MICHIGAN FAMILY LAW JOURNAL

A PUBLICATION OF THE STATE BAR OF MICHIGAN FAMILY LAW SECTION • ROBERT TREAT, 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*

* Breakfast at 9:00 a.m. and meeting commences at 9:30 a.m., unless otherwise noted

Saturday, January 5
Amway Grand Plaza, Grand Rapids

No February meeting - Mid-Winter Conference

Saturday, March 2
Crowne Plaza, Lansing

Saturday, April 6
Weber's Inn, Ann Arbor

Saturday, May 4
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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, Robert Treat, c/o State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, MI 48933, soudsema@mail.michbar.org

The *Michigan Family Law Journal* Endeavors to Establish and Maintain Excellence in Our Service to the Family Law Bench and Bar and Those Persons They Serve.

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(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 elizabeth.sadowski@gmail.com, or call her at (248) 652-4000.

To All Prospective Family Law Journal Authors:

On behalf of the Family Law Council, we are 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 Anthea Papista (aep@papistalaw.com) and Amy Spilman (spilman@eisenbergspilman.com) and write "Article for the Family Law Journal" in the subject line when you submit your article.

Article Due Date is One Month in Advance: Please submit your articles to Sue Oudsema at her email address above no later than the 15th day of the month preceding the next publication. In other words, if you wish to have your article considered for publication in February, please have your article to us by January 15th. 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 *State 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 Anthea Papista or Amy Spilman. 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 and Amy M. Spilman
Journal Committee Co-Chairs

Chair Message: Know Your Resources and Treasure Them

By Robert Treat, Family Law Section Chair 2018-2019

Much of the role of Chair is to continue the work that has already begun and address new items brought to attention, such as proposed legislation, court rules and requests for Amicus Briefs, etc. We'll do those things, and we'll deal with whatever lands on our desk, but beyond that, my vision this year is to focus on two very important things: Section membership and demographics, and cultivating the Family Law Council so its committees can get things done and we continue to elect qualified talent to Council.

Family law is the fourth largest section, with 2,773 members per the recent tabulation. We had been at around 2,500 members from 2008 until 2014, and realized a sizeable percentage of our membership was approaching retirement age. We made a concerted effort to bring in new attorneys with an interest in family law, and established attorneys who practiced family law but were not section members. And this brought us up above 3,000 members in the 2014-2015 year. Since then membership has declined slightly; the people who worked so hard on this effort had life events demand more of their time. Thanks to them, however, we know how to increase membership, and we will again focus on it this year. The benefits of Section membership are extremely valuable. We have the best Listserv anywhere; yes, anywhere. Our ListServ is the largest most active, effective, study group/information center/guidance resource I have ever seen. The experience, perspectives, willingness to help and camaraderie on our ListServ are alone enough to make Section membership worthwhile. The Annual Family Law Institute put on by the Institute for Continuing Legal Education ("ICLE") and the Family Law Section is an amazing thing to experience. Everyone is there. The faculty is top notch and the subject matter is always timely and relevant. The core concepts, intermediate/advanced, and bench and bar tracks run concurrently through one and a half fun and fast-moving days, interspersed with fine breakfasts, lunch and networking receptions. Let's not forget the bags of swag you can collect from vendors. It's a dream.

The Family Law Institute is not the only event, however. There is a Mid-Summer Conference put on in a cooler climate where the water is clear and clean, and a Mid-Winter Conference put on somewhere warm near a sandy beach. Both conferences offer great speakers on timely topics, and there are a lot of opportunities to network and participate in fun activities. There are also numerous ICLE seminars throughout the year, all of which have outstanding speakers on timely and relevant topics.

Then there is this *Family Law Journal*. Want to know what's going on? This Journal is the key. Steady as a beating drum, the *Family Law Journal* consistently provides well written articles on the current issues. The staff of this journal remarkably pulls all the articles together with informational and ad content to provide a must-have ready reference for anyone attempting to practice family law.

Let's not forget the membership. The people who work in family law are so capable and so in tune with living in our times, and they have such a broad perspective on issues and life in general. When I think of what kind of people I want to talk to and be around, they are it. What new lawyers or experienced lawyers or judges do you know who are missing out by not being a member of the Family Law Section?

The Family Law Council has elections every year. The term for seven of the twenty-one seats expire each year. To get great candidates requires a readiness to have dialogue with people who are interested in what we do but may not be aware of the various ways to get involved. Many people join committees and make valuable contributions through their committee work, but cannot make the commitment required of a council member. These individuals sometimes run for council later when their schedule allows a little time for it. Others are ready to run for council, but simply haven't had a conversation about it. There may be a very capable and willing individual who just needs someone to invite them to a meeting. Some people attend the meetings just to stay totally up to date on one particular issue. I can't tell you how many times people have remarked that they never realized how more in-touch they feel after attending Family Law Council meetings. I remember the epiphany I had when I first started attending

Council meetings. It struck me that this group of people really does have a voice, especially since the lobbying firm in Lansing informs us of proposed legislation and other issues. I then realized that since I was at the council meetings, I actually had a voice. We are not at the whim of poorly conceived legislation; we have a voice and can inform legislators how laws that bear on family law should be phrased and worded. We are part of the refinery.

Knowing your human resources is a job for everyone who wants to see the Family Law Section grow and thrive. We all treasure our relationships with others. Most of us are glad to be a resource to those with whom we have a valued relationship. I've learned that most people want to help and to be valued. Whether consciously or not, we all value the resource that is others, and we treasure them. Everyone knows someone who should be a member of the Family Law Section. Most of us know a few who could greatly benefit. If you aren't the type who likes to ask people to join, let someone who is involved in the Family Law Section/Family Law Council know, and we will reach out.

Who do you know who could benefit from being a Section member, participating in Family Law Section events and ICLE events, being on the ListServ, receiving the Family Law Journal, getting to know other members of the Section? You know someone. Who is it?

Who do you know who wants to help on a committee, is concerned about one or more issues, who aspires to leadership, who wants their individual voice heard, who wants the collective voice of the Family Law Section heard by the legislature and our higher Courts? You know someone. Who is it? Is it you?

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What’s H🔥T!

Are you the type of person who loves forms? Do you also enjoy making lists? Then you’re in luck! Effective beginning January 1, 2019, the SCAO form titled “Case Inventory Addendum” will be *required* when filing your complaint in a family law action.

Parties will be required to identify any family division cases involving any person identified in the complaint *including* family members of the person named in the complaint.

As a practice tip, attorneys may want to consider updating their new client intake forms to require parties to disclose both pending and resolved family law cases as well as identifying family members of the persons identified in the complaint/petition.

A copy of the case inventory addendum can be found here: *https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/mc21.pdf*.

Sahera G. 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 Court Committee and former chair of the committee; an Oakland County Bar Foundation member; State Bar of Michigan foundation member; co-editor of the State Bar of Michigan Family Law Journal*; immediate past President of the Referees Association of Michigan (RAM); past President of the Michigan Inter-Professional Association on Marriage, Divorce, and the Family, Inc.(MIPA); and a 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 Doctor 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 currently serves as a Friend of the Court Referee in Oakland County. He is a former chairperson of the Oakland County Bar Association Family Court Committee. He has served as a district court case evaluator for Oakland County. 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 several articles in the Oakland County Bar Association publication Laches. *He is an adjunct professor of Business Law at Oakland Community College.*

Submit your Hot Tip to Sahera Housey (houseys@oakgov.com) and Ryan O’Neil (oneilr@oakgov.com).

Approved, SCAO

STATE OF MICHIGAN
CIRCUIT COURT - FAMILY DIVISION
COUNTY

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(FAMILY DIVISION)

CASE NO.
PETITION NO.

Plaintiff’s name v Defendant’s name

In the matter of

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Examples of family division cases include personal protection orders, divorce, custody, paternity, child support, juvenile delinquency, and child protective proceedings. See MCL 600.1021 for a complete list.

Note: You must serve this form on the other parties with the summons and complaint or petition.

