SECTION REPORT
FAMILY LAW

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IN THIS MONTH'S REPORT

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Section Wear and Publications

MESSAGE FROM THE CHAIR

It's hard to believe that my position as Chair will be ending in a few short weeks. As is always the case with any family law litigator, the time has rushed by in a flash of court appearances, mediations and meetings, all of which seemed to be months away, until my calendar warned me they were right around the corner. It has been an incredible year and an even more incredible honor to serve as Chair of the Family Law Section, and I have no doubt that my successors will continue the hard work and bar leadership necessary to pursue the goal of serving family law attorneys throughout the state. As I look forward to assisting the incoming Chair in this endeavor, I also find myself reflecting on the year that has passed.

CONTINUING LEGAL EDUCATION

The Family Law Section continues to produce some of the most interesting and innovative CLE in the country. In December, the Section presented its Advanced Family Law Drafting Course in Dallas. The program, directed by the Honorable Scott Beauchamp, was a record success, as well it should be, providing attendees with the latest and greatest in family law drafting tips and techniques.

Course Director, Charla H. Bradshaw, and the planning committee have put together a great program for the 39th Annual Marriage Dissolution Institute, taking place at the Moody Gardens Hotel, Spa and Convention Center in Galveston, Texas. The 101 Course, directed by Leigh de la Raza will commence on Wednesday afternoon, April 6th, with the main course immediately following on April 7-8. Good times and lots of learning to be had by all!

I'm very excited to report that the State Bar of Texas's Annual Meeting, co-directed by our own Cindy Tisdale, will take place in my home town of Fort Worth this June, including a family law seminar, also directed by Cindy, being presented by the Section on June 16th. Save that date, and look for more information to come. Thanks Cindy for doing double duty!

PRO BONO COMMITTEE

The Family Law Section continues to pursue its goal of providing attorneys for indigent Texans across the State. The Pro Bono Committee, co-chaired by Lisa Hoppes, Dick Sutherland and Leigh de la Raza, have planned our Family Law Essentials seminars for 2016. We will have five seminars this year at San Marcos, Abilene, Longview, Stephenville and Sherman. Family Law Essentials Webinars are also available for those attorneys who are not able to attend in person. The price of admission to the seminar or webinar, which qualifies for mandatory CLE credit, is the commitment to handle two family law pro bono matters in the next twelve months. Thank you to the Pro Bono Committee and the many volunteers who donated their time to make our pro bono efforts successful. If you are interested in speaking at or attending the family law essentials seminars, please contact Lisa Hoppes at Lisa@hoppescutrer.com.

LEGISLATIVE COMMITTEE

The Legislative Committee, Co-Chaired by Diana Friedman and Jack Marr, has been working diligently since last August on the Section's Legislative Package for the next Legislative Session. As a part of these efforts, Chris Nickelson, our newest Legislative Committee Member, along with other noted family law appellate attorneys, have worked tirelessly on drafting proposals intended to clarify and revise the portions of the Family Code related to family law appellate matters. Having witnessed these efforts myself, I can personally assure you that it's been a long haul and significantly hard work. Committee members, as well as others, have voluntarily committed their valuable time to this effort on behalf of the Section. Thanks to all of those who have assisted in this endeavor.

PUBLICATIONS

Charla H. Bradshaw, Chairing the Checklist Committee, and Kyle Sanders, Chairing the Predicates Manual Committee, have, along with their committee members, been working throughout the year on updating and revising the Checklists and Predicates Manuals. We hope to have everything ready for sale at the Section Booth at the upcoming Advanced Family Law Seminar this August, along with Kathryn Murphy's fantastic new and continuously growing publication, *Family Law at Your Fingertips*, an excellent research tool for quick access to the substantive law regarding alimony, protective orders and characterization of property.

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UPCOMING CLE

Upcoming CLE seminars include:

- **Marriage Dissolution Institute – April 7-8, 2016, Galveston, Texas**
  Moody Gardens Hotel, Spa, and Convention Center
  Course Director: Charla H. Bradshaw
  101 Course Director: Leigh de la Reza
- **State Bar of Texas Annual Meeting – June16-17, 2016, Fort Worth, Texas**
  Fort Worth Convention Center
- **Advanced Family Law Seminar – July 31 - August 4, 2016, San Antonio, Texas**
  Marriot Rivercenter
  Course Directors: Chris Nickelson and Jimmy Vaught
  101 Court Director: Jessica H. Janicek
- **New Frontiers in Marital Property Law, October 13-14, 2016**
  Louisville, Kentucky
  Course Directors: Joe Indelicato and Natalie Webb
- **Family Law Technology Course – December 8-9, 2016, Austin, Texas**
  Course Director: Heather King

In closing, it has been an incredible honor to serve as the Chair of the Family Law Section. I am grateful to all of the former Chairs, Executive Committee, Council Members and other volunteers who continue to dedicate their time, year after year, for the benefit of the Section and its members, and I hope to do the same. I am also blessed with so many friends and colleagues who so graciously gave of their valuable time to make this year a great one for the Section. On a personal level, I am especially thankful to my Father-In-Law, J. Steven King, for being my mentor and teacher, and helping me to be the lawyer and bar leader that I've become; to my Husband, J. Seven King Jr, for patiently tolerating my frequent absences due to leadership and speaking commitments; to all of my colleagues at KoonsFuller Family Law, for providing me with the assets, camaraderie and support that allowed me to dedicate myself to leadership and service to the Family Law Section in this past year; and last but certainly not least, to my brothers and sisters in the Tarrant County Family Law Bar for your continued support and friendship.

I'm one lucky girl for sure! Hear that Las Vegas?

Heather L. King
Chair, Family Law Section

2016 Recommended Nominations Slate
State Bar of Texas Family Law Section

Pursuant to Article VI, Section 1 of the Bylaws of the State Bar of Texas, Family Law Section, the Nominating Committee of the Section hereby forwards the following names for the following positions on the Family Law Council:

Officers		**Nominations to the Class 2021**
Chair:	**Kathyrn Murphy**	**1. Leigh de la Reza (Austin)**
Chair-Elect:	**Cindy Tisdale**	**2. Jim Mueller (Dallas)**
Vice-Chair:	**Steve Naylor**	**3. Rick Robertson (Plano)**
Treasurer:	**Chris Nickelson**	**4. Jacqueline Smith (Houston)**
Secretary:	**Kristal C. Thomson**	**5. Chris Wrampelmeier (Amarillo)**
Immediate Past Chair:	**Heather King**	

The election will take place on **April 7, 2016,** at the section meeting during Marriage Dissolution.

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In the Law Reviews and Legal Publications

TEXAS ARTICLES

Same-Sex Bi-National Couples: The Benefits and Pitfalls of Judicial Evolution and the Validity of Marriage, Jon Carlo **Serna**, 17 Scholar: St. Mary's L. Rev. & Soc. Just. 591 (2015).

What Marriage Equality Can Tell Us About Popular Constitutionalism (and Vice-Versa), Jane S. **Schacter**, 52 Hous. L. Rev. 1147 (2015).

LEAD ARTICLES

Family Support and Supporting Families, Courtney G. **Joslin**, 68 Vand. L. Rev. En Banc 153 (2015).

Child Abuse Rises in Connection with Soldiers' Deployments, American Bar Association, 34 No. 12 Child L. Prac. 189 (December 2015).

The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities, Charisa **Smith**, 26 Stan. L. & Pol'y Rev. 307 (2015).

Who is a Family: Cohabitation, Marriage, and the Redefinition of Family, Andrew **Morrison**, 29 Can. J. Fam. L. 381 (2015).

The History of the Subsidiarity Principle in the Hague Convention on Intercountry Adoption, Chad **Turner**, 16 Chi.-Kent J. Int'l & Comp. L. 95 (January 6, 2016).

Religious Law, Family Law and Arbitration: Shari'a and Halakha in America, Mohammed H. **Fadel**, 90 Chi.-Kent L. Rev. 163 (2015).

A Prospective Analysis of Family Fragmentation: Baby Mama Drama Meets Jane Austen, Lynne Marie **Kohm**, 29 BYU J. Pub. L. 327 (2015).

Family Cycles" and the Future of Family Law, Allan **Carlson**, 29 BYU J. Pub. L. 431 (2015).

Adopting the Gay Family, Cynthia **Godsoe**, 90 Tul. L. Rev. 311 (December 2015).

The Law's Duty to Promote the Kinship System: Implications for Assisted Reproductive Techniques and for Proposed Redefinitions of Familial Relations, Scott **FitzGibbon**, 29 BYU J. Pub. L. 389 (2015).

