INSIDE: Juvenile Competency, Paternity Disestablishment, Servicemembers Civil Relief Act

Delaware Lawyer

A PUBLICATION OF THE DELAWARE BAR FOUNDATION
VOLUME 24 ◆ NUMBER 1
$3.00 ◆ SPRING 2006

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Delaware Lawyer

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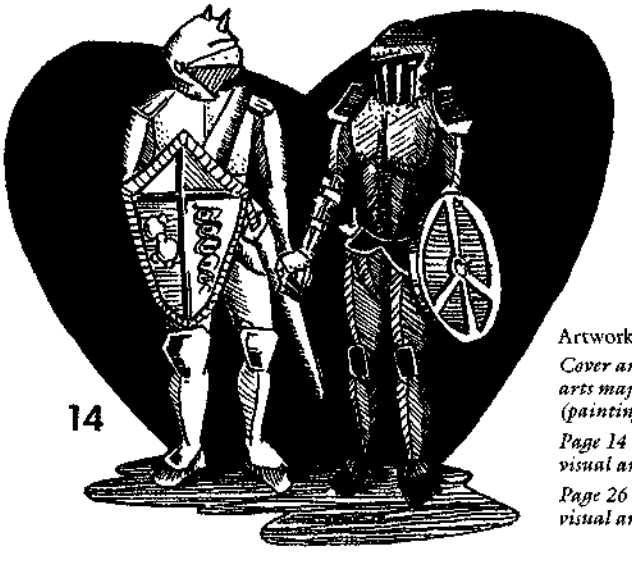

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Delaware Lawyer

A publication of Delaware Bar Foundation
Volume 24, Number 1

DELAWARE LAWYER
is produced for the Delaware Bar Foundation by:

Media Two, Inc.
22 W. Pennsylvania Ave., Ste. 305
Towson, MD 21204

Editorial Coordinator
Megan M. F. Everhart

Art Director
Samantha Carol Smith

Subscription orders and address changes should be directed to:
Chris Calloway 302-656-1809

Requests for information about advertising should be directed to:
Howard B. Hyatt 1-800-466-8721 x250

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When editing this issue, I came across a footnote from the concurring opinion in a 2005 West Virginia Supreme Court family law case: "Pope Pius XI called family the 'first and essential cell of human society.' Ogden Nash, however, defined a family as 'a unit composed not only of children, but of men, women, an occasional animal, and the common cold.'" Leaning more toward Nash, the cover art shows a first grader's view of the modern family unit — absolutely child centered, encircled by real parents, imaginary pets, and "heart and circle" relations.

For better or worse, science, mores, and the law have morphed since I grew up in a world with virtually no divorce and totally unacknowledged sex — no less procreation — outside of marriage. Today's family unit may contain two moms, biodads, legal fathers, stepparents, intergenerational and single-parent families. Indeed, as I write, a *60 Minutes* episode explores single and same-sex families connecting to ensure that their half-sibling children — related through a common (formerly) anonymous sperm donor — know each other.

To a significant extent, this issue is the middle part of a discussion Delaware Lawyer has sponsored for more than a decade — and assuredly will return in the future. Our outstanding authors offer an eclectic group of excellent articles, each in their own way considering how family is defined, and what laws defend its members.

As children are at the core of this issue, Loretta Young explores the infuriatingly complex question of juvenile competency in delinquency proceedings. Next, Aida Waserstein and Jody Huber lend their expertise and advice for those assisting families whose members are engaged in defending the country.

Today, the genetic identity of a child can be known, but we struggle with the extent to which scientific "truth" should control the legal relationship of father and child. Vernon Drew conducts a fascinating interview with three renowned ethicists — Art Caplan, Nadia Sawicki and Joanna Bergmann — exploring how society might best approach paternity disestablishment cases that are frequently too twisted for believable fiction. A sidebar to this interview offers a unique approach to considering and categorizing the wide array of national disestablishment cases.

Maryland law professor Bill Reynolds, a conflict of laws expert, and I consider interstate litigation of child support and paternity claims involving same-sex couples. Finally, Claire DeMatteis movingly writes of the intolerable choices faced by battered women in immigrant families.

I thank our authors for being so generous with time and expertise — and the Cab Calloway students for enriching this issue with their artwork. I expect readers will find all these articles thoughtful and trust that they will engender lively debate.

Susan F. Paikin

Susan F. Paikin

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Loretta M. Young

Juvenile

Legal, Clinical, and System Issues

Competency is one of the most intriguing and comprehensive issues in juvenile justice. It beckons new consideration at every turn.

My fascination with the workings of the human mind will never wane. I graduated from the University of Delaware as a psychology major with all intentions to continue on to graduate school and become a clinical psychologist. Somewhere in the summer following graduation, I suffered a serious attack on my mental faculties and began contemplating … law school. Despite attempts to overcome this irresistible urge, I enrolled in law school.

The Socratic method was not something that my undergraduate degree had prepared me for, but perseverance, Oodles of Noodles, a pair of reading glasses, and Jamaican Blue Mountain coffee helped me through. During my tenure at the Attorney General's Office, I rationalized that my undergraduate studies were actually being put to good use because all criminal matters have some psychological component that manifests itself in different ways.

Over the last 16 years, I have been continuously involved in the criminal justice system. I have found competency to be one of the most intriguing and comprehensive issues in juvenile justice. It beckons new consideration at every turn based on recent psychological studies, evolving case law, and statutory change in some of the most progressive states. At the same time, it raises great questions and concern as to the sufficiency of Delaware's existing policy, procedure, and public services.

Spotlight on Competency

In the last decade, there have been dramatic changes in the nature and consequences of juvenile adjudications. Court procedure and adjudications are quite different from the way they looked when the first Juvenile Court was established in Wilmington in 1911. As a result of statutory changes in the past five years, the list of charges that can result in the juvenile being tried as an adult in the Superior Court

has grown. Certain crimes involving the use or possession of a firearm require that the Family Court impose a minimum mandatory sentence. As the result of a push to open the courts to the public, there may be no guarantee of the confidentiality that once existed. The consequences of delinquency adjudication may have far-reaching ramifications such as mandatory sex-offender registration[1] and possible inability to expunge a juvenile criminal record for many years. Although Family Court remains treatment oriented, there is no doubt that the juvenile process in some respects has come to resemble the adult system. As a result of the more adversarial nature of the proceedings and the serious consequences, juvenile competency issues have come into the spotlight and have gained renewed importance.

On a national level, there have been some sensational cases that have piqued the interest of the public, and the legal and psychiatric communities. Many of us watched the Lionel Tate case with great interest. In 2001, he was convicted of first-degree murder in the death of a six-year-old playmate. Lionel was 12 when he punched, kicked, and stomped the 48-pound girl to death in 1999. The defense claimed that he accidentally killed the girl while imitating professional wrestling moves he observed on television and that he did not appreciate that he could inflict such serious injury or cause death.

A Florida jury convicted him and he became the youngest defendant in the nation to be sentenced to a life sentence without the possibility of parole. After serving three years in a detention facility, the Florida 4th District Court of Appeals overturned the conviction citing the absence of a competency evaluation. On appeal, the court unanimously agreed: "A competency hearing should have been held particularly given the complexity of the legal proceedings and Tate's age. ... At a minimum ... the [trial] court had an obligation to ensure that the juvenile, who was less than the age of fourteen, with known disabilities raised in his defense and who faced a mandatory life sentence, was competent to understand the plea offer. ... And understood the defense being raised and the state's evidence to refute the defense position, so as to ensure that Tate could effectively assist in his own defense."[2] In turn, prosecutors offered a plea to murder second, which included no further jail time, ten years probation, counseling, and community service.

The Tate case and others like it highlight the importance of competency determinations and raise awareness of other related issues peculiar to juvenile adjudication.

Although Family Court remains treatment oriented, there is no doubt that the juvenile process in some respects has come to resemble the adult system.

Adjudicative Competency

Competency is a front-end analysis that centers on the juvenile's present capacities in pretrial and trial proceedings. It is a different issue than sanity, which is focused on criminal culpability. Competency is a fluid test, and the outcome may change depending on case specifics. For example, a juvenile may be competent to stand trial on a simple disorderly conduct, but incompetent on a more complex charge because he/she may not be able to comprehend the nature of the elements of the crime or defense.

Family Court looks to statutory and case law for guidance in these determinations. Delaware has one competency statute that applies to both juveniles and adults. The test for competency is set forth in 11 Del. C. §404(a), which states, "Whenever the court is satisfied, after a hearing, that an accused person, because of mental illness or mental defect, is unable to understand the nature of the proceedings against the accused, or to give evidence in the accused's own defense or to instruct counsel on the accused's own behalf, the court may order the accused person to be confined and treated in the Delaware Psychiatric Center until the accused person is capable of standing trial."

In other words, "The test of legal competency ... is ... [w]hether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him[3] and whether the defendant is able to assist in preparing his defense."[4]

The Process of Determining Competency in Family Court

The initial issue of competency to stand trial can be raised by defense counsel, the prosecution, the Children's Department, the juvenile's parent, or by the court. It is the statutory burden of the prosecution to prove competency by a preponderance of the evidence. However, competency is most often raised by defense counsel since they have the earliest and most substantive contact with the juvenile. Once a Motion to Determine Competency is filed by counsel, an Order of the Court sets the wheels in motion. The Division of Child Mental Health (part of the Delaware Department of Services for Children, Youth and Their Families) assigns a licensed clinical child psychologist to the case who conducts an evaluation, creates a written report, testifies, and presents it to the judge at the competency hearing.

The psychologist will review records such as the arrest report, and any other records that will help familiarize him with the juvenile and the case at hand including, but not limited to, previous mental health, medical, and academic records. Some third-party information from the attorney, detention staff, par-

ents, or significant others regarding the behavior, habits and history of the juvenile will be obtained and included in the report. Clinical evaluation and testing will also be performed using a number of assessment instruments designed to measure understanding, decisional competence, and competence to assist counsel. There are even ways to test for malingering using interview methods designed to identify psychologically inconsistent symptoms.

Based on the above, the psychologist will provide an overall picture of the juvenile's current mental state, the ability/capacity to participate in his or her own defense, and make a recommendation for treatment when indicated. Although it can vary among clinicians, most reports do not include an opinion on the ultimate legal issue of competence. Rather, reports identify specific disabilities and leave it to the court to make an independent decision.

Subsequent to reviewing reports and testimony from one or more evaluators, the court will enter a finding of competence/incompetence based on the evidence or perhaps by stipulation of the parties.

The Impact of a Finding of Incompetence

If the child is found to be incompetent, there are two courses of action. In both instances, there are gaps in services for children who are mentally disabled and who require long-term services to keep them from reoffending.

In the first scenario, the offender is not competent and is unlikely to ever become competent. The Attorney General's Office will enter a *nolle prosequi* on the charges thereby ending any further court involvement. Youth Rehabilitative Services is out of the picture at this point because there is no adjudication by the court. A finding of incompetence often leads to discontinuation of Child Mental Health involvement because that division was created to serve children with treatable mental illnesses or immediate crisis situations. It becomes the responsibility of the Department of Education (DOE) and Department for the Developmentally Disabled (DDDS) to formulate special educational plans for these children. Parents are expected to initiate contact with the departments to set up special educational services and pursue any other recommendations that may have been contained in the competency evaluation. These agencies may offer educational programs and related services, but no monitoring or oversight component that would be a functional deterrent to reoffending.

This is a crucial time for the juvenile and the family when they need guidance, support, and direction. Parents may find themselves in the middle of a disagreement between agencies regarding which agency is responsible for providing continuing services at this point, and who will pay. Some incompetent children are being raised by adults who are struggling with mental illness or mental disabilities themselves. Coordination of services between DOE and DDDS, cutting through the red tape, filling gaps in services, finding a provider, and paying for it, can be overwhelming for any parent. In some cases where a parent is unable or unwilling to provide care, a referral to the Division of Family Services is in order. Even then, crucial services may not be provided, simply because Delaware has no appropriate programs or facilities to assist children with mental disabilities who require long-term care, special education, intensive supervision, and training. The Division of Family Services can provide some assistance, such as parent counseling, transportation, and perhaps a home aide, but that agency was not created to provide treatment and services to mentally disabled children.