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Real Training for Real Judges: The Importance of Specialized Training for Domestic Violence Cases

By Hon. Adrienne Hinnant-Johnson and
Referee Shelley R. Spivack

Domestic violence cases are tough. As judicial officers hearing these cases, our orders go well beyond the paper they are written on. Our decisions can change and even save lives. Whether you are a district court judge hearing a case involving misdemeanor domestic violence charges, a circuit court judge deciding whether to grant a PPO, or a family court judge or referee trying to craft a custody and parenting time order for a family that has experienced physical and/or emotional violence, simple knowledge of the letter of the law is not enough.

In order to better enable judges to respond to the growing number of cases involving family and intimate partner violence, the National Judicial Institute on Domestic Violence (NJIDV) was created. Founded in 1998, the NJIDV is a collaboration between the National Council of Juvenile and Family Court Judges (NCJFCJ), the US Department of Justice, Office on Violence Against Women, and the nonprofit organization *Futures Without Violence*. According to its website the

> [NJDIV] has provided highly interactive, skills-based domestic violence workshops for judges and judicial officers nationwide since 1999. During the past 18 years, the NJIDV has developed a continuum of judicial education that currently includes the Enhancing Judicial Skills in Domestic Violence Cases (EJS) Workshop, Continuing Judicial Skills in Domestic Violence Cases (CJS) Program, Enhancing Judicial Skills in Elder Abuse Cases Workshop, Faculty Development, and Technical Assistance for state and regional adaptation and replication of NJIDV programs.

In June of 2018, the NJIDV held its four- day basic training, "Enhancing Judicial Skills in Domestic Violence Cases (EJS) Workshop," in Providence, Rhode Island. Along with 48 other judges and judicial officers hailing from New Hampshire to Kentucky to the state of Washington, the authors participated in one of the most intense and enlightening experiences of our lives. In this article we will share with readers our own personal reflections of the training as well as how it has affected the way we hear and decide cases in which domestic violence plays a role.

Judge Adrienne Hinnant-Johnson

I have been on the bench at the 36th District Court in Detroit for three years and currently serve as the Presiding Judge of the traffic division. The 36th District Court has a dedicated domestic violence criminal misdemeanor docket and at the request of my chief judge I attended the National Judicial Institute's domestic violence training seminar this past June. Prior to becoming a judge, my knowledge of domestic violence was from the perspective of a criminal defense attorney and my focus was on resolving my clients' legal issues in their best interest. Before attending the training, I viewed domestic violence in a fashion similar to other assaultive crimes, with only slight variances. After having attended this seminar, I now realize how different these cases are and how important it is to be properly trained to decide cases involving domestic violence.

My colleagues informed me that the training was intense and engaging, which proved to be a spot-on description. Upon arrival at the conference it was apparent that I would have the benefit of training with a diverse group of people. There were judges and referees of different ethnicities from across the nation with varying years of service on the bench in criminal, family and even civil PPO cases. This deliberate and conscious push to establish a diverse learning environment facilitated robust and insightful discussions during the group exercises. The training consisted of practical courtroom exercises in small groups in which each judge took on the role of either perpetrator, victim, judge, attorney or case worker. We were presented with real-life fact patterns and had to make rulings on the case. We discussed how to identify the signs of domestic violence in a case, as well as behaviors that are considered deadly and high risk, such as strangulation or gun possession. We learned about implicit bias, how everyone unconsciously attributes particular qualities to members of certain social groups, and how to recognize these biases in ourselves so we can move past them and adjudicate cases as fairly and impartially as humanly possible. The implicit bias sessions were insightful and refreshing for me as I now realize that we all carry them. Recognizing these biases in one's self is difficult and uncomfortable, but failure to do

so can cause you to look past certain behaviors which, as a judge presiding over a domestic violence case, can prove to be deadly for a victim.

The most moving part of the training session was the victim/perpetrator behavior exercise conducted in silence, where we were divided into groups to take on the role of perpetrator, victim, child or observer. We walked through scenarios of domestic violence between a married couple with children. The wife was the victim of domestic violence at the hands of her husband and with limited resources she must decide to either stay with her abusive husband or leave. Throughout the scenario I was able to gain an understanding of how isolated a victim can feel, how difficult it is to escape the abusive relationship and how deficient we are as a society and justice system in protecting the victims by intervening before a situation turns lethal.

The training is invaluable to say the least. It provided me with a tool box of knowledge I would not have gained otherwise. Within two days of returning to work, I presided over a domestic violence case and immediately identified the red flags that were discussed during the training session. It was an "ah-ha" moment for me and I know I was able to put the appropriate pre-trial conditions in place to protect the alleged victim as well as protect the defendant's rights under the presumption of innocence. It completely transformed how I view and handle domestic violence cases. Domestic violence is distinct from other assaultive cases as there is a power and control dynamic that is not generally present in other assaultive cases. It's our duty as judges to equip ourselves with the tools we need in order to properly recognize those issues so we can facilitate eradicating domestic violence from our communities.

Referee Shelley R. Spivack

"Step back," "process," "see how it fits together and informs you" – this is what stands out when I look at my notes from the last day of the "Enhancing Judicial Skills in Domestic Violence Cases (EJS) Workshop" that I attended in June of 2018. And, over the last several months, I find myself doing this on an almost daily basis. If I were to use cooking methods as a metaphor, this training more resembled a slow cooker than a microwave oven. Time was needed to process the ingredients so that the full flavor could be realized.

Lead Trainer Judge Jeffery Kremers, Presiding Judge of the Milwaukee Domestic Violence Court, explained that in designing this training, the faculty created a framework fo-

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cusing on the decision making process. "How" rather than "what" to decide would take center stage. With a view towards understanding the 'dynamics' of domestic violence, why victims and perpetrators act the way they do, the training uses an experiential approach. As stated by Judge Kremers, "if you don't understand what motivates a perpetrator or a victim, it is hard to respond." The way we 'respond' as judges is through the entry of orders. Thus, "crafting orders consistent with what we know about domestic violence," explained Judge Kremers, is really what the training is all about.

Judges are not a monolithic group, and the variety found in our group of 50 participants enhanced the vibrancy of the training. Jurists were male and female, rural and urban, and from criminal, family, and tribal courts as well as from single court jurisdictions. Working in small groups we experienced (as much as possible during a training) the dynamics of domestic violence. As our backgrounds differed, the lens through we which we saw and experienced the differing fact patterns and scenarios led to a much more nuanced understanding of this issue which cuts across racial, ethnic and class lines. It also allowed us to view the issue outside of the silos in which we practice. For example, even though I practiced criminal law for 18 years before I became a referee, I tend to think of domestic violence only in terms of the family law custody, parenting time, and support cases I now see on a daily basis. When, during the first exercise, I was chosen to be the judge in a case involving misdemeanor domestic assault charges, I felt like a first year law student the first time the professor called your name. And, I am sure, the criminal court judge when asked to decide the parenting time issue in the same fact pattern felt no differently than I.

For me, one of the most poignant and emotionally difficult exercises was that involving a child name Jared. Based on a true story of a child who was murdered by his father during court-ordered unsupervised parenting time, the exercise brought home to me what can happen if we, as well as other professionals, fail to adequately evaluate the level of risk to children in cases of domestic violence. As is the case in many jurisdictions within Michigan, different courts and professionals (criminal courts, family courts, probation officers, GALs, and CPS) work in silos. Information is not exchanged, and judges are given a limited set of facts which tell only part of the story. In addition, these facts are often relayed by individuals who lack an understanding of the nature of domestic violence and its impact upon children. In relying on only part of the story, we, as judges and referees, fail to assess the risk to both victims and their children. In Jared's case, we did not know of the case's tragic consequences while we were evaluating different pieces of information upon which to make a parenting-time decision. It was not until we watched a video re-enactment of the case that we realized how at each point in the decision making process, opportunities were missed that could have saved the life of a young child.

As a Family Court referee, both this training as well as the Advanced Training for Family Court Judges that I attended in October of 2018, have dramatically altered the way I look

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at each case and each individual who walks into my hearing room. Thinking of Jared, and the missed opportunities that arise when risk is not accurately assessed, I try to look at each case with new eyes. Realizing that risk is dynamic and inherently linked to a pattern of coercive control, I try to determine the current level of risk and how it may escalate as a result of any actions I may take. Using this assessment I try to craft my recommendations as carefully as possible to ensure the safety of the parties and the children.

