

# The Family Law Review

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## Family Law Revolution: Changing Attitudes About Parentage in Non-Traditional Families Use of Collaborative Reproduction

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Since the 1960s advances in reproductive medicine associated with in vitro fertilization (IVF), embryo transfer, gestational surrogacy, and other reproductive technologies, have raised legal issues and other disputes involving parentage in non-marital families. A few states have enacted legislation dealing with aspects of this technology, and a few jurisdictions have enacted sections of the Uniform Parentage Act (2002), which deals with determination of parental interests as to children conceived by collaborative reproduction. But much remains unresolved.

Until recently only a few reported cases had raised concerns about assisted reproduction, and then only in the context of what was then called "artificial insemination" (i.e., intrauterine insemination) or surrogacy. While it was foreseeable that developments in medical reproductive science were likely to create substantial legal issues as use of donor gametes became more common, the exact contours of those issues are not yet fully developed.

The growing number of court decisions and fast-paced medical developments such as cryopreservation of gametes and embryos, IVF, embryo transfer, and intracytoplasmic sperm injection make it abundantly clear that some legislation on assisted reproduction is needed. A decade ago the California Appeals Court in frustration said, "[A]gain we must call on the legisla-

ture to sort out the parental rights and responsibilities of those involved in artificial reproduction."<sup>1</sup> Today that call has still largely been unanswered. It was in hopes of educating the bench and bar that attorney Maureen McBrien and I undertook to write a book for the American Bar Association that is intended to provide a practical and readable source for understanding this new technology.



In the coming years it is likely that many lawyers will come into contact with a case involving assisted reproduction. Just reading the daily newspaper accounts of noteworthy new disputes and developments should be persuasive on this. An increasing number of family law practitioners are encountering divorce disputes over who should control cryopreserved embryos that have been produced for usage by in vitro fertilization; a number of these disputes have already

reached appellate courts. Since there are over a half million unused frozen embryos in storage, it is likely that this issue will continue to be an active one for divorce practitioners; *see* Charles P. Kindregan Jr. and Maureen McBrien, *Assisted Reproductive Technology*, 111-115 (2006).

Other issues deal with the use of the gametes (sperm, eggs, or even embryos). The people who use

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# Editor's Corner

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**H**ow fast a year flies by! The new child support guidelines have been in effect a year (still quite a bit confusing, right?). New custody law becomes effective Jan. 1, 2008. And our Institute in Destin is only months away. On a personal note, my daughter is almost a year old and that, more than anything shows me how fast time flies.

I hope in the coming year we all continue to learn from each other and treat each other with respect and dignity. I appreciate all of our contributors and all of you who have complimented the FLR (which is really a compliment to Johanna Merrill at the State Bar who does more work on it than anyone.) Please keep the articles coming.

I wish you all a happy new year and look forward to seeing everyone in Destin. **FLR**

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If you would like to contribute to *The Family Law Review*, or have any ideas or suggestions for future issues, please contact Editor Randall M. Kessler at 404-688-8810 or rkessler@kssfamilylaw.com.



## Note from the Chair

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As another year comes to a close, we enter into the season of holiday festivities and gatherings when we have the opportunity to spend time with friends, meet new friends and reacquaint with old friends. It is also a time to be grateful for the things we have and to help those who are less fortunate. As a family law practitioner, we should all be mindful that this holiday season may not be as joyous for some of our clients, who are dealing with a sense of loss, as it is for us. Of course, we should be mindful of the hand that life has dealt many of our clients, not only during this holiday season, but year round.

I know that there are many times when a client will call or e-mail every day with questions or “problems” that may seem simple to resolve to us. It is these situations that may leave you wondering how that client was able to get dressed in the morning before hiring you. So as easy as it may be to type out a quick e-mail response, or to have your paralegal return the call, take the time to accept the call or to return the call and hopefully that effort will help your client address those problems that seem so simple to us and will make this holiday season a little easier.

We also cannot lose sight of the ever-changing playing field that we call “family law.” Not so long ago, the family law practitioner might be heard to comment that the law really has not changed much recently. Not true anymore. With the Pilot Project still going strong, we continue to be the beneficiary of developments

in our case law, which I am sure everyone reads and keeps up with on a regular basis. For those of you who do not, or have not, give a special thanks to Vic Valmus for continuing to devote his time and efforts to providing us the case law updates that are brought to you in every issue of our newsletter.

In addition to keeping up with case law developments, we need to also be mindful of possible legislative changes, such as those that we have seen recently with the changes to the Child Support Guidelines and now House Bill 369 that will come into effect in 2008. I am grateful to my fellow members of the Executive Committee who continue to help monitor and comment on these possible changes. In an effort to keep the members of our Section knowledgeable of these changes, we remain committed to organizing seminars, including our traditional annual Family Law Institute. In speaking with Ed Coleman, I know he is already putting together a great 2008 Institute that promises to provide great and useful information!

I hope everyone has a safe and enjoyable holiday season! **FLR**

The opinions expressed within *The Family Law Review* are those of the authors and do not necessarily reflect the opinions of the State Bar of Georgia, the Family Law Section, the section’s executive committee or the editor of *The Family Law Review*.

# Case Law Update: Recent Georgia Decisions

By Victor P. Valmus  
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## Alimony

*Jackson v. Jackson*,  
S07F0945 (Sept. 24, 2007)

The parties were divorced after 23 years of marriage and the wife was seeking alimony and child support. A temporary order was entered awarding the wife temporary alimony. A final bench trial was held in which the court declined to award the wife alimony; however it required the husband to continue to pay payments, included temporary alimony and child support and attorney's fees, that were due under an earlier contempt ruling on the temporary order entered earlier. The wife appeals the court's ruling denying her alimony and the Supreme Court affirms.

The wife contends that the trial court abused its discretion by denying her claim for alimony because evidence showed the husband abandoned his family and failed to support his minor child and caused the marital home to go into foreclosure. However, there was also other evidence before the court that the wife initiated the separation; that she was gainfully employed and had been so throughout most of the marriage; that she failed to cooperate with the husband in taking steps that would have resolved or alleviated several financial problems arising out of the parties' separation; that the wife had mismanaged marital funds and ran up extravagant bills; and she failed to take advantage of low cost health insurance coverage for the minor child. Taking these factors into consideration, this court cannot conclude that the trial court erred by declining to award the wife alimony.

## Child Support

*Scarborough v. Scarborough*,  
S07A0971 (Sept. 24, 2007)

On May 4, 2001, the parties reached a separation agreement that required hus-

band to pay the wife monthly child support in the amount of \$1,000. On Oct. 15, 2001, a final decree was entered incorporating the separation agreement. On Oct. 10, 2001, the husband turned 65 and began receiving retirement benefits under the Social Security Act. In addition, the wife began receiving retirement benefits on behalf of the parties' children and the husband unilaterally stopped child support payment. Neither the separation agreement nor the divorce decree addressed the receipt of future Social Security retirement benefits or any impact this would have on the child support obligation. On Feb. 11, 2005, the wife filed a petition for contempt alleging the husband was in arrears in child support payment. The husband answered counterclaiming that he owed nothing because he was entitled to a credit for the social security retirement benefits being made to the wife for the benefit of the children. The trial court found the husband was not entitled to the credit, and it ordered the husband to pay the accumulated child support arrearage. Husband appeals and Supreme Court reverses.

This court recognizes that a parent is generally entitled to a credit against his support obligation for Social Security disability payments paid for the benefit of the child because such payments substitute for income. Also, retirement benefits received on behalf of the child should be credited against the non-custodial parent's child support obligation. The wife argues that the intent of the agreement was that the Social Security benefits would augment and not supplant the child support obligation. The wife cites *Koch* as her authority. In *Koch*, this court held that child support obligations cannot be offset by pre-existing social security disability benefits paid for the benefit of dependent children where the non-custodial parent's disability and associated benefits are presently being paid on behalf of the children at the time the



parties entered into a settlement agreement and where the agreement did not make any special provisions regarding receipt of those disability payments. In Koch, because the social security benefits were already being paid at the time the agreement was written, it was assumed that the parties had taken the presence of these current payments into account when they calculated the non-custodial parent's child support obligation.

In the instant case, at the time of the settlement agreement, Social Security benefits were neither due nor payable. In the absence of a provision otherwise, it cannot be assumed either of the parties considered the future possibility of such payments. This court also notes that the recent-

ly enacted O.C.G.A. §19-06-15(f)(3)(a) provides "Benefits received under Title II of the federal Social Security Act by a child on the obligor's account shall be counted as child support payments and shall be applied against the Final Child Support Order to be paid by the obligor for the child."

Wife also argues that the husband is precluded from terminating his support obligation absent a petition for modification. However, this court has previously determined the Social Security benefits can be credited to satisfy the support obligation without obtaining a modification of the original decree.