Many of these children fall between the cracks because there is no mechanism for tracking them once they leave the courthouse.

The key in assisting these children and their families is early identification, and proper early-life-stage treatment. Many of these children fall between the cracks because there is no mechanism for tracking them once they leave the courthouse. When agencies fail to properly assist or when parents are unwilling or unable to get the child to recommended services, no one knows about it until months or years later. The only time the court will have a second contact with this child is if they reoffend.

In a second scenario, the competency report may indicate that the child could be made competent at some time in the future given the administration of certain treatment, medication, or remedial education. In this case, the proceedings will be delayed and the issue of competency revisited. In such cases, the court will order the recommended course of treatment or therapy and an updated competency report for the hearing, normally in 60 or 90 days. At that time, an abbreviated hearing will be held to determine if any appreciable change has taken place regarding competence.

During his "wait and see" period, the presence of certain factors may indicate to the judicial officer that it would be prudent to initiate some type of monitoring for both public safety and the needs of the juvenile. The court, prosecution, and defense will fashion interim conditions through a bail order which will address special needs and safety issues, and provide some assurance that the juvenile follows all the recommendations in the report such as attending the treatment or taking any prescribed medication. If the court feels it is necessary to have assurances of compliance through someone other than the parent, it can order supervision by a contract service agency.

The Department of Youth Rehabili-

tative Services currently contracts with Project Stayfree for such purposes.[5] Although the court is very appreciative of Project Stayfree's and Albert Mills' willingness to assist this segment of the population, Stayfree was designed for pretrial supervision of children with true behavior problems, not incompetent children. Children who are receiving restoration services are in need of treatment, not probation. These types of cases are difficult to manage and involve additional time that detracts from Stayfree's already heavy assignment of cases. The main problem is that, due to their competency issues, these children are not appropriate for placement at New Castle County Detention Center. Therefore, Stayfree has no alternative when a violation of conditions occurs and just continues to monitor until the next scheduled court event as if nothing happened. It is both overly burdensome and unrealistic to ask someone who is trained to do the job function of a high-level, intensive supervision probation officer to act as a mental-health aide, treatment coordinator, mentor, or surrogate caregiver. However, it is sometimes the only safety net available to the court due to a lack of alternatives.

After the Hearing and Beyond

The needs of juveniles who are found incompetent to stand trial are often different than adults in similar circumstances. The majority of adults found to be incompetent suffer from mental health problems and may be restored to competency by treatment services, medication, and other stabilization methods as is contemplated by the Delaware competency statute, 11 Del.C. §404(a).

In contrast, studies and statistics show that the majority of juveniles who are found incompetent have mental disabilities that are permanent and simply cannot be mitigated by medication or treatment therapies.[6]

Delaware, like many states, works with what resources it has. We have been addressing this issue of juvenile competency by applying adult standards and statutes intended for adult courts. That does not mean that we are totally in the backwoods or necessarily wrong for doing so. After all, a few states are still debating whether the rulings in *Kent v. United States*, 383 U.S. 541 (1966) and *In Re Gault*, 387 U.S. 1, 55 (1967) can be interpreted to include a requirement that youths be competent to stand trial in delinquency proceedings.[7] Overall, Family Court, prosecutors, defense counsel, and the agencies involved try to maintain some degree of uniform procedure in these cases. After reviewing other states' mandatory evaluation components and the American Bar Association endorsed standards for assessments, it is clear that the quality of the reports prepared by Delaware's juvenile evaluators meets or exceeds the highest enunciated standards. We could most certainly continue to operate without any specialized statutes or rules, but this gap in services must be recognized and remedied. Despite all the recognition that our justice system has received, the options available to address the needs of this special population remain woefully inadequate.

The majority of juveniles who are found incompetent have permanent mental disabilities that simply cannot be mitigated by treatment.

Comparison to Other Jurisdictions

Statutory Changes. Arizona, Colorado, Florida, Ohio, Virginia, and Wisconsin are among some of the more progressive states that have enacted detailed statutory guidance for juvenile competency matters. Specialized juvenile competency statutes and procedural rules were created to address legal standards, procedural mandates, time frames, and treatment options. For example, some states now require a licensed psychiatrist or psychologist experienced in clinical evaluation or juveniles and trained in forensic competency assessments to complete evaluations. Evaluations must at a minimum include an opinion regarding whether the juvenile is competent to proceed, as defined by the code, and whether competency may be restored, and the identification of appropriate services.[8]

Many of the statutes mandate continued involvement of the court after a finding of incompetence by directing the court to create a minimally restrictive management plan that balances public safety and best interests of the child. Plans are required to address treatment and modalities that will permit a child to remain at or at least near home if at all possible, and identify responsible parties or agencies and appropriate behavior management tools. The plan may also include outside supervision, a guardianship petition, or any other remedy deemed appropriate or necessary.[9]

Restoration and Long-Term Treatment Programs. Florida and Arizona have created interesting long-term treatment and competency restoration programs. There are several other programs initiated in other states, but the Arizona and Florida programs operate completely differently.

Arizona has a program that utilizes special outside contractors to administer and coordinate the services offered by various state agencies. This is an unbelievably comprehensive program that pools the collective services of the courts, Juvenile Mental Health, and the Arizona Department of Education to create customized plans that are supervised by a mental health expert and include mandatory ongoing plan development and reevaluation until the juvenile reaches majority.[10]

Florida also established a fairly comprehensive restoration system but it is completely administered by outside contractors. An independent contractor operating as "The Brown Schools" provides restoration services a minimum of

3-6 hours per juvenile per week. These services are offered in three different settings: secure confinement, group home/specialized foster care, and in-home. Services include individual and group competency training, special education, behavioral management, social skills training, and psychiatric services.[11]

Emerging Case Law

Of particular interest is a recent Indiana Supreme Court ruling that held juveniles have a constitutional right to a competency determination, and that it was not appropriate to apply an adult competency statute to juvenile proceedings, particularly when the state had no facilities available to meet the needs of incompetent juveniles. *In the Matter of K.G., D.G., D.C.B., and J.J.S.*, Indiana Supreme Court, No. 49S04-0305-JV-225, May 20, 2004.

This Indiana case is distinguishable on its facts from the situation in Delaware. In particular, the Indiana statue read, "The trial court *shall* ... order the defendant committed to the division of mental health." The Delaware statute simply provides "... *may* order the accused person confined and treated." While it does not have direct application to Delaware procedure, some interesting seeds have been planted by the underlying reasoning in the opinion.

What Next for Delaware?

An informal juvenile competency committee has been in existence for almost two years. The task is a formidable one and it will take time to make any changes. Key agency and court players meet regularly; more will be brought to the table. Issues have been identified as well as gaps in service. Several actual cases have been dissected and analyzed. Model (and not-so-model) state treatment plans and statutory schemes have been reviewed. The committee is still in it's infancy, but eventually specific recommendations will made that will include, among other things, training for the bar and judiciary, statutory enactments, procedural changes, proposals for the necessary infrastructure, and funding and resources for adequate treatment programs. And, quite simply, if your level of awareness has been raised by this article, we are one step closer to achieving the goal. ◆

FOOTNOTES

1. Juveniles adjudicated of sex offenses require registration under Megan's Law. Tier III registration can apply to be moved to Tier II after 15 years. After another 10 years, defendant can make application to move to Tier I. In another 10 years, defendant may petition to be relieved of registration requirements. Under some circumstances there is no reduction in tier or relief from registration requirements if the victim was under 18 years old.

2. *State v. Lionel Tate*, 2003 Fla. App., LEXIS 18750.

3. *State v. Shields*, 593 A.2d 986, 1004 (Del. Super.Ct.1990) (citing *Dusky v. United States*, 362 U.S. 402 (1960).

4. *Oliver Randolph v. State of Delaware*, (Del. Fam. Ct.), slip opinion No. 510, June 30, 2005 (citing *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

5. Project Stayfree is a private contractor offering pretrial and presentencing monitoring. It includes counseling, curfew checks, regular telephone contact, home and school visits, and coordination of supervision with an existing probation officer. If ordered by the court, it may include electronic monitoring to further enforce curfew and school attendance. The Stayfree worker will keep in close contact with the juvenile and the parents to assure that all conditions are being complied with. If the terms are violated, Stayfree will return the child to the Court and request a bail review. Revocation of Project Stayfree will result in placement out of the home until the next hearing.

6. Otto, Randy K., Ph.D., *Capacity of Juveniles to Participate in the Legal Process: Clinical and Systems Issues*, Department of Mental Health Law and Policy, Florida Mental Health Institute, University of South Florida, presented in conjunction with Delaware Child Mental Health, January 24, 2004, Carvel Building, Wilmington, De. *Also see* Grisso, *at* http://www.abanet.org/crimjust/juvjus/12-3gris.html and Grisso, T., et al (2003). *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adult's Capacities as Trial Defendants.* Law and Human Behavior, 27, 333-363.

7. Id.

8. Understanding Adolescents; A Juvenile Court Training Curriculum. *How to Get High-Quality Evaluations and What to Do With Them in Court.* Prepared by Youth Law Center, Juvenile Law Center and ABA Juvenile Justice Center. At http://www.njdc.info/macarthur.php.

9. *Adjudicative Competence in the Modern Juvenile Court.* 9 Va. J. Soc. Pol'y & L. 353. Winter 2001 at pp 9-10.

10. *Id* at pp. 10-12.

11. The Brown Schools referred to in this article are a group of psychiatric hospitals, residential treatment centers, and community-based programs oriented toward youthful clients. This group also offers a wide array of other residential and wilderness treatment programs across the country designed for youth with behavioral problems. www.brownschools.com.

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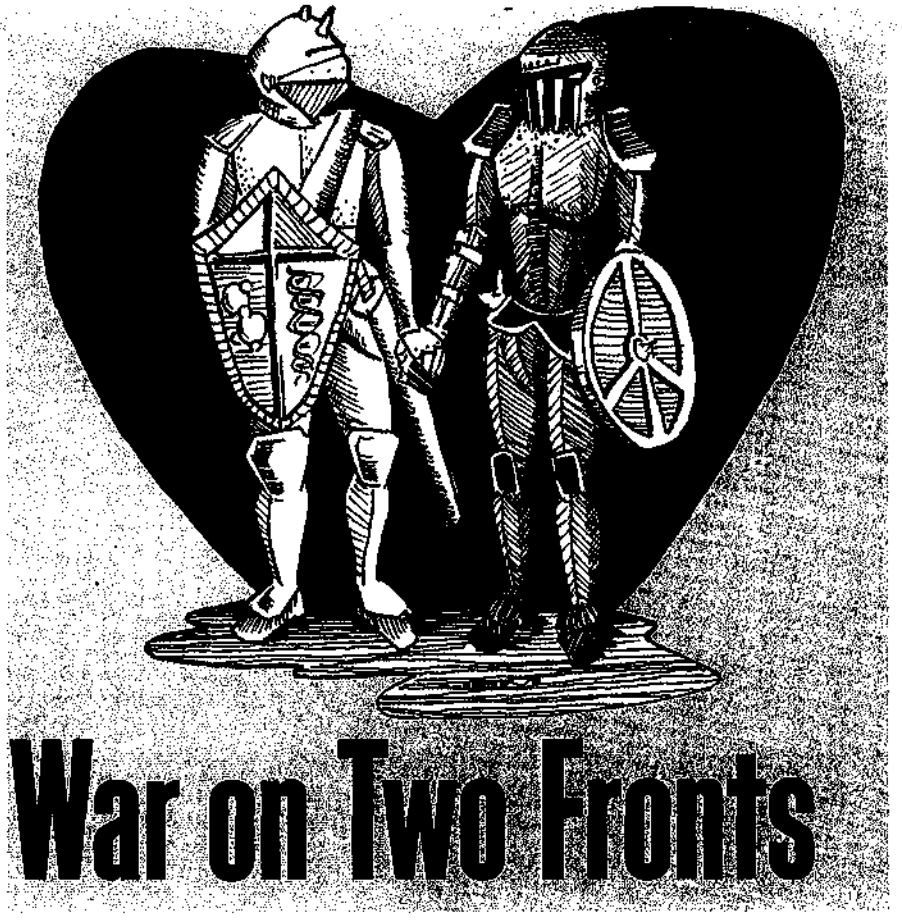

Fighting a War on Two Fronts

The Servicemembers Civil Relief Act

Servicepersons who are activated face a variety of family-law issues including conflicts related to divorce, property division, and child custody.