The training also challenged us to "Explore, define, and refine your role as a judge, with the goal of advancing access to justice in your court and community." In other words, we were challenged to think outside of the box and look beyond the individual cases we hear on a daily basis. Suggestions included developing or working with Coordinated Community Response (CCR) systems to create a multi-sectored approach at the local level as well as working to create and/or enhance services such as supervised parenting time and safe exchanges.

As a FOC referee I rely heavily on information relayed to me by FOC caseworkers and staff. What I realized was missing from these reports was an understanding of the dynamics of domestic violence. Taking the challenge posed to us in Providence, upon my return I began working with our FOC deputy director and the training coordinator at our local domestic violence shelter to begin a series of trainings for all FOC staff on issues related to domestic violence.

While we as judicial officers cannot stop domestic violence, we can do our part to facilitate the healing process, while at the same time dispensing justice.

For more information about the NJIDV visit their website at: *https://njidv.org/*.

About the Authors

*Judge **Adrienne Hinnant-Johnson** graduated from the Howard University School of Law and currently serves as the Presiding Judge of the Traffic Division at the 36th District Court. She also serves as a Judge in the Street Outreach Court, Detroit which offers individuals who are homeless the opportunity to resolve certain civil infractions and misdemeanors by crediting their personal efforts to improve their lives toward their outstanding fines, costs and jail time. Judge Hinnant-Johnson is a member of the Association of Black Judges of Michigan and Delta Sigma Theta Sorority Inc. Prior to joining the bench in 2015 she maintained a successful criminal defense practice in the counties of Wayne and Oakland.*

***Shelley R. Spivack** is an Attorney-Referee with the Genesee County Family Court and a Lecturer in Women and Gender Studies at the University of Michigan-Flint. She is a member of the Family Law Council's Domestic Violence Committee and an assistant editor of the Family Law Journal. She also serves on the State Bar Publications Committee and as an assistant editor of the Genesee County Bar Beat. Referee Spivack is a past-president of the Referees Association of Michigan and is the co- founder of "Youth Arts: Unlocked," an organization which offers free arts workshops to detained youth in Genesee County.*

DIVORCE & FAMILY LAW MEDIATOR

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Professor Lex

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

Dear Professor Lex:

Can you assist me with the following factual scenario:

Husband, prior to marriage, gave Wife a modest engagement ring. Now that they are both in a much better financial situation than they were then, they both want to sell the ring and purchase a much more expensive engagement ring. The husband has requested an opinion from me as to the likelihood that he will be reimbursed for his contribution in the event of a divorce. Do you have any thoughts?

Dear Practitioner:

The ring is currently your client's wife's sole and separate property. See *Meyer v. Mitnick*, 244 Mich App 697, 703-704; 625 Nw2d 136 (2001). Therein the Court held:

> [A]n engagement ring given in contemplation of marriage is an impliedly conditional gift that is a completed gift only upon marriage. If the engagement is called off, for whatever reason, the gift is not capable of becoming a completed gift and must be returned to the donor.

If the replacement ring is purchased solely with Wife's sole and separate property, it will likely remain her sole and separate property.

If your client wants an assurance that his contribution will be returned to him, in the event of a divorce, he and his wife should execute a document so indicating. He must understand that the agreement would likely be nonbinding as it would constitute a postnuptial agreement which would likely not be enforceable.

You should also advise your client that he might be opening a Pandora's Box. By raising the issue of what might occur in the event of a divorce with regard to the ring he may be creating an irresolvable issue.

Answer respectfully submitted by Harvey I. Hauer and Mark A. Snover.

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* or *Msnover@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.*

Mark A. Snover, *Hauer & Snover, PC, has been named by his peers to Best Lawyers in America and Leading Lawyers in Family Law. He was named to the National Advocates, Top 100 Lawyers. Mr. Snover is listed in Martindale Hubbell's Bar Register of Preeminent Lawyers. He was also selected to the American Society of Legal Advocates, Top 100 Lawyers, and the National Association of Distinguished Counsels, Top 1 Percent. Mark served on the State Bar of Michigan Family Law Council. He is a frequent author in the family law arena.*

The Case of the Issue

Lamis H. Elahham, Plaintiff-Appellee/Cross-Appellant v. Mohamad B. Al-Jabban, Defendant-Appellant/Cross-Appellee.

Lamis H. Elahham, Plaintiff-Appellee/Cross-Appellant v. Mohamad B. Al-Jabban, Defendant-Appellant/Cross-Appellee.

For Publication: March 9, 2017

By Henry S. Gornbein and Lori K. Smith

The Issue

This interesting case deals with the Hague Convention and child custody as well as when a foreign marriage is deemed to be valid.

Statement of Facts

The parties were married in Syria in 1989. Defendant husband is a physician with his own medical practice. Plaintiff wife had a pharmacy degree from Syria but was not licensed as a pharmacist in Michigan. She was a stay-at-home mother throughout much of the marriage.

In late 2012, Plaintiff left the marital home in Grand Blanc, Michigan, and moved into the parties' apartment in Egypt. She took the parties' minor child with her. She then filed for divorce in January 2013. The case was tried with a contested judgment of divorce being signed on December 1, 2014.

There were numerous issues on appeal including attorney fees, property division, spousal support, child custody, and discovery sanctions.

The key issues that are significant were those involving child custody and spousal support.

The Court of Appeals

Child Custody

The court granted physical custody of the minor child to Defendant father as long as Plaintiff mother was living in Egypt.

Plaintiff mother argued that the court erred in not granting her physical custody while she was in Egypt.

During the trial, Defendant father moved for a directed verdict on the issue of whether the court could grant physical custody of the minor child to Plaintiff while she lived in Egypt. He contended that the trial court could not grant physical custody of the minor child in Egypt because Egypt was not a party to the Hague Convention on the Civil Aspects of International Child Abduction. Defendant further explained that if Plaintiff decided not to return the minor child to the United States in order to have parenting time with Defendant, the trial court could not enforce the parenting time order. The trial court agreed and granted sole physical custody to Defendant father.

MCL 722.27a(10) provides:

> Except as provided in this subsection, a parenting time order shall contain a prohibition on exercising parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction. This subsection does not apply if both parents provide the court with written consent to allow a parent to exercise parenting time in a country that is not a party to the Hague Convention on the Civil Aspects of International Child Abduction.

The parties did not dispute that Plaintiff intended to live in Egypt and that Defendant did not agree to the exercise of parenting time in Egypt. The sole issue was whether the trial court correctly determined that it could not grant Plaintiff physical custody of the minor child in Egypt because Plaintiff was precluded from exercising parenting time in a country that is not a party to the Hague Convention.

Plaintiff claimed that the statute would permit a parent with physical custody of a child to take the child to a country that is not a party to the Hague Convention. The Court of Appeals stated that the concern for international child abduction applies equally to the custodial and the noncustodial parent.

Spousal Support

The other key issue was the modification of spousal support based upon remarriage. The trial court stated that it reserved the right to amend or modify the ruling on spousal support based on a pending motion by Defendant husband that the Plaintiff wife has remarried and may be gainfully employed.

Defendant filed a motion to terminate or modify his spousal support obligation on September 23. 2014. He contended that his former wife had remarried and has stated that she is a pharmacist in Cairo.

The trial court after a hearing ruled that Defendant's spousal support obligation to the Plaintiff shall terminate upon the death of the payee, December 31, 2018, or one (1) year after the remarriage of the Plaintiff, whichever occurs first. The court also stated that upon the remarriage of the Plaintiff her monthly spousal support shall be reduced 50% of one-half of the present monthly amount.

The Court of Appeals ruled that this ruling was not an abuse of the trial court's discretion.

Plaintiff's Remarriage

The issue was also over whether there was sufficient evidence to establish that Plaintiff wife had remarried

There was conflicting testimony with the trial court holding that Plaintiff entering into a Katb el-Kitab (Kitab) with another man on June 11, 2014, was not a marriage contract.

Plaintiff testified that she was not married but that she was going back to Egypt with the intent to marry. She explained that she had a "Katb-Kitab" which is an engagement under the Islamic faith but not a remarriage.