#### ***Alejandro v. Alejandro*, S07F0743 (Sept. 24, 2007)**

The parties were married in 1998 while both were in college. There were two minor children of the marriage, born in 1999 and 2000. In 2002, the wife filed a Complaint for Divorce for which a Final Judgment and Decree of Divorce awarded the mother primary physical custody and ordered the father to pay child support and made equitable division of the couple's property. The husband appeals the ruling, among other things, that the trial court improperly calculated his gross income. Supreme Court affirms.

The husband testified that his true annual gross income was between \$25,000 and \$28,000. The trial court calculated the husband's child support obligation based on a gross income of \$45,000 a year. However,

the husband also testified that his annual income in 2000 and 2001 was between \$40,000 and \$45,000 and that he moved in 2002 to Ohio to make more money and within a period of 13 months before the trial, the husband had bank deposits more than \$56,000 and anticipated his income from salary and commissions of \$40,000. Therefore, the trial court as the finder of facts can resolve conflicts in evidence in determining the gross income.

#### ***Hammond v. Hammond*, S07F0917 (Sept. 24, 2007)**

The parties were divorced after a bench trial and the court entered a Final Judgment and Decree of Divorce in September 2006. The wife appeals, among other things, that the trial court erred in its calculation of the

child support obligation. The Supreme Court affirms in part and reverses in part.

The wife argues that the trial court erred in calculating the husband's gross income of \$3,604.43 per month. The wife argues that the husband had significant overtime pay that should have been used in the calculation of this figure. The husband testified that he had been able to earn large amounts of overtime

in the past, but his company has reorganized thus making overtime payments now largely unavailable. Even though the wife argues that this testimony is not credible, the trial court weighs the credibility of the witnesses and this court cannot re-weigh the facts and assess the credibility of the witnesses.

The wife also argues that the trial court erred in calculating her gross income of \$1,316.83 by including her monthly child support in the amount of \$240 that she receives as a result of a previous marriage. Payments received by a parent for the benefit of a child of another relationship should not be included in the gross income, but instead provide support for the child. The Court also noted that this ruling is consistent with the new enacted child support guidelines that excludes from gross income child support payments received by either parent for the benefit of a child of another relationship. Therefore, the wife's gross income calculation for the purpose of child support is reversed and remanded.



Photo by Jimmy Emerson

***Gowins v. Gary*, 284 Ga.App. 370 (March 20, 2007)**

Unmarried mother and father had twin children. Mother filed a contempt action against father for non-payment of child support. The parties had reached an agreement regarding child support in July 2002 that was incorporated into an April 29, 2005, order by the trial court. The trial court found the father in contempt of the April 29, 2005, order in the amount of \$135,000. However, the trial court further found that the original settlement agreement was a contract between the parties and was not an order prior to the court's incorporation of the agreement in April 2005. Therefore the trial court had no authority to enforce the agreement for the period between July 2002 and the April 29, 2005, order. The trial court also refused to award interest on the amount of child support it found enforceable pursuant to the contempt action. Mother appeals and the Court of Appeals affirmed in part, reversed in part, vacated in part and remanded with direction.

The court reversed the trial court's ruling that it had no authority to enforce the child support due for the period between the entry of the settlement agreement and the April 29, 2005, order that because the April 2005 order incorporated the July 2002 settlement agreement. The terms of the incorporated agreement no longer establish a private debt for the support between the parties, but become the judgment of the court enforceable by contempt proceedings, and the child support obligations imposed by the agreement from the date it was executed on July 3, 2002, became the support obligations awarded by the court's judgment. The court further found that the trial court had the authority to find the father in willful contempt for support payments "which accrued under the terms of the settlement agreement regardless of whether the payments accrued before or after the judgment was entered." The court then remanded the matter back to the trial court for a determination of whether the father's failure to pay was willful.

Regarding the award of interest on the amounts due, the court found that the trial court erred in its award of interest in this action and vacated the interest award. The court further found that the trial court should apply the current version of O.C.G.A. § 7-2-12.1 when reviewing the matter on remand.

### **Child Support/Gross Income**

***Banciu v. Banciu*, S07F1075 (Oct. 29, 2007)**

After a bench trial on Nov. 21, 2006, the court awarded a final judgment and decree on Dec. 18, 2006, which awarded, *inter alia*, real and personal property, joint legal and physical custody of the minor children, with primary physical custody of the two older boys to the husband and primary physical custody of the younger

son to the wife, visitation and child support to be paid by the husband in the amount of \$1,875 per month based upon the finding of the husband's income was approximately at least \$90,000 per year or at least \$7,500 a month, and the wife's income was \$325 monthly; and \$500 per month in alimony to the wife for a period of 36 months. Husband appeals, arguing that the Superior Court abused its discretion basing child support on his imputed income that was allegedly contrary to evidence and without findings of fact. The Supreme Court affirms.

The husband argues, among other things, that the only evidence of his income comes from his own testimony and documents that showed income of \$4,000 per month. The superior court made express findings that the husband's gross income was at least \$90,000 per year or at least \$7,500 per month. In this case, the evidence showed the husband's earning capacity far exceeded \$48,000 per year, that he was the president of a stucco company that grossed over \$700,000 in 2005 and that some company co-workers were paid sums far more than \$48,000 per year. The evidence also showed that the husband had purchased a new truck, in addition to an older Mercedes Benz automobile, he owned multiple parcels of real estate, including rental properties, he owned two homes in Georgia, a condominium in Florida with a purchase price of over half a million dollars, and the husband was the principal earner during the marriage. Therefore, the superior court was understandably skeptical of the husband's stated income on his financial affidavits and was authorized to consider the husband's earning capacity in setting his child support obligation.

### **Contempt**

***Gallagher v. Breaux*, A07A0471 (July 6, 2007)**

On Jan. 11, 2006, the mother moved for contempt alleging that the father had failed to pay court ordered child support for the parties' two children. The father was unrepresented by counsel. The father was ordered to pay \$850 per month in child support and child support arrearage in the amount of \$24,709.96. At the contempt hearing, the father testified that he was currently employed at a sandwich shop and was paid \$200 per week and was paying \$100 per month toward restitution order by a Florida Federal Court arising out of an earlier child support dispute. The father admitted he had not paid the monthly \$850 child support payment since December 2003 and that he had a lawsuit pending against the U.S. government for, among other things, back wages and had turned down a government offer of \$120,000 plus a government job with an annual salary of \$60,000. The trial court found the father in contempt and that he owed \$24,709.96 in back child support and had a present ability to pay. The

Court also determined that the father's non-payment of child support was willful and deliberate and ordered him incarcerated until he paid back the child support.

The father moved for reconsideration of the trial court's order and was represented by counsel. The father testified that he had no liquid assets, did not own an automobile and had no other assets with which to pay back the child support. Also, the father could not obtain funds from his family because he already received \$55,000 from his family for past child support obligations. The father also stated his efforts to obtain other employment had been unsuccessful due in large part of the fact he was a convicted felon, but testified that he could obtain a job through the halfway house within 14 days if he were released from jail. The father's attorney requested that the father be released from jail and get a job and earn money to pay back his child support; however, the trial court declined to do so. Instead, the trial judge signed an order maintaining the original contempt but recommended the father to be considered for work release program. The order provided that any fees the father earned the program would first go to the sheriff for his board and fees and the remainder would go to pay his child support obligation. The father appeals and the Appeals Court reversed.

The father appeals stating, among other things, the trial court erred in ruling that the father was not in willful contempt because he showed an inability to pay; by placing him in a work release program for an unspecified period of time until he paid back the child support; and ordering that 100 percent of his earnings from the work release program be paid to the plaintiff minus board and fees to the sheriff. A person who has failed to pay child support under a court order when he has the ability to pay may be subject to incarceration for either civil or criminal contempt. Because the father was sentenced for an indefinite period until the performance of a specific act (pay back child support) the contempt in this case was civil. The essence of civil contempt involved in a proceeding to enforce child support is willful disobedience of a prior order. A trial court must release a party from incarceration for civil contempt when he lacks an ability to purge himself of the contempt.

The purpose of civil contempt is to provide a remedy and to obtain compliance with the trial court's order, and the justification for imprisonment is lost when that compliance is impossible. This court cannot say the trial court abused its discretion by initially finding the father to be in civil contempt when there was evidence at the initial hearing that he had refused compensation employment which would have allowed him to pay his child support obligation and that he

failed to seek employment commensurate with his skills and training. But, we find the trial court erred in failing to release the father from incarceration based upon the evidence at the motion for reconsideration hearing which clearly established the father lacked ability to purge himself. Once the father established inability to pay, the trial court had no authority to continue his incarceration, thus had no authority to confine him in a diversion center or to place him in a work release program under O.C.G.A. §15-1-4(c).