Anyone who has been embroiled in domestic litigation appreciates the similarity between that situation and a state of war. During domestic litigation, people who are normally pleasant and productive lose their objectivity and adopt the primary goal of destroying the other side in order to achieve "victory." Unfortunately, there are many innocents who succumb in the midst of this chaos, primarily the children, but also the family's financial stability, reputation, and self-esteem.

People who have otherwise been relatively financially responsible heretofore lose all sense of proportion and can spend inordinate amounts in attorney's fees and costs in pursuit of unrealistic goals. Persons who are able to conduct themselves appropriately in the business and work environment cease to be reasonable and go to enormous lengths just to "get even." Even if other aspects of one's life are intact, going through the process of divorce is often devastating, especially if children are thrust into the middle of the dispute.

Similarly, being involved in a war or national emergency can be devastating. Whether it is a member of the National Guard who is activated and has to take leave from his or her job, or a member of the military who is deployed overseas, the uncertainty caused by this change can be staggering. One is required to leave the stability of one's family and community to go toward the unknown. If this happens while one is in the midst of a divorce or post-divorce proceedings, the pressure can be overwhelming and the results catastrophic.

First, there is the understandable fear that a loved one will be far away and placed in the path of danger among people who are different and in a discordant cultural milieu. The forced separation is hard and the

constant bombardment of national and international news from the battlefield heightens the difficulty since the daily quota of news about the latest suicide bombing or the latest terrorist attack is, unfortunately, a reality of modern life. If this occurs in the context of divorce, family members who are already suffering the effects of the breakup of the family now have to face the possibility of permanent loss.

Second, the accompanying reduction in financial resources renders one unable to meet financial obligations. This problem is present in the context of divorce since there are two households living on the same amount of income and is aggravated in situations, such as the National Guard, where members are forced to leave their everyday jobs in order to meet their military obligations. For those already in the military, deployment abroad can also strain limited resources. As noted by the U.S. Supreme Court in reference to a precursor to the current law, there is a need to "[p]rotect those who had been obliged to drop their own affairs to take up the burdens of the nation."[1]

Servicepersons who are activated face a variety of family-law issues. These can include conflicts related to divorce, property division, and child custody, among others. Even servicepersons without family conflict develop family care plans prior to deployment to arrange for the welfare of their families while they are away.[2] This planning is perhaps even more difficult when the marriage or custody arrangements are immersed in conflict. Some units report that approximately 10 percent of first-time soldiers and 33 percent of second-time deployed servicepersons experience separation or divorce.[3] One option for the serviceperson is to appoint an attorney or designate a power of attorney prior to deployment or activation. However, due to time and financial constraints, among various other complications, this is often not a viable possibility. These realities, dating centuries back, set the stage for the development of laws to protect our servicepersons.

History of the Servicemembers Civil Relief Act and Its Predecessors[4]

The War of 1812 was the scenario for passage of the Louisiana "suspension" law, and the Civil War saw the passage of "stay laws" that imposed absolute moratoriums in both the North and the South on legal actions against soldiers. Subsequently, the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1918 introduced the concept of "material affect," which required proof that the serviceperson's ability to defend civil litigation was materially affected by his performance of military duties. The SSCRA expired by its terms following World War I.

The SSCRA of 1940, in turn, protected those "called to arms" and introduced a 6 percent yearly interest rate cap on financial obligations incurred prior to the commencement of military service for the duration of that service. 1991 amendments, at the time of the Desert Shield/Storm War, updated the SSCRA and added nondiscrimination provisions.

The Servicepersons Civil Relief Act (SCRA) was signed by President Bush on December 19, 2003. It applies to those who are active in the Army, Navy, Air Force, Marine Corps and Coast Guard; reservists called to active duty; commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration; and the National Guard in Title 10 or Title 32 status if called to active duty for more than thirty days to respond to a national emergency declared by the president and supported by federal funds.[5] It does not apply to civilian employees, retirees or Department of Defense contractors. Some of the provisions, however, apply to contractual obligations of dependents of those in the military. Dependents are defined as spouses, children and those for whom the serviceperson has provided over half of the support for the 180 days immediately before an application for relief under the SCRA. Active service includes absence from duty due to illness, wounds, leave, or other lawful causes and it includes the time from the receipt of orders to report and the actual commencement of service.

Basically, the SCRA provides both a mechanism to ensure that the serviceperson is able to respond to civil litigation while he or she is in the service and contains provisions for financial relief to alleviate the additional strain encountered during activation in the military.[6] Its purpose is to "1) ... enable such persons to devote their entire energy to the defense needs of the Nation; and 2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicepersons during their military service."[7]

When a defendant does not appear in court or respond to agency summons, the SCRA requires that the plaintiff file a sworn affidavit stating whether or not the defendant is in the military service or whether the plaintiff is unable to determine whether the defendant is in the military service. Absent said affidavit, the case should not proceed. In the event that it does, failure to file the affidavit can result in voiding of any order entered in the litigation if the serviceperson shows that he or she is materially affected by reason of military service in presenting a defense to the action and has a meritorious or legal defense to all or part of the action.

In those cases where the plaintiff cannot determine whether the defendant is in the military, the litigant or the court may apply for information to the Department of Defense, which issues a certificate of service.[8] The application is filed with the Defense Manpower Data Center (DMDC), Military Verification, 1600 Wilson Blvd, Suite 400, Arlington, VA 22209.

If the defendant is in the military, the court may not enter a judgment until after the court appoints an attorney to represent the serviceperson.[9] In addition, the court or agency is required to issue a mandatory stay of 90 days if there may be a defense and it cannot be presented without the presence of the serviceperson or, after due diligence, counsel has been unable to contact the serviceperson or otherwise determine whether a meritorious defense exists.[10] A request for a stay does not constitute an appearance for jurisdictional purposes or a waiver of any defense,[11] but must indicate how the serviceperson's military duties materially affect his or her ability to appear, and must contain a statement from the commanding officer stating both that the current military duties prevent appearance and that military leave is not authorized. The question of leave is significant since members of all

branches of the military receive thirty days of leave annually, accruing at the rate of 2.5 days per month, but military necessity may limit when the leave may be taken. Moreover, for members in basic or advanced training, missing training often means that one will have to repeat the same training program from the beginning. The serviceperson's Leave and Earnings Statement will reflect the amount of accrued leave.

One of the primary changes brought about by the SCRA passed in 2003 is the mandatory nature of the stay. The former SSCRA gave court discretion in entering an initial stay of 90 days when requested by the serviceperson.[12] The new SCRA provides different standards for the initial stay dependent upon whether the serviceperson has received notice of the proceeding. If the respondent is in the military service and *has not* received notice of the proceeding, the court must grant a stay for at least 90 days upon the request of a court-appointed attorney if there is a defense that cannot be presented without the serviceperson present, or if the attorney has been unable to contact the serviceperson to discuss a defense. If the serviceperson *has* notice of the proceeding, the court is mandated to issue an initial 90-day stay, provided that the serviceperson provides the following information:

1) a statement as to how the serviceperson's current military duties materially affect his/her ability to appear;[13]

2) a date when the serviceperson will be able to appear;

3) a statement from the serviceperson's commanding officer stating that the serviceperson's current military duty prevents his appearance; and

4) a statement that military leave is not authorized for the serviceperson at the time.[14]

Because the initial 90-day stay is mandatory if the above requirements are met, the phrase "materially affect" in regard to the serviceperson's ability to appear is significant. It is suggested that the court make a finding of material effect when, "a military member's ability to prosecute or defense a civil suit is impaired by military duties which prevent the member from appearing in court at the designated time and place, or from assisting in the preparation or presentation of the case."[15] A material effect might also be found if the serviceperson's ability to meet financial obligations is affected.[16] In Delaware, this standard has been applied in *Advanced Litigation, LLC v. Herska*, where the court held that since the defendant's attention would be demanded elsewhere due to his deployment to Iraq, this would materially affect communication with regard to his litigation, thus impeding his ability to effectively conduct his defense.[17]

A stay may not be the most appropriate legal tool for the parties because it prolongs the dispute and harms the children by contributing to their instability.

Serviceperson's Dilemma: To Stay or Not To Stay?

Initially, it would appear that the activated serviceperson should always request the mandatory stay, thereby seeking to benefit from the SCRA protections. After all, if one's body and mind are elsewhere, why embroil oneself in the minutia of Family Court litigation, especially, if by seeking a delay, one could make it harder for the other side? This would appear to be especially true if the serviceperson is the one in the seemingly more powerful position because she either has the child or has control of the funds. The following scenarios are intended to demonstrate in everyday terms the types of situations in which these questions arise:

1) The serviceperson has been activated, within the U.S. mainland, to another state nearby and has taken the child with him in a situation where the serviceperson has been the primary caretaker for the child but the noncustodial parent has had alternate weekend and other visitation. The second parent is understandably frustrated by lack of access to the child, especially since the first parent has not been deployed overseas and, in the second parent's view, is merely using the SCRA strategically to gain advantage in the custody litigation. In this case, the child is cut off from the parent who is not in active military service for no other primary reason other than convenience of the parent who has been activated.

2) The activated serviceperson has made arrangements for payments of the mortgage and other expenses on the home occupied by her and the children prior to the activation, thereby preserving that asset, but will not agree that the other parent can move into that home during the period of activation because she fears that the other parent will dissipate that asset, either through use or malicious action. The second parent requests permission to move back into the home with the children on the grounds that the children need the additional space that they don't have in the cramped apartment that the second parent can afford. In this case, the children are forced to live in more limited quarters than they did previously, away from the surroundings that are familiar to them at a time that they are suffering the loss of the daily presence of the first parent, who has been activated.

Both of these situations demonstrate how children are often placed in the middle of parental disputes, either intentionally or unintentionally, and suffer the possibility of incalculable loss. These are primary examples of situations in which a stay may not be the most appropriate legal tool for the parties because it simply prolongs the dispute and harms the children by contributing to their instability. The above are situations in which a temporary order may be appropriate to provide stability for the children while one parent is activated.

3) The parent who has been activated has provided structure and discipline to a child with Attention Deficit Hyperactivity Disorder (ADHD) and has previously refused to consent to psychotropic medication for the child. While not perfect, this arrangement worked reasonably well when both parents were present on a regular basis and the serviceperson's approach helped compensate for any lack of structure in the other parent's household. However, now that the child is primarily in the other parent's home, the lack of structure in that home is more evident. Combined with the child's fears for the safety of the absent parent, the situation has deteriorated and, while medication such as Ritalin and Adderal were considered by the medical providers previously, now more powerful medications like Respiral are suggested. The absent parent, who has been activated to Iraq, is not willing to consent to such drastic intervention from a distance and the parent who remains behind is at a loss about how to deal with the child on a daily basis. The child, however, is quickly losing ground and cannot wait for the absent parent to return at the completion of her military assignment months from now.

In this case, the child's deterioration is profound and the difficulties with the geographic distance appear insurmountable. This and similar situations are more common since our country has engaged in the Global War on Terrorism, which has resulted in a greater number of deployments in which activated military family members are separated for longer periods of time over greater geographic distances.[18] Similar problems are again encountered when the servicemember returns home, coparenting must resume and the child must readjust to both parents once again. This reentry has been the focus of many programs established by the armed forces. These programs can be of great assistance, not just for intact families, but also for those involved in custody and marital disputes as well. Those providing legal assistance to such individuals should recommend that parents seek these services in addition to any legal services being provided.[19]

4) The serviceperson is divorced immediately before deployment and a property division hearing is months away. He has worked for a company for many years while married and, absent a Qualified Domestic Relations Order (QDRO) allocating a share of that person's pension benefits to the former spouse, the former spouse will probably not be able to claim her share of the benefits in the event that the serviceperson perishes prior to the entry of a QDRO. The problem arises because Delaware, unlike other states, has bifurcated proceedings in which the entry of the divorce decree often occurs months before the property division hearing. The passage of time also affects other financial responsibilities, such as credit-card bills, which accrue interest on overdue balances. While the SCRA places a cap on the interest rate, the fact is that time is still passing and the credit-card bill, which may have been paid in the normal course of business if the family were intact, now remains unpaid while the parties remain entrenched in their respective positions in the midst of the domestic imbroglio.