For a remarriage to occur, there had to be steps taken in Egypt which were to take place in January of 2015. The marriage contract must be certified in Egypt by filing a lawsuit asking for a declaration opinion that the marriage is valid, which could take a couple of years to obtain. This was the testimony of an attorney who was licensed in Michigan and Egypt and the court found this testimony to be more credible than that of a Syrian Imam with a Ph.D in Sharia law. He admitted that he was not familiar with the laws of Egypt.

The court found that Plaintiff had taken the first step by having a Kitab and filing for its certification in Egypt but the Kitab does not indicate that the document was registered with any Egyptian city or certified by the government. Thus, the trial court was correct in ruling that the marriage had not been completed in Egypt.

Conclusion

The trial court was affirmed on all issues. The two most relevant and pertinent were dealing with the Hague Convention issues regarding custody and the definition of when a marriage has actually occurred.

Comments

This case is very interesting regarding its discussion of the Hague Convention and the facts that it applies regarding custody as well as parenting time. The discussion regarding when a marriage becomes valid is also very worthwhile. It is worth reading in its entirety.

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.*

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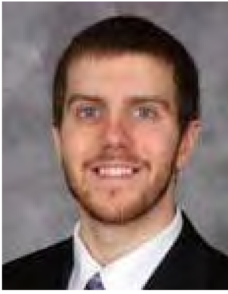

CHILDREN'S PROTECTIVE SERVICES CASES

Best Interests Findings in Termination Trials: It's Not Over 'Til It's Over

By Joshua Pease
The Kronzek Firm

Too often, when Children's Protective Services becomes involved in parents' lives, it results in a petition being filed with the court. And too often, that petition results in a hearing to terminate parental rights, whether initially, or after a period of reunification efforts. Parents are understandably upset when that hearing rolls around and the threat of losing their child(ren) permanently becomes a very real possibility. However, even if the facts in the petition are true and well-founded and the State can successfully prove one of the statutory bases for termination by clear and convincing evidence, the court still cannot terminate parental rights without finding that termination is in the best interests of the children.

Following a finding that a the State has established a statutory ground for terminating parental rights, the Court must make an affirmative finding by a preponderance of the evidence that termination of rights is in the best interests of the minor children. [1] The court can consider the entire record of the case, which makes careful representation from the beginning of the case important. A seemingly irrelevant mistake early in a case can prove costly if raised as part of a termination of parental rights hearing.

The court has little boundaries when deciding which factors to consider in a termination of parental rights determination. Case law provides some suggestions.[2] However, the one factor the court *must* consider is whether the children are in the care of a relative at the time of the hearing.[3] While case law does not explicitly say so, courts tend to weigh relative placement against termination of parental rights. Resultantly, devoting resources to pushing for a relative placement can pay serious dividends for the client at a termination hearing.

A court may consider the child custody best interest factors of MCL 722.23 at a termination of parental rights hearing. When utilized appropriately, these factors can help stave off termination. For example, the court can consider the reasonable preference of the child, which becomes increasingly relevant as the child ages. A parent who maintains a close bond with her teenage child throughout the case can benefit from the child adamantly refusing to be adopted.

Much like a custody dispute, a court must consider the best interests of each child individually. Carefully arguing about the differences between the children (age, custody situation, even gender) can preserve parental rights as to one child even when termination occurs as to another. Be aware that the court is not required to make redundant factual findings as to each child, however, there is case law indicating that the court should address the different best interests of children when those interests *significantly* differ.[4]

One of the dangers of a termination of parental rights hearing comes from the fact that the rules of evidence do not apply at such a hearing. The State will regularly rely on hearsay evidence. The CPS or foster care worker will testify about statements made by the children, by service providers, by mental health professionals, and even by other CPS or foster care workers even if those witnesses never testified in court. Because this testimony (particularly service providers and mental health professionals) is so critical to a best interests determination, it is imperative to be sure about the veracity of these statements *before* the State puts its workers on the stand. Bringing in helpful counselors and other similar service providers rather than relying on the workers to accurately relay their information is generally sound strategy.

Facing a termination of parental rights petition is a frightening prospect, especially if the facts are slanted heavily against the parents. However, even bad facts aren't the end of the road for these parents, as strong advocacy can lead the court to the conclusion that termination of parental rights is simply not in the best interests of the children.

About the Author

Joshua Pease *is a Children's Protective Services defense attorney who has been working in various capacities regarding child welfare for his entire career. He has worked with numerous families, both as a parent's attorney and as an LGAL. Joshua is an associate with The Kronzek Firm, PLC, which houses multiple attorneys dedicated to this area of practice and the preservation of families. His email is Pease@Kronzek.law.*

Endnotes

1 MCL 712A.19b(5); *In re White*, 303 Mich App 701 (2014)

2 See *In re Olive/Metts*, 297 Mich App 35, 41-42 (2012); *In re McCarthy*, 497 Mich 1035 (2015)

3 See *In re Mason*, 486 Mich 142 (2010)

4 *In re White*, 303 Mich App at 715-16

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Strategy for Allocating the Property Tax Deduction in Year of Divorce to Minimize Effect of New Limits on Deducting Taxes

By Joseph W. Cunningham, JD, CPA

The 2017 Tax Cuts and Jobs Act limits the annual itemized deduction for state and local taxes to $10,000. Such taxes include (1) state and local income tax, sales tax, and property tax.

The $10,000 cap does not apply to taxes on land used for farming or a rental property. It does, however, apply to second homes – e.g. a cabin up north – and to investment property.

In the year of divorce, for which each party will file a separate tax return, it is common for real property taxes to have been paid from a joint account before date of divorce. Under federal tax law, payments made from a joint account in which both spouses have an equal interest are presumed made equally by them.

That presumption can be rebutted by evidence that funding of the account was other than equal.

Example

- Assume that H, the higher earning spouse, contributed 80% to the account and W 20%. The property tax deduction is allocated accordingly.
- But as the higher earner, H will have higher state (and possibly local) income taxes.
- Depending on the amount of these taxes relative to the $10,000 cap, it may be advisable to split the deduction 50:50 even though H provided substantially more funds to the account.
- This also provides W with 50% vs. 20% of the tax deduction if she itemizes deductions on her tax return.

Observations

So, as a practical matter, the parties have some flexibility on the allocation of the property tax deduction. Factors to consider are:

- Amount of other taxes of each party relative to the $10,000 limit.
- Funding of the joint account from which taxes were paid prior to the divorce.
- Whether either party will likely use the increased standard deduction.

It is often advisable to provide for the allocation in the property settlement agreement to avoid post-divorce problems at tax return preparation time.

The following summarizes some general aspects of payments of mortgage interest and property taxes in a divorce context. It is drawn from the author's Taxation Chapter in ICLE's *Michigan Family Law.*

Payments Made in a Divorce Context

The deductibility of mortgage interest, property taxes, utilities, maintenance, etc., in a divorce context depends on the following:

- ownership of the home
- use of the home as a personal residence
- liability on the mortgage loan
- whether payments are made pursuant to a qualifying divorce or separation instrument.

Ownership. While some homes may be owned individually by one of the spouses during marriage, it is more common that a marital residence is owned by the spouses as tenants by the entireties, a form of ownership that is not severable and that provides survivorship rights for each party. A tenancy by the entireties is converted to a tenancy in common incident to divorce under Michigan law unless an alternative provision is made in the governing divorce instrument. MCL 552.102. Tenants in common do not have survivorship rights but do have a severable half interest in the home. It is not unusual for one of the parties to be awarded the family residence, often the custodial parent in cases involving minor children. It is also common for such a home to be owned as tenants in common subject to sale when the youngest child reaches the age of majority or graduates from high school.

As explained below, the form of ownership may affect the deductibility of payments related to the residence.

Use of the Home as a Qualifying Residence. IRC 163(h) permits the deduction of home mortgage interest, or "qualified residence interest," on a taxpayer's principal residence and a second qualifying home used by the taxpayer as a residence. If a noncustodial parent vacates the family residence and lives elsewhere, he or she may select the family residence as an "other residence" provided he or she uses the home for personal purposes for at least 14 days during the year. In this regard, the use of the home by a taxpayer's child—again, for as little as 14 days—is attributed to the taxpayer. IRC 280A(d)(1).