## Equitable Division

### *Cubbedge v. Cubbedge*, A07A0739 (Aug. 9, 2007)

The parties were divorced in 2001. The divorce decree incorporated a settlement agreement that contained the following provision: "Husband shall transfer, assign one-fifth of any inheritance he ever receives in the future to the wife. Husband shall notify the wife immediately if he is entitled to inherit any assets from anyone. Husband shall not take any action to defer or refuse to accept any property or funds to which he is entitled as a result of a bequest he shall receive." The husband's parents became aware of the provision several years after the decree and had an attorney make an inter vivos gift of their assets to the husband by establishing a family limited partnership with the parents as general partners and the husband as a limited partner. The husband was not aware of the parents' creation of the limited partnership until he was asked to sign the documents establishing it.

After the partnership was established, the husband notified the wife to buy out her one-fifth share of the inheritance for approximately \$5,000. Wife did not accept the offer but brought suit seeking creation of a legal title to or imposition of an implied constructive trust or a lien in her favor for one-fifth of any assets transferred by the parents to the husband, any limited partnership created for the purpose of circumventing her rights under the divorce decree. Wife also sued the parents for tortious interference with contractual rights.

The trial court awarded summary judgment to the husband and the parents. The trial court defined inheritance as property received from an ancestor under the laws of intestacy or by bequest or devise and that the parents' inter vivos transfer of their assets to a family limited partnership would not result in the husband's receipt of an inheritance and would not trigger the provisions of the divorce decree relating to inheritances. The court also found that the parents did not tortuously interfere with the wife's contractual rights because the parents were the owners of the assets used to fund the limited partnership and were non-parties to the divorce decree and had a right to transfer their assets. Wife appeals and the Appeals Court affirms.



The Court distinguished *Meeks v. Kirkland* in that in *Meeks*, the wife was awarded one-half of any interest in any property the husband would receive from his father's estate. At the time of the divorce, the husband's father was living and therefore the decree dealt with a mere expectancy or possibility in which the husband had no interest and as such was utterly void and ineffectual to vest in her any interest in property acquired by him in the future. The court also distinguished *Baldree v. Baldree* and *Searcy v. Searcy* in that a husband's interest in an undistributed estate of deceased parents could be awarded to the wife as alimony, or as in *Baldree* where the husband's inheritance from his uncle became an asset, it becomes a legally protected and assignable interest.

In the instant case, because the husband's parents were alive at the time of the entry of the divorce decree and remained so, the drafter of the wife's decree sought to avoid the application of *Meeks* by requiring the husband to transfer a share of any future inheritance after the expectancy had matured, rather than by attempting to effectuate the transfer by decree. Even if this mechanism were effective to distinguish *Meeks*, it fails because the trial court correctly stated that inheritance is defined as property received from an ancestor under the laws of intestacy or by will at the ancestor's death. Therefore, assets received through the establishment and operation of a family trust would not be an inheritance, or would not be considered an advancement against the husband's future inheritance.

Since 1998, under Georgia law the intent to treat a lifetime transfer as advancement is shown only if the will provides for deduction or its value or if the advancement is declared in writing signed by the transferor or within thirty days of making the transfer or acknowledged in a writing signed by the recipient at the time. Neither are shown in the instant case.

The trial court was also correct in granting summary judgment to the parents because the parents were not bound by any contractual restrictions and thus had the legal right to give, bequeath or devise their property to the husband.

## Mediation

### *Wilson v. Wilson*, F07F1201 (Nov. 21, 2007)

The wife filed for divorce in Coweta Judicial Circuit that had adopted the Alternative Dispute Resolution Program (ADR). The attorney for the husband filled out a form to initiate mediation with the Coweta ADR Program, but was postponed due to pending discovery. Without informing the Mediation Center or their attorneys, on Dec. 22 the parties met with a registered mediator of their choosing and as a result of mediation, the parties reached an agreement and agreed to submit it

to the court for incorporation into a Final Decree of Divorce. On Dec. 27, the husband sent a letter to the wife's attorney stating that the husband would not comply with the terms of the agreement and therefore it was set aside. On Dec. 29, the wife filed a Motion to Enforce Settlement Agreement. The husband agreed the agreement was not enforceable because the parties engaged in a court referred mediation and under the mediation Rule 12(d)(2), each party had three calendar days in which to object to the mediated agreement, since the attorneys were not present at the mediation, the husband had properly objected to the filing with notice to the wife's attorney. The husband also contended he was not competent to enter such agreement because he suffered from depression and did not understand the obligations he was undertaking.

The wife contended the parties were not engaged in court-referred mediation; therefore, it was not subject to the ADR Rules. A hearing was held on Jan. 29 and the trial court entered an order enforcing the mediated agreement. The trial court ruled that it was a private mediation and was not subject to ADR Rules. The court also stated that the husband had mental capacity to enter into the agreement. The husband appeals. The Supreme Court affirms in part and remands in part.

The Supreme Court finds that the mediation was court-ordered mediation even though the parties did not participate in certain parts of the process of the local program and did not fulfill their responsibilities to communicate with the program director. Therefore, even though the husband was entitled to the benefits of Rule 12(d)(2), the court concludes the husband did not comply with the rules. The husband filed his objection to the mediated agreement to opposing counsel and not with the program coordinator and therefore, did not timely object to the mediated agreement.

The husband also argues that the trial court erred by calling the mediator to testify at the hearing on the enforceability of the settlement agreement as it violated the confidentiality portion of the mediated agreement signed by the parties and the mediator. The mediator did not testify to substantive settlement discussions or specific confidential communications and only testified, in relevant part, about his status as a private mediator and about his general impression that both of the parties had the mental capacity to engage in the mediation and settlement. The Court here, creates an exception that when a party contends in court that he or she was not competent to enter a signed settlement agreement that resulted from mediation, then that party waives the privilege confidentiality and the mediator could testify to such issues. Otherwise, the court might be deprived of evidence that it needs to rule reliably on a party's contention of mental incompetence. By not adopting this rule, it could encourage either party to



try to escape the commitments they made during the mediation or to use threats of such escapes to try to renegotiate after the mediation for more favorable terms that they never would have been able to secure without this artificial and unfair leverage.

Issue of attorney's fees was remanded because the trial court failed to make findings sufficient to support such an award of attorney's fees.

## **Retirement Benefits**

### ***Plachy v. Plachy*, S07F0834 (Oct. 29, 2007)**

The incorporated settlement agreement between the parties' equally divided the husband's Civil Service Retirement System's (CSRS) retirement benefits as equitable division of property. The wife received 50 percent of the husband's gross annuity benefits earned as of the date of the agreement, less the amount deducted for the cost of survivor annuity benefits. The wife was also assigned 50 percent of the maximum possible survivor annuity. However, the Court Order Acceptable for Processing (COAP) provided that the payments were to continue to the wife for the husband's lifetime and to the wife's estate should she pre-decease the husband. Pursuant to Office of Personnel Management (OPM), if there are no express provisions giving directions regarding post mortem payments, the recipient spouse share of the benefits reverts to the federal employee spouse (husband). The husband appeals arguing the trial court committed reversible error by entering the COAP because the COAP's provision for payment of benefits to the wife's estate should she pre-decease the husband was not a part of the incorporated settlement agreement and should not have been included in the COAP's provisions. The Supreme Court affirms.

While the settlement agreement did not expressly state that the benefits were to survive the death of the wife, retirement benefits acquired during the marriage were marital property and the wife received a share of the retirement benefits as equitable distribution of the marital property which had the effect of awarding title to the property. The inclusion in the COAP of the express statement required by federal law to give effect to the Georgia law was not the addition of a new substantive provision. Also, the equitably divided retirement benefits that are to be distributed to the wife by means of monthly installments do not make the payments alimony payments that are terminated upon death of the recipient/former spouse.

## **Temporary Protective Order/Jurisdiction**

### ***Loiten v. Loiten*, A07A1092 (Nov. 29, 2007)**

The wife initiated divorce proceedings in Alabama, but filed a Petition for a Temporary Protective Order

(TPO) in Clayton County stating jurisdiction was proper in Clayton County because the alleged acts committed by the husband happened in Clayton County. An ex parte protective order was entered on June 7, 2006, and on July 1, 2007. The husband was served in Alabama with a copy of the order as well as a June 30, 2006, order extending TPO pending service. The order directed him to appear in Clayton County on July 5, 2006. The husband retained counsel and appeared at the July 5 hearing and filed a motion to dismiss alleging insufficient notice and lack of service since he was not served with the petition setting out the allegations against him. The court asked the husband to waive service of the petition but he refused. The sheriff served the husband with a copy of the petition in the parking lot of the courthouse as he was leaving the hearing.

The husband filed another motion to dismiss arguing that service upon him in the parking lot was inadequate. At the July 7 hearing, the court announced that it would tentatively deny both motions to dismiss. The trial court proceeded with the hearing and granted the wife a one-year Protective Order. The husband appeals. The Court of Appeals reverses.

The original service by the sheriff in this case was insufficient because the document served on the husband provided no notice of the allegations against him and the order extending the Protective Order was merely form documents with no explanation of the underlying allegations.