In this case, a family with relative financial stability may lose a large part of the marital estate because everything is on "hold." This is another example of a situation where a stay may not be the most appropriate tool.

In each of the above cases, and in many variations thereof, it may be prudent for the parties to consider addressing the underlying issues in a timely basis, rather than resorting to the mandatory stay which, by virtue of the passage of time, will only result in the worsening of the underlying problems. After all, the difficulties don't go away, they merely deteriorate and get worse.

Given the SCRA's provision for the appointment of counsel and the realities of modern technology, communication with counsel through the use of e-mail and participation in the litigation by parties activated in the military through mechanisms such as videotape depositions suggest that the "knee-jerk" response of always invoking the mandatory stay for the duration of the first 90 days may not always be the best or obvious solution. This is particularly significant when an attorney is appointed and that attorney can provide an analysis for the client of the pros and cons of the 90-day stay.

The decision whether or not to invoke the stay is exemplified in *Lenser v. McGowan*, decided by the Supreme Court of Arkansas. In that case, the trial court granted a stay of proceedings under the SCRA, however, the court simultaneously issued a temporary custody order. The Arkansas Supreme Court upheld this ruling stating that, "The stay of the Civil Relief Act does not freeze a case in permanent limbo and leave a circuit court with no authority at all."[20] This case, among others, demonstrates the importance, at times, of issuing a stay, but providing some type of temporary order for the sake of the child. Particularly with a temporary or interlocutory order, the interests of the child may be preserved while, at the same time, not entering a final default judgment against the serviceperson while he is unavailable. This concept was also demonstrated in *Shelor v. Shelor* where the Supreme Court of Georgia determined that a temporary modification of child support did not materially affect a serviceperson's rights since it was a temporary order and was later modifiable.[21] *Shelor* aptly demonstrates the importance of providing a child with child support, even while the serviceperson is deployed. In addition to seeking the issuance of a temporary order along with a stay of proceedings, servicepersons also have the option of filing a motion to reopen

> Section 201 of the new SCRA provides for the appointment of an attorney to represent litigants in military service. This section requires that if a defendant is in military service, the court may not enter a default judgment against the defendant until after the court appoints an attorney to represent that serviceperson's interests. If that attorney cannot locate the serviceperson, the attorney may not waive any defenses of the serviceperson or otherwise bind him or her to any agreement. The court-appointed attorney's role is simply to protect the interests of the serviceperson.

See **Fighting a War** on page 31

T. Vernon Drew

An interview with
Joanna L. Bergmann,
Arthur L. Caplan,
and Nadia N. Sawicki

Conceiving

An Ethicist's Approach to Paternity Disestablishment

Technological advancement leads us to the same initial questions: What is a mother? What is a father? How do these parental rights and responsibilities arise?

On January 25, 2006, an invitational symposium on Emerging Issues in Paternity Establishment was convened in Washington, D.C., by the Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services (ASPE). This project grew from discussions between ASPE and the federal Office of Child Support Enforcement.

Changes in paternity establishment policy have overwhelmingly benefited children born outside of marriage. The science of genetics has unlocked biological identity. The federal requirements and financial support provided under the national child support enforcement program offer inexpensive, streamlined procedures by which legal fatherhood may be established — both voluntarily and in contested cases. In fiscal year 2004 alone, 1.6 million children had paternity either established or acknowledged.[1] However, in the past few years, there were a growing number of cases in which paternity established by voluntary acknowledgement, default orders, or consent were being later challenged. These cases (together with those of ex-husbands) have engendered a wide-ranging response by courts and state legislators — as well as high visibility in the media.

Paternity disestablishment touches on areas such as child well-being, marriage and family formation, health promotion, and the interaction between science and society. The ASPE project is a very preliminary look at an emerging issue. The research is anecdotal; the magnitude of paternity disestablishment is unknown. The symposium's goal was to look beyond just the economic implications of paternity disestablishment and consider the emotional, social, and financial well-being of the child; the societal and legal implications of paternity disestablishment, including maintaining the integrity of the paternity establishment process; and the affect of child support enforcement and other federal programs, especially child welfare.

Those invited, including law professors, child welfare researchers, state and federal administrators, and academics, considered four background papers.[2] The final paper of the day, "Conceiving the Father: An Ethicist's Approach to Paternity Disestablishment," explored: "How should society and the law respond when, for want of genetic ties, the father of a child seeks to relinquish his parental rights and responsibilities? How should policy makers, legislators, and judges negotiate and reconcile the conflicting values and stakeholder interests which lie at the heart of such disputes?" I was fortunate to facilitate the symposium and am equally pleased to interview, for Delaware Lawyer, *the paper's authors on the ethical considerations and constructs raised by paternity disestablishment.[3]*

VERNON T. DREW: Your central work is in bioethics. How is your interest in the ethical conundrums around paternity disestablishment connected to your other work?

ARTHUR L. CAPLAN: We have been fascinated for some time now at the center with the social and ethical challenges and opportunities raised by advances in reproductive medicine. We have long been aware that historically mothers who gave birth were understood to be the indisputable mothers of their children. But, with advances in reproductive technology it is now possible for a woman to give birth to a baby with whom she has no genetic relationship. The transplantation of reproductive organs and the ability to procure sperm and eggs from persons who are deceased also creates situations where persons who might have been parents are long since dead, raising obvious questions of paternity. Some courts have already had to wrestle with the issue of paternity in situations where a child was born after the death of the biological father in terms of determining eligibility for inheritance or for state benefit programs. So the issue of paternity establishment and disestablishment has been on our intellectual "plate" for some time.

NADIA N. SAWICKI: For the bioethics community, there is no more exciting place to be than at the forefront of technological advancement. As Art noted, novel reproductive technologies are very much challenging traditional understandings of parenthood. Surrogate motherhood, ovarian transplants, postmortem sperm donation all lead us to the same initial questions: What is a mother? What is a father? How do these parental rights and responsibilities arise? Our responsibility as bioethicists is not just to explore these basic questions, but also to understand their further implications and identify potential problems on the horizon. Personally, exploring the issues surrounding paternity disestablishment was a way for me to recognize that there are ethical questions relating to parenthood that extend throughout a child's life. In other words, having a definitive answer to the question "Who's the father?" at the time of a child's birth is not enough to insulate us from problems in the future — for example, where the father identified at birth seeks disestablishment of his paternal status. Having an ethically sound theory of parenthood is certainly helpful, but it is by no means sufficient to deal with these ongoing challenges.

JOANNA L. BERGMANN: For me, the idea of a biological or genetic imperative has long captured my interest; that is, the notion that we are not only biologically predisposed to favor our genetic offspring but that we are also biologically compelled both to conceive and to raise genetically related offspring regardless of the medical obstacles, the financial costs, or the emotional consequences that follow. I would argue that the proliferation of reproductive technologies is one of the most significant and high-profile manifestations of the way we in the United States as individuals and as a society support this so-called imperative — but whether or not the imperative derives from biology or society or from some combination of both is to me a fascinating question. While this imperative has long been framed as a female phenomenon, exploring the debate over paternity disestablishment has given me a unique opportunity to gain a new perspective on this issue as well as a chance to explore aspects of the so-called imperative in terms of an actual, tangible policy debate.

VTD: I find it interesting that at the same time we are forging ahead with an amazing array of reproductive technologies, there is an undeniable backlash in the child support arena to ensure that a man is held responsible only for supporting a child with his genetic markers. You talk about the three monistic models by which the legal system determines paternity. Would you briefly explain these and what values each model represents?

NNS: Sure. The most traditional model of paternity establishment, originating in Roman law, is a status-based model grounded in the marital presumption. This, of course, is the presumption that the husband of a woman who gives birth to a child is the child's genetic father. Some might argue that, today, the marital presumption has lost its relevance, given the availability of genetic tests that can determine paternity with a far greater degree of certainty. But, in fact, the marital presumption is still alive and well in many states, and I think exploring its historical origins can help us understand why. This model represents the stability and sanctity of the marital unit and the state's reluctance to intrude in that sphere. While today's marital landscape has certainly changed, I think the marital presumption in some ways reflects a societal ideal, a goal many parents and legislators wish to strive for, and that may be why it is still so prevalent.

The second model, a function- or intent-based model, assigns paternity to the man who actively assumes a paternal role in a child's life, regardless of marital status or genetic connection. This more modern approach reflects the understanding that a child's best interests may be better served by assigning paternity to the man most willing and able to care for the child, rather than grounding paternity in idealized categories of men who should assume an interested and active paternal role. In fact, it's almost like a contract-based theory, in that it allows for changing paternal roles over time.

Finally, the purely genetic model views a man's paternity as fixed at the moment of conception by virtue of his genetic contribution. The benefit of this model, of course, is that it provides for a bright-line, scientifically verifiable determination of paternity that is hard to dispute (for example, in enforcing child support orders). On the other hand, this model has been challenged by some as overly simplistic. For exam-

ple, evidence from adoptive households and other nontraditional families suggests that children can be successfully nurtured and reared by adults with whom they share no genetic link.

ALC: The state is often only interested in minimizing its liability for the financial provision for children. It often relies on genetics simply as a means to clearly identify a party against whom a claim of financial responsibility can be made. But, it is hardly self-evident that a genetic tie between a father and a child is the best basis for creating a paternal relationship. Nor is it always a child's best interest to seek fiscal support from the genetic father — for example, where the genetic father has many children with more than one partner and poor job prospects. Nor is it clear that the state should try to overturn situations where men seek to parent children and support them even without a genetic tie to them. Public policy needs to understand that there is more than one way to ground paternal relationships and simple-minded solutions that may sound appealing in theory do not necessarily create the best environment and circumstances for the flourishing of every child.

VTD: Historically, children seemed primarily to offer an economic benefit to their parents or caretakers — as workers — and legitimate children offered a perceived societal benefit, stabilizing control of wealth through inheritance. I am not sure many parents would today categorize a child as a financial plus — at least until well into their adult years, possibly when you are old and gray, seeking their help with your nursing home bills. What do you see as the competing interests in the approach we take to establishing or disestablishing paternity?

ALC: Ethically there are many different interests at play in child-parent relationships. Some societies see children as a key means to achieving security in old age. Others see children as a primary means for ensuring the survival of an ideology, culture, or value-system. Still others see children as an "option," but not something that anyone need feel a duty or obligation to create for any single reason.

From the point of view of law and morality it becomes very important to create policies that protect the interests of children. They do not consent to their own creation and for extended periods of time are completely dependent on others for their existence and survival. So while adults may argue about the motivations for creating children and social theorists may expound on what role children ought to play in the overall fabric of a society, there would seem to be an overriding obligation on the part of the law to shape public policy so as to maximize the protection of the interests of each child, which may mean that a fine-tuned rather than a blunt set of protections is requisite.

Simple-minded solutions that may sound appealing in theory do not necessarily create the best environment and circumstances for the flourishing of every child.

JLB: That said, each individual (including society) with a stake in the outcome of a given paternity disestablishment case has a unique set of interests. In our view, these interests can be grouped into five categories: financial, medical, emotional, developmental, and legal/administrative. Depending on the facts of the case, the interests actually held may conflict or correspond. And, depending on the values or moral philosophy ultimately selected for expression in a paternity disestablishment policy, the same interests may or may not be valued in the case's resolution. Nevertheless, after enumerating the stakeholders and their interests, we did notice that a few surprising features emerged fairly consistently.

VTD: What are those features?

JLB: First, despite the fact that the medical interests of fathers and children are often held out as a central reason to favor a disestablishment policy based purely on genetics, as important and universal as genetic transparency may be for individual and familial health, it need not dictate legal paternity for those medical interests to be realized. Accurate genetic information and access to medical histories alone should be sufficient to satisfy those important medical interests.

Second, stakeholders, interests, and what is required to satisfy them are *not* necessarily going to be stable over time. This suggests that parity between paternity establishment and disestablishment policies may be unnecessary. For example, while the genetic father may best meet the child's emotional interests in love and support at the time of the child's birth, after a paternal relationship is formed between father and child, that need will best be met by preserving the stability of the existing relationship, regardless of whether it is with the genetic father.