Finding Solutions to the Termination of Parental Rights in Parents with Mental Challenges, Charisa **Smith**, 39 Law & Psychol. Rev. 205 (2014-2015).

Meyer, Pierce, and the History of the Entire Human Race: Barbarism, Social Progress and (the Fall and Rise of) Parental Rights, Jeffrey **Shulman**, 43 Hastings Const. L.Q. 337 (Winter 2016).

Best Practices in Handling Family Law Cases Involving Children with Special Needs, Margaret "Pegi" S. **Price**, 28 J. Am. Acad. Matrim. Law. 163 (2015).

Locating the Criminal: Civil Sanctions, Sexual Abuse, and the American Family, Bela August **Walker**, 44 Sw. L. Rev. 562 (2015).

Making Good on an Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with Mental Disabilities, Charisa **Smith**, 18 Quinnipiac Health L.J. 191 (2015).

Non-Exclusive Adoption and Child Welfare, Josh **Grupta-Kagan**, 66 Ala. L. Rev. 715 (2015).

Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys, Susan L. **Crockin** & Gary A. **Debele**, 27 J. Am. Acad. Matrim. Law 289 (2015).

The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage, Stu **Marvel**, 64 Emory L.J. 2047 (2015).

Alimony's Job Lock, Margaret **Ryznar**, 49 Akron L. Rev. 91 (2016).

Shared Physical Custody: Does It Benefit Most Children?, Linda **Nielsen**, 28 J. Am. Acad. Matrim. Law 79 (2015).

Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?, Paula **Gerber** & Phoebe Irving **Lindner**, 18 N.Y.U.J. Legis. & Pub. Pol'y 225 (2015).

Same-Sex Marriage and Disestablishing Parentage: Reconceptualizing Legal Parenthood Through Surrogacy, Michael S. **Deprince**, 100 Minn. L. Rev. 797 (2015).

Breaking Forever Families, Andrea B. **Carroll**, 76 Ohio St. L.J. 259 (2015).

Helping Clients Achieve Happiness in Family Law Matters: Key Qualities and Strategies of Successful Family Law Attorneys, Harriet Newman **Cohen**, Aspatore at *1, 2016 WL 676264 (January 2016).

Rights, Privileges, and the Future of Marriage Law, Adam J. **MacLeod**, 28 Regent U.L. Rev. 71 (2015-2016).

The Enforcement of Premarital Agreements at the International Level, John **Sill**, 27 J. Am. Acad. Matrim. Law. 245 (2014-2015).

Parental Alienation: Overview, Management, Intervention, and Practice Tips, Richard **Warshak**, 28 J. Am. Acad. Matrim. Law. 181 (2015).

Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time, Stacy **Brustin** & Lisa Vollendorf **Martin**, 48 Ind. L. Rev. 803 (2015).

Adoption and Foster Care, Arielle **Bardzell** & Nicholas **Bernard**, 16 Geo. J. Gender & L. 3 (2015).

Victims of Our Own Success: The Perils of Obergefell and Windsor, Anthony C. **Infanti**, 76 Ohio St. L.J. 79 (2015).

IN BRIEF

Family Law From Around the Nation
by
Jimmy L. Verner, Jr.

Child support: In New Jersey, an obligor who flees the country to avoid paying child support cannot raise other issues in the case under the "fugitive entitlement doctrine," which "bars a fugitive from seeking relief in the judicial system whose authority he or she evades." *Matison v. Lisnyansky*, ___ A.3d ___, 2015 WL 9693164 (N.J. Super. App. Div. Jan. 13, 2016). A Massachusetts appellate court rejected an obligor's "double dipping" argument that income from restricted stock units awarded to him on divorce should not be taken into account in calculating child support. *Hoegen v. Hoegen*, 43 N.E.3d 718 (Mass. App. Jan. 22, 2016).

Custody: The North Dakota Supreme Court held that a commercial airline pilot had shown a prima facie case of changed circumstances when he took a job that brought him home every night instead of being out of town for up to four nights per week in his old job. *Ritter v. Ritter*, ___ N.W.2d ___, 2016 WL 165887 (N.D. Jan. 14, 2016). A Wisconsin court of appeals upheld a trial court's decision to disallow a change of custody to the father, when the father wanted to move to Washington State to pursue his best career options in the US Navy, because removing the children from Wisconsin was unreasonable and not in their best interests. *Alvarez v. Veliz*, 2015 WL 9485139 (Wis. App. Dec. 30, 2015). The Oregon Court of Appeals affirmed a trial court's decision to grant custody to a stepfather as the child's "psychological parent" because the stepfather had a parent-child relationship with the child under Oregon law, having had physical custody of the child for at least six months. *In re Southard*, ___ P.3d ___, 275 Or.App. 538, 2015 WL 9102500 (Dec. 16, 2015).

Death: The New Hampshire Supreme Court affirmed a trial court decision to abate a divorce action when, although the parties had settled the divorce via a "Memorandum of Understanding," the husband died before the trial court signed the divorce decree and the trial court did not know of the husband's death. *In re Mortner*, ___ A.3d ___, 2015 WL 9252613 (N.H. Dec. 18, 2015). A California court of appeals approved a juvenile court's holding that it had no further jurisdiction over the child upon its death for the purpose of learning the cause of the child's death and investigating potential tort claims for the child's estate. *Imperial County Dep't of Soc. Servs. v. S.S.*, 242 Cal.App.4th 1329 (Dec. 10, 2015). In a dispute between the decedent's wid-

ow and his sisters, a Virginia federal court awarded the proceeds of an insurance policy on the life of the decedent to the widow because, even though Virginia law states that life insurance beneficiary designations are automatically revoked upon divorce, the decedent had spoken with the life insurance company after divorce and had been told that he need do nothing to maintain his ex-wife as the policy beneficiary. *Metropolitan Life Ins. Co. v. Gorman-Hubka,* ___ F.Supp.3d ___, 2016 WL 452140 (U.S.D.C. E.D. Va. Feb. 3, 2016).

Grandparents: The New Jersey Supreme Court allowed a paternal grandparent visitation case to proceed over the mother's objections after the father died, when the grandmother frequently spent time with her granddaughter both in the child's home and on outings and the grandfather "visited his granddaughter approximately once every two weeks, often caring for her while her father underwent cancer treatment," and took the child on frequent fishing trips. *Major v. Maguire,* 128 A.3d 675 (N.J. Jan. 12, 2016). A California court of appeals rejected challenges to an order allowing paternal grandparents to visit their grandchild, despite no finding that either parent was unfit, because there had been a pre-existing relationship between the grandparents and the child and it was in the child's best interest for visitation to continue. *Stuard v. Stuard,* ___ Cal.Rptr.3d ___, 2016 WL 618646 (Cal. App. Feb. 5, 2016).

Hague Convention: In *Gomez v. Salvi Fuenmayor,* ___ F.3d ___, 2016 WL 454037 (11th Cir. Feb. 5, 2016), the 11th Circuit held that "significant threats and violence directed against a parent can constitute a grave risk of harm to a child under the Hague Convention on the Civil Aspects of International Child Abduction." Under the International Child Abduction Remedies Act ("ICARA"), a child's "acclimatization" - as opposed to the child's "acculturization" – to the child's new home is a factor to consider when determining whether the parents had a settled intent to establish a new habitual residence. *Albani v. Albani,* 2016 WL 158583 (U.S.D.C. S.D. Cal. Jan. 12, 2016). A trial court considering an ICARA case must conduct an evidentiary hearing on a mother's allegations that the child's father had emailed death threats to her and to the child and that he had "engaged in a history of spousal abuse and child abuse." *Noergaard v. Noergaard,* 197 Cal.Rptr.3d 546 (Cal. App. Jan. 15, 2016).

Property: Neither federal nor Arizona law prohibits a court from "making up" military retired pay waived to receive service-related disability benefits when the veteran waived his military retired pay after the trial court had awarded the ex-spouse a share of that military retired pay. *In re Howell,* 361 P.3d 936 (Ariz. Dec. 2, 2015). When one spouse contributes to Social Security, which is separate property, and the other participates in a pension plan in lieu of Social Security, which is community property, California courts may not consider Social Security benefits and are required to divide the pension plan benefits equally between the parties. *In re Peterson,* 243 Cal.App.4th 923 (Jan. 11, 2016).