The husband also asserts that service of the petition in the court's parking lot was also insufficient. Generally, a witness in attendance upon trial of any case in court is privileged from arrest under any civil process and is exempt from the service of any writ or summons upon him while in the attendance upon such court or in going or returning there from. Over a period of time, the courts have recognized several exceptions. The exception to the rule does not apply to criminal defendants or non-residents who are in the state temporarily for some purpose other than to appear in court as a party or witness. The privilege rule was intended to insulate a party in attendance upon the trial of the case from service of process in a new action. In the instant case, service of petition in the courthouse parking lot was the initial service providing the husband with first notice of an action against him. Since this was a new action, the husband could not be served while he was attending the noticed hearing in this case or when he was going to or from those proceedings. **FLR**

# Q&A With Greg Lundy: Staff Attorney for Gwinnett Superior Court and Judge Michael Clark

Conducted by Austin Buerlein

John Marshall Law School 3L and Law Clerk for Margaret Gettle Washburn, P.C.

**G**reg Lundy is a staff attorney with the Gwinnett Superior Court, and works directly with Judge Michael Clark (see profile on page 12). I had the opportunity to meet with Lundy and Judge Clark to discuss a day in the life of a staff attorney, and any advice that he may have for a lawyer litigating before his and Judge Clark's busy bench.

**Q:** Let's talk about the route you took to get here today. I understand you also attended John Marshall Law School here in Atlanta. Can you talk about your experience there?

**A:** I attended classes during the day and was working two jobs at night, including a job with the Atlanta Falcons reviewing their books, and I typically worked from 11 at night until 7 the next morning, and then went to school.

**Q:** Wow, when did you find time to sleep?

**A:** I took naps. You'd be surprised at the places I found I could take a nap.

**Q:** I've been extremely pleased with my education and the curriculum. How well do you feel it prepared you for the legal practice?

**A:** Extremely well. In fact, I felt John Marshall provided particular advantages over other schools in that the professors were all active in the legal community. Not only were they professors teaching law, but they were currently still in the trenches and taught me about the insides of the practice in the real world. I even had a criminal law professor who was an active assistant district attorney, and there were judges teaching classes too. I think complimenting what you learn in your books with real world practical advice is important for

a law school student.

**Q:** What next, what did you do after law school and before you began working as a staff attorney?

**A:** After law school I went into private practice for myself in Buford, Ga. I handled many court-appointed cases of all kinds, but a majority of my cases were criminal. Eventually I started getting a lot of referrals, as well as repeat clients. I did this for about five years before taking a job as a staff attorney with Judge Clark.

**Q:** Do you have any memories that stand out from your early years of practice?

**A:** Well, I remember attending a symposium as a young lawyer where Bobby Lee Cook was present. I was fascinated with some case that he had recently tried and after waiting in the long line of lawyers and people that were fighting to speak with him, I had the opportunity to ask him about the facts of the case. He asked me if I had a card, and he would send me the facts. I gave him my card and figured for sure I would never hear from him again. He is such a busy man and wouldn't have the time; plus he'd probably forget or lose my card anyway. However, less than a week later I got a personal letter in the mail along with a typed out explanation of all the facts. I will always remember that.

**Q:** That's a great story! Now, how did you end up with your position as a staff attorney?

**A:** Well, during my private practice Judge Clark had appointed me second chair for a murder case, and I got to know him fairly well over the course of this case. After it was over, I expressed interest in a position working as a staff attorney for

Judge Clark or the court. Not too long after, his secretary called me up and let me know about the opening and I jumped at the opportunity. A position as a staff attorney in Gwinnett is an excellent and heavily sought after career, not just a job. After interviewing with several other candidates, I was hired. I've been here since.

**Q:** How do you spend most of your time during the day?

**A:** I spend a lot of my time reviewing and managing the pleadings that are submitted for all of the cases assigned to our court. After receiving and tickling one party's pleading, I wait for the other party's response. I then read both of these pleadings and further research the authority on the matter and the law cited in the pleadings. I meet with Judge Clark and brief him and explain both sides and what my position on the issues is. Many times I'll have a drafted order ready for the judge to either edit, or sign if he agrees. I also sit in for and am involved in different regards for certain hearings or trials, among other duties.

**Q:** As a person who plays a direct role in assisting with the final determination on which side will prevail, do you have any advice to lawyers about how to write their pleadings, such as what to include and what not to include when submitting them to your court?

**A:** I think the two most important things for pleadings are brevity and authority. Make sure you explain your authority, and even attach the cases to the pleading. However, be careful not to stretch the

authority and law because I am going to read it, and if you are stretching the law then you lose your credibility. Also be brief. When I say brief, I don't mean leave out facts necessarily, but rather have your pleadings streamlined and succinctly explain the facts, what you are asking for, and exactly why you deserve what it is you are asking for (and again, use the law to assist your position in this regard).



**Q:** Are there any tips that you have for any lawyers that will be trying cases in your and Judge Clark's courtroom?

**A:** I'd say for starters, always be courteous and professional. We appreciate the old fashioned courtesy and decorum and respect for the court. This includes standing before you speak. I would also advise always know the facts of your case before you come into court to ask for something. We've had lawyers come in and request for child custody, but they don't even know the age of the child involved. Be prepared, because if you are not, it will negatively reflect on you and your client.

**Q:** Thanks a lot for taking the time out of your busy schedule to meet with me. Speaking of your busy schedule, I have been told that you and your wife are expecting a child. Do you think you are ready for this second job?

**A:** It will be my wife and my first child. She is due any day now, so I better hope so! **FLR**



# Judge Michael Clark: Theory in Practice

By Raj Mehta

Law Offices of Margaret Gettle Washburn, P.C.

Getting to know this judge requires considering the various perspectives and philosophies he brings to the bench. Mindful of the impact of the court on the individual and society, Judge Clark infuses his decisions with principles from disciplines that impact the law, drawing from his education in psychology and religion, as well as interests such as economics and a more comprehensive study in business.

Despite the long black robes and hours spent preaching from on high in rooms filled with pews and Bibles, most judges probably can't claim a calling to the ministry early in life. Not so with 14-year veteran of the Gwinnett Superior Court bench Mike Clark. The Macon-born, University of Georgia triple grad and one time religion major (B.A. awarded 2003), once had planned to don quite a different set of robes. While opting for membership in the legal community instead of the priesthood, Judge Clark still holds to a philosophical approach to his work, one which looks at the theories and precepts that underpin rules, and looks across various disciplines to draw out the right rule for the case.

As an undergrad, Clark's interests extended from jurisprudence to business. When the UGA grad (B.S. in Psychology, awarded 1976) narrowed his post-graduate education options to those particular two studies, the tie was broken in favor of legal studies by no less prominent an influence than Dean Rusk, secretary of state under President Kennedy, who on a visit to UGA advised that 'one can always enter the business with a law degree but one can't go into law with a business degree.' The 1980 UGA School of Law grad then set out to broaden his opinion of the legal landscape by trying his hand at various forms of practice.

The future jurist whet his appetite for the

bench by first serving as a law clerk on the Rome Judicial Circuit from 1980 to 1981, then arrived in Gwinnett County as an assistant district attorney until 1983. Judge Clark then got quite a different perspective in when he entered private practice as a partner in Clark & McLaughlin focusing on general litigation as well as criminal defense in particular as part of the Indigent Defense Committee when it was still relatively small and heavily utilized the few lawyers on its rolls.

Drawing national attention on his first appointed case, referred to widely as a "slam dunk death penalty case," which included not one but three client confessions; Judge Clark successfully avoided a death penalty for the client. He would go on to chair the Indigent Defense Committee the following year. Over the next decade, he further informed his perspective by serving as chief counsel to the local chapter of the Police Benevolent Association (1986-89) and chair to the Gwinnett Bar's Guardian ad Litem Committee (1994-96), on his way, in 1993, to succeeding the same judge who appointed him to that first death penalty case.

Judge Clark views his role as a jurist as both remaining respectful of precedent—where the law stands—yet also observant of where the law is moving in light of advances in informed and accepted wisdom. This philosophy was apparent in the judge's recent opinion addressing Georgia's version of the impact rule, by which, generally, recovery for emotional distress from witnessing physical injury of another is premised on whether the plaintiff also sustained a direct physical impact from the same incident, in a case involving plaintiffs who witnessed the accidental collapse of a concrete display which severely injured their daughter, without either impact as to the parents or malicious intent on behalf of the retailer. Noting a sea of change in how

other jurisdictions had construed their similar version of the rule and a recent Supreme Court of Georgia special concurrence rejecting the requirement, the judge and his senior staff attorney Greg Lundy (see Q&A on page 10), opened the door for Georgia to reconsider whether it would still widely require parents to incur direct physical contact and resulting physical injury as grievously impacted their child in order to recover. The Court of Appeals, addressing the judge's denial of the retailer's motion for summary judgment in that matter, *Pike Nurseries, Inc. v. Allen*, 253 Ga. App. 312, 558 S.E.2d 834 (2002), determined that the existing Georgia impact rule would remain in effect. Clark nonetheless achieved one any jurist's aspirations by striving to remain vigilant to possible changes in rules applicable to legal analysis.