Third, no matter how carefully one analyzes each stakeholder and no matter how diligently one attempts to balance everyone's interests, there is ultimately little to nothing that any policy or court of law can do to ensure that interests other than financial interests are met. Therefore, rather than debating the issue at the back end of a disestablishment action, it may be preferable to debate and to settle the issue at the front end, since, at the point of paternity's dissolution, it may be too little, too late.

VTD: In recommending what the law should permit — e.g. biology trumps always, anytime vs. conclusive presumptions and unopened default orders; mandatory genetic testing at birth for all children (marital and nonmarital) vs. restricted time periods to request a genetic determination — you describe three ethical models for the

disestablishment of paternity. Would you explain these and give our readers an example?

NNS: Conceptually, the simplest model is the purely utilitarian approach, whereby different parties' preferences and interests are weighed against each other in an effort to maximize satisfaction of interests. In other words, we should grant a petition for paternity disestablishment if doing so will satisfy more participants' interests or interest categories than denying the petition. This simplistic, almost mathematical, approach leaves little room for dispute.

A modification of this model is a rule-based utilitarian model, which performs the same system of weighting, but takes into account additional rules reflecting values we wish to promote. For example, if society determined that the interests of the child should reign supreme, those interests would take priority. Alternatively, if society concluded that the principal value to be pursued in paternity disestablishment cases were the preservation of existing, supportive father-child relationships, this rule would govern our weighting of interests; again, a somewhat simplistic approach.

The model we favor is one based on three general ethical principles that are particularly relevant in the context of disestablishment — fairness or justice, beneficence and nonmaleficence, and the linked principles of autonomy, liberty, and privacy. Looking at each scenario, we ask ourselves how best to promote these principles. The principle of fairness or justice, for example, may be best promoted by favoring the interests of the most innocent party (that is, the child). Likewise, if a paternity disestablishment action arose as a result of one party's dishonesty or blameworthy conduct, we might value that party's interests lower. Questions of beneficence and nonmaleficence are tied to the utilitarian analysis above — in other words, we approach every case thinking about how best to promote satisfaction and avoid harm. Finally, the principles of autonomy, liberty, and privacy seek to avoid excessive government intervention in the distribution of children, the attribution of paternity, and the reformation of families. In other words, where a group of autonomous parties is able to find a solution on its own, the state should refrain from interfering to promote its own interests. A guiding force, of course, is the constitutional principle of privacy in the familial sphere.

VTD: Space limitations preclude us discussing the multitude of fact patterns in which paternity disestablishment arises. Your paper applies these principals to a range of cases. For this discussion, would you walk us through the story of Jane, who currently lives with her boyfriend, Charles, and her 18-month-old son, Timothy?

Where a group of autonomous parties is able to find a solution on its own, the state should refrain from interfering to promote its own interests.

Jane and Charles had been dating intermittently for three years, and moved in together when Jane informed Charles that she was pregnant with his child. In fact, at the time of Timothy's conception, Jane and Charles were broken up and Jane was exclusively seeing Earl, who was unemployed and physically and verbally abusive towards Jane. Jane left Earl upon realizing that he would not make a good father for her unborn child, reconnected with Charles, and, within weeks, informed Charles that she was pregnant. She assured Charles that she had had no other sexual partners during their brief breakup and suggested that the child must have been conceived on the night of their reunion. In reliance on Jane's assurances, Charles took on a second job, found a new apartment with room for a nursery, and asked Jane to live with him so they could raise the child together. At the hospital and with his consent, Charles was listed as the father on Timothy's birth certificate. Recently, Charles noticed that Timothy's features look nothing like his own and asked one of Jane's best friends if it was possible that the child was not his. "You didn't know?" asked Jane's friend incredulously. "That deadbeat Earl is Timothy's real father." Charles, who feels angry and upset, initiates a paternity disestablishment action.

ALC: A utilitarian analysis of this case would emphasize that both Timothy and Jane have an interest in ensuring that Timothy has an available father figure offering emotional, developmental, and financial support. Administrative interests likewise tend to favor stability, particularly when the existing father is able to offer financial support. These interests weigh strongly against granting Charles' petition for disestablishment. As Earl's interests are unknown, the only interest in favor of disestablishment appears to be Charles' interest in withdrawing from a situation that he might not have agreed to had he known all the facts. Thus, a strict interest-oriented utilitarian approach would likely result in the denial of Charles' disestablishment action.

The virtue of the utilitarian model is that it seeks to produce results that are tangible, actual instantiations of an empirically verifiable good — maximizing the satisfaction of stakeholder interests. However, its appeal is compromised by the fact that it does not distinguish those interests which society believes should be afforded greater consideration from those interests which society considers, for one reason or another, to be less "worthy."

JLB: In contrast, applying a rule-based weighting system to the above scenario, it is clear that the preferred outcome will differ depending on the rule selected. For example, ranking the child's interests above all others would likely

result in denial of Charles' disestablishment action, as removal of a supportive father figure would not likely be in Timothy's best interests. Favoring stability of existing relationships would likewise weigh against permitting disestablishment (although, as we noted in our paper, it is impossible for the law to mandate the quality of those existing relationships into the future).

On the other hand, a preference for genetic ties above all else might lead us to permit Charles to disestablish his paternity, presumably giving Timothy a greater opportunity to learn about his genetic history if he is raised with no misconceptions about who his genetic father may be.

Although simple and easy to apply, such a rule-based model falls short of the ideal because it tends to be formulaic, inflexible, and lacking in nuance. Always favoring a particular stakeholder's interests or a particular value-weighted category of interests smacks of a cookie-cutter approach to paternity disestablishment under which all outcomes are essentially predetermined. Applying a fixed rule (or even a rebuttable presumption) dictated by somewhat arbitrary normative assumptions and generalizations leaves no room for the intricacies and ambiguities of each case. Such an approach is particularly troubling given the lack of societal consensus about which set of interests should take priority in every case — Genetics? Stability? Finance? Best interests of the child? Finally, as Art noted, the application of a rule will not necessarily result in the realization or advancement of the rule's underlying interests or values.

NNS: As I mentioned earlier, we favor an approach that applies ethical principles that are particularly relevant in the context of disestablishment — fairness or justice, beneficence and nonmaleficence, and the linked principles of autonomy, liberty, and privacy. In Timothy's case, the principled approach would first consider fairness as between the interested parties. It would recognize Timothy's relative innocence and inability to care for himself, as well as Jane's dishonesty and what effect, if any, it should have on the comparative valuation of her interests and desires. Principles of systemic fairness might also dictate that there be some degree of congruence between the method by which Charles established his paternity (voluntary acknowledgement based on representation of a genetic link) and his justifications for seeking disestablishment (deception and absence of genetic link).

The principles of beneficence and nonmaleficence, in turn, require consideration of the relative benefits and harms that each stakeholder would experience were Charles permitted to disestablish paternity. For example, both Timothy and Jane would be significantly harmed by withdrawal of Charles' financial support. A principled model would also weigh the harms to Timothy's development and the general family structure that might arise from disestablishment (breakup of the family unit, possible emotional and developmental harm to Timothy) with those that might result if Charles' petition were denied (bitterness or anger on Charles' part, potentially resulting in familial conflict). To the extent that Earl might become involved in Timothy's care were Charles to withdraw as the legal father, it would be necessary to consider what harms or benefits might arise from Earl's involvement. Likewise, we should consider Timothy's interests in understanding his genetic background and whether disestablishment is necessary to satisfy these interests.

A fixed rule ... dictated by somewhat arbitrary normative assumptions and generalizations leaves no room for the intricacies and ambiguities of each case.

Finally, principles of autonomy and liberty suggest that we recognize Charles' and Jane's freedom to contract and come to their own agreements, and consider the extent to which Jane has responsibly exercised her autonomy in the past. We should also consider the systemic implications of having a governmental decision-maker make the final determination as to paternity withdrawal rather than encouraging a system in which the adult stakeholders negotiate an agreement among themselves.

VTD: It appears Timmy's case leads inevitably back to the need to coordinate these three sets of principles into a workable policy that judges are able to apply in an equitable manner.

ALC: True, but we believe the application of such a policy is likely to yield outcomes that are fairer, more principled, and more accurately reflective of individual interests than a simple rule-based approach. While decision-makers applying the principled model may find the process of adjudicating individual cases somewhat more complex than adjudication under a rule-based or presumptive model, it is this comprehensive process that brings to the principled model the benefits of ethical reasoning. Only a paternity disestablishment model which recognizes and considers the values inherent in paternity establishment, the interests of various stakeholders, and the ethical principles guiding a just society will be capable of bringing public policy closer to the ethical ideal.

VTD: This important debate on how law and society should respond to the challenge of paternity establishment and disestablishment is clearly just beginning. I thank you all for sharing your insight and look forward to the continuing discussion. ◆

FOOTNOTES

1. There were over 915,000 in-hospital and other paternities acknowledged in fiscal year 2004. This amounts to more than a 5 percent increase over fiscal year 2003. (OCSE Preliminary Data Report for fiscal year 2004) Table 4 of that report shows paternity acknowledge-

ments were obtained for a national average of 71.99 percent of children born out of wedlock. For a number of states, the data is not available. http://www.acf.dhhs.gov/programs/cse/pubs/2005/reports/preliminary_report/.

2. In addition to the ethics paper that is the subject of this interview, Marsha Garrison, Brooklyn Law School presented her paper, *Implications of Principles of Family Law*. Linda Elrod, Washburn University School of Law (and former chair of the ABA Family Law Section) discussed this paper and that presented by Susan Paikin on *The State of Paternity Establishment Policy*. From the child welfare perspective, Waldo Johnson, University of Chicago and Wayne Salter, Midwest Center on Workforce and Family Development, presented their paper, *Paternity Disestablishment and Child Well-being: Lessons Learned from Child Welfare and Family Law*. Esther Wattenberg, University of Minnesota, was the discussant for the ethics and child welfare papers.

3. The views expressed in this article and the four background papers are those of the authors and do not necessarily represent the official positions or policies of the Department of Health and Human Services or its agency. The papers and expert symposium were prepared for the Office of the Assistant Secretary for Planning and Evaluation of the United States Department of Health and Human Services, Washington, D.C. under Contract No. HHS-233-02-0089-3 with Xtria LLC.

Paternity Disestablishment — Just the Facts, Please![1]

18 years, 18 years
She got one of yo kids got you for 18 years
I know somebody payin child support for one of his kids
His baby momma's car and crib is bigger than his
You will see him on TV Any Given Sunday
Win the Superbowl and drive off in a Hyundai
She was spose to buy ya shorty TYCO with ya money
She went to the doctor got lypo with ya money
She walkin around lookin like Michael with ya money
Should of got that insured got GEICO for ya money
If you aint no punk holla We Want Prenup
WE WANT PRENUP!, Yeaah
It's something that you need to have
Cause when she leave yo ass she gone leave with half
18 years, 18 years
And on her 18th birthday he found out it wasn't his

— **Gold Digger** by Kanye West (2005) ©

When child support and questions of father-identity are the topic of a Grammy-award winning rap song, you know the subject has moved forever beyond the courtroom and academic journals. Paternity establishment is the legal affirmation of the identity of a child's father. From common law until very recently, paternity law regarding marital and nonmarital children was straightforward. The father of a child born during marriage was conclusively the mother's husband, stemming from the presumed biological link. Known as Lord Mansfield's Rule[2] the testimony of husband and wife was barred on paternity issues. The presumption of legitimacy could be rebutted only when it could be conclusively shown that the husband was "beyond the four seas," and thus could not possibly have fathered his wife's child. Still later, paternity challenges for marital children were allowed when the father was in prison at the time of conception, or could establish he was impotent or sterile.

The marital presumption is today codified into state law either as a conclusive or rebuttable presumption. While states may permit the husband or wife to challenge paternity of a marital child at the time the marriage is terminated, the law is far more reluctant to permit a stranger to the marriage to establish his paternity of the child when the marital relationship is intact.

As to children born outside of wedlock, they were considered *filius nulius* — the child of no one. Where paternity was established at all it was through "bastardy" proceedings. The putative father was arrested and tried before a jury. The mother had the burden of proving paternity beyond a reasonable doubt. The suit was brought to relieve the public of the burden of providing for the child. Where paternity was established, the child had few legal rights. (Indeed it was this loss of rights — succession, inheritance, and financial support — that caused the bar to be set so high when paternity of a marital child was challenged.)