Taxation: The Montana Supreme Court held that even though the IRS and the Montana Department of Revenue considered a wife to be an innocent spouse, that determination did not prevent a trial court from equitably apportioning tax liabilities between the spouses upon divorce when the parties had used the money they should have paid in taxes on living expenses and to buy a second home. *Rose v. Rose,* ___ P.3d ___, 2016 WL 154914 (Mont. Jan. 12, 2016). An Ohio appellate court held that potential tax consequences from a future sale of a husband's business could not be taken into account in equitably distributing the parties' property because the husband had no plans to sell his business. *Nieman v. Nieman,* ___ N.E.3d ___, 2015 WL 8572288 (Ohio App. Dec. 14, 2015).

Voluntary unemployment: The Alaska Supreme Court held that an obligor who quit her job, moved to a remote village and adopted a subsistence lifestyle was voluntarily unemployed despite the obligor's claim "that her decision was reasonable in light of her cultural, spiritual, and religious needs." *Sharpe v. Sharpe,* ___ P.3d ___, 2016 WL 106140 (Alaska Jan. 8, 2016). A Virginia court of appeals agreed with the trial court that an incarcerated obligor was voluntarily unemployed, but the trial court should have considered the obligor's recent past earnings before his incarceration to set child support rather than concluding that the obligor's earning capacity was zero. *Niblett v. Niblett,* 779 S.E.2d 839 (Va. App. Dec. 15, 2015). In *Kamm v. Kamm,*

___ P.3d ___, 2016 WL 245282 (Wyo. Jan. 21, 2016), the Wyoming Supreme Court agreed with a trial court that a wife's request for alimony should be denied, even though the wife suffered from a myriad of conditions including PTSD, lupus, fibromyalgia, spinal arthritis, and depression, because she had made no attempt to find employment and the husband worked four different jobs, drove a fifteen-year old vehicle and lived in a mobile home.

We tried! In New Hampshire, a divorced couple that reconciles may not obtain an order vacating their divorce decree, absent a showing of "fraud, accident, mistake, or misfortune," because no New Hampshire statute allows vacation of a divorce decree on mere request. *In re Harman & McCarron*, ___ A.3d ___, 2015 WL 7747720 (N.H. Dec. 2, 2015) (collecting cases from other states, some allowing vacation at will, others not).

COLUMNS

OBITER DICTA
By Charles N. Geilich[1]

Wow, customer relation training sure has come a long way. I know this from dining out, flying, using a credit card and staying in hotels, and you've probably seen it, too.

For example, I was recently asked by a waiter who interrupted my conversation, "Is your meal still excellent, sir?" If I were a younger, newer lawyer, I might have objected to the question as assuming facts not in evidence, but as it was, I merely confirmed that the meal was fine. Not "excellent," just fine.

But I wondered, wouldn't it be effective if family lawyers incorporated some of this nifty customer service into their practices? I see many applications of this "consumer friendly" approach for all of us.

A diligent family lawyer could call up client just after he's been deposed by opposing counsel and his bank accounts have been frozen and ask, "Is your divorce still excellent?" Perhaps the lawyer who takes that deposition, and throws in one of the girlfriend, too, for good measure, could politely inquire, as the videographer is breaking down the equipment in the conference room, "Is there anything else I can do for you?" This is what retailers would call "raising the customer experience." Not only that, it cements that business relationship, so that next time the client wants his girlfriend's deposition taken, he'll be sure to return to that same thorough lawyer.

Don't forget "loyalty cards." I'm thinking that if you pay full price for three divorces, you get your fourth divorce for half-price. (After all, your attorney already has all your information, and your estate is probably getting smaller each time anyway, so this "bargain" really doesn't cost the lawyer much). The client could just keep a little key fob with the law firm's name and number on it and use it at the receptionist's desk. Refrigerator magnets are always nice, too. "Smith and Jones, Your Friendly Neighborhood Divorce Lawyers. Call in Case of Emergency." The magnet should have one of those cheap thermometers attached to it, and it should run hot. "Act now, and we'll waive the usual initiation fee to join our exclusive Divorce Club! Be the envy of all your friends."

[1] Mr. Geilich is a writer, family lawyer, and full-time mediator in the DFW Metroplex. He's doing what he can with what he's got and can be reached at cngeilich@gmail.com. His two books, *Domestic Relations* and *Running for the Bench*, may be purchased on Amazon.

Referring a friend for a divorce should be encouraged, too. "Join our Frequent Referral Club and get child support modifications free for five years!"

And, of course, no customer service experience is complete these days without a phone call or an email a few days later, asking you to answer a "few short questions." When you answer, you will be automatically entered into a contest to win a deluxe divorce with SAPCR at no cost. "Would you say your family law experience was a) delightful, b) refreshing, c) likely to restore your faith in the legal system, or d) better than you expected? Please circle each answer that applies, and you can circle more than one answer."

Yeah, you're right. Best to leave this particular innovation alone.

IS THE EXPERT DODGING APA GUIDELINES?

By John A. Zervopoulos, Ph.D., J.D., ABPP[1]

Have you ever been frustrated with psychologists who insist that they are allowed to dodge compliance with APA practice guidelines that apply to their testimony? From now on, many of these psychologists will need to change their tune when lawyers challenge their assertion. Recently, the American Psychological Assn. (APA) clarified language about psychologists' use of its practice guidelines. The new language, appearing in *Professional Practice Guidelines: Guidance for Developers and Users*—essentially, *Guidelines on Guidelines*—will be included in all of the APA's new or revised practice guidelines. (70 Am. Psychol. 823 (2015)).

APA practice guidelines—consensus documents drafted and vetted within the APA—"recommend specific professional behavior, endeavor, or conduct for psychologists" in a variety of practice contexts. One purpose, of several, for the forensic-related guidelines is to guide psychologists in their roles as experts in the legal system. Such guidelines include: *Specialty Guidelines for Forensic Psychology*; *Guidelines on Child Custody Evaluations in Family Law Proceedings*; *Guidelines for Psychological Evaluations in Child Protection Matters*.

The new *Guidelines on Guidelines* clarifies the key last sentence in a paragraph that appears in the beginning section of every APA practice guidelines document. Let's compare the old and new versions of that important sentence:

The old sentence version reads: "They [guidelines] are not definitive, and they are not intended to take precedence over the judgment of psychologists."

This old sentence version appears to allow testifying psychologists to dismiss practice guidelines applicable to their testimony for any reason they deem necessary. Unfortunately, some psychologists misuse this sentence to dodge accountability for the poor methods and reasoning they use to support their opinions. These psychologists value their personal views over the field they represent as experts—a professional ethical concern and a *Daubert*-related evidentiary issue.

The new sentence version reads: "As a result, guidelines are not intended to take precedence over the professional judgments of psychologists *that are based on the scientific and professional knowledge of the field (Ethics Code, Std. 2.04)*." (emphasis added).

The new sentence version in the *Guidelines on Guidelines* document reflects the proper use of the APA's practice guidelines, tying psychologists' "professional judgments" to the *Ethics Code* definition of the term. That is, guidelines allow flexibility for psychologists in their methods and reasoning that deviate from guidelines recommendations provided that the flexibility is "based on the scientific and professional

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[1] *John A. Zervopoulos, Ph.D., J.D., ABPP is a forensic psychologist and lawyer who directs PSYCHOLOGYLAW PARTNERS, a forensic consulting service to attorneys on psychology-related issues, materials, and testimony. His second book, How to Examine Mental Health Experts: A Family Lawyer's Guide to Issues and Strategies, is newly published by the American Bar Assn. Dr. Zervopoulos is online at www.psychologylawpartners.com and can be contacted at 972-458-8007 or at jzerv@psychologylawpartners.com.*

knowledge of the field." For lawyers this clarification is critical: While a psychologist's compliance with APA guidelines does not ensure the reliability of her work, not complying with guidelines "is powerful evidence that the [psychologist's] reasoning and methodology may be invalid." Daniel W. Shuman & Stuart A. Greenberg, *The Role of Ethical Norms in the Admissibility of Expert Testimony*, 37 A.B.A. Judges J. 4 (1998).

Although the clarifying new sentence will be included in practice guidelines that the APA develops or revises from now on, the old sentence version will remain in the current forensic-oriented guidelines until those guidelines are revised during the next few years. Nevertheless, keep the new sentence version on hand—it reflects APA policy and echoes *Daubert*'s requirement for reliable testimony. Use it to challenge experts who dodge practice guidelines that apply to their testimony as well as to support your legal arguments about that testimony.