IRC 164(a) allows a taxpayer to deduct property taxes that he or she (1) pays and (2) is personally obligated to pay. The obligation to pay generally tracks with ownership.

Liability on the Mortgage Loan. Spouses who own their marital residence as tenants by the entireties usually have joint and several liability on the mortgage loan on which the home is pledged. It is also not uncommon for both parties to remain jointly and severally obligated on the loan after the divorce since lending institutions often will not release one party from the debt even if the other has been assigned full responsibility for its payment in the divorce settlement.

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.

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Trial Outline: Active Duty Service and Military Pension Division

(Part One of Two)

By Mark E. Sullivan

Introduction

Jake Baker was mad. He'd spent thousands of dollars on his lawyer for settlement negotiations in his divorce case, and now he was facing a trial, which meant more money for the lawyer. Jake told his lawyer that, if he was going to spend all that money, he needed to get an overview of what he could expect, and he wanted to know the questions and answers he would see in the trial. This article is a summary of what his lawyer outlined for him.

Although most divorce matters which involve military pension division are resolved through a negotiated settlement, sometimes a case goes to trial. Not much has been written about contested trials regarding military retirement benefits. The reader will find below issues of fact and of law, sample questions, proposed answers, and the arguments which one would expect to see in such a case.

The case takes place in the state of East Carolina. Jake is the petitioner in the lawsuit and his wife, Ellen Baker, is the respondent. She is a master sergeant currently serving in the Air Force. The parties have not been able to arrive at a settlement concerning her retired pay, the Survivor Benefit Plan[1] and other military benefit and retirement issues.

Expected Questions for the Servicemember

The respondent, Ellen Baker, will want to set out the facts for the court regarding her military service. She will hope to establish her credibility with the judge as well, since she may be asked further questions on cross-examination or on redirect. She should aim to get into evidence her present rank, her date of entry into military service, and her creditable years of service. She will need to explain any breaks in service which would have an impact on her total years of service.

Ellen Baker may also aim to set out for the court what her retired pay would be if she were to retire on the date of dissolution, as will be explained below. Her testimony may also cover her Thrift Savings Plan (TSP) account and the accrued leave; these are shown below primarily to demonstrate to the judge that she's being candid and straightforward in the disclosures of all marital property. If it were up to Ellen Baker, she'd prefer to "take a pass" on these issues, which might mean that the assets would be ignored or omitted in the final order.

Last but not least, someone – perhaps both lawyers – will need to outline for the court what the military pension is and how it's divided.[2] Pension division trials are rare, and those involving military retirement benefits are rare indeed. The judge will probably not be familiar with the rules, the statutes and the terms employed. In a well-tried case, the lawyers will collaborate so that the judge can "hit the ground running." If the court does not understand the means of division, the limitations imposed by Congress, the tax aspects of pension division, how to allocate survivor annuity coverage through the SBP (Survivor Benefit Plan), the rules which are enforced by the retired pay center, and a myriad of other issues, then the resulting order will likely be flawed. In some cases, the aggrieved party may appeal the result. Even if the order is not appealed, the parties will spend plenty of their lawyers' time (and *the parties* money) in trying to implement the flawed decree.

Jake and Ellen don't have a lot of money to spread around with their lawyers. Both of them will benefit from a joint effort by the attorneys to bring the judge into the picture about dividing the pension, valuing the Thrift Savings Plan account, election of the Survivor Benefit Plan for the former spouse and other issues.

As to the documents needed to illustrate testimony and pin down numbers and values, Jake should be able to get these from Ellen, which would simplify the issue of authentication. This might occur by voluntary discovery or through his taking a snapshot of them at the home with his smartphone before the parties separated. It might occur through discovery and document requests.

A court order or subpoena signed by a judge will, given time, result in the production of the appropriate documents from the U.S. government.[3] When a party requests documents from the government which are to be introduced in trial, it is usually necessary to request an affidavit concerning business records from the records custodian or a public records affidavit from the agency or office responding to the request. In regard to obtaining authenticated documents and a records affidavit, "One size fits all" is not the rule. There are no standard affidavits which are used by all federal agencies. Usually the applicant's attorney will need to draft the affidavit, which is then reviewed and revised by the legal office in the agency. It is also important to remember that all agencies need

a reasonable amount of time to respond to document requests. Sometimes several weeks or months may be needed to obtain the requested papers, affidavits and records.

Initial Questions – Basic Information

The questions below are directed to Master Sergeant (MSG) Ellen Baker by her attorney. They could also be asked of her by petitioner's counsel if she is called as an adverse witness. And they could also be asked – with different phrasing – of Jake Baker, the petitioner, if he has knowledge of the answers or has authenticated documents to support his responses.

Q. [by the respondent's attorney] Please state your name.
A. Ellen W. Baker.

Q. Are you married to the respondent, Jake Baker?
A. Yes – we married in July, 2005.

Q. What is your rank in the Air Force?
A. I am a master sergeant.

Q. You're stationed at Franklin Air Force Base here in East Carolina?[4]
A. Yes, that's right.

Q. When did you begin serving in the Air Force?[5]
A. I enlisted on June 3, 2000.

Q. What's your pay grade and years of service at present?
A. "E-7 over 18."

Q. Please explain what that means.
A. When you look up my pay on the military pay tables published by DFAS, you'll find my current pay. It is shown on the pay table for this year under the rank of E-7, and it is also "over 18," since I have been serving for over 18 years. Pay increases occur every two years.

Q. What is "DFAS?"
A. The Defense Finance and Accounting Service. It's the pay center for the Air Force.

Questions about Military Service

Q. Do you have your initial enlistment contract here?
A. No, I don't. I thought I had it at my office, which is where I keep important Air Force documents. But I've looked and looked, and I can't find it.

Q. How about getting a copy of the enlistment contract from the Air Force?
A. Good idea – but no good. I tried. I phoned to obtain a copy, but that was only a week ago – as soon as I heard that this case was "first up" on the calendar this week. They told me that they could not provide a copy with that affidavit you mentioned on such short notice. "Records affidavit" I think it's called.

Q. Well, Ellen, what can we do to support this statement of yours? How can you verify that you entered the Air Force on June 3, 2000? Is there another means of proving this to the judge?
A. Well, we could use my LES, I guess.[6]

Q. Your "LES"? What's an LES?
A. Oh, excuse me – it's my leave and earnings statement. It's called "LES" for short.

Q. Well, how would that help us with the start of your military career?
A. At the box labeled "Pay Date" at the top of my LES you will find the date when I entered active duty. In this case it shows 000602, which is years, then month, then day. So it's <u>00</u> for 2000. And then <u>06</u> for June and <u>02</u> for the second day of the month.

Q. Were there any breaks in your military service between then and now?[7]
A. No. I've had no breaks in service. I have served about eighteen years as of now, and I can retire at any time after I hit twenty years.

Questions– Basis for Retired Pay

Q. At your retirement date, will your retired pay be based on the final active duty pay you will be receiving at that point?
A. No, it will not. That's because I entered the Air Force after September 1980.

Q. Would you explain how your retired pay will be calculated since you entered military service after September 1980.
A. My retired pay will be based on what's called my "High-3" pay.[8]

Q. Please explain what you mean by your "High-3" pay.
A. When I retire, the government takes the pay I got in my highest three years of service, and it uses that 36-month average to calculate my retired pay.

Q. All right. So if you were able to retire today, which will be the date of your divorce judgment, tell us what would be your "High-3."[9]
A. It would be $4,500.

Q. How did you figure that?
A. I ran the calculations myself last week. I took the last 36 months of LES's and averaged only the base pay shown on them. The last 36 months is the highest pay that I have received while in service.

Questions for the Plaintiff – Other Benefits

Q. What about the Thrift Savings Plan, MSG Baker? Do you have an account was started during the marriage?
A. Yes, I do.

Q. And what is the current balance?
A. As of the first day of this month, the account balance was $12,500.

Q. Are there any loans against it?
A. Yes – I decided to build a workshop next to the house where I could store my carpentry tools and other things. I got a loan from the TSP for $7,000. About $2,000 has been paid back, so about $5,000 remains as an outstanding TSP debt balance.