Over the last 30 years, changes in the structure of society and scientific developments have radically altered paternity law and practice regarding both marital and nonmarital children. Nonmarital births have soared. In 1960, 225,000 children (five out of 100) were born to unmarried mothers; today more than one-third of all children are born outside of marriage. During the same period illegitimate children have gained greater rights and the changing role of nonmarital fathers has matured in law, policy, and public discourse. And a series of federal requirements in Title IV-D of the Social Security Act facilitated the establishment of the father-child relationship. As a condition of federal funding, states are required to provide genetic testing and eliminate jury trials in contested cases. Far greater emphasis is placed on voluntary paternity acknowledgments, and courts are required to enter default orders where the respondent has been served and failed to appear.

Equally unchallenged is that modern genetic testing has unlocked biological identity. Billboards and Internet offerings for do-it-yourself kits to determine "Who is Daddy?" are omnipresent — as are those screaming television programs (which of course no reader of this magazine watches) declaring or disproving a man's biological connection to a child before a screaming audience. Yet such testing presents a classic example of opening Pandora's Box: We can know the scientific "truth" of who fathered a particular child; does that mean the biology is paramount? And what should the law do when someone — the legal father, the mother, another man — seeks to terminate an established and ongoing father-child relationship that is not based on biology?

Where someone seeks to end the legal relationship between a child and her legal father, to a surprising extent six factors tend to sway the judge when deciding whether or not to disestablish paternity. While it is true that all paternity disestablishment cases have bad facts — and we know that bad facts make bad law — below is a shortened synopsis of these paternity disestablishment archetypes:

White Knights. Is another man willing and able to step up and be the father? No judge wants to create a fatherless child. Substitution is more acceptable than desertion. So if another man wants in, disestablishment appears more acceptable to the courts. For example, the court declined a husband's disestablishment request in *In re Marriage of Wendy,* 962 P.2d 130 (Wash. Ct. App. 1998); the alleged biological father was incarcerated and the child should not be left essentially fatherless. Similar prejudice to the child won the day in *F.B. v. A.L.G.,* 821 A.2d 1157 (N.J. 2003); the acknowledged father was not allowed to sever the legal relationship (and corresponding financial obligation) where there was no biological father to assume the role. Correspondingly, the ability to corral the child's genetic parent swayed a Wyoming court to allow a husband to disestablish his paternity. Two years after waiving genetic testing at a court hearing, the mother purportedly surprised her husband with the news that he may not be the child's father. He was allowed out because genetic testing established another man as father. *MAM v. Wyoming,* 99 P.3d 982 (Wyo. 2004).

Baretta. For those old enough to remember '70s TV (rather than the recent criminal justice appearance of its star), this category of cases proves the old adage, "Don't do the crime if you can't do the time." The trend: If one party has a criminal record, bet against him or her; if both sides have "issues" go

with the relatively cleaner one. Take for example *Koos v. Wilson*, 2005 Iowa App. Lexis 243 (March 31, 2005). Mother tells her husband he is not Dad — after she has been convicted of embezzlement. Turns out mother's out-of-town "business" was named Brendan, the biological father. Court refuses to oust father at Mom and Brendan's behest. *In re Jessua*, 95 P. 3d 2 (Cal. 2004) offers a biological father, incarcerated for raping his 7-months pregnant girlfriend. He decides he wants to claim the girlfriend's older child from mother's husband. Mother and her husband had not lived together for several years but never divorced. Their five children all lived with husband. While mother was in the hospital due to the rape, child protective services released her child to live with husband, who agreed with mother that he would be the child's father. The court refused to allow rapist bio-dad to disestablish paternity of husband. Finally, *Randy A.J. v. Norma I.J.*, 677 N.W. 2d 630 (Wis.2004) offers the tale of an acknowledged father, who obtained custody while mother was in prison. She now seeks custody and the biological father intervenes. No go. Although all the parties had drug histories, the court credits acknowledged father with being sober for a substantial period of time — while mother remained a mess. The attempt to disestablish father's paternity is denied.

Devoted Dad Veto. When a legal father has a relationship with the child and wants to remain the father despite knowing he is not a biological parent, courts are reluctant to disestablish his paternity. The media so hypes the "duped dad" and "paternity fraud" it is easy to forget that paternity disestablishment cases are frequently litigated to oust the legal father because he is not a child's biological parent. There are dozens of cases providing variations on this theme: both *In re Marriage of Their*, 841 P.2d 794 (Wash. Ct. App. 1992) and *Pettinato v. Pettinato*, 582 A.2d 909 (R.I. 1990) preclude mother from challenging paternity of an ex-husband who had been awarded custody of his nonbiological child. As the Rhode Island court said: "We are concerned about the situation before the court wherein a mother can tell a man that he is a father of her child, marry him and live together as a family, and then illegitimatize the child during a divorce proceeding by attacking the legal presumption of paternity that she helped to bring about." In *John P. v. Vito C.*, 6 Misc.3d 1099 (N.Y. Fam. Ct. 2004), a child was born two months after marriage. Mother later dies and the court rejects the biological father's suit against the husband. However, there may be a caution for the Devoted Dad. In *Griffin v. Bell*, 881 So.2d 184 (Miss. 2004), the court said that parentage is about biology. Mother and husband married after the child's birth; he believed he was the biological father. Genetic testing at divorce reveals he is not. Mother establishes paternity of biological father, who then turns around and agrees with husband that husband should be declared the legal father. The court rejects this agreement, but in a twist on "Heather Has Two Mommies," says the husband can petition for custody and visitation in a separate proceeding.

Defense of Marriage Act (DOMA). Courts don't want to be home-wreckers. If a child is born of the marriage and the married couple opposes disestablishment by the biological father, courts are reluctant to disestablish. The most famous of this category of cases is *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) wherein a four-member plurality of the United States Supreme Court determined that Michael's interest in establishing his parentage with his biological daughter was not constitutionally protected. The married mother had an affair with Michael during her marriage. Her husband's name was on the child's birth certificate and he held out that she was his daughter. The marriage remained rocky. Several times over the next few years mother and child lived with Michael; during these times he also held himself out as her father. Eventually, husband and wife reconciled and blocked Michael from seeing the child. He filed to establish paternity and visitation. The suit was dismissed. California law precluded the biological father from challenging the marital presumption; husband or wife had a right to challenge husband's presumptive paternity that was also limited to two years from the child's date of birth. While cases around the country similarly warn men not to fool around with a married woman, (see, e.g., *Evans v. Wilson*, 856 A.2d 679 (Md. 2004)), there is, perhaps, a growing exception where the court finds the marriage is unstable, and perhaps unworthy of defense. Illustrative is *GDK v. Wyoming*, 92 P.3d 834 (Wyo. 2004), which contains a remarkable discussion on the relative unimportance of the marital presumption in modern society.

The Man Who Knew Too Much. If you know you are not the biological father and acknowledged paternity or consented to a judgment of paternity, courts are less likely to disestablish. *In re Cheryl*, 746 N.E. 2d 488 (Mass. 2001) illustrates this category — and offers a heartwarming coda. A father acknowledges paternity, waives genetic testing, and for five years pays support for and has a relationship with Cheryl. He then seeks to disestablish paternity. The court denies relief, finding it had reason to believe he knew all along he was not her biological parent. Despite a pitched legal battle, father never revealed his doubts to his child and several years later he became her primary custodial parent. It is worth noting that this category of cases may be short-lived, as state legislatures around the country grant legal fathers the right to genetic testing and access to the courts.

Snooze You Lose. This category is simple; the more time that passes before disestablishment is sought, the less receptive the courts are. *In re Cheryl* and *Koos v. Wilson* also fit this category — the groupings are far from neat. On the reverse side, a Minnesota court allowed the biological father to oust mother's husband based in part on the recommendation of a guardian ad litem. The GAL recommended that the biological father prevail, "even though the child has spent the majority of his life with husband, because of the child's young age, he can still develop a relationship with respondent." (*In re Paternity of BJH*, 573 N.W. 2d 99 (Minn. App. 1998))[3]

— *Susan F. Paikin*

FOOTNOTES

1. This article is based, with permission, on a presentation by William Alvarado Rivera, Esq. at the National Child Support Enforcement Association's Policy Briefing, January 31, 2006. The views expressed in the article are those of the author and do not necessarily represent the official positions of the Department of Health and Human Services or its agencies.

2. See the famous English case of Goodwright v. Moss, 2 Cowp. 591 (1777).

3. Delaware enacted the Uniform Parentage Act (2002), which specifically addresses issues of times.

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Parentage and Child Support

Interstate Litigation and Same-Sex Parents

The formation, recognition, and rights of those families has been a constant source of not-so-polite public discourse and political wrangling.

The past few years have seen a dramatic increase in couples of the same sex living together openly. Increasingly, those couples want to lead "normal" middle-class lives, including that most middle-class of all life-style ornaments, children.

Same-sex couples, like their hetrosexual counterparts, raise children in joint or separate households. The formation, recognition, and rights of those families has been a constant source of not-so-polite public discourse and political wrangling. Adoption by gay individuals or partners led the way, though not without legal challenges.[1] Medical interventions and scientific advances now offer a smorgasbord of assisted reproductive technologies, where a child may be biologically related to one, both, or neither member of the couple — and a child could have as many as six parents.[2] Layered on top is the hot-button topic of the legal status a same-sex couple may obtain in some states or countries — domestic partnerships or gay marriage — and the Defense of Marriage Act[3] (DOMA).

Not surprisingly, same-sex families are beginning to see the same pattern of breakups as more traditional families. Those family breakups, of course, involve children, and, as a result, the legal system has begun to face some difficult issues.

The Problem

Whether or not the end of the adult relationship involves a legal divorce, termination of a domestic partnership, or simply moving out and on, when children become involved, attention shifts to the normal disputes involving the couple's children — custody, visitation, child support, and parentage. This article focuses on child support and parentage. Those issues are perhaps not very difficult when the events occur wholly within one state. After all, all that the state needs to do is determine whether it will treat same-sex families in the same way that traditional families or relation-

ships are treated.

The California Cases. Well, perhaps not so simple. Recently, the California Supreme Court decided three cases that raised the question whether a child can have two mothers. Using both equitable principles and the Uniform Parentage Act, the California courts held that biology alone does not control parentage.[4] Thus, a birth mother could not disestablish the parentage of her lesbian ex-partner, where they had entered into a stipulated court order (before the child's birth) that both would be the child's legal parents. [5]

Similarly, a woman who had donated her ova, which was then fertilized and carried by her former registered domestic partner, was declared the parent of the twins born six years before the couple's breakup, despite having signed a document similar to the ones used by a sperm donor. The court held that: The law applying to sperm donors did not apply to egg donors in this situation, the ex-partner was the biological mother of the twins, and under the Uniform Parentage Act both mothers evidenced intent of establishing the mother-child relationship.[6]

In the third case, a lesbian couple each gave birth (the first to a son, the second, a few months later, to twins). They lived together as a family, but neither partner signed a domestic partnership agreement nor formally adopted each other's children. After the couple separated, the mother of the twins began receiving public assistance and the county child support enforcement agency[7] sought child support from her former partner, who denied responsibility asserting that she was neither the biological nor legal parent of the twins. The court applied the statutory presumption of paternity, as the defendant had taken the twins into her home and held them out as her own. However, the defendant was not permitted to rebut that presumption and abandon the children to the care and resources of the other parent; thus, child support was ordered.[8]

The Delaware Case. In *Carol Chambers v. Karen Chambers*,[9] the Family Court of Delaware addressed the question whether an ex-partner of a lesbian couple should be liable for child support. Chief Judge Kuhn accepted the commissioner's order requiring Carol to pay current child support for David, who had been born to Karen during the couple's three-year cohabitation. Visitation between Carol and David had been set by a 2000 Family Court order. The decision, based on the best interests of David, found Carol to be David's parent within the meaning of the Delaware child-support law. Carol, in other words, was a *de facto* parent. She had been in a committed relationship with David's biological mother at the time of his conception and birth, and Carol and Karen had a specific intent to co-parent together. Accordingly, Carol was equitably estopped from refusing to pay child support.

