Support
HB 4479 (PA 87)	PREGNANT WOMEN (Price) Increases penalties for assault of a pregnant woman. Amends 1931 PA 328 by amending section 81 (MCL 750.81), as amended by 2012 PA 366. Bill Text Signed by the Governor (4/26/2016; Signed: April 26, 2016; Effective: July 25, 2016) Position: No Position
HB 4480 (PA 95)	DOMESTIC VIOLENCE (Heise) Modifies factors determining best interest of child in cases of domestic violence. Amends 1970 PA 91 by amending section 3 (MCL 722.23), as amended by 1993 PA 259. Bill Text Signed by the Governor (5/3/2016; Signed: May 3, 2016; Effective: August 1, 2016) Position: Support
HB 4481 (PA 96)	DOMESTIC VIOLENCE (Lyons) Prohibits custody or parenting time for certain parents of a child conceived through sexual assault or sexual abuse. Amends 1970 PA 91 by amending sections 5 and 7a (MCL 722.25 and 722.27a), section 5 as amended by 1993 PA 259 and section 7a as amended by 2012 PA 600. Bill Text Signed by the Governor (5/3/2016; Signed: May 3, 2016; Effective: August 1, 2016) Position: Oppose
HB 4482 (PA 51)	CUSTODY (Kesto) Modifies requirement to file motion for change of custody or parenting time order when parent is called to active military duty. Amends 1970 PA 91 by amending section 2 (MCL 722.22), as amended by 2005 PA 327. Bill Text Signed by the Governor (6/10/2015; Signed: June 8, 2015; Effective: September 7, 2015) Position: Support

HB 4563 (PA 248)	DOMESTIC VIOLENCE (Leutheuser) Authorizes contracting for services to assist victims of domestic violence. Amends 1846 RS 16 by amending section 110c (MCL 41.110c), as added by 1989 PA 77. Bill Text Signed by the Governor (12/22/2015; Signed: December 22, 2015; Effective: March 21, 2016) Position: TBD
HB 4622	HUMAN TRAFFICKING (Hovey-Wright) Provides for personal protection orders for victims of human trafficking. Amends 1961 PA 236 by amending section 2950a (MCL 600.2950a), as amended by 2010 PA 19. Bill Text Introduced (5/19/2015; To Judiciary) Position: Support
HB 4658 (PA 257)	CIVIL PROCEDURE (McCready) Allows collection of court-ordered financial obligations from judgements against the state. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 6096. Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: March 22, 2016) Position: TBD
HB 4731	MARRIAGE AND DIVORCE (Courser) Eliminate requirement for issuance of marriage license. Amends 1987 PA 180 by amending the title and sections 1, 2, 3 and 4 (MCL 551.201, 551.202, 551.203 and 551.204), the title and sections 1 and 2 as amended by 1983 PA 199 and by adding section 1a. Bill Text Introduced (6/17/2015; To Government Operations) Position: TBD
HB 4732	MARRIAGE AND DIVORCE (Courser) Eliminates requirement of marriage license and allows only clergy to solemnize marriage. Amends 1846 RS 83 by amending sections 2, 7 and 16 (MLC 551.2, 551.7 and 551.16), section 2 as amended by 1996 PA 324, section 7 as amended by 2014 PA 278 and section 16 as amended by 2006 PA 419. Bill Text Introduced (6/17/2015; To Government Operations) Position: TBD
HB 4733	MARRIAGE AND DIVORCE (Courser) Eliminate government facilitated marriage licenses, restores common law marriage and only allows clergy to solemnize marriages. Amends 1887 PA 128 by amending the title and sections 1, 2, 3, 4, 5, 6 and 8 (MCL 551.101, 551.102, 551.103, 551.104, 551.106 and 551.108) the title as amended by 1998 PA 333 and sections 2 and 3 as amended by 2006 PA 578 and by adding section 1a and to repeal acts and parts of acts. Bill Text Introduced (6/17/2015; To Government Operations) Position: TBD
HB 4742 (PA 255)	FAMILY LAW (Kosowski) Repeals uniform interstate family support act and recreates. Repeals 1996 PA 310 (MCL 552.1101 to 552.1901). Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: January 1, 2016) Position: TBD
HB 4743	FAMILY LAW (Kosowski) Updates reference to the uniform interstate family support act. Amends 1971 PA 174 by amending section 3 (MCL 400.233), as amended by 2014 PA 381. Bill Text Reported in Senate (12/2/2015; By Families, Seniors and Human Services) Position: TBD