Drawing from a wealth of experience from various seats in the courtroom and beyond, Judge Clark holds a certain expectation of attorneys who appear before the bench, none more important than preparedness—both for their client and for the Court. First of all, he anticipates that counsel remain prepared for the sake of their client. Preparation, as to both the case and the client's needs, results in the attorney remaining efficient as to the client's time and fees. As to the Court and the public, Judge Clark warns that attorneys are always "in a fishbowl," and their conduct effectively impresses upon jurors and judges the merits of their clients' case from the moment they drive up to the Court to the moment they leave. Underpinning this preparedness should be an air of success and thus confidence in the case, without ostentation or pride.

This fishbowl philosophy holds true for litigants in Judge Clark's court as well; in other words what's good for the goose is, well, good for the goose's client. For judges and jurors as attentive as Judge Clark, the overall impression that a party conveys is a criterion in evaluating the party's credibility. In a fairly recent hearing on a motion to modify child support award, a party which rattled off a very academic accounting of certain monetary factors which painted a portrait of a much lower wage earner to a less attuned fact finder. Instead, the party was greeted with a flurry of questions from the judge including 'what kind of car the party drove,' directed at illuminating the true financial status of the individual. As to that particular question, the Judge shares a note from a practical economic tenet that a party is more likely to give an accurate evaluation of assets and earnings when one is freely applying for a car loan than when compelled to complete child support worksheet. Remaining observant of all factors which would more accurately describe a party's financial makeup, the judge notes a propensity that 25 to 33 percent of one's income goes to mortgage payment, and thus from knowing that payment amount, one can

approximately reverse deduce a party's actual income.

Judge Clark urges parties to remain observant of judges as well, and advises that lawyers unfamiliar with a certain Court should take the time to sit in the gallery and note to what arguments and articulations the judge responds, as well as the judge's own mannerisms and inferences thereof. To summarize, Judge Clark brings up the adage 'Good lawyers know the law, great lawyers know the judge.'

As one who seeks to bring a thorough well-informed analysis to each case, Judge Clark constantly seeks to expand his knowledge base, most recently in working towards a certificate in business from Edinburgh Business School at Heriot-Watt University, Edinburgh, Scotland. **FLR**

## 2007 Family Law Institute Photos



The 2007 Family Law Institute was held in May at the Ritz-Carlton Hotel in Amelia Island, Fla. The 2007 Institute also marked the event's 25th anniversary.

**Top:** Judge Stephen Schuster and Joe Winter

**Center:** Elizabeth Lindsey and Steve Harper

**Bottom:** Judge John Bailey and Rosemary Bailey

# Confessions of a *Guardian ad Litem*

By M. Debra Gold  
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I have to confess that I am looking forward to 2008, as it seems that things keep on getting better every year! Typically, I am not one to make New Year's resolutions. This year, however, I listed my personal standards as a *guardian ad litem* (GAL) in the form of "resolutions" because even though I already practice these standards, a refresher course never hurts. Thus, I resolve to continue to observe the following resolutions and hope all GALs take heed.

## **1. I resolve to keep an open mind.**

The GAL should not pre-judge a case and does not have a crystal ball as to what the ultimate outcome will be. In order to do a complete and fair job, the GAL must remain neutral and give ample time to both parties and counsel so they can present their cases. Before I start writing my report, I give the attorneys for the parties an opportunity to make "closing arguments." I may find that they have a perspective or angle that has not yet occurred to me. I sometimes find that even after a long investigation, I still do not know what my recommendation is going to be until I get to the end of my report! There are always at least two sides to every story. A good GAL needs to consider all sides with an open mind.

## **2. I resolve to handle my investigation in the most expeditious manner possible given the facts of the case.**

It takes time for the GAL to complete his investigation. He has many people to interview and records to review. However, when custody of a child is in limbo, sometimes time is of the essence. On the other hand, in many cases, time is the GAL's best friend because there is so much to learn as the clock ticks on. While making sure that he makes a complete investigation in order to get the full picture, the GAL should also be sensitive to the effect a continuing custody battle may have on not only the children, but also their parents.

## **3. I resolve to be sensitive to your clients' positions while remaining true to my role of representing the best interests of the children.**

The GAL should remember that we are dealing with families and with emotionally-charged issues. Empathy is important. The GAL should be sensitive to how both sides are going to react to her investigation, recommendation and the ultimate custody decision as their reactions may have an effect on the children. It can be very difficult, for example, for the GAL to recommend that one party should lose custody of the children. The GAL should endeavor to conduct her investigation and make her recommendations in such a manner that the effects do not trickle down to the children.

## **4. I resolve to make a complete investigation in order to get to the bottom of my cases.**

Until the GAL hears all of the facts, she is not in a position to make a recommendation. When I am getting close to the end of my investigation, I ask the parties and their attorneys if there is any other avenue they want me to investigate before I write my report. In this way, they can help me fill up any holes I may have in my investigation.

## **5. I resolve to work toward an amicable resolution to my cases.**

It goes without saying that it is generally best for all involved, especially the children, if cases are settled amicably rather than drawn out in a long, litigious trial.

## **6. I resolve to make recommendations that I believe in my heart are in the best interests of the children.**

Following my heart and conscience is what makes my job as a GAL easier. I go to bed every night knowing that I did what I believe is the right thing, no matter how difficult. Every GAL knows how rewarding this can be. **FLR**



# YLD's 2007 Supreme Cork Benefit—A Vintage Event!

By Leigh F. Cummings  
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On Sept. 20, 2007, the Family Law Committee of the Young Lawyers Division (FLCYLD) hosted its second annual Supreme Cork wine-tasting and silent auction event at JCT Kitchen in the Westside Urban Market on Howell Mill Road. In only the second occurrence of The Supreme Cork, the family law community demonstrated their commitment to this event and the children of The Bridge with great enthusiasm and in increasing numbers. Due to the generosity of the sponsors and attendees, the members of the FLCYLD were able to present a check of more than \$19,000 to The Bridge!

The Bridge CEO Tom Russell was thrilled with the event's success. "It is nothing short of amazing what the Family Law Section of the State Bar of Georgia has done to benefit abused youth served by The Bridge in Atlanta. Through the Supreme Cork fundraiser, now entering its third year, much needed dollars have been raised, and even as important, if not more, the awareness of the needs of physically

and sexually abused youth has increased significantly," he said.

The great success of this event was due in large part to the generosity of the sponsors, which consisted of law firms, vendors and private individuals, all of whom are listed below.

The members of the FLCYLD donated a great deal of time and effort to the 2007 Supreme Cork. Special thanks to: Katie Connell, event chair; Whitney Mauk, who led the charge for sponsorships; Jonathan Rotenberg, who served as the chair for the silent auction; Adrienne Hunter Strothers and John Lovett, who also worked to make the silent auction particularly successful; and Alyson Finkelstein and Pia Koslow, public relations co-chairs who spread the word about The Supreme Cork.

FLCYLD members hope that this event continues to grow as a sign of the compassion of all those involved. As committee chair, I would personally like to thank everyone who supported this event so graciously. **FLR**

## 2007 Supreme Cork Sponsors

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# Q&A with Judge William Ray, Superior Court of Gwinnett County

Conducted by Austin Buerlein

John Marshall Law School 3L and Law Clerk for Margaret Gettle Washburn, P.C.

Judge William “Billy” Ray encompasses a true Georgian and has served as an outstanding asset for this state. Ray grew up outside of Macon in Fort Valley, Ga., and attended Beechwood High School in Marshallville, before becoming a triple “Dawg,” earning his B.A., M.B.A. and J.D. from the University of Georgia. Son of a hard working farmer, Ray was influenced at an early age by family members who were influential in Georgia politics, including uncles former U.S. Congressman Richard Ray of Perry and Rep. Robert Ray of Fort Valley, who served in the Georgia House of Representatives for 24 years. After practicing as an attorney for local firm Anderson, Davidson & Tate, Ray was elected state senator for the 48th District of Georgia in 1996 for the 1997-98 term.

As a Republican, Ray was a member of the Judiciary Committee, which influences legislation involving the state’s criminal justice system and proposed constitutional amendments. He was also a member of the Natural Resources, Transportation, and State and Local Government Committees.

This influential position with the legislative branch (coupled with his prior experience as a practicing litigator) proved to be an excellent segue for his judicial position with the Gwinnett Superior Court, where he was appointed by Gov. Roy Barnes. Judge Ray has been active in this role, and he was a leader in both spearheading and implementing the “Drug Court” program in Gwinnett County, which has boasted extraordinary positive results. In addition to running his busy docket, he currently serves as chairman of the Legislation Committee of the Council of Superior Court judges. Judge Ray is a deacon with his church, married to the former Kelle Chandler, Ph.D., an active father to three boys (ages 7, 9 and 11), among numerous other distinctions and achievements.