Today, more than 250,000 children are being raised in same-sex-couple households. In response ... courts have looked to factors other than biology to define the parent-child relationship.

The Legal Problems

These cases reflect the continued evolution of the concept of family in American society. Today, more than 250,000 children are being raised in same-sex-couple households.[10] In response to this evolution, courts have looked to factors other than biology to define the parent-child relationship. Some jurisdictions have defined the relationship by combining both biological and psychological factors; thus developing what is referred to as a *de facto* parent.[11] The complications multiply, however, when a child-support or paternity decree in one state (often referred to as F-1) must be enforced in another state (F-2). A related problem occurs when one "parent" resides in a different state from the biological parent and child, and no basis exists for the child's state to assert long arm jurisdiction over the proposed obligor.

This article first discusses the enforcement of F-1 child support orders in F-2. We do so because enforcement presents the most common interstate child support problem. In doing so, we will address the related problems that arise when no order was issued in F-1, and F-2 is asked to establish such an order. Child support is particularly interesting both because the national child support enforcement program offers a template of very similar state laws[12] and because a significant number of child support cases will, at one time or another, involve situations where the parents reside in different states.

The Traditional Framework. The law never writes on a clean slate, of course, and it has long found solutions to problems involving children when a couple, marital or not, dissolves. When the legal problem lies entirely within one state, that state has been free to work out whatever legal principles it deems appropriate, within the general framework provided by the federal and state constitutions and statutory law. Normally, that solution is provided by a judicial order. However, Congress has mandated that all states have a voluntary paternity acknowledgment law under which an acknowledgement that is not timely rescinded or challenged ripens into a legal determination of paternity, without judicial ratification.[13] Sometimes, however, the legal issue arises after one of the couple (or even all members of the putative family) leaves the state, and no effective judicial order is ever issued there.

The Interstate Framework. Interstate problems involving children invoke several different governing rubrics: the Constitution, the relevant uniform statutes (which have been adopted, with small variations, in every state), and their implementing federal statutes.

Full Faith and Credit. The most im-

portant interstate principle comes from the Full Faith and Credit Clause of the United States Constitution[14] That clause has long been read to require that a final judgment entered by any American court must be given as much preclusive effect as it would receive in the state where it was rendered. In short, if a Maryland court issues a child support order, that order must be given as much respect in Delaware and every other state as it would receive in Maryland. It is constitutionally irrelevant that the public policy of Delaware stands in complete opposition to the Maryland policy that underlies the judgment from that state.[15] In other words, the public policy of neither Delaware nor Maryland has any bearing on the question of whether Delaware should enforce a Maryland judgment for child support involving same-sex parents.

The Statutes. Every state has adopted the Uniform Interstate Family Support Act (UIFSA). UIFSA provides that a child support judgment that satisfies its criteria must be recognized. Moreover, Congress has adopted legislation — The Full Faith and Credit to Child Support Orders Act (FFCSOA)[16] — that was enacted under the express authority of the Full Faith and Credit Clause. The federal law tracks closely UIFSA and makes quite clear that decisions made pursuant to the latter are to be routinely enforced in all American courts. In other words, Congress has reinforced the clear requirement of the Full Faith and Credit Clause with its own mandate: Enforce child support judgments.[17]

Paternity Acknowledgements. Although not a traditional judgment, voluntary paternity acknowledgments now create a conclusive determination of paternity, subject to a 60-day rescission period. The acknowledgment itself becomes a legal paternity determination, entitled to full faith and credit. Beyond the rescission period, the acknowledgment may be challenged only on proof of fraud, duress, or material mistake of fact.[18] Even in those situations, however, once the time for reopening the judgment has passed in F-1, other courts must give the paternity order full faith and credit.

Special Considerations for Same-Sex Couples. Two special problems, however, arise for same-sex couples; these are the Defense of Marriage Act (DOMA)[19], and the Supreme Court's decision in *Lawrence v. Texas*.[20] DOMA and *Lawrence* move the discussion in opposite directions, however. There is also the consideration as to whether state laws to establish paternity are more generally applicable to establishing legal parentage in a person of the same sex as the biological parent.

DOMA. Congress adopted the Defense of Marriage Act in 1996 to make clear that the states did not have to recognize, under the Full Faith and Credit Clause, same-sex marriages entered into in other states. The history confirms what the language of DOMA makes clear: that it applies only to "marriage" (and divorce, the dissolution of marriage): "no state ... is required to give effect to any public act, record, or judicial proceeding of any other state respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such state. ... Or a right or claim arising from such relationship." Thus, child support is not covered by DOMA and orders from other states must be recognized under FFCSOA. The only exception to that statement might arise if the order is based on a marital presumption of paternity; that might well be, in the statutory language, "... a right or claim arising from such relationship."

Congress has reinforced the clear requirement of the Full Faith and Credit Clause with its own mandate: Enforce child support judgments.

Lawrence. This is the true wild card in the deck. In *Lawrence*, the Supreme Court struck down a Texas law imposing criminal penalties for consensual conduct between homosexuals. The majority opinion by Justice Kennedy contains broad language suggesting that most, if not all, state-based discrimination against homosexuals is unconstitutional; the opinion said, for example, of a 1986 precedent upholding a criminal conviction under similar circumstances, that its "continuance as precedent demeans the lives of homosexual persons."[21]

On the other hand, the *Lawrence* majority carefully limited the formal extent of its holding, and specifically stated "The present case ... does not involve whether the government must give formal recognition to any relationship that homosexuals seek to enter." Thus, the majority can be read as having issued a broad declaration of the rights of same-sex couples, or one that merely forbids the criminalization of their conduct. This article is not the place to explore that question in detail.

How *Lawrence* will be interpreted remains a mystery. Read narrowly, it has little to say about the subject at hand, parentage and child support, which do not criminalize homosexual conduct. Read broadly, however, it suggests that any law that "demeans" homosexuals faces a tough struggle to survive. And laws that treat homosexuals differently for no apparent independent reason, even under DOMA's guiding hand, do "demean" homosexuals and, therefore, are constitutionally suspect.

It is certainly too early to tell how the tension between DOMA and *Lawrence* will play out. Both the well-prepared litigator and the wise policy-maker, however, must be aware of the problem.

Paternity Problems.

Child support orders require, of course, that parentage be determined. Children of same-sex couples raise problems concerning establishment generally, and establishment across state lines specifically.

Paternity Establishment. Spurred to action by the burgeoning number of

nonmarital children and the attendant child poverty and welfare dependence associated with single-parent families, Congress required states to enact and use expedited procedures to streamline paternity establishment. While seeking to ensure that nonmarital children gained the financial and emotional benefit of two parents, it is undoubtedly true that Congress did not intend such enhancements as voluntary paternity acknowledgments to be used to establish same-sex parentage. However, neither is there an explicit prohibition. Thus, state law will govern whether "parentage" or "maternity" can be used interchangeably with "paternity" — and same-sex couples would be able to assert successfully the right to establish parental rights in a child using state voluntary acknowledgement statutes.

The Uniform Parentage Act (2002)[22] §106 states: "Provisions of this Act relating to determination of paternity apply to determinations of maternity." Some argue that this language means the act's provisions are not limited to opposite-sex couples and "man" should be read generally as either "man" or "woman." If so interpreted, voluntary paternity acknowledgments are arguably available to establish a second mother (or second father). However, UPA's official comments note that §106 is designed for those rare cases where a mother-child relationship needs to be established.[23]

During drafting, there was considerable debate about whether the UPA's acknowledgment provisions should include an affirmative statement that the signors are the biological parents of the child being acknowledged. There is no such requirement in federal law, though this was likely because it did not dawn on Congressional drafters that someone other than a biological father would acknowledge paternity. The original concern of UPA's drafters was that parties would use the acknowledgment to circumvent state adoption laws. The 2000 UPA revisions included a "biological connection" limitation. Based on objections, primarily but not solely from the Individual Rights and Responsibilities Section of the ABA, the National Conference of Commissioners on Uniform State Laws amended §302 (a)(4); and an acknowledgment must state, "whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing."[24]

Establishment of Support Obligations Across State Lines. Where no support order exists, UIFSA[25] permits a resident of F-1 to establish a support (and/or paternity) order by petition in F-2, where the obligor resides. As the receiving state, under UIFSA's choice of law rules, F-2 applies its own law as to whether the respondent has a duty of support to the named child.[26] Thus, F-2 must first decide whether there was a legal basis requiring a person who was neither a biological, legal, nor adoptive parent to provide financial support for the child. Clearly, states will have varying public policy positions on same-sex parenting and individual liability will be factually driven.

Given human nature and assisted reproductive technologies, the potential fact situations are almost never ending.

There is an additional twist in interstate child support establishment cases. UIFSA precludes the responding state (F-2) from considering nonparentage as a defense if paternity already has been determined. [27] UIFSA's choice of law rules requires F-2 to apply F-1 law to ascertain if paternity has already been determined. There are a multitude of unanswered questions that arise given these rules. There could be an existing judicial order finding the same-sex respondent to be the named child's parent. Or a same-sex couple lawfully executed a voluntary paternity acknowledgement that has ripened under the law of F-1 into a paternity determination. Under the analysis described above, F-2 would be required to give full faith and credit to the sister state's judicial decree or legal determination. With an enforceable finding of parentage, would F-2 be authorized to find that the same-sex respondent had no duty of support under its law? Despite full faith and credit arguments, it will likely be difficult for trial judges in F-2 to order child support where they would not do so in an intra-state case. A legal argument supporting that result is that UIFSA speaks of a "paternity" determination and the law of F-2 governs whether "paternity" is equivalent to "parentage." At a minimum, such cases likely will require appellate litigation.

Given human nature and assisted reproductive technologies, the potential fact situations are almost never ending. Here are two more examples: A same-sex couple is legally married in F-1, a child was born during the marriage, and F-1 has a conclusive marital presumption; would F-2 have to treat the case as one where parentage had been established. What if a mother in F-1 sought support from a biological father in F-2; could he defend based on the existence of same-sex parents in F-1?

And there are practical issues for the child-support agency. Is it obligated to seek child support from a same-sex parent named by the custodial parent, including one who must cooperate with the IV-D agency as a condition of continued welfare eligibility? Must the agency provide services to a same-sex ex-partner seeking to establish parental rights? These are likely only the tip of the proverbial iceberg.

International Problems.

A number of European countries and Canadian provinces have given some form of legal recognition to same-sex couples. As a result, there will be more litigation involving the familial obligations for those couples.

The law here is clear. The Supreme Court has left it up to the individual states to determine whether to recognize the decree of a foreign court — that is, the court of another nation. In other words, the constitutional mandate of Full Faith and Credit is not applicable to international litigation. Even for those countries or Canadian provinces declared to be reciprocating states by the Secretaries of State and Health and Human Services,[28] such agreements would not necessarily bind the state if it found that the request was "manifestly incompatible" with public policy of the state. *Be advised there are no reported cases on this issue.*

Further, by enacting UIFSA (2001) §102(21)(B), it is arguable that the state legislature has removed the availability of the state public policy exemption for those foreign countries meeting the statutory requirement to be treated as are other American states.[29] For example, Ontario, Canada is a declared foreign reciprocating jurisdiction and has recognized the right to same-sex marriage under the Canadian Charter of Rights and Freedoms.[30] There might well be cases, both inside and outside of a same-sex marriage, where enforcement of an Ontario child support order against a same-sex non-custodial parent is sought in the United States. UIFSA thus can be read as restricting the ability of a receiving state to decline enforcement of such an order on public policy grounds because they would not be permitted to reject the order of a sister U.S. state. *We are similarly unaware of any litigation in this context.*

CONCLUSION

A legal analysis of the interstate obligations that same-sex parents owe to their children leads to the conclusion that enforcing established obligations do not differ from those that are owed by traditional parents. The only serious questions arise when the problems surface in an enforcing state that has adopted DOMA. Even then, a proper reading of that law and the underlying policies of the various other relevant statutes suggest strongly that the traditional rules should be followed. The more likely reading of *Lawrence* reinforces that conclusion. Because the establishment of duty against a same-sex ex-partner has been recognized by the Family Court, Delaware would unlikely have a basis for precluding enforcement of a comparable order from another state, even though Delaware has enacted its own DOMA provision.[31] Similarly, Delaware courts would apply the same analysis where an original child support order is sought here under UIFSA. What is left open is whether a Delaware parent similarly situated to Karen Chambers could obtain a parentage and child support order elsewhere. ◆

FOOTNOTES

1. *See* Lynn Wardle, *A Critical Analysis of Interstate Recognition of Lesbigay Adoptions*, 3 Ave Maria L. Rev. 561 (Summer 2005).