HB 4744 (PA 256)	FAMILY LAW (Kesto) Updates references to uniform interstate family support act. Amends 1982 PA 295 by amending section 2 (MCL 552.602), as amended by 2014 PA 373. Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: January 1, 2016) Position: TBD
HB 4745	FAMILY LAW (Heise) Updates reference to the uniform interstate family support act. Amends 1982 PA 294 by amending section 2 (MCL 552.502), as amended by 2009 PA 233. Bill Text Reported in Senate (12/2/2015; By Families, Seniors and Human Services) Position: TBD
HB 4840	ADOPTION LICENSEES (Wittenberg) Requires adoption licensees to provide services to all applicants. Amends 1939 PA 288 by amending section 23g of chapter X (CL 710.23g) as added by 2015 PA 54. Bill Text Introduced (8/20/2015; To Families, Children and Seniors)
HB 4841	ADOPTION LICENSEES (Hoadley) Requires adoption licensees to provide services to all applicants. Amends 1973 PA 116 by amending sections 14e and 14f (CL 722.124e and 722.124f) as added by 2015 PA 53. Bill Text Introduced (8/20/2015; To Families, Children and Seniors)

HB 4842	ADOPTION/FOSTER CARE LICENSEES (Tinsley-Talabi) Requires adoption and foster care licensees to provide service to all applicants. Amends 1939 PA 280 by amending section 5a (CL 400.5a) as added by 2015 PA 55. Bill Text Introduced (8/20/2015; To Families, Children and Seniors)
HB 4845	CHILD RESIDENCE (Runestad) Reduces distance parents can move under custody orders; changes how distance is measured. Amends 1970 PA 91 by amending section 11 (CL 722.31) as added by 2000 PA 422. Bill Text Introduced (8/20/2015; To Judiciary)
HB 4855	FAMILY LAW (Glenn) Provides immunity for religious officials' refusal to solemnize a marriage based on violation of conscience or religious beliefs under certain circumstances. Amends 1846 RS 83 (MCL 551.1 to 551.18) by adding section 8. Bill Text Introduced (9/9/2015; To Government Operations)
HB 4858	FAMILY LAW (Gamrat) Provides for immunity for religious official refusing to solemnize a marriage based on conscience or religious beliefs under certain circumstances. Amends 1846 RS 83 (MCL 551.1 to 551.18) by adding section 8. Bill Text Introduced (9/9/2015; To Government Operations)
HB 4911	PATERNITY (Crawford) Allows option to disclose identity of paternity in a private adoption. Amends 1939 PA 288 by amending sections 36 and 56 of chapter X (MCL 710.36 and 710.56), section 36 as amended by 1996 PA 409 and section 56 as amended by 2014 PA 118. Bill Text Committee Hearing in Senate (5/11/2016)
HB 5028 (PA 230)	COURT ACCESS (Kesto) Allows electronic access to courts. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding chapter 19A. Bill Text Signed by the Governor (12/22/2015; Signed: December 22, 2015; Effective: January 1, 2016)
HB 5029 (PA 231)	COURT ACCESS (Heise) Allows electronic access to courts. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding sections 1986 and 1987. Bill Text Signed by the Governor (12/22/2015; Signed: December 22, 2015; Effective: January 1, 2016)
HB 5030 (PA 232)	COURT ACCESS (Price) Allows electronic access to courts. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding chapter 1989. Bill Text Signed by the Governor (12/22/2015; Signed: December 22, 2015; Effective: January 1, 2016)
HB 5270	FAMILY LAW (Irwin) Includes circuit court judges as persons authorized to solemnize marriage. Amends 1846 RS 83 by amending section 7 and 16 (MCL 551.7 and 551.16), section 7 as amended by 2014 PA 278 and section 16 as amended by 2006 PA 419. Bill Text Introduced (1/28/2016; To Judiciary)
HB 5310	GUARDIANS (Lucido) Provides procedure for ward's relative to petition court for access to ward and requires guardian to notify interested persons of ward's admission to hospital. Amends 1998 PA 386 by amending sections 5308, 5310 and 5314 (MCL 700.5308, 700.5310 and 700.5314), section 5308 as amended by 2005 PA 204, section 5310 as amended by 2000 PA 54 and section 5314 as amended by 2013 PA 157. Bill Text Introduced (2/3/2016; To Judiciary)