Q. Is that debt balance already reflected in the net $12,500 figure which you stated a few minutes ago?
A. Yes, it is.

[At this point, the respondent's attorney should mark and introduce the current TSP account statement into evidence.]

Q. Do you have an accrued leave balance?[10]
A. Yes. As of the first of this month, I had 60 days of accrued leave on the books. It's right there on my LES.

Q. Do you have a current LES here in court?
A. Yes.

Q. Show it to me, please.
A. Here it is.

Q. Your honor, I am marking this current LES from MSG Ellen Baker as Respondent's Exhibit B, right after Exhibit A, the TSP statement. [When appropriate, move for admission of this exhibit] No further questions.

At this point, Ellen Baker's case is finished. This is the end of the necessary testimony for her. She has given to the court the minimum information needed for the judge to assemble a military pension division order (the armed services equivalent of a QDRO, or qualified domestic relations order), a Retirement Benefits Court Order (RBCO) for the TSP, and a valuation and setoff for the accrued leave. If the testimony ended here, the court would have enough data to make these decisions.

[Part 2 of this article will cover cross-examination of the military member, direct examination of the nonmilitary spouse, the Survivor Benefit Plan, indemnification and accrued leave, as well as legal issues which should be saved for briefing and argument instead of brought out in testimony.]

About the Author

Mark Sullivan *is a retired Army Reserve JAG colonel who practices family law in Raleigh, North Carolina. He is the author of* The Military Divorce Handbook *(Am. Bar Assn., 2nd Ed. 2011). Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com (alternate: 919-306-3015, mobile; law.mark.sullivan@gmail.com).*

Endnotes

1 The Survivor Benefit Plan is a survivor annuity that is available to those in the armed forces who are retirement-eligible. This means those who have over 20 years' of creditable service in the Army, Navy, Air Force, Marine Corps or Coast Guard. The benefit paid to the designated beneficiary is 55% of the selected base amount. 10 U.S.C. § 1451 (a)(1)(A)-(B). The base may be anywhere between $300 per month and full retired pay. The latter is the default if no other amount is chosen. The cost is 6.5% of the base for regular retirements (i.e., those from active duty) and about 10% for non-regular retirements (that is, those from the National Guard or Reserves). SBP coverage for a former spouse is suspended if the beneficiary remarries before age 55. The statutes covering the Survivor Benefit Plan and the Reserve Component Survivor Benefit Plan are found at 10 U.S.C. §§ 1447-1455.

2 The lawyers should explain to the court that a military pension is not a "qualified plan." It is a program established by federal law (Title 10, U.S. Code) to allow members of the armed forces to receive retired pay. Military retired pay is divisible pursuant to the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. No QDRO (qualified domestic relations order) is filed to divide the retired pay, there is no plan administrator, and there is no Annual Benefit Statement for what an individual accrues in pension benefits during a particular year. The servicemember does not receive a Summary Plan Description stating what she will receive upon retirement and how the plan works. Many of the aspects of military pension division and SBP allocation may be found at the Silent Partner series of infoletters published by the North Carolina State Bar's military committee, located at *www.nclamp.gov* > For Lawyers.

3 See the Silent Partner info-letter, "Docs for Division," for a listing of most of the papers and forms which may be needed in a military pension division case. It may be found at the website of the North Carolina State Bar's military committee, identified above at note 2.

4 Although Ellen Baker is being questioned on direct examination, most state rules of evidence allow the use of leading questions on direct for preliminary matters or issues which are uncontested.

5 At this point, an enlisted airman such as MSG Baker would answer the question by discussing her initial enlistment. An officer, on the other hand, might talk about gaining her commission through ROTC (the Reserve Officer Training Corps), or one of the service academies (e.g., the Air Force Academy). There are several documents which would verify the initial military status of an officer, such as her signed commission, her initial military orders appointing her as a second lieutenant in the Air Force, or her leave-and-earnings statement (LES), as will be explained below. There are similar documents which would prove the initial entry on military duty for an enlisted member (e.g., her enlistment contract, her initial orders or her LES).

6 The leave-and-earnings statement provides information on the pay grade of Ellen, her date of initial entry into service, her current pay, her Social Security number and other data which will help in preparation of a military pension division order. The specifics which the LES gives include the following:

NAME: The member's name in last, first, middle initial format.

SOC. SEC. NO.: The last four digits of the member's Social Security Number.

GRADE: The member's current pay grade.

PAY DATE: The date the member entered active duty for pay purposes in YYMMDD format. This is synonymous with the Pay Entry Base Date (PEBD).

YRS SVC: In two digits, the actual years of creditable service.

ETS: The Expiration Term of Service in YYMMDD format. This is synonymous with the Expiration of Active Obligated Service (EAOS).

The LES is issued electronically twice a month to active military personnel. DFAS publishes the LES to the servicemember's account on the secure website, *https://mypay.dfas.mil*. The first LES shows all pay and entitlements for the month. The second LES of the month will not have all required information; if the servicemember (SM) elects to be paid twice a month, the second LES will only show the amount paid along with the basic information.

7 Breaks in service can result in a shorter period of time for the "marital pension service" portion of the marital fraction. The numerator of the fraction is the period of time during the marriage when the servicemember was serving. A shorter period means a smaller numerator, and thus a smaller total fraction which will be divided between the parties. It is vital to know the correct number for the months of marital pension service.

8 When a SM entered military service between September 8, 1980, and July 31, 1986, the "High-3" formula is used to compute retired pay. 10 U.S.C. §§ 1407(a), 1409(b)(2). Unless the SM has chosen a retirement bonus known as CSB/REDUX, available to those who entered military service after July 31, 1986, her retired pay after 1/31/86 will also be based on the "High-3" formula. CSB/REDUX was eliminated as of 12/31/2017.

9 This line of questioning, asking the servicemember to take a "snapshot" of her retired pay as if she were to retire on the date of dissolution, applies as a matter of state law in a handful of jurisdictions (e.g., Texas, Florida, Oklahoma, Tennessee and Kentucky). In those states, statutes or case law requires that the court fix the benefit to be divided as of the date of divorce. This is multiplied by a truncated marital fraction, namely, pension service between marriage and divorce, divided by total pension service until the divorce. The result is a fictitious pension figure, sometimes called a "hypothetical award." This approach would not apply in most states, which use the "time rule" to divide military pay. This means that the court applies the marital or community fraction (months of marriage overlapping pension service divided by total pension service) times the individual's actual retired pay.

Section 641 of the National Defense Authorization Act for 2017, changed the rules for defining "disposable retired pay" that can be divided at divorce, specifying a "frozen benefit" that is based on the military member's hypothetical retired pay at the time of divorce. 10 US.C §1408(A)(4)(B). Several Silent Partner info-letters contain further information on the Frozen Benefit Rule, the data points which must be presented to the court, the issue of double dilution and the denominator of the marital/community property fraction, and work-arounds. These are found at *www.nclamp.gov* > For Lawyers. The fixing of the retired pay as of divorce is the approach which MSG Ellen Baker will pursue, asking the court to "freeze" her pension benefit to that which theoretically would exist if she retired when the divorce was granted.

10 It is important for the non-military party to consider accrued leave of the SM in property division when state law allows the classification of vacation time and leave as marital property. Each servicemember accrues 30 days of paid leave each year, regardless of rank. This leave is worth what its equivalent would be at the monthly pay rate of the SM, and one can calculate this easily by using the pay tables available at the DFAS website, *www.dfas.mil*. If MSG Baker's gross retired pay is presently $4,600 a month, then two months of leave is worth $9,200, which represents gross pay before tax and other withholdings. Counsel for the husband should advocate use of the gross pay figure, while MSG Baker's lawyer should use after-tax computations for the pay and eliminate any non-pay entitlements. If state law forbids such treatment, so be it. If, on the other hand, the law or cases within one's state is favorable or undecided, then overlooking this asset means depriving the non-military spouse of a substantial amount of money when all that the practitioner needs to do is obtain the SM's LES for the applicable date (under state law) for determining and valuing marital or community property.