WHAT IF I FORGET TO UPDATE MY BENEFICIARIES?
By Christy Adamcik Gammill, CDFA[1]

The simple answer is this: If you want the right people to get your money, you'll need to keep your beneficiary designations up-to-date, even if your will or estate plan already is. That's because a beneficiary form will override whatever is said in your will or estate plan. If you've got a bank, brokerage or retirement account, annuity or life insurance policy, you've probably filled out a beneficiary designation form. Most of the time, we fill them out then forget about them. Years pass. Then, when changes happen in our lives – we get married, divorced, lose a spouse, gain a child or grandchild – we might remember to update our will, but oftentimes forget about all of those beneficiary forms. That's where things can get a bit sticky. Not updating those forms could force future generations to pay too much in taxes, not receive their rightful inheritance, or lead to other unfortunate consequences.

Here's an overview of what could happen, depending on who you name as beneficiary:

Your spouse, child, or grandchild (assuming he or she is an adult)	The money will go directly to him or her, bypassing the costly and often lengthy probate process.
Your ex-spouse	The money will go directly to that person, whether or not you remarried or named someone else in your will.
A minor	The court will appoint someone to hold and manage the funds, which can be a time consuming and expensive process. When the minor turns 18 or 21 (depending on the state), he or she will be entitled to the money in the account, and will be free to spend it wisely or unwisely.
Someone with special needs	Anything more than a small cash gift could prevent a person with special needs from receiving government assistance, unless the money goes into a special "supplemental needs" trust.

[1] This article is provided by Christy Adamcik Gammill. Christy Adamcik Gammill offers securities through AXA Advisors, LLC, member FINRA, SIPC. 12377 Merit Drive, Suite 1500, Dallas, TX 75251, offers investment advisory products and services through AXA Advisors, LLC, an investment advisor registered with the SEC and offers annuity and insurance products through an insurance brokerage affiliate, AXA Network, LLC. CBG Wealth Management is not a registered investment advisor and is not owned or operated by AXA Advisors or AXA Network. Contact information: 972-455-9021 or Christy@CBGWealth.com.

Your estate	The money will go directly to your estate, to be distributed according to your will. If that money was a retirement plan, the full amount must be paid out – and taxes – within 5 years. If you name an individual instead, that person can stretch out the payments, and taxes, over years or even decades, taking advantage of the potential for growth too.

Make updating beneficiaries a part of your financial review

Consider adding updating beneficiaries to the list of things to go over during your annual review with your financial professional. Or, at the very least, update all of your beneficiary forms after you experience a life-changing event, such as marriage, divorce, birth or death of a loved one, as well as when you change jobs or retire, since any time you roll over a retirement plan, you'll need to assign a new beneficiary.

ARTICLES

The QDRO Corner: Chapter II
Surviving Survivor Benefits

By James M. Crawford, Jr.[1]

Issues relating to surviving spouse benefits have been plaguing family law practitioners since 1984, which is when the Qualified Joint and Survivor Annuity (QJSA) and the Qualified Preretirement Survivor Annuity (QPSA) were added to ERISA and the Code as required benefit forms for all qualified pension plans,[2] excepting only governmental, tribal, and church plans.[3] The rules and regulations that control the administration, assignment, and waiver of these benefits, are still a work in progress after more than 30 years, are exceedingly complex and arcane, and contain all too many of those proverbial traps for the unwary. The purpose of this chapter is to provide the reader with a basic understanding of the QJSA and QPSA and the rules that govern them sufficient for their successful navigation when dividing a plan by QDRO. The stakes can be high, for it is an unfortunate fact of life that unless the surviving spouse benefits are properly addressed in the apportionment of a covered plan, an unequal division of the community interest is all but guaranteed—creating a ticking time bomb that may not be discovered until the participant spouse later retires or dies, when it can be too late to diffuse it.

Background

Added to ERISA and the Internal Revenue Code (Code)[4] in 1984, the QJSA and the QPSA together comprise the "crown jewel of ERISA's spousal protection," providing monthly support for surviving spouses in the event of a participant's death, whether occurring before or after retirement.[5] This protection ensures that the surviving spouse will receive an annuity following the participant's death of at least 50% of the participant's benefit, unless the spouse consents to payment in some other form. The QJSA and

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[1] Mr. Crawford's practice in limited to Employee Benefits, ERISA, and Fiduciary Law and is located in The Woodlands, TX. He can be reached at jcrawford@ERISAsite.com. The author wishes to gratefully acknowledge the editing assistance of Charla Bradshaw and John Eck in the preparation of this paper.

[2] ERISA §205 [29 USC §1055]; IRC §§ 401(a)(11) and 417.

[3] See, e.g., Code §412 (e)(ii)(C) and (D)

[4] Non-pension plans such as profit sharing or 401(k) plans are not subject to these rules unless (a) the plan so provides (b) the benefit is not payable as an annuity (c) the plan does not contain benefits accrued under a pension plan, or (d) the plan does not provide that 100% of the benefit is payable to the participant's spouse at death. Treas. Reg. §1.401(a)-20, Q&A 3 and 5.

[5] *Vanderkam v. Vanderkam*, 776 F3d 883 (DC Cir., 2015).

QPSA rules apply to all private industry qualified pension plans, and even to a few profit sharing and 401(k) plans.[6] And although governmental, church and tribal plans are exempt, similar rules may usually be found in these plans as well.

So sacrosanct are the QJSA and QPSA that they can only be waived to allow payment in a different form of benefit by following very strict requirements designed to ensure that both the waiver and the required spousal consent to it are informed and voluntary.[7] *See, generally*, Treas. Reg. §1.401(a)-20, and § 1.417(a)(3)-1. For example, in order for a QJSA waiver to be effective, it must (i) be preceded by an explanation of its relative financial effect, (ii) be properly consented to by the spouse, (iii) state the specific non-spouse beneficiary (iv) specify the particular optional form of benefit in which the benefit is to be distributed, (v) be witnessed by a notary or plan representative, and (vi) generally be executed within 90 days of the commencement of benefits. However, in some plans, the spouse may execute a general consent that exempts the participant from requirements (iii) and/or (iv), provided that the spouse acknowledges that s/he has the right to limit consent to a specific beneficiary and a specific optional form of benefit, and that s/he voluntarily elects to relinquish on or both such rights as applicable.

Thus, spousal rights cannot be waived in a prenuptial agreement [Treas. Reg. §1.401(a)-20, Q&A 28] and once the participant has entered pay status (what is known as the "annuity starting date"), will even survive a divorce. [Id., at Q&A 25; See also *Vanderkam (supra)* at p. 884) (constructive trust not available to recover survivor benefit from former spouse)]. In fact, under developing case law, after the annuity starting date, even a QDRO cannot touch the spouse's survivor protection, which is deemed to become "vested" in the spouse at that time. [See, e.g., *Carmona v. Carmona*, 603 F. 3d 1041 (CA 9, 2010; and DOL Reg. §2530.206, and the preamble thereto, both discussed *infra*.

For family law practitioners, the importance of the QJSA and QPSA requirements cannot be overstated, for two very practical reasons. First, they trump community property law entirely; [8] and second, unless the participant has already commenced benefits by the time the divorce is final, their protection evaporates entirely on that date—unless otherwise provided in a QDRO.[9]

Practice Pointer

Sometimes the participant spouse may wish to take payment of all or a portion of his or her accrued pension prior to divorce and roll it to an IRA or use it to pay legal bills. Even assuming the benefit is eligible for distribution, unless the consent of the participant's spouse can be obtained, this option will still not be available unless it can be established to the satisfaction of the plan representative that (i) the participant is legally separated or the participant has been abandoned (within the meaning of local law) and the participant has a court order to such effect; (ii) the spouse is legally incompetent to give consent, in which case the spouse's legal guardian, if it is the participant spouse, may give consent; (iii) the participant's spouse cannot be located; or (iv) if the plan so provides, the participant has been married for less than one year. [*Id.* Q&A 27].

What is likely not a feasible workaround is for a family court to simply order the spouse to consent, both because of ERISA preemption, and because an involuntary consent would not appear to meet the requirements of federal law in any event.

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[6] Profit Sharing plans, ESOPs, 401(k) plans and any other defined contribution plans not subject to the minimum funding standards for pension plans are generally not subject to the QJSA or QPSA requirements, provided that the participant's spouse is required to be the 100% beneficiary (absent spousal consent), or the plan provides for the payment of annuities. Thus in this type of exempt plan, spousal consent is not required to take a lump sum distribution of a participant's entire account.

[7] It should be noted that pensions are not required to allow the waiver of the QJSA and/or QPSA, however most do.