Did I mention that he is the youngest judge on the Superior Court bench? (Please note the responses below are not verbatim, but are intended to reflect my notes from our meeting.)

**Q:** I see you have been active in politics. Did your interest in politics lead you to law school, or did law school lead you to politics?

**A:** A little bit of both. Having grown up in a family with several politicians and having the opportunity to work in the area at a young age, I have long been interested in politics. However, I’ve also always known I wanted to be a lawyer. So, I don’t think one really followed the other necessarily or came as a surprise. However, growing up in a primarily Democratic household, including uncles and parents, I think I might have surprised my family when I joined the Republican party and was elected to the senate in 1996. However, I think my family members that are Democrats saw eye-to-eye on a majority of issues, and we even helped campaign for each other, as well as were able to effectively utilize each other’s positions in politics and positions in our respective political party.

**Q:** When you were in the Senate, what bills did you actively support?

**A:** Heidi’s Law, HB 826: “WHEREAS, an ignition interlock program has been shown to be effective in reducing both the number of drunk drivers on the highways and the number of fatalities caused by repeat offenders; and WHEREAS, it is fitting to honor the memory of all victims of drunken driving and Heidi Marie Flye, Cathryn Nicole Flye, and Audrey Marie Flye in particular by strengthening the laws requiring the installation and use of ignition interlock devices.” SB 292-Gwinnett Co.-Homestead exemption, coun-

ty taxes. A bill to provide for a homestead exemption from certain Gwinnett County ad valorem taxes for county purposes in an amount equal to the amount of the assessed value of that homestead that exceeds the assessed value of that homestead for the taxable year immediately preceding the taxable year in which that exemption is first granted to a resident; to provide for definitions; to specify the terms and conditions of the exemption and the procedures relating thereto; to provide for applicability; to provide for a referendum, effective dates, and automatic repeal; to repeal conflicting laws; and for other purposes.

**Q:** How do you feel your career in the legislative branch as a senator has impacted your career in the judicial branch as a judge?

**A:** I think I am less likely to stray from what the law says. [The legislative branch] is in charge of making and writing the law. I understand the process of what goes in the formulation and passage of a bill. However, I am currently the chairman of the Legislative Committee of the Council of Superior Court Judges, where I represent Superior Court judges before the General Assembly.

**Q:** What areas of law did you practice before becoming a judge?

**A:** About 50 percent of my work was in domestic relations cases, but I also did a good amount of criminal defense and construction law cases. I enjoyed those areas, and think if I were to practice again, those particular areas would be of interest.

**Q:** What are two main tips you would have for a lawyer appearing in your courtroom?

**A:** Be respectful to one another. Don't interrupt each other and be cordial. I think in Gwinnett County our lawyers have developed a good rapport with other lawyers in the area, and frequently I see a noticeable difference between a local lawyer and an "Atlanta law firm" lawyer. Some lawyers are constantly objecting to petty things, such as objecting to asking a leading question on direct testimony in a bench trial. Another example is a lawyer objecting to a witness reading from a document tendered into evidence, arguing that "the document speaks for itself." I could have taken 10 minutes to read the thing myself, or had the relevant part read in the record in a much more efficient manner. Tell me the issues up front and exactly what you are asking for; it is easier for me to know what information I am searching for at the onset and I can better filter and concentrate on the relevant evidence.

**Q:** What areas of law/cases do you find the most difficult to adjudicate?

**A:** I have recently had a difficult time with a few cases regarding contempt for one party failing to meet his or her child support obligations when the non-paying party alleges they "just can't pay." I hear about how they lost their job and don't have access to any funds to make their support obligations, and it's difficult to know whether or not they are being stubborn and just don't want to put forth the effort, or whether they legitimately just can't pay. Recently I even asked a defendant on the stand what brand his gold watch was, in order to assess his actual financial situation. It was a Pulsar.

**Q:** From what I gather, you were the judge responsible for the Drug Court. Can you talk about this?

**A:** Prosecutor Lisa Jones and Court Administrator Phil Boudewins, and myself, among others, initially spearheaded this project, but all the judges on the bench were in favor of implementing this program. To learn about it, we observed and studied other jurisdictions already utilizing it, and we also attended training sessions. This project is intended to offer a structured program that will provide support, stability, and treatment to offenders; not just slap them on the wrist and forget about them until they get arrested and come back to our court again. When someone gets charged with a drug offense, there are two roads available for guilty defendants. If they elect, and are chosen to participate in the drug court program, they are required to stay clean and take advantage of the great treatment and rehabilitative programs available through the county. Not only do they have to frequently submit to drug tests, but also they are required to attend various meetings, including frequent meetings with me in my courtroom. We monitor each person for a minimum of 18 months, and if they are ready to "graduate" from this program, then their case is dismissed. We have been pleased with the results thus far. The national statistics show that there is a 55-60 percent chance that a criminal that has committed a drug crime will prevent some sort of additional drug-related crime within five years of release. However, under our program, we have reduced this figure to 10-15 percent chance that they will commit another drug related crime in that same period.

**Q:** What is your favorite book or movie?

**A:** I love *To Kill a Mockingbird*, but the movie *My Cousin Vinny* is my favorite.

I'm definitely making a note now to add that movie to my Netflix queue list. The only remaining question is, do I also have to wear that ruffled tux shirt and red cutaway tuxedo Joe Pesci wears in the movie? **FLR**



## Family Law Revolution

*Continued from page 1*

reproductive technology do so for many different reasons. Many people seek medical intervention in the reproductive process to overcome problems of infertility that preclude them from having children by sexual intercourse. However, others use it because they are in a same-gender relationship or wish to have a child after their partner has died. Courts in California,<sup>2</sup> Arizona,<sup>3</sup> New Jersey<sup>4</sup> and Massachusetts<sup>5</sup> have struggled with issues arising from posthumous reproduction. California has even enacted a so-called "dead dad's bill" providing for legal recognition of a child born to a deceased parent under certain circumstances.<sup>6</sup> These can include consent requirements, interpretation of probate instruments, and public policy determinations, among others.

Many couples in same-gender relationships also use reproductive technology. Issues regarding same-gender parents have been recognized in a number of decisions, and will continue to be raised in the future. The use of gestational surrogates to carry children for women who are unable to bear children or on behalf of men who aspire to parenthood reflects still another group of people who use assisted reproduction. The number of cases involving such situations has continued to grow in recent years.

While only a small amount of litigation has developed around the use of gametes provided by donors when prospective parents run a substantial risk of producing offspring with inheritable diseases or genetic abnormalities, the potential for malpractice claims in such cases is obvious. Medical malpractice litigation has also occurred in cases involving misplaced embryos, diseased gametes, or unauthorized use of sperm. Some people seek to retain the potential to have children using cryopreserved gametes after they have undergone treatment for cancer that is likely to adversely affect their fertility, but as with other experimental medical technology the potential for disputes exists.

### The Changing American Family

From an historical perspective American law for centuries has placed a strong emphasis on promoting and protecting the traditional family by statutes regulating civil marriage. From the 17th century on, American law has stressed the importance of marriage as the best forum for producing, raising and educating children.<sup>7</sup> Even today the "traditional" marital family is recognized as the proper and appropriate unit of society for having and raising children. But the increasing use of assisted reproduction to procreate children has created the potential for increased recognition of "non-traditional" groups as appropriate childbearing families.<sup>8</sup>

For most of the 20th century the statutory and decisional law focused primarily on the legal regulation of and dissolution of heterosexual marriage. As the contemporary practice of domestic relations evolved the law witnessed the liberalization of married women's rights by passage of married women's property acts,<sup>9</sup> gradual liberalization of divorce laws,<sup>10</sup> development of standards for resolving custody disputes in divorce cases, legislative efforts to define the rights and responsibilities of married persons, and (in the last part of the 20th century) the development of property division laws to be applied in divorce.<sup>11</sup>

While the legal system continues to focus substantially on issues relating to the marital family, a quiet revolution has been taking place in American society independent of the status of marriage. The Supreme Court of the United States has acknowledged this social change in stating that "[t]he demographic changes of the past century make it difficult to speak of an average American family."<sup>12</sup> There has been substantial growth of and acceptance of the nontraditional family in American society, and the increased procreation of children by assisted reproduction in nontraditional families promises to create legal issues that have not been previously addressed.