HB 5504	STATUTE OF LIMITATIONS (Kesto) Modifies statute of limitations period under uniform fraudulent transfer act for action relating to qualified dispositions in trust. Amends 1998 PA 434 by amending 1, 4 and 9 (MCL 566.31, 566.34 and 566.39), section 1 as amended by 2009 PA 44. Bill Text Committee Hearing in House (5/17/2016)
HB 5505	TRUSTS (Kesto) Enacts qualified dispositions in trust act. Bill Text Committee Hearing in House (5/17/2016)
HB 5511	FAMILY LAW (Chang) Repeals lewd and lascivious cohabitation prohibition. Amends 1931 PA 328 by amending section 335 (MCL 750.335), as amended by 2002 PA 672. Bill Text Introduced (3/23/2016; To Criminal Justice) Position: Support
HB 5520	DIVORCE (Kesto) Eliminates divorce provisions regarding "wife's dower rights." Amends 1909 PA 259 by amending section 1 (MCL 552.101), as amended by 2006 PA 288. Bill Text Committee Hearing in House (5/3/2016) Position: Oppose
HB 5522	LEGAL FEES (Lucido) Eliminates sunset for annual increases in fee for publication of legal notice based on inflation. Amends 1961 PA 236 by amending section 2534 (MCL 600.2534), as amended by 2004 PA 506. Bill Text Committee Hearing in House (5/24/2016)

HB 5536	PARENTING TIME (Vaupel) Allows another family member to use parenting time when parent is on active duty outside Michigan. Amends 1970 PA 91 (MCL 722.21 to 722.31) by adding section 7d. Bill Text Committee Hearing in House (5/10/2016) Position: Oppose
HB 5638	WILLS AND ESTATES (Lucido) Allows descendent to exclude adult child by written instrument. Amends 1998 PA 386 by amending section 2004 (MCL 700.2404), as amended by 2000 PA 177. Bill Text Introduced (5/11/2016; To Oversight and Ethics)
HB 5641 (PA 269)	PERSONAL PROTECTION ORDERS (Barrett) Allows issuance of orders for transfer of wireless telephone numbers. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 2950n. Bill Text Signed by the Governor (7/1/2016; Signed: June 29, 2016; Effective: September 29, 2016)
HB 5642 (PA 270)	PERSONAL PROTECTION ORDERS (Guerra) Requires wireless telephone providers to transfer numbers under court order. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 2950o. Bill Text Signed by the Governor (7/1/2016; Signed: June 29, 2016; Effective: September 29, 2016)
HB 5754	DRONES FOR STALKING (Darany) Expands definition of stalking to include certain uses of unmanned aerial drones. Amends 1931 PA 328 by amending section 411h (MCL 750.411h), as amended by 1997 PA 65. Bill Text Introduced (6/9/2016; To Criminal Justice)
SB 9 (PA 52)	PARENTING TIME (Jones) Modify requirement to file motion for change of custody or parenting time order when parent is called to active military duty. A bill to amend 1970 PA 91 by amending section 7 (MCL 722.27), as amended by 2005 PA 328. Bill Text Signed by the Governor (6/10/2015; Signed: June 8, 2015; Effective: September 7, 2015)
SB 227	SAME-SEX MARRIAGE (Hertel) Removes prohibition on same-sex marriage from family law. Amends 1846 RS 83 by amending sections 2, 3, and 9 (MCL 551.2, 551.3, and 551.9), sections 2 and 3 as amended by 1996 PA 324; and to repeal acts and parts of acts. Bill Text Introduced (3/24/2015; To Judiciary) Position: Support
SB 228	MARRIAGE LICENSES (Knezek) Allows issuance of marriage license to same-sex couple without publicity. Amends 1897 PA 180 by amending section 1 (MCL 551.201), as amended by 1983 PA 199. Bill Text Introduced (3/24/2015; To Judiciary) Position: Support
SB 229	SAME-SEX MARRIAGE (Smith) Removes prohibition on same-sex marriage from foreign marriage act. Amends 1939 PA 168 by amending section 1 (MCL 551.271), as amended by 1996 PA 334; and to repeal acts and parts of acts. Bill Text Introduced (3/24/2015; To Judiciary) Position: Support
SB 249	NO-FAULT INSURANCE (Hune) Amends cross-reference to no-fault act in the support and parenting time enforcement act to reflect amendments to the no-fault act. Amends 1982 PA 295 by amending section 25a (MCL 552.625a), as amended by 2009 PA 193. Bill Text Reported in House (4/23/2015; By Insurance) Position: Support
SB 252	UNEMPLOYMENT BENEFITS (Hertel) Creates exception from disqualification from receiving benefits when leaving employment for domestic violence victim. Amends 1936 (Ex Sess) PA 1 by amending sections 17 and 29 (MCL 421.17 and 421.29), section 17 as amended by 2011 PA 269 and section 29 as amended by 2013 PA 146, and by adding section 29a. Bill Text Introduced (4/14/2015; To Commerce) Position : Support