[8] See e.g., *Boggs v. Boggs*, 520 U.S. 833 (1997). For example, if a participant with a large accrued separate property pension marries, immediately retires and then divorces, the entire surviving spouse benefit must go to the divorced spouse free from any threat of a constructive trust claim by the participant's heirs or estate. *Vanderkam*, *supra.*

[9] Treas. Reg. §1.401(a)-20, Q&A 25.

Although when the divorce occurs pre-retirement, the spousal protection afforded by the QJSA and QPSA rules no longer applies to the former spouse except as provided in a QDRO, unless the participant actually changes the designated beneficiary to a non-spouse, the spouse will still receive any death benefit that becomes payable under the plan, unless the plan automatically cancels all spousal beneficiary designations on divorce. Worse, in some plans, [10] if the participant should die unmarried pre-retirement before remarrying, the accrued benefit will be forfeited back to the plan. [Id. Q&A 19].

When it comes to the accrued benefit in QJSA/QPSA covered plans, a rose by any other name may not smell as sweet.

In order to understand how easy it is for a family law practitioner to run into trouble in dealing with survivor benefits when dividing a pension, consider how often terms such as "the pension," "retirement benefits," "pension benefits," and "husband or wife's benefits" are used interchangeably in a final judgment to refer to all benefits payable under the plan with respect to the participant spouse, including survivor benefits.

The problem is that because these terms all commonly refer *only* to the portion of the participant's "accrued benefit" [11] that is payable "to" the participant, i.e., while the retiree is alive, a division of that portion will ordinarily not include any survivor or death benefits.

But even if the term "accrued benefit" is used, that will still not ensure that the participant's former spouse will continue to receive payments once the participant has died. That will be determined *solely* by whether the QDRO implementing the judgment either (A) requires the former spouse to continue to be treated as a "spouse" for purposes of the QPSA/QJSA rules;[12] or (B) awards to the spouse a separate interest that is not subject to those rules; or (C) does both. Thus, while the term "accrued benefit" in a judgment will ordinarily embrace all benefits payable "with respect to a participant" (as opposed to just the benefits payable "to" a participant), whether there will actually be any survivor benefits paid will depend on how the QDRO is drafted.

And therein lies the rub, because too often under the QJSA/QPSA rules, what you see in a QDRO is not necessarily what you get.

Understanding the Drafting Options

It is commonly believed that the failure to provide in a judgment dividing a pension for the former spouse to be treated as a spouse under the plan (Option A, above) is malpractice. After all, unless a survivor benefit award is included in the judgment, it cannot be added in a subsequent QDRO without impermissibly changing the division of property. [See, *Texas Family Code* § 9.007, precluding the modification of a judgment by ancillary order].

The good news is that, while in some cases this omission may indeed be problematic, its inclusion is often not only unnecessary, but could actually be fortuitous since it can make life very difficult for the QDRO drafter who is intending to effect an equal division of the community interest. To understand why Option A might be the better choice, consider the following scenario:

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[10] Namely, the plans that provide no benefits in the event of a pre-retirement death other than a QPSA.

[11] While the accrued benefit is normally expressed in terms of an annuity payable only for the life of the participant, at retirement payment must be made in the form of a QJSA or, if that is properly waived with spousal consent, in any of the optional forms of benefit the plan may offer, all of which must at least be actuarially equivalent in value to the QJSA.

[12] This separate award is expressly allowed by mirror provisions in ERISA and the Code. See, e.g., ERISA §206 (d)(3)(F) [29 USA §1055(d)(3)F] ("To the extent provided in any qualified domestic relations order (i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205 [29 USC §1055] (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes….")

Assume there are two divorcing participants in the ABC Defined Benefit Pension Plan who are twin brothers. Presciently named P1 and P2, each has an accrued benefit of $10,000 per month for life commencing at age 65. Assume also that in each case the value of the entire pension is to be divided equally, and that neither has retired. In their separate cases:

> P1's Judgment (Option A) states: P1's accrued benefit under the ABC Plan is to be divided equally as of the date of divorce with P1's spouse, W1, by QDRO, and W1 shall be treated as P1's spouse for purposes of any survivor benefit payable under the plan.
>
> P2's Judgment (Option B) states: P2's retirement benefit earned under the ABC Plan is to be divided equally as of the date of divorce with P2's spouse, W2, by QDRO.

Which of the above provisions is the least problematic for the QDRO practitioner who must draft the implementation order?

Oddly, it is Option B. Although the court refers only to P2's "retirement benefit" and does not provide for S2 to be treated as P2's spouse post-divorce for the survivor benefit, a QDRO that awards W2 her 50% of the retirement benefit as a "separate interest" will nevertheless produce an equal division. This is because under the applicable regulations[13] such an order will cause half of the actuarial value of the accrued benefit (i.e., the benefit paid as a life only annuity for the retiree) to be paid to W2 as an annuity for *her* life.[14]

Such payments are not subject to the QJSA or QPSA rules, [*Id.*] and therefore will automatically continue to the spouse after, and be unaffected by the participant's death—giving her an automatic survivor benefit on her share. In this circumstance, were she also to be awarded QPSA or QJSA rights with respect to P2's remaining share of the community interest by virtue of being deemed his spouse (the Option A language), W2 would receive too much and P1 too little.

Practice Pointer

Some plan administrators either are not familiar with the regulation under which a separate interest assigned to an alternate payee by QDRO is no longer subject to distribution as a QJSA or QPSA, or choose to ignore in order to allow the plan to pay the assigned benefit at 50%, rather than at 100% as required by the regulation—effectively causing the remaining 50% to revert to the employer. In such situations it is good practice to include a citation to the regulation in the order, and where appropriate, to also include some carefully drafted failsafe language making the alternate payee the deemed spouse only to the extent necessary for his or her payments to be unaffected by the participant's death.

In order to quantify the potential for invasion of the participant spouse's community interest under an Option A type of judgment consider what would happen if P1 were to terminate service with ABC the day after the divorce was final, and, for simplicity, that he and W1 have the same life expectancy. On these facts, if W1 were to be given a separate interest QDRO for 50% of the accrued benefit, she would receive $5,000 per month for her life (her half of $10,000 per month); and, as the designated surviving spouse, she would also receive any QPSA or a QJSA that becomes payable with respect to P2's remain-

[13] See, Treas. Reg. §1.401(a)-13(g). Under this regulation, the separate interest awarded to the alternate payee is required to be distributed as provided in the QDRO without regard to the participant's death or pay status. This gives the alternate payee spouse the spouse with the right to receive a benefit payable for life, whether or not s/he survives the participant. If instead the QDRO awards the alternate payee a *shared interest*, then the QJSA/QPSA rules continue to apply to the entire benefit, and the alternate payee will be entitled to a survivor benefit only if designated as a surviving spouse in the order.

[14] Unless of course she elects an optional form of benefit available under the plan (such as an actuarially equivalent lump sum).

ing share.[15] Assuming, as is typically the case, the plan provides for 50% QJSA and QPSAs, and that a distribution in this form, as is typical, entails about a 12% actuarial reduction in the monthly amount that would otherwise have been payable as a single life annuity (in order to account for the fact that the benefit must be paid over the longer of the two lifetimes), P1 will receive for his share $4,400 per month for life, and W1 would receive $5,000 per month plus an additional $2,200 per month if she survives P1, for a potential monthly total benefit of $7,200.[16]

Fortunately, although Option A would seem for this reason to rule out the use of a separate interest QDRO, if the court is willing to interpret its language to require only that W1 be designated as P1's spouse only with respect to her share, then, as discussed below, a separate interest order can still work just fine. Alternatively, the QDRO preparer must resort to what is known as a "shared interest" order.[17]

A Separate Interest QDRO Option for dealing with an Option A Judgment

If Option A language is determined to be ambiguous regarding to the court's intent in granting deemed spouse status to the non-participant spouse ("S"), and assuming the purpose of the grant is to ensure that the resulting retirement income will not stop when the participant spouse ("P") dies, this language may reasonably be interpreted to limit the grant to apply only to S's awarded share. This interpretation is supported by the fact that were spousal status to be granted as to the entire benefit, then the S would have a right to receive a QJSA or QPSA not only on S's interest, but also on P's, including any separate property benefits that may be accrued through pre-marriage or post-divorce employment as separate property.

If deemed spouse status can be found to be limited to S's portion of the benefit, then under the regulations cited above, that status will not affect the share of either spouse, since, as we have seen, under a separate interest order S's awarded interest is already unaffected by P's death. This approach will leave P free to waive the QPSA/QJSA benefit form for P's remaining interest in favor of a beneficiary of P's choosing, or have it available to provide a survivor benefit for a new spouse.