### Procreation and the Non-traditional Family

Resistance to legal recognition of non-marital families was often based on the state's interest in children. For example, the Court of Appeals of Washington denied a marriage license to a same-sex couple in this analysis: "Although, as appellants hasten to point out, married persons are not required to have children or even to engage in sexual relations, marriage is so closely related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman."<sup>13</sup>

This argument is based on two propositions. One is that "the institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other,"<sup>14</sup> which is an argument for not providing the protections to same-sex unions. The other proposition is that children are best conceived and raised in a traditional marital family rather than in a non-traditional family. This argument is based in part on the lack of applicable law governing such non-marital unions, as expressed in the questions "What of the children of such relationships? What are their support and inheritance rights, and by what standards are custody questions resolved?"<sup>15</sup>

Critics of non-traditional families argue that the law should promote the procreation of children only by

male-female sexual intercourse, and that children should be raised in a marital family. This was the essence of the state's position in the now-famous same-gender marriage case in Massachusetts. The Commonwealth in *Goodridge*<sup>16</sup> argued that only heterosexual marriage provides a favorable setting for procreation and that only marriage provides the optimal setting for child rearing.<sup>17</sup> The majority opinion of the Massachusetts Supreme Judicial Court rejected this dual argument:

Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family . . . .

Fertility is not a condition of marriage, nor is it grounds for divorce. . . . While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to each other, not the begetting of children, that is the *sine qua non* of civil marriage. Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether the assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means.<sup>18</sup>

This analysis by the Massachusetts court reflects the impact that assisted reproductive technology has had on legal analysis of the reality of modern American family life. Parents, whether they are in a married or unmarried union with another, whether they are single parents, whether they procreate by sexual intercourse or by assisted reproductive technology, are entitled to the respect the law gives to family choices. Obviously there are many who disagree with this type of analysis about issues that same-gender marriage or domestic partnerships raise, but it would be hard to deny that the availability of assisted reproduction (as distinguished from sexual intercourse) to procreate has produced new realities that the law must confront.

The Supreme Court of New Jersey stated a simple reality in a case involving a custody dispute between two women over a child conceived by one of them by intrauterine insemination when it commented about reproduction in non-traditional families:

[W]e should not be misled into thinking that any particular model of family life is the only one that

embodies 'family values.' . . . Those attributes may be found in biological families, step-families, blended families, single parent families, foster families, families created by modern reproductive technology, and in families made up of unmarried persons. . . . Moreover, our judicial system has long acknowledged that 'courts are capable of dealing with the realities, not simply the legalities, of relationships,' and have adjusted the rights and duties of parties in relation to that reality. . . . [T]he nuclear family of husband and wife and their offspring is not the only method by which a parent-child relationship can be created.<sup>19</sup>

It is that reality of a child conceived, or sought to be conceived, by medical collaborative reproduction that has created a number of difficult legal issues for lawyers and judges in the context of nontraditional family life.

### **The Use of Assisted Reproductive Technology by Non-traditional Families**

Advances in the science of reproductive technology in recent decades have made the potential for procreation of children a reality for thousands of people who before this technology would have been childless. This has created non-traditional methods of conceiving and giving birth to children, which in turn has created a new dimension of life-giving for people who either cannot or do not choose to have children by sexual relations. There are many examples of the use of assisted reproductive technology to procreate by means other than sexual intercourse. Same-gender female partners can employ intrauterine insemination to produce a pregnancy in one of the partners with the sperm of an anonymous donor or a known donor. Same-gender male partners can employ a traditional surrogate to carry a child for them using the sperm of one of them to produce the pregnancy by intrauterine insemination. Male-female couples may use an embryo produced by another couple that is fertilized in vitro and cryopreserved in order to be implanted into the uterus of the female. Intrafallopian transfer, gamete uterine transfer, or peritoneal ovum and sperm transfer can be used by same-sex or opposite sex couples. Couples can employ a gestational surrogate to carry a child for them. Same-gender male partners may provide the sperm of one of them to fertilize a donated egg in vitro, with the resulting embryo to be carried by a female gestational carrier. Male-female couples can employ the sperm of a donor to make the female pregnant by intrauterine insemination because of the infertility of the male partner, or to avoid a disease carried by the male partner, or because of Rh blood incompatibility. Male-female couples can use their own gametes but employ intrauterine insemination to produce a

pregnancy because male impotence makes sexual intercourse impossible. Single females may use donated sperm to become pregnant by intrauterine insemination.

These are just some examples of various situations in which non-coital reproduction can be employed. When combined with the ability of reproductive medical science to cryopreserve gametes or embryos, and the use of co-parenting agreements, lawyers and judges must be prepared to deal with a growing number of different nontraditional family settings in which legal issues of parentage will arise.

### **Impact of Assisted Reproduction in Determining Parentage**

One area where the use of reproductive technology in nontraditional families has caused a transformation of black letter family law is the decline in emphasis on genetic or birth connections in determining parental interests. For example, the Supreme Court of Wisconsin recognized this new reality in allowing the non-biological parent of a child conceived by one lesbian partner through intrauterine insemination with donor sperm to seek visitation with the child after the adult relationship ended. Such a claim by a non-biological parent would have been almost always denied in previous generations. However, by 1995 the Wisconsin court was able to recognize that a child growing up in a nontraditional same-sex union could create a parent-child relationship based not on biology but rather on a *de facto* family relationship.<sup>20</sup>

Such *de facto* parent-child relationships are in many cases formed in a nontraditional family, and the child is often the product of assisted reproductive technology. One year after the Wisconsin decision, a Pennsylvania court explicitly recognized that when same-sex partners in a nontraditional family decided to have a child by assisted reproductive technology “the child was to be a member of their nontraditional family, the child of both of them and not merely the offspring of [the birth mother] as a single parent.”<sup>21</sup> Decisions recognizing parenthood even in the absence of a genetic or birth mother connection have become more common since the Wisconsin and Pennsylvania decisions.<sup>22</sup>

### **The Decision to Have A Child**

One aspect of the use of assisted reproduction by same-sex non-traditional families is that persons who employ reproductive technology are making a conscious decision to procreate a child, whereas “natural” reproduction often occurs simply as the result of sexual intercourse without a specific reproductive intent. This was discussed in an Indiana appellate decision in relation to the state’s “clear interest in seeing that chil-

dren are raised in a stable environment. Those persons who have invested significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the ‘protections’ of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place. By contrast, procreation by ‘natural’ reproduction may occur without any thought for the future.”<sup>23</sup>

### **The Uniform Parentage Act**

The issue of parentage arising from assisted reproduction has to date been resolved only on a case-by-case basis. But the proposal of a new version of the Uniform Parentage Act (U.P.A.) in 2000 (as amended in 2002) by the National Conference of Commissioners on Uniform State Laws has created a potential means to develop a uniform system for determining parentage in such cases. The National Conference to withdraw its prior approval of the 1988 Uniform Status of Children of Assisted Conception Act (U.S.C.A.C.A.) and now supports the new version of the U.P.A.

The use of assisted reproductive technology other than by traditional marital families has caused the National Conference to include references to unmarried couples who attempt to have children by assisted reproduction. After the publication of the 2000 version of the U.P.A., several sections of the American Bar Association objected that the Act did not “adequately treat a child of unmarried parents equally with a child of married parents.”<sup>24</sup> The amendments to the U.P.A. inserted in 2002 thus take account of the needs of children conceived both by married parents and within non-traditional families.

Under the U.P.A., when a married woman conceives by assisted reproduction, her husband may not challenge his paternity unless he commences a paternity suit within two years of the child’s birth and the court makes a finding that he did not consent before or after the birth of the child.<sup>25</sup> However, the court may adjudicate a husband’s paternity at any time if it is found that he did not provide sperm or consent at any time, he and the mother have not cohabited since the probable time of the application of the reproductive technology, and the husband never openly treated the child as his own.<sup>26</sup>

When a child is conceived by assisted reproduction, but the eggs, sperm or embryo are implanted after a divorce, the former husband is not a parent of the child under the U.P.A. unless he consented in writing to his former wife’s use of the technology after a divorce.<sup>27</sup> A man or woman, whether married or not, who consents to collaborative reproduction may withdraw that consent in a written record before the place-



ment of egg, sperm or embryo, and if he or she does so that person will not be considered the legal parent of a child under the U.P.A.<sup>28</sup> A person who consented to assisted reproduction but who dies before the placement of eggs, sperm, or embryo is not a legal parent of any resulting child unless in a written record consent was given for posthumous parentage.<sup>29</sup>

The U.P.A. provides that a court may approve a surrogacy agreement if the intended parents and the prospective gestational mother (and her husband if she is married) agree.

The agreement must include a statement that (1) there was a 90-day residency in the state, (2) there was a home study, (3) all parties entered the agreement voluntarily and understand it, (4) there is adequate provision for health care expenses until the child is born, and (5) that the compensation provided to be paid to the gestational mother (if any) is reasonable.<sup>30</sup> After court approval of the agreement but prior to the gestational mother becoming pregnant, she (and her husband if she is married) or either of the intended parents can terminate the agreement by giving written notice of termination to all other parties.<sup>31</sup> Neither the gestational mother nor her husband can be held liable to the intended parents for terminating the agreement.<sup>32</sup> However not everyone agrees that gestational contracts should be subject to judicial approval. It is likely that a few states, like Illinois, will allow parties to enter into gestational surrogacy contracts without judicial approval as long as everyone has counsel and other protections are complied with.