Recent Published and Unpublished Cases

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

Summaries for this issue written by Liisa R. Speaker, Speaker Law Firm, PLLC

Property Division and Spousal Support

Beauchamp v Beauchamp (Unpublished Per Curiam Opinion)
Lower Court: Delta Circuit Court
Docket No: 340792, October 23, 2018

The parties were married in 1988. In 2014, after being treated for cancer, the husband could no longer work the amount of hours needed on drywall projects so he began focusing on his medical marijuana grow operation in the summer of 2014, with five qualified patients. The trial court took into account the marijuana grow operation in the division of marital assets. The trial court also awarded spousal support in the amount of $1900, taking into account the money the husband would receive from the sale of medical marijuana. The husband contended this income should not be taken into account. The wife's expert testified as to the number of mature plants the husband owned in April 2017, and valued them at $1,000. The husband eventually admitted to having 72 plants. The trial court found the husband made $15,300 for his drywall business and $120,000 per year for his medical marijuana grow operation for each year between 2015 and 2017.

The Court of Appeals concluded it was appropriate for the trial court to take into account the money made from the medical marijuana grow operation when calculating spousal support. The Court of Appeals also held that the husband was not required by the trial court to engage in criminal activities to pay his spousal support because under the Michigan Medical Marijuana Act a caregiver cannot lawfully make money off their patients. The Court of Appeals also held that there is no law that states income gained from illegal sources could not be taken into account for spousal support, so the trial court's decision was within reasonable principled outcomes.

The husband next argued that the medical marijuana grow operation should not be considered marital property. The Court of Appeals determined that the grow operation had $2,000 in equity and ordered this equity to be considered as marital property making the marital estate worth $65,284. The Court of Appeals reasoned that property acquired during the marriage is generally considered marital property. The trial court awarded the grow operation to the husband. The Court of Appeals found that the property division was appropriate.

Spousal Support

Becker v Becker (Unpublished Per Curiam Opinion)
Lower Court: Marquette Circuit Court
Docket No: 342922, October 23, 2018

In this divorce case arising from a 29-year-marriage, the husband was a stay at home father, and the wife was a professor at a university. The wife was required by the trial court to pay $1,000 per month for five years. The husband appealed the spousal support award in the judgment of divorce, complaining that he should have received a higher amount of support from his wife. The husband argued based on the factors he was entitled to $1,700 per month for ten years. The couple had two minor children. The wife is required to pay $617 per month in child support as well. The husband was awarded significant assets in the property division including a property that generates $1,200 per month in income, and also $44,167 from the wife's retirement account. The Court of Appeals ruled that the husband could not substantiate why the $1,000 award was an abuse of discretion.

Paternity and Custody

Derkin v Tersigni (Unpublished Per Curiam Opinion)
Lower Court: Livingston Circuit Court Family Division
Docket No: 342850, October 23, 2018

In this paternity action, the two individuals had an affair while both were married to other persons. The mother agreed to remain with her husband and that he would raise the child. The husband then filed for divorce only five months after the child was born. Genetic testing then proved the other man was the biological father of the child. The mother and father were unable to negotiate parenting time and custody terms, so the trial court awarded joint legal custody and increasing parenting-time until the parents had 50/50 parenting time. The mother's appeal raised three issues; (1) the trial court applied an improper evidentiary standard to the best-interest analysis, (2) the trial court erred using the best-interest factors to determine legal and not physical custody, and (3) the best-interest findings were against the great weight of the evidence. The Court of Appeals found the trial court properly used the clear and convincing evidence standard due to the lack of an established custodial environment with the father, and also utilized the proper standard for analyzing the best-interest factors.

The Court of Appeals then found that the trial court correctly addressed the issues associated with custody and under MCL 722.23 determined the parties would have joint legal custody. Once the trial court properly made this determination, the Court of Appeals concluded the trial court then properly turned to the parenting time factors under MCL 722.27a to award a graduated scale ending at 50/50. However, the Court of Appeals found that the order did need to reflect the award of joint physical custody since it was not addressed.

Lastly, the mother argued the best-interest factors were not properly applied. The Court of Appeals found that the mother did contribute to the instability of the child's life by not allowing the father to have visitation. The mother attempted to argue the best-interest factors was a close call and was not clear and convincing, but the Court of Appeals held that just because it was a close call does make it impossible to meet the burden of proof.

Custody

Guyette v Cornell (Unpublished Per Curiam Opinion)
Lower Court: Cheboygan Circuit Court Family Division
Docket No: 343869, October 23, 2018

In this custody case, the trial court awarded joint legal custody and sole physical custody to the mother of two minor children. The father argued that the trial court erred by finding an established custodial environment with the mother, such that the wrong standard of proof was applied. The Court of Appeals determined the trial court properly found there was an established custodial environment with the mother due to her being the primary provider for the children for a period of time. The Court of Appeals concluded that the trial court also properly determined the best-interest factors due to the unreliability of the father's work and also some of his unsettling anger problems.

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Parenting Time

Luna v Regnier (For Publication)
Lower Court: Tuscola Circuit Court Family Division
Docket No: 343382, October 18, 2018

The parents never married, but lived as a family unit with three minor children. The mother had temporarily left the children with the father while she tended her children from another relationship in Florida for six months. After the mother returned to take the children to Florida with her, the Father initiated a custody action against her and obtained an ex parte order to retrieve the children. The mother then returned to Michigan to find the living conditions for the children to be abhorrent and reported this to CPS, which resulted in the children being placed in foster care. The mother was granted parenting time, and eventually in September 2011 the children were returned to the father's custody. Even though the mother was the non-respondent, unadjudicated parent in the child welfare case, the trial court eventually terminated her parental rights. Once the "one parent" doctrine was abolished, the Michigan Supreme Court vacated the termination order and her parental rights were reinstated.

However, a custody case ensued. In December 2015 the GAL requested that the mother's parenting time be suspended, which the trial court granted. According to the Court of Appeals, the trial court properly found an established custodial environment with the father and then subsequently suspended parenting time with the mother until the children requested such time. The Court of Appeals also stated that the best interest factors analysis was not against the great weight of the evidence. The Court of Appeals agreed that the trial court was correct in suspending parenting time, but determined that the trial court must conduct periodic hearings to evaluate if the children's position has changed with regards to their mother.

Divorce and Arbitration

Thomas-Perry v Perry
Lower Court: Washtenaw Circuit Court
Docket No: 340662, October 16, 2018

In this divorce case, the parties were scheduled to go to arbitration, but before the arbitration began, they independently reached an agreement on several issues (child custody, child support, spousal support). These agreements were then incorporated into the arbitration award. The arbitrator also granted the wife sole ownership of the assets and liabilities of the husband's insurance agency business, split the parties' retirement accounts, and made the wife responsible for her substantial student loan debts. The wife sought to modify the award with respect to the pension division, the student loan and other debt, arguing that the award was inequitable. The trial court confirmed the arbitration award.

On appeal, the wife argued that the arbitrator exceeded its authority by acting contrary to controlling law when it reached an inequitable property division. The wife on appeal failed to recognize the limited scope of the appellate court's review, "which does not extend to the arbitrator's factual findings." The Court noted that "to the extent that the award could have been the result of the arbitrator's findings of fact, the reviewing court cannot reasonably conclude from the face of the award that the arbitrator exceeded the scope of his or her authority by acting contrary to law." Based on a review of the record, the Court of Appeals concluded that it seemed probable that the arbitrator used the "unequal distribution" to offset awarding the wife the husband's business. As for the student loan, the wife was only awarded one out of four of the loan debts, and even though the loan attributed to the husband is slightly less than half of the entire marital portion of the student loan, Michigan law does not require a "perfectly equal" property division.