The Shared Interest QDRO Option for Dealing with an Option A Judgment

The alternative of utilizing a shared interest order to implement a division under Option A language is a bit more complicated. As is evident from the above discussion, there are three pieces that together make up the actuarial value of the accrued benefit that is to be divided. The first piece is the value of the payments that are to be made while both P and S are alive. The second piece is the value of the payments to be made to P if P survives S ("P's survivor benefit"). And third is the value of the payments to be made to S if S survives P ("S's survivor benefit"). To the extent that the accrued benefit is community property, the QDRO must be designed so that each spouse receives a benefit that is equal in actuarial value to 50% of the actuarial value of each of these three pieces. Unfortunately, however, this is easier said than done, because an order simply confirming P's survivor benefit to P and S's Survivor benefit to S, and then dividing equally the remaining piece that is payable while both are alive will rarely, if ever, generate the desired result.

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[15] For a good example of a QDRO provision that accomplishes this designation see Section 10 of the model QDRO language prepared by the Pension Benefit Guaranty Corporation in "Qualified Domestic Relations Orders & PBGC", available on the Web at http://www.pbgc.gov/Documents/QDRO.pdf

[16] In some plans, the cost of providing surviving spouse protection is fully subsidized by the employer, in which case there is no actuarial reduction in the actual amount payable to the participant. In such plans, the participant should carefully consider whether it makes sense to waive the QJSA in favor of a different (unsubsidized) form of benefit, and thereby forfeiting the value of the subsidy.

[17] A shared interest QDRO is one in which the spouse share each payment as it becomes payable to the participant, with the spouse being named as the surviving spouse for all or a portion of the QPSA and QJSA survivor benefits. For a good, plain language explanation of the difference between types of QDROs see "QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders", available on the web at http://www.dol.gov/ebsa/publications/qdros.html.

When the accrued benefit is paid as a 50% QJSA (pursuant to which 50% of the pre-death payment amounts will continue as S's survivor benefit after the death of P), then the rule of thumb, as mentioned earlier, is that the benefit payable while P and S are both alive, as well as P's survivor benefit, will be actuarially reduced by around 12% as compared to what would have been payable had the benefit been paid as a single life annuity with no survivor benefit. And since on these facts S's surviving spouse benefit under a QPSA or a QJSA is going to be only 50% of this reduced amount, while that for P is 100%, it is easy to see that the actuarial value of the two surviving spouse benefits is unlikely to be the same (depending upon the applicable actuarial factors). In such circumstances, the only way to accomplish an equal division with a shared interest QDRO is for one spouse to either receive less than 50% of the piece payable while both parties are alive, and/or for S to be deemed to be a spouse for less than the full survivor benefit, such that P is free to determine who gets the remainder. No other adjustments are feasible because a QDRO cannot award any portion of P's survivor benefit to S's estate (because an estate cannot qualify as an "alternate payee"); and under the "new" rule typified by the *Carmona* case referenced above, S's survivor benefit cannot be redirected by a QDRO once it has "vested."

Since making the actuarially-based adjustments called for to successfully implement Option A language with a shared interest order is generally outside the expertise of family law practitioners, the parties will usually require the assistance of a consulting actuary or economist to make all of the necessary calculations. However, even with the best actuarial talent involved, there still may be situations in which personal health issues make it clear that the life expectancy of either P or S is less or more than that indicated in the actuarial tables, in which case actuarial values may be too far off the mark to be useful.

Practice Pointer

Except when large benefits are involved, it is often cost prohibitive to attempt to divine the "correct" percentage to apply to the division of the retirement benefit using a shared interest order. In such situations, it has been the author's experience that the facts will often support a rough justice solution, under which each party takes his or her survivor benefit and the retirement payments are split more or less equally.

Practice Pointer

Where either the participant or spouse has health issues, such as a terminal disease, it may be wise to award the entire plan to the healthy spouse, and provide the other spouse with non-plan assets of equal value. For example, if the participant is on his or her deathbed, awarding the entire benefit to the non-participant spouse will insulate it completely from being affected by the participant's death. However, in this circumstance, it may not be acceptable to use actuarial tables to determine the value of this award for purposes of computing the required equalizing payment to the participant spouse.

Fortunately, all of these issues are largely confined to defined benefit plan divisions. As noted earlier, the QJSA/QPSA rules do not apply to most defined contribution plans other than money purchase or target benefit plans, provided the plan requires 100% of the participant's account to be payable on death to the spouse, unless s/he consents to the designation of a non-spouse beneficiary. Therefore, unless a 401(k) or profit sharing plan has been drafted to fall outside of this exception, or contains money merged into the plan from a QPSA/QJSA-covered plan that is not separately accounted for, the accrued benefit (the participant's account balance) can safely be divided by a separate interest order.

Procrastination Can Be Problematic

As may already be evident from the above, there is rarely anything to be gained by deferring the QDRO issue past the date of divorce, and much to lose. It is a fact of ERISA life that a former spouse has no surviving spouse rights following a divorce unless and until they are granted under a QDRO, or the benefit is already in pay status, in which case if former spouse should die before the QDRO is issued, his or her marital interest cannot go to the spouse's estate or beneficiary. In addition, if before the QDRO is

prepared the participant dies or commences benefits, or if the former spouse dies prematurely, it can be anticipated that P's benefit will either "vest" in a different beneficiary or survivor annuitant, [18] or will never be paid, to anyone.[19]

What to do?

If at the time of divorce the parties are not yet ready to prepare a full blown QDRO for their pension plan (whether defined benefit or defined contribution), the adoption of a provisional order should be considered in order to preserve the status quo regarding survivor benefits until the final QDRO can issue. Suggested language for such an order, which should be coupled with a reservation of jurisdiction, is as follows:[20]

> EACH PARTY (insert names and mailing addresses) IS PROVISIONALLY AWARDED WITHOUT PREJUDICE AND SUBJECT TO ADJUSTMENT BY A SUBSEQUENT DOMESTIC RELATIONS ORDER, A SEPARATE INTEREST EQUAL TO ONE-HALF OF ALL BENEFITS ACCRUED OR TO BE ACCRUED UNDER THE PLAN (name each plan individually) AS A RESULT OF EMPLOYMENT OF THE OTHER PARTY DURING THE MARRIAGE OR DOMESTIC PARTNERSHIP. IN ADDITION, PENDING FURTHER NOTICE, THE PLAN SHALL, AS ALLOWED BY LAW, OR IN THE CASE OF A GOVERNMENTAL PLAN, AS ALLOWED BY THE TERMS OF THE PLAN, CONTINUE TO TREAT THE PARTIES AS MARRIED OR DOMESTIC PARTNERS FOR PURPOSES OF ANY SURVIVOR RIGHTS OR BENEFITS AVAILABLE UNDER THE PLAN TO THE EXTENT NECESSARY TO PROVIDE FOR PAYMENT OF AN AMOUNT EQUAL TO THAT SEPARATE INTEREST OR FOR ALL OF THE SURVIVOR BENEFIT IF AT THE TIME OF THE DEATH OF THE PARTICIPANT, THERE IS NO OTHER ELIGIBLE RECIPIENT OF THE SURVIVOR BENEFIT.

Although in most cases a judgment containing this language, when served on the plan, will be deemed not to be sufficiently specific to meet the applicable QDRO requirements, in most plans (and in all qualified plans subject to ERISA), it will nonetheless trigger the right to an amendment period during

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[18] See, Preamble to the regulation adopted by the Department of Labor to this effect (§2530.206):

> With regard to the principle, expressed above, that a domestic relations order issued after the annuity starting date does not violate the requirements of section 206(d)(3)(D)(i) merely because the order requires the allocation of some or all of the participant's determined monthly benefit payment to an alternate payee, the Department, based on its review of sections 206 and 205 of ERISA, the case law, and other relevant guidance, is of the view that such principle does not apply to a domestic relations order that is received after the annuity starting date and that requires an allocation to an alternate payee of some or all of the death benefit that, under the form of benefit in effect, is payable to another beneficiary. FN An example of this is a plan's receipt of a domestic relations order after the annuity starting date of a QJSA that assigns to the participant's former spouse a shared payment of the participant's current spouse's survivor benefits under the QJSA. FN: *See Boggs v. Boggs*, 520 U.S. 833 (1997); *Hopkins v. AT & T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997); *Rivers v. Central & S.W. Corp.*, 186 F.3d 681 (5th Cir. 1999); *Carmona v. Carmona*, 548 F. 3d 988 (9th Cir. 2008); 26 CFR 1.401(a)-20 Q&A-25 (b)(3) (second sentence); and 29 CFR 022.8(d). [Fed. Reg., Vol. 75, No. 111, p. 32846].