The U.P.A. states that after the birth of a child to the gestational mother the intended parents shall file a statement of the birth with the court if the birth took place within 300 days of the assisted reproduction.<sup>33</sup> The court will then issue an order confirming the legal parentage of the intended parents, if necessary will issue an order for surrender of the child to the intended parents, and direct the issuance of a birth certificate naming the intended parents as the parents.<sup>34</sup> But if the child born to the gestational mother is alleged not to be the child of assisted reproduction, the court will order genetic testing to determine parentage.<sup>35</sup> If the intended parents do not report the birth to the court, the gestational mother or a state agency may do so. Upon proof that the court has validated the agreement, the court will enter an order declaring the intended parents to be the legal parents and stating that they are to be financially responsible for the support of the child.<sup>36</sup>

## Conclusion

Many of the issues that arise at law involving traditional families are covered by legislation. However, most of the issues that have arisen in the courts involv-

ing assisted reproductive technology find little solution in statutory law. Although some issues arising in traditional families can be addressed by reference to statutory law, the questions that exist in non-traditional families usually come to the courts with no statutory framework for developing a solution. Clearly state legislatures can contribute to the development of this area of law by drafting statutory frameworks of rights and liabilities affecting all parties involved in assisted reproductive technologies.

It is obvious that legislatures are "the most appropriate forum to address issues raised by assistive reproductive technology in a comprehensive fashion."<sup>37</sup> Courts have joined "the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of artificial reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices, and the courts to strive for uniformity in their decisions."<sup>38</sup>

A California appellate court best expressed the need for legislation in the *Buzzanca*<sup>39</sup> case:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and—as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.<sup>40</sup>

When people use donated gametes to avoid substantial risk of producing offspring with inheritable diseases or genetic abnormalities, the potential for malpractice arises if the donors are not properly screened. Medical malpractice litigation has also been raised in cases involving misplaced embryos, diseased gametes, or unauthorized use of sperm. Still others seek to retain the potential to have children using cryopreserved gametes after they have undergone treatment for cancer that is likely to adversely affect their fertility, but as with other experimental medical technology the potential for disputes exists.

The absence of uniform legal standards for determination of parental rights and obligations under surro-

gacy and embryo agreements, which are increasingly being used today, is at best problematic. There is currently little or no statutory or common law in most jurisdictions. The law should encourage all participants to execute such agreements, spell out the intended uses and disposition in the event of divorce, illness, death, or other change of circumstances, and should provide a mechanism for enforcement. But until that happens, lawyers and courts will have to struggle with various factual situations. For example, a fundamental question that courts in California,<sup>41</sup> Massachusetts,<sup>42</sup> and other states have had to deal with is the status of a prebirth order of parentage based on a surrogacy agreement. Even when granted, the question of the status of such prebirth orders under the Full Faith and Credit Clause of the Constitution remains open.

Dealing with these issues in the absence of statutes requires creative lawyering. While a growing number of lawyers are developing a specialty in collaborative reproduction law, non-specialists will continue to encounter these issues in divorce, parentage, and other areas of family law.<sup>43</sup> Subjects in our new American Bar Association book I co-authored include the use of assisted reproduction in various family settings, intrauterine insemination, IVF and issues relating to cryopreserved embryos, gestational surrogacy, government regulations, posthumous reproduction, reproductive cloning, liability, contracts, and documents. These topics suggest a developing field of law, which is likely to produce greater specialization in the coming years.

While the Uniform Parentage Act deals only with parentage issues there are many other issues relating to assisted reproduction that need to be addressed by legislation. These include informed consent standards, liability, compensation, mental health issues, contracts, insurance coverage, quality assurance, embryo transfer, and others. Currently the Family Law Section of the American Bar Association is developing a Model Act that will propose legislation governing these matters. It is hoped that in a few years the law will have a more structured and ordered method of regulating assisted reproduction. **FLR**



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## Endnotes

1. *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410 (1998).
2. *Hecht v. Kane*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993) (post-mortem use of sperm not per se contrary to public policy).
3. *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (posthumously conceived child is Social Security beneficiary).
4. *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000) (status of posthumous child should be established even if no part of estate remains to be distributed).
5. *Woodward v. Comm'n. of Social Security*, 760 N.E.2d 257 (Mass. 2002) (posthumously conceived child is legal heir of father).
6. Cal. Probate Code, § 249.5 (2005).
7. *Reynolds v. United States*, 98 U.S. 145 (1878) (Court expressed the belief that the European and American legal tradition is founded on the concept of family being centered in a monogamous marital union).
8. A "traditional family" in the context of American family law means two heterosexual adults who are married to each other and who may have their own biological children as a product of sexual intercourse or who have legally adopted children. A "non-traditional" family is one which does not fit this definition of a traditional family.
9. See analysis in Homer H. Clark, *The Law of Domestic Relations in the United States*, 2d ed., §§ 8.1, 8.2 (1987) (discussing position of common law disabilities of married woman and development of modern statutes ending those disabilities).
10. See analysis in John DeWitt Gregory et. al, *Understanding Family Law*, 2d ed., Ch. 8 (2001) (discussing development of modern divorce law).
11. See American Law Institute, *Principles of the Law of Family Dissolution* (2002), Chapter 4 (division of property in divorce).
12. *Troxel v. Granville*, 530 U.S. 57 at 63 (2000).
13. *Singer v. Hara*, 522 P.2d 1187 at 1197 (Wash. App. Ct. 1974).
14. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 at 995 (Mass. 2003) (Cordy, J., dissenting).
15. *Hewitt v. Hewitt*, 394 N.E.2d 1204 at 1207-08 (Ill. 1979).
16. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).
17. *Id.* at 961.
18. *Id.* at 961-62 (Marshall, C.J.).
19. *V.C. v. M.J.B.*, 748 A.2d 539 at 556-57 (N.J. 2000) (Long, J., concurring).
20. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).
21. *J.A.L. v. E.P.H.*, 682 A.2d 1314 at 1321 (Pa. Super. Ct. 1996).
22. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (nonbirth mother with no genetic connection to child of her former

partner allowed to seek visitation as a defacto parent of child conceived by assisted reproduction); Elisa B. Super. Ct., 117 P.3d 690 (Cal. 2005) (former domestic partner held liable for support of child conceived by her former partner by assisted reproduction).

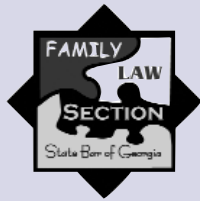
23. Morrison v. Sadler, 821 N.E.2d 15 at 24 (Ind. App. 2005) (ruling that same-sex couples have no right under the state constitution to have marriage licenses issued and that the ability or inability to reproduce by natural means is a basis for the state to distinguish between homosexual and heterosexual couples in regard to marriage).
24. Uniform Parentage Act (2000) [hereafter U.P.A.], Prefatory Note, amended 2002, 9B U.L.A. (West Supp. 2004).
25. U.P.A. § 705(a).
26. U.P.A. § 705(a).
27. U.P.A. § 706(a).
28. U.P.A. § 706(b).
29. U.P.A. § 707.
30. U.P.A. § 803.
31. U.P.A. § 806(a). The court may terminate the agreement for good cause. If a party gives notice of termination the court will vacate the order of validation
32. U.P.A. § 806(d).
33. U.P.A. § 807(a).
34. U.P.A. § 807(a)(1)–(3).
35. U.P.A. § 807(b).
36. U.P.A. § 807(c).
37. Hodas v. Morin, 814 N.E.2d 320, 327, n. 16 (2004) (in absence of statute dealing with the issue, court employed general equity power to authorize a pre-birth order as to parentage of child being carried by a gestational surrogate).
38. Prato-Morrison v. Doe, 103 Cal. App. 4th 222, 232, n. 10 (2002) (couple who sought to determine if their gametes were used by an in vitro fertilization clinic to produce a pregnancy for another couple without the knowledge of either couple, were denied right to seek determination of whether there was a genetic link to the children born to the other couple).
39. Buzzanca v. Buzzanca, 61 Cal. App. 4th 1410 (1998) (ruling that a now divorced man and woman who entered a gestational surrogacy arrangement which involved implanting the gametes provided by other donors in the surrogate were the legal parents of the child so conceived).
40. *Id.* (Sills, P.J.).
41. Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (court declined to revoke prebirth order of parentage).
42. Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001) (prebirth order entered on request of intended parents, gestational surrogate and the hospital). Some states have refused to issue prebirth orders, and the law in this area is not yet clear.
43. A well-attended seminar on assisted reproduction chaired by the author at the 2007 annual meeting of the American Bar Association reflected the growing interest in this area of practice.

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