SB 253	MEDIATION (Bieda) Limits mediation in certain domestic relations actions. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 1035. Bill Text Introduced (4/14/2015; To Judiciary) Position: No Position

SB 254	PROTECTIVE ORDERS (Bieda) Provides for alternate service of papers if party is protected by a protective order. Amends 1961 PA 236 by amending sections 227 and 316 (MCL 600.227 and 600.316). Bill Text Introduced (4/14/2015; To Judiciary) Position: Oppose
SB 255	DOMESTIC VIOLENCE VICTIMS (Warren) Prohibits housing discrimination for domestic violence victims. Amends 1976 PA 453 by amending the title and section 502 (MCL 37.2502), the title as amended by 1992 PA 258 and section 502 as amended by 1992 PA 124. Bill Text Committee Hearing in Senate (5/26/2015) Position: Support
SB 256	SICK LEAVE (Ananich) Expands criteria for use of sick leave. Requires employers to permit use of sick leave to address issues arising from sexual assault, domestic violence, or stalking. Bill Text Introduced (4/14/2015; To Commerce) Position: Support
SB 257	DOMESTIC VIOLENCE VICTIMS (Emmons) Creates address confidentiality program for victims of domestic violence crime. Creates the address confidentiality program; provides certain protections for victims of domestic abuse, sexual assault, stalking, or human trafficking; and prescribes duties and responsibilities of certain state departments and agencies. Bill Text Introduced (4/14/2015; To Judiciary) Position: Support
SB 258	CHILD'S BEST INTEREST (Warren) Modifies factors determining best interest of child in cases of domestic violence. Amends 1970 PA 91 by amending section 3 (MCL 722.23), as amended by 1993 PA 259. Bill Text Introduced (4/14/2015; To Families, Seniors and Human Services)
SB 351	DIVORCE (Jones) Prohibits contacting a party to a divorce action for a certain time period. Amends 1961 PA 236 (MCL 600.101 to 600.9947) by adding section 914. Bill Text Received in House (6/11/2015; To Judiciary) Position: Support
SB 458 (PA 143)	PARENTAL RIGHTS (Schuitmaker) Clarify grounds for termination of parental rights under certain circumstances. Amends 1939 PA 288 by amending section 51 of chapter X (MCL 710.51), as amended by 1996 PA 409. Bill Text Signed by the Governor (6/7/2016; Signed: June 6, 2016; Effective: September 5, 2016)
SB 517	UNIFORM INTERSTATE FAMILY SUPPORT ACT (MacGregor) Repeals and recreates uniform interstate family support act (UIFSA). Makes uniform the laws relating to support enforcement; and repeals acts and parts of acts. Bill Text Received in House (12/1/2015; To Judiciary)
SB 518 (PA 253)	FRIEND OF THE COURT (MacGregor) Updates friend of the court reference to the uniform interstate family support act. Amends 1982 PA 294 by amending section 2 (MCL 552.502), as amended by 2009 PA 233. Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: January 1, 2016)
SB 519 (PA 254)	CHILD SUPPORT (Emmons) Updates child support reference to the uniform interstate family support act. Amends 1971 PA 174 by amending section 3 (MCL 400.233), as amended by 2014 PA 381. Bill Text Signed by the Governor (12/23/2015; Signed: December 23, 2015; Effective: January 1, 2016)
SB 520	PARENTING TIME (Emmons) Updates parenting time reference to the uniform interstate family support act. Amends 1982 PA 295 by amending section 2 (MCL 552.602), as amended by 2014 PA 373. Bill Text Received in House (12/1/2015; To Judiciary)
SB 558	DOWER RIGHTS (Jones) Repeals dower rights. Amends 1846 RS 66 (MCL 558.1 to 558.29) by adding section 30; and to repeal acts and parts of acts. Bill Text Committee Hearing in House (5/3/2016)
SB 559	DOWER RIGHTS (Jones) Eliminates requirement that judgment of divorce contain provisions regarding wife's dower rights. Amends 1909 PA 259 by amending section 1 (MCL 552.101) as amended by 2006 PA 288. Bill Text Received in House (11/5/2015; To Judiciary) Passed in Senate (11/5/2015; 34-4)