It should be noted, however, that because this body of case law primarily involved DROs that purported to create new rights for the alternate payee (e.g., an award to pay as spousal or child support arrearages), it remains unclear whether an order that merely recognizes an existing right to marital property under community property law can be trumped by a subsequent "vesting" of those same benefits in a new spouse. Indeed, the *Carmona* court appears to have left the door open on this issue: "Because the retirement of a plan participant *ordinarily* creates a vested interest in the surviving spouse at the time of the participant's retirement, we conclude that a DRO issued after the participant's retirement may not alter or assign the surviving spouse's interest to a subsequent spouse." *Carmona*, supra, at pp. 1059-1060 (emphasis added).

[19] For example, in some plans, if P dies pre-retirement without a surviving spouse, no other benefit is payable with respect to P's accrued benefit and the entire amount effectively reverts to the plan and is lost. Alternatively, should P retire post-divorce and elect a single life annuity (which does not require the consent of P's former spouse absent a QDRO designating the former spouse as a surviving spouse) and then die the next day in a car accident, no further benefit will be payable by the plan.

[20] This language is patterned after a recent amendment to California FC §2337 that was co-written by the author in order to better preserve surviving spouse rights in the event marital status is terminated prior to the division of the marital estate is completed.

which the order may be perfected by amendment to accomplish the desired result consistent with the terms of the plan (for ERISA plans, this is an 18-month period, commencing with the date benefits would otherwise be distributable). 29 U.S.C. §1056(d)(3)(H)(v). In this way, if during the amendment process the participant or former spouse should die, or if the participant should commence benefits, no rights will have been lost. *See Trs. of the Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 420 (9th Cir. 2000).

Summary of What a QDRO can and cannot do relative to Survivor Benefits.

1. *If the accrued benefit is not yet in pay status*:
   a. a QDRO can award an alternate payee *separate interest* in the benefit, which interest is then exempt from the effect of the QJSA or QPSA rules.
   b. a QDRO can designate a former spouse as a current spouse for all or any part of the benefit payable with respect to the participant. However, if a separate interest is awarded, this designation only applies to the participant's remaining interest, if any.

2. *If the accrued benefit is in pay status:*
   a. A QDRO can award all or any portion of the amount payable while the participant is living to an alternate payee.
   b. A QDRO probably cannot, however, award a portion of any survivor benefit to an alternate payee.

3. *Whether the participant is in pay status or has died, a QDRO cannot be used to waive a surviving spouse benefit,*
   a. Before a participant enters pay status or dies: a surviving spouse benefit can only be waived by complying with the plan requirements, which include spousal consent. Even a stipulated order that these rights are waived will be ineffective *unless it satisfies all of the applicable explanation, notice, and content requirements.*[21]
   b. After a participant enters pay status or dies: if a surviving spouse benefit waiver is allowed by the plan, it must be made in the manner specified in the plan document, which will likely not include a QDRO for any number of reasons, not the least of which is that the QDRO exception to preemption applies to orders to designate an alternate payee for a benefit, not to allow the participant a do-over of a benefit election.[22]

Conclusion

The best way to address survivor benefit problems is before they become a crisis, which can happen any time after the divorce. With a basic understanding of the rules, however, and a thorough reading of the plan document to determine which rules apply, this is not an impossible task for which careful planning, and timely execution will be the keys to success.

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[21] This is particularly true for those plans (there are many) that will only accept a spousal waiver properly executed on its forms after receiving all required information.

[22] For this same reason, waivers that are contained in post-nuptial or marital settlement agreements, or judgments, even if not preempted (see *Kennedy v. DuPont*, 129 S. Ct. 865, 555 US 285, 172 L. Ed. 2d 662 - Supreme Court, 2009), will NOT entitle a different beneficiary to receive the waived benefits from the plan. They will simply result in a forfeiture of the waived benefits, just as if it were the subject of a qualified disclaimer.

The Legalization and Consequences of Three-Parent In Vitro Fertilization (3IVF)

By Danielle Westgard[1]

I. Introduction

Mitochondrial disease can be a fatal or debilitating condition that can affect a person's living condition in a significant way and is caused by the part of the cell that creates most of the body's energy not functioning properly.[2] While some people can remain asymptomatic for years others have only minor complications, some parents seeking to have children may have concerns about the risk of passing on dysfunctional mitochondria.[3] It is estimated that nearly 800 children are born in the United States with a dysfunctional mitochondria inherited from their mother each year[4], but the numbers may be as high as 1 in 250 live births that have a mutation in the mitochondrial DNA (mtDNA).[5] Further, a woman with dysfunctional mitochondria may have a more difficult time conceiving and carrying a child to term, resulting in fewer births each year.[6]

A recent advance in reproductive technology allows for a woman with a dysfunctional mitochondria to have children using her own egg with mitochondria from a female donor.[7] While the resulting child would have genetic material from three people, the mitochondrial DNA would make up less than .01% of the child's genetic code.[8] This procedure, known as three person in vitro fertilization or mitochondrial replacement therapy, was recently voted on in the UK's House of Lords.[9] This new legislation will allow fertility clinics to begin using the technology by the end of 2015, following the adoption of licensing rules for the procedure.[10]

In the United States, the FDA has cited concerns with the procedure due to lack of research pertaining to the safety of the procedure, but they have not reached a final conclusion on whether the procedure should be allowed.[11] Instead, the FDA is requiring clinics wishing to perform the procedure to first conduct clinical trials, like those for new prescriptions, which effectively has banned the practice for now.[12] In deciding whether to allow the procedure, there are many concerns to be considered including eugenics, family building policies, safety, and regulations. Further, if the U.S. were to allow this process, it would raise questions about how to treat the mitochondrial donor and whether both women would be granted parental rights.

This new procedure would allow for mothers with dysfunctional mitochondria to have biological children without fearing they will pass on a potentially fatal genetic disease.[13] Currently there are some techniques that allow perspective parents to avoid genetic diseases, such as utilizing donor egg or sperm as well as screening and early testing of embryos or fetuses. However, this is the first procedure that involves removing defective genetic material and replacing it with healthy material.[14] While mitochondrial disease may affect a small number of children, as the technology improves, scientists may discover ways

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[2] Salvatore Dimauro & Guido Davidzon, *Mitochondrial DNA and Disease,* 37 Annals of Medicine 222 (2005), *available at* http://www.med.unc.edu/neurology/files/documents/child-teaching-pdf/Mitochondrial%20Review%20DiMaro%2005.pdf.
[3] *Id.*
[4] Grainne S. Gorman, M.D., et al., *Mitochondrial Donation---How Many Women Could Benefit?* 372 N. Engl. J. Med. 885 (Feb. 26, 2015), *available at* http://www.nejm.org/doi/full/10.1056/NEJMc1500960.
[5] Lyndsey Craven et al., *Pronuclear Transfer in Human Embryos to Prevent Transmission of Mitochondrial DNA Disease*, 465 Nature 82 (2010).
[6] Gorman, *supra* note 3.
[7] Craven, *supra* note 4.
[8] *Id.*
[9] James Gallagher, *UK Approves Three-Person Babies,* BBC, Feb. 24, 2015, *available at* http://m.bbc.com/news/health-31594856
[10] *Id.*
[11] Jody Madeira, *Conceivable Changes: Effectuating Infertile Couples' Emotional Ties to Frozen Embryos Through New Disposition Options,* 79 UMKC L. Rev. 315, 317 (2011).
[12] *Id.*
[13] Dimauro, *supra* note 1 at 223.
[14] Craven, *supra* note 4.

to avoid other genetic disorders, such as Huntington's disease, Tay-Sachs, and Cystic fibrosis, through replacement technology.

Though assisted reproductive technologies are generally highly unregulated, this new technology and subsequent procedures should be subject to federal regulation to allow for monitoring and ultimately FDA approval in order for parents to have the freedom to safely choose to have biological children and also allow them to improve the health of those children. 3IVF or mitochondrial replacement is the first ART to involve genetic replacement and will set the standard for future standards for regulation, and legal rights for parents and donors of genetic material. Further, as history has shown, individuals or couples facing infertility or complications with conceiving will be willing to risk using new unregulated procedures, which can include traveling to other states or countries.[15] Regulating 3IVF before the procedure is widely practiced would allow for safety and ethical concerns to be considered and appropriate policies to be put in place for the repercussions for parenthood. 3IVF should be legalized and regulated at a federal level to allow for organ transplant status to be given to the mitochondria donor in order to ensure that parents can choose how they wish to have children while avoiding concerns over children having more than two parents and litigation over parental rights for the mitochondria donor.