Parenting time and contempt

Devries v Devries
Lower Court: Allegan Circuit Court
Docket No: 342135, October 16, 2018

This is a post judgment parenting time appeal. The 2011 judgment of divorce granted joint legal custody, primary physical custody to the mother with substantial parenting time to the father. The judgment of divorce also contained a "right of first refusal" provision. In 2015, the trial court entered an order allowing the parties' to "opt out" of 3 parenting time visits with either parent in a 30 day period. The order also allowed "make up" parenting time to the parent subject to the opt out. In 2016, the father show caused the mother for several alleged denials of parenting time. The FOC then filed show cause motions against both parents for parenting time violations, and set forth a fine schedule for the violating parent. Under MCL 552.644, the trial court can impose sanctions if the party to a parenting time dispute is found in civil contempt and if there was bad faith.

The testimony at the referee hearing revealed that there were numerous instances in 2016 and 2017 in which the older child (almost 17 years old) refused to go to parenting time with her father. The mother also offered the father make up parenting time on several occasions. The referee found the mother in contempt for denying the father's parenting time with the older child on numerous dates. The referee recommended sanctions of $1,100. As to the mother's denial of the right of first refusal, the referee recommended that the mother be held in contempt for one week in which she made other plans for the children without waiting to hear back from the father. The referee, however, limited that contempt recommendation as to the younger child.

The father filed objections on the grounds that the mother had acted in bad faith and the sanctions should have been more severe. After a de novo hearing, the trial court found in a few instances that the mother had acted in bad faith. The trial court therefore issued sanctions.

The Court of Appeals vacated the trial court's decision. The defendant only objected to the amount of the sanctions. The referee's recommendation related to the father's parenting time with the older child and one day of makeup parenting time for the younger child. The trial court made some clear errors regarding the identification of the child the granting of make up time which exceeded the father's objections. The trial court clearly erred in its review and resolution of the referee's recommendation and defendant's objections. The Court of Appeals vacated the trial court's order and remand for further proceedings. On remand, the trial court should review de novo, at an evidentiary hearing, the referee's recommendation in light of defendant's objections.

Spousal Support

Sivils v Sivils
Lower Court: Lenawee Circuit Court
Docket No: 339028, November 8, 2018

In this post-judgment appeal, the husband challenges the trial court's rewriting of the judgment. Prior to the divorce, both parties were in danger of filing bankruptcy. Knowing that bankruptcy was imminent, the judgment of divorce included language that "[a]ll marital debt shall be evenly divided between the parties. In the event of a bankruptcy, those debts may be discharged." The judgment also stated that if a spouse were obligated to assume the responsibility for paying certain debts, those would be a domestic support obligation and non-dischargeable in banrktupcy.

The husband filed bankruptcy. After the bankruptcy discharged the husband's portion of the marital debt, the trial court amended the judgment of divorce to make the husband entirely responsible for the wife's portion of the marital debt. The wife's theory was that the husband was obligated to pay half of the marital debt (meaning her portion) since his portion had been discharged in bankruptcy. The trial court ordered that the husband pay the wife $157,894, representing the unpaid portion of the property settlement awarded to the wife.

The Court of Appeals held that the trial court's ruling violated the plain language of the judgment of divorce. The personal property division provision in the parties' judgment of divorce specifically allowed a party to discharge his or her marital debt liability in bankruptcy. The trial court's ruling was vacated.

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Domicile

Lechner v Lechner
Lower Court: Washtenaw Circuit Court
Docket No: 343164, October 16, 2018

The parties shared joint legal and physical custody of their child, and the parties had equal parenting time. The father accepted a teaching position at a University in Tennessee. For two years, he commuted to Nashville to teach classes. In 2017, the father sought to change the child's domicile from Michigan to Tennessee. The impetus for the motion was a promotion opportunity for the father at the university, which would require him to move to Tennessee, rather than merely commuting. The trial court granted the father's motion.

As to the domicile factors, the Court of Appeals held that the decision on the capacity to improve the parent's and child's life was not against the great weight of the evidence. The father's promotion would come with a substantial pay increase, and the father would no longer have to commute between Ann Arbor and Nashville. Although the child's activities and school would be similar, "there is nothing in the record to indicate that [the child]'s life could not be enhanced by the move to Nashville." The Court of Appeals also affirmed the trial court's other findings on the change of domicile.

As to the best interests of the child, however, the Court of Appeals held that the trial court erred by applying the preponderance of the evidence standard. The trial court held that because the established custodial environment was with both parents that the parenting scheduled could be modified without changing the established custodial environment. Prior to the trial court's order, the parents had nearly equal parenting time and lived close to each other. The domicile order contemplated the child living in Tennessee during the school year and in Michigan during the summer and holidays. The trial court erred by not using the clear and convincing evidence standard. The Court of Appeals remanded for consideration of whether the change of domicile would be in the child's best interests.

Guidelines for Requesting Appearance of the Family Law Section of the State Bar of Michigan as Amicus Curiae

1. Requests from litigants should be directed to the Amicus Committee and may be submitted to any Council member.
2. The amicus request must clearly indicate whether leave to appeal has been requested and/or granted. If leave has been requested but not yet granted, the requesting attorney must indicate whether an amicus is requested to support granting leave or on the substantive issues. Absent exceptional circumstances, no amicus request will be considered until the Court has granted leave to appeal.
3. Amicus requests must be in writing, accompanied by five copies of each of the following:
   a. A short and concise memorandum setting out the legal issue(s) addressed by the appeal;
   b. Previously submitted briefs (from both parties) and opinions in the case, together with the order granting leave to appeal, if appropriate, and a list of the filing deadlines, including the deadlines for the amicus curiae brief;
   c. A list of significant cases that an amicus brief should consider, together with copies of any cases outside of Michigan;
   d. A brief statement explaining why the Family Law Council should grant the request. This statement should specifically reference the Case Selection Criteria and the impact of the case on the domestic relations bar as a whole. The statement should also address the potential expenditure of Council time and resources;
   e. For amicus requests prior to the Court granting leave to appeal, a statement setting out "exceptional circumstances" to justify Family Law Council involvement;
   f. A proof of service indicating that all materials submitted to the Amicus Committee have been concurrently served on all other counsel in the matter.
4. The requesting party may be required to meet with the Amicus Committee to discuss Family Law Council involvement. In this event, the Amicus Committee shall notify the opposing attorney of the date, time, and location of the meeting and invite them to be present and participate in the meeting. A meeting of the Amicus Committee will be convened for this purpose at which the requesting party should be prepared to discuss the importance of the issue(s) presented; how Council support will benefit the party, the bench, and the Bar at the present state of litigation; the likelihood of the case eventually progressing to the Supreme Court (for cases on which the Supreme Court has not yet granted leave); and practical considerations, such as the level of commitment of the requesting attorney and his/her client to pursuing the case.
5. The requesting party shall furnish any additional material or information required by the Amicus Committee.

Case Selection Criteria for Requests for Appearance of the Family Law Section of the State Bar of Michigan as Amicus Curiae

In passing on a request for appearance as Amicus Curiae, the Amicus Committee of the Family Law Section shall consider the following criteria:

1. Whether the legal issue involved is of substantial interest to the domestic relations bar.
2. Whether the legal issue involves a conflict in case law, or a case of first impression, or a novel or previously unresolved question, or whether there is a need for clarification of a legal issue, the disposition of which is likely to have broad range effects beyond the particular case.
3. Whether the legal issue involved affects fundamental rights of individuals or involves a constitutional question.
4. Whether the case presents an opportunity to ameliorate or reverse prior judicial decisions or legislative enactments which adversely impact domestic relations law.
5. Whether the issue or case impacts the practice of family law from the view of practitioners.
6. Whether the briefs of the parties before the court, or briefs of other amicus curiae, adequately address the legal issues presented.
7. Whether the facts presented are strong enough, and the record sufficiently developed, to support the position to be asserted.
8. Whether the position to be asserted is appropriate in view of the recent pronouncements of the appellate courts and consistent with the Family Law Council's principles and philosophy.
9. Whether there exists sufficient time to request amicus status and properly prepare a brief.
10. Whether sufficient resources are available, given the Council's amicus caseload, to grant the particular request.
11. Whether the Court has requested the submission of briefs.
12. Whether the case should be referred to another Section of the State Bar.

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. The PAC lobbyist has contact with, and access to, legislators involved with family law issues. Contributions to the PAC are the one way for you to help influence legislation that directly affects your practice as a family law 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 the House of Representatives.

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