2. The six include the sperm donor, the egg donor, the gestational mother, the gestational mother's husband, the intended mother, and the intended father. See the discussion in *The Uniform Parentage Act: A Complete Revision*, 17 Del. Lawyer 2, 8 (Summer 1999). And Vol. 39, Family Law Quarterly (Fall 2005) contains 10 articles and 2 book reviews (almost 300 pages) on legal issues swirling around assisted reproductive technology (ART).

3. 28 U.S.C. §1738C. "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from the relationship."

4. *See* Paula Roberts, *Parentage Case Update: Can a Child Have Two Mothers, Pub. No. 05-53, at* www.clasp.org/publications/parentage_update_120105.pdf; (retrieved 12/30/05).

5. *Kristine H. v. Lisa R.*, 37 Cal.4th 156 (2005).

6. *K.M. v. E.G.*, 37 Cal.4th 120 (2005).

7. Operating in accord with Title IV-D of the Social Security Act, hence the "IV-D" agency.

8. *Elisa B. v. Superior Court of El Dorado County*, 37 Cal. 4th 108 (2005). On the other hand, the Supreme Judicial Court of Massachusetts held that the same-sex ex-partner did not have a duty to support the child her former partner conceived by artificial insemination. The parties' parenthood agreement was unenforceable on public policy grounds. The partner was not a legal parent under Massachusetts law and the court had no equity powers to make her pay.

9. 2005 Del. Fam. Ct. LEXIS 1 (Del. Fam. Ct.1/12/05). The court used pseudonyms, pursuant to Delaware Supreme Court Rule 7(d).

10. *Can Gay Marriage Strengthen the American Family?* Brookings Institution Briefing 4/1/04 at 26. (retrieved 1/20/05 *from* http://www.brookings.org/comm/events/20040401.htm) Other commentators in the same discussion put the number at closer to 400,000.

11. *Chambers, id.* at 12.

12. Congress enacted Title IV-D of the Social Security Act in 1974. Each state IV-D agency operates under a state plan, approved by the federal Office of Child Support Enforcement (OCSE), based on program standards set by the federal government. The Division of Child Support is the IV-D agency in Delaware. Federal matching funds are used establish and enforce child support obligations, including establishing paternity. Welfare recipients are required to cooperate with the child support program, absent a finding of "good cause." Congress has also granted enhanced enforcement tools but also required states to enact laws as a condition of federal funding.

13. 42 U.S.C. §666(D)(ii) and (E).

14. *See* U.S. Const., art. IV, § 4, cl. 1.

15. *See generally* William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md. L. Rev. 412 (1994).

16. 28 U.S.C. § 1738B.

17. There are a few exceptions—the most important is lack of personal jurisdiction over the defendant—but the exceptions are irrelevant to questions involving support for children of same-sex couples.

18. 42 U.S.C. §666(a)(5)(d)(iii).

19. 28 U.S.C. §1738C.

20. 539 U.S. 558 (2003).

21. *Lawrence* was a 6-3 decision. Justice Kennedy's position had five votes, including his. Justice O'Connor concurred with Kennedy on a perhaps more radical note: She wrote, "The state cannot single out one identifiable class for punishment ... with moral disapproval as the only asserted state interest for the law." Three justices dissented.

22. Delaware enacted the Uniform Parentage Act (2002) at 13 Del.C. §§8-101 through 8-904, effective 1/1/04.

23. *See* the differences between mother-child and father-child establishment in UPA (2002) §201.

24. 12 Del.C. §8-302(4).

25. In 2005, the Delaware legislature enacted the UIFSA (2001) amendments, effective 7/1/06. The enactment contains a renumbering of UIFSA with the section numbers mirroring the uniform act.

26. 13 Del. C. §622 (13 Del.C. §600303 effective 7/1/06).

27. 13 Del.C. §634 (13 Del.C. §600315 effective 7/1/06).

28. 42 U.S.C. §659(a)(A). States were similarly authorized by federal law to enter into reciprocity agreements. 42 U.S.C. §659(a)(D).

29. "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes:

(B) a foreign country or political subdivision that:

(i) has been declared to be a foreign reciprocating country or political subdivision under federal law;

(ii) has established a reciprocal arrangement for child support with this State as provided in Section 308; or

(iii) has enacted a law or established procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this [Act].

30. *Halpern v. City of Toronto*, [2000] 172 O.A.C. 276 (Ontario).

31. 13 Del. C. §101.

Fighting a War Continued from page 17

a default judgment for the time during which they were unavailable due to active duty.

Particularly in the Army, divorce rates have risen; in fact they nearly doubled from 2001 to 2004. Sgt. Rowe Stayton, a former Air Force pilot who served in Iraq, stated that nearly one-quarter of the soldiers in his platoon ended their marriages while in Iraq.[22] These statistics simply scratch the surface of the marital and familial concerns that occur before, during and after deployment of a spouse, mother or father. The new SCRA further protects the interests of the men and women serving our country. As the new SCRA is implemented, however, case law will likely further define how the SCRA will be applied in specific scenarios and how the interests of the servicemember will be protected, while at the same time protecting the interests of his children. ◆

FOOTNOTES

1. *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

2. Baughn, Darrell, *Divorce and Deployment: Representing the Military Servicemember*. FAMILY ADVOCATE, Fall 2005 at 8.

3. *Id* at 8.

4. The Servicemembers Civil Relief Act applies to all civil litigation and is not limited to the area of domestic law. However, the authors have chosen to focus on this area only.

5. 50 U.S.C. §511(4).

6. Although various tribunals are covered pursuant to 50 U.S.C. 511(5), this article is limited to issue relating to notice and participation in judicial and administrative hearings.

7. 50 U.S.C. §502.

8. 50 U.S.C. §582.

9. 50 U.S.C. §201(b)(2). If the attorney cannot locate the serviceperson, actions by that attorney do not bind the serviceperson or operate as a waiver of any defenses that the serviceperson may have.

10. 50 U.S.C. 521(4)(d).

11. 50 U.S.C. 522(c).

12. Meixell, John T., *Servicepersons Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, 2003 DEC ARMY LAW, 38.

13. Because both men and women serve in the military and fall under the purview of the Servicemembers Civil Relief Act, "him" and "her" are used interchangeably in this article.

14. Sullivan, Mark E., *A Judge's Guide to the Serviceperson's Civil Relief Act*, 5, a joint project of the Military Committee of the American Bar Association's Family Law Section, and the North Carolina State Bar's Standing Committee on Legal Assistance for Military Personnel. The Act does not speak to the form that the request must take. Therefore, an affidavit, letter or memorandum would likely be appropriate.

15. *Id.* at 5.

16. *Id.* at 5.

17. *Advanced Litigation*, LLC v. *Herska*, 2004 WL 1949292 (Del. Ch.).

18. APA Task Force on Resilience in Response to Terrorism, Fact Sheet, *Fostering Resilience in Response to Terrorism: For Psychologists Working with Military Families*.

19. *Id.* Additional resources regarding reentry can be found at: U.S. Army Soldier and Family Support Center: at http://www.armycommunityservice.org.

20. *Lenser v. McGowan*, WL 2064892 (Ark. 9/16/04).

21. *Shelor v. Shelor*, 259 Ga. 462 (1989).

22. Leland, John, *Sex and the Faithful Soldier*, N.Y. TIMES, October 20, 2005.

Claire M. DeMatteis

Exposing the 'Dirty Little Secret'

"It is common in my country if you marry a man you must work out your own problems. I have been emotionally tormented and that is not recognized in my family."

"My mother and father told me to go back and be a better wife, otherwise I would be shaming them and could be deported."

"Yes, we feel ashamed to involve strangers in our personal lives. We don't like publicity because in my culture, family problems stay in the family."

The comments above, from battered immigrant women interviewed in a nationwide 2003 study, illustrate that far too many women seeking a better life in America remain trapped in abusive relationships. They are trapped by social, cultural, economic, and legal barriers to the U.S. criminal justice system.

Make no mistake — since the landmark Violence Against Women Act (VAWA), authored by Delaware's own U.S. Senator Joseph R. Biden, Jr., was originally enacted in 1994, our country has made tremendous strides to expose domestic violence and sexual assault as the serious, public crimes they are; and to provide much-needed federal resources to states, police, prosecutors, judges, victim service agencies and battered women shelters to combat these crimes, which let's face it, disproportionately burden women.

But, by and large, for battered immigrant women domestic violence and sexual assault remain a dirty secret — a private family matter, rather than a serious, public crime.

While family violence transcends race, nationality, and economic status, immigrant women are at high risk of domestic violence due to their fears of deportation; utter lack of knowledge of U.S. immigration laws and protections; lack of access to legal assistance; fear of police and the judicial system; significant language barriers; social isolation; total financial dependence on their abuser; and fear that they will be separated from their children.

- Nearly 50 percent of Latinas in one recent study reported that their partner's violence against them had increased since they immigrated to the United States.
- Abusers often use their partners' immigration status as a tool of control. In such situations, it is common for a batterer to exert control over his partner's immigration status in order to force her to remain in the relationship.

Despite the bleak reality and barriers too many battered immigrant women face, VAWA has been dismantling these barriers since it was originally enacted nearly 12 years ago. Federal funding under VAWA has provided millions of dollars to nonprofit organizations such as The National Network to End Violence Against Immigrant Women, Las Americas Immigrant Advocacy Center; as well as state coalitions, including the Delaware Coalition Against Domestic Violence. The overriding funding objective is to ensure that battered immigrant women have networks of advocates, attorneys and judges who work together to ensure that the U.S. Department of Homeland Security carries out the will of Congress encompassed in the 1994, 2000 and 2005 Violence Against Women Acts.

Specifically, the original Violence Against Women Act of 1994 blazed new ground by allowing battered spouses and children to request legal permanent residency status, without the help or knowledge of the abuser. With VAWA protections enacted in 1994, 2000 and 2005, a battered immigrant woman is now able to:

- Self-petition with a special VAWA unit at the U.S. Department of Homeland Security to request permanent residency;
- Suspend deportation proceedings;
- Change conditional residency status to permanent residency status;
- Request a work permit;
- Seek a new U Visa if they have suffered "substantial physical or emotion abuse" as a result of a crime, including domestic violence, or sexual assault;
- Seek a new T Visa for victims of human trafficking for labor exploitation or sexual exploitation

Significantly, the opportunities outlined above are completely confidential. The Department of Homeland Security may not contact the immigrant woman directly. Also, the abusive spouse is not notified.

It is important for battered immigrant women to know that they may qualify for legal permanent residency if their husband is a bigamist, their spouse has died in the past two years, their spouse has been deported for a crime of domestic violence in the past two years or she has divorced her abusive spouse in the last two years.

Our charge now: to get this message to battered immigrant women and empower them to escape abusive relationships and seek the legal, housing and victim assistance available to all women in our country and state. It is not an insurmountable task. Every day, every year, we are training more and more police officers and judges of the specific needs of immigrant women. Victim advocates are focused like never before on reaching these women who suffer in silence and sheer shame.

With heightened awareness of the barriers battered immigrant women face and a renewed commitment to helping them expose physical, sexual and emotional abuse as a violent crime — not a private family matter — these victims will be survivors living in the freest country in the world. ◆

FOOTNOTES

1. Erez, Edna, Ammar Nawal, Leslye E. Orloff, Gail Pendelton, and Leni Marin, 2003. *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study*. A report submitted to the National Institute of Justice, Washington, DC.
2. Id..
3. Id.
4. Dutton, Mary; Leslye Orloff, and Gisell Aguilar Hass. 2000. *Characteristics of Help-Seeking Behaviors, Resources, and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*. GEO. J. ON POVERTY L. & POL'Y. 7(2).
5. Id.
6. Orloff, Leslye and Janice V. Kaguytan. 2002. *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*. J. GENDER, SOC. POL'Y & L. 10(1): 95-183.

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