The remainder of this article will be divided into four parts. Part II will explain the medical and scientific background of mitochondrial disease including effects and prevalence. It will also cover the IVF procedure and how this differs from three-person IVF. Part III will discuss the history and evolution of laws regarding IVF and 3IVF. It will also include the rights granted in surrogacy and egg and sperm donation. Part IV will analyze the legal, social, and ethical challenges and concerns that 3IVF raises. These include concerns about eugenics and cloning from genetic manipulation, multi-parent situations including untraditional families and polygamy concerns, and safety and regulatory concerns such as the use of stem cells. Part V will conclude by proposing how to treat 3IVF, including how to classify the legal rights of a mtDNA donor.

II. Medical and Scientific Background

Mitochondrial disease is a group of disorders that are the result of dysfunctional mitochondria, a component of nearly all cells in the body that generates nearly all of the energy needed to live and grow.[16] Mitochondria has separate DNA from the twenty-six chromosomes located in the nucleus and is the only other part of the cell with its own DNA.[17] This DNA, known as mtDNA, makes up approximately .1% of a person's genetic make-up.[18] They are passed from the biological mother to the child, so all children in the same maternal line will share mitochondria with the exception of mutations that occur in the individual.[19] One cause for this dysfunction is a mutation in the mitochondria's genes, which is passed from mother to child. Women with mtDNA mutations were found to have a lower rate of live births (63.2 per 1000) compared to women without the mutations (67.2 per 1000).[20] Further, an estimated 12,423 women in the United States are at risk for transmitting the mutation, leading to approximately 23,000 births in a thirty year period, or nearly 800 children a year are at risk of inheriting a potentially life threatening mitochondrial mutation.[21]

People with mitochondrial disease experience different symptoms and side effects depending on where the dysfunction mitochondria are present, and the type of mutation within the mtDNA.[22] Some

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[15] Roberto Matorras, *Reproductive Exile Versus Reproductive Tourism,* Human Reproduction 20, Oxford Journal 12, 3571 (2005), *available at* http://humrep.oxfordjournals.org/content/20/12/3571.1

[16] Dimauro, *Supra* 1 at 222.

[17] Robert W. Taylor & Doug M. Turnbull *Mitochondria DNA Mutations in Human Disease*, 6 (5) Nat. Rev. Genet. 389 (2005), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1762815/.

[18] Francoise Baylis *The Ethics of Creating Children with Three Genetic Parents,* 26 Reproductive BioMedicine 531 (March 27, 2013), *available at* http://www.iffs-uit.com/article/S1472-6483%2813%2900132-6/fulltext

[19] Taylor, *supra* note 16.

[20] Gorman, *supra* note 3.

[21] *Id.*

[22] United Mitochondrial Disease Foundation, *What is Mitochondrial Disease*, *available at* http://www.umdf.org/site/c.8qKOJ0MvF7LUG/b.7934627/k.3711/What_is_Mitochondrial_Disease.htm

symptoms include muscle weakness, loss of motor control, poor growth, developmental delays, respiratory complications, cardiac disease, seizures, hearing and vision problems, liver disease.[23] Some people will live fairly normal lives while others have debilitating conditions, as the disease may lay dormant until a severe illness or infection triggers the dysfunction. However some children will succumb to mitochondrial disease in infancy or in their teenage years.[24]

Currently there has not been successful treatments for mitochondrial disease.[25] Those treatments that do exist, have limited successful.[26] The mutation cannot be reversed so the treatments are generally to treat the side effects caused by the disease.[27] In order to understand how 3IVF will allow children to be born without a dysfunctional mitochondria, it is necessary to have a basic understanding of how IVF works.

A. In Vitro Fertilization (IVF)

In Vitro Fertilization (IVF) is a technique that is now widely accepted and commonly used to assist in human reproduction and treat infertility, however when IVF was originally introduced it met resistance because of concern over test-tube babies. IVF is a surgical procedure that involves the removal of eggs from ovaries, which are then fertilized by sperm prepared to increase fertility.[28] The new embryo begins to develop and will be inserted back into the mother or surrogate's uterus who has taken hormones to prepare for implantation.[29] If the implantation is successful then the woman will become pregnant.

IVF dates back to the early 1940s, though the first live human was born using the procedure in 1978, with the idea dating back even further to at least the 1930s.[30] The debate over whether IVF should be allowed morally and legally started when trials began in animals, such as rabbits and grew as the procedure was successfully used to conceive a human child.[31] Over the years the number of IVF procedures completed has steadily increased to more than 61,000 babies conceived in 2012 from 165,000 IVF cycles performed.[32]

B. Three Person In Vitro Fertilization (3IVF)

Three person in vitro fertilization (3IVF) is a specialized form of IVF, also known as mitochondrial replacement technology, in which the baby has mtDNA from one woman and nuclear DNA from another woman.[33] In order to avoid the potentially devastating consequences that a dysfunctional mitochondria can bring, the procedure first began in the mid-1990s.[34] Fertility specialists at a few clinics began injecting healthy cytoplasm from an egg into an egg with defective cytoplasm.[35] Later, the procedure involved removing the nucleus from the woman with defective mitochondria and injected it into a donor egg whose nucleus has been removed. This egg is then fertilized with the father's or donor's sperm.[36] Alternatively,

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[23] *Id.*
[24] R.H. Haas, et al., *The In-Depth Evaluation of Suspected Mitochondrial Disease,* Science Direct, Molecular Genetics and Metablism (Nov. 21, 2007), *available at http://www.umdf.org/atf/cf/%7B858ACD34-ECC3-472A-8794-39B92E103561%7D/mito101_InDepth_Evaluation_of_Mitochondrial_Disease http://www.umdf.org/atf/cf/%7B858ACD34-ECC3-472A-8794-39B92E103561%7D/mito101_InDepth_Evaluation_of_Mitochondrial_Disease.pdf.pdf*
[25] Madeira, *supra* note 10.
[26] Craven, *supra* note 4.
[27] *Id.*
[28] Meena Lal, *The Role of the Federal Government in Assisted Reproductive Technologies,* 13 Santa Clara Computer & High Tech L.J., 517, 521 (1997).
[29] *Id.* at 521-22.
[30] Lyria Bennett Moses, *Why Have a Theory of Law and Technological Change*, 6 Minn. J.L. Sci. & Tech. 505, 509 (May 2005).
[31] *Id.*
[32] Michaeleen Doucleff *IVF Baby Boom* NPR Feb. 18, 2014 http://www.npr.org/blogs/health/2014/02/18/279035110/ivf-baby-boom-births-from-fertility-procedure-hit-new-high
[33] Baylis, *supra* note 17.
[34] *Id.*
[35] *Id.*
[36] Charlotte Pritchard, *The Girl with Three Biological Parents,* BBC News, Sept. 1, 2014, *available at* http://www.bbc.com/news/magazine-28986843 (citing HFEA regarding the procedures used for 3IVF)

the mother's egg and donor's egg can both be fertilized with sperm from the father or a donor and then both nuclei are extracted allowing the mother's fertilized nucleus to be implanted in the donor's egg.[37]

The techniques used in mitochondrial replacement are similar to those used in cloning.[38] This is because it involves transferring the nucleus of the mother into the cell of the mitochondrial donor. Some of the largest concerns that are brought up from this technique include the controversial use of cloning techniques, the likely destruction of embryos and safety concerns due to unregulated and untested procedures.[39] However, one analogy used is that 3IVF is "like changing the battery on a laptop."[40]

Unless a close female relative of the mother, without the dysfunctional mitochondria, donated mtDNA, then the child would have identifiable genetic material that is different from her mother and father due to the mtDNA donor, leaving the child with three genetic parents, though this would not impact their appearance or traits, such as eye color or intelligence.[41]

III. Legal History

Scientists and perspective parents have long looked to address fertility problems. The CDC states that 11% of woman of reproductive age have difficulty getting pregnant or carrying a pregnancy to term.[42] Men also face fertility complications, but the prevalence is difficult to determine.[43] The laws and public opinion have historically been slow to adapt to emerging technologies. One of the earliest assisted reproductive technologies was artificial insemination, which started to gain popularity in the 1940 with an estimated 9000 children being born in the United States using artificial insemination that year.[44] An early court decision ruled that children born