SB 560	WILLS AND ESTATES (Jones) Revises reference to dower in estates and protected individuals code to reflect abolition of dower. Amends 1998 PA 386 by amending sections 1303, 2202, 2205, and 3807 (MCL 700.1303, 700.2202, 700.2205, and 700.3807), sections 1303, 2202, and 2205 as amended by 2000 PA 54 and section 3807 as amended by 2000 PA 177. Bill Text Committee Hearing in House (5/3/2016)
SB 629	PARENTAL RIGHTS (Jones) Expands termination of parental rights to a child to include forcible rape where child results. Amends 1939 PA 288 by amending section 19b of chapter XIIA (MCL 712A.19b), as amended by 2012 PA 386. Bill Text Received in House (12/16/2015; To Judiciary)
SB 646	SECOND PARENT ADOPTION (Warren) Provides for second parent adoption. Amends 1939 PA 288 by amending sections 24, 41, and 51 of chapter X (MCL 710.24, 710.41, and 710.51), section 24 as amended by 2014 PA 531, section 41 as amended by 1994 PA 222, and section 51 as amended by 1996 PA 409. Bill Text Introduced (12/9/2015; To Families, Seniors and Human Services)
SB 742	ATTORNEYS (Casperson) Modifies eligibility requirements for attorney licensed in another state to practice law in Michigan. Amends 1961 PA 236 by amending sections 931, 937, 940, and 946 (MCL 600.931, 600.937, 600.940, and 600.946), section 931 as amended by 2000 PA 86, and by adding section 945. Bill Text Reported in Senate (6/8/2016; Substitute S-1 adopted; By Judiciary)
SB 811	SURROGATE PARENTING ACT (Warren) Repeals surrogate parenting act and establishes the gestational surrogate parentage act. Establishes gestational surrogate parentage contracts; allows gestational surrogate parentage contracts for compensation; provides for a child conceived, gestated, and born according to a gestational surrogate parentage contract; provides penalties and remedies; and repeals acts and parts of acts. Bill Text Introduced (2/23/2016; To Families, Seniors and Human Services)
SB 858 (PA 178)	PATERNITY REVOCATION (Jones) Clarifies revocation of paternity in cases where a child's birth is the result of criminal sexual conduct. Amends 2012 PA 159 by amending sections 13 and 15 (MCL 722.1443 and 722.1445) as amended by 2014 PA 374. Bill Text Signed by the Governor (6/14/2016; Signed: June 12, 2016; Effective: September 12, 2016) Position: Oppose
SB 882	PARENTING TIME (Hune) Allows another family member to use parenting time when parent is on active duty outside of Michigan. Amends 1970 PA 91 (MCL 722.21 to 722.31) by adding section 7d. Bill Text Introduced (4/13/2016; To Families, Seniors and Human Services)
SB 923	UNREGULATED CUSTODY TRANSFERS (Jones) Prohibits and provides penalties for unregulated custody transfer. Amends 1931 PA 328 by amending section 136c (MCL 750.136c), as added by 2000 PA 205. Bill Text Introduced (4/28/2016; To Families, Seniors and Human Services) Position: Oppose
SB 924	ADOPTION VIOLATIONS (Jones) Updates sentencing guidelines for certain adoption violations. Amends 1927 PA 175 by amending section 15f of chapter XVII (MCL 777.15f), as added by 2002 PA 206. Bill Text Introduced (4/28/2016; To Families, Seniors and Human Services) Position: Oppose
SB 925	CHILD TRANSFERS (Jones) Prohibits advertising or, soliciting or recruiting prospective or biological parents or guardians to participate in certain transfers of a child under certain circumstances. Amends 1939 PA 288 by amending section 55 of chapter X (MCL 710.55), as added by 1994 PA 222. Bill Text Introduced (4/28/2016; To Families, Seniors and Human Services) Position: Oppose
SB 926	PARENTAL POWER OF ATTORNEY (Jones) Prohibits use of parental power of attorney to permanently transfer custody of a child. Amends 1998 PA 386 by amending section 5103 (MCL 00.5103), as amended by 2004 PA 93. Bill Text Introduced (4/28/2016; To Families, Seniors and Human Services) Position: Oppose
HR 149	DOMESTIC VIOLENCE AWARENESS (Cox) A resolution to declare October 2015 as Domestic Violence Awareness Month in the state of Michigan. Bill Text Passed in House (9/24/2015; Voice vote, With substitute H-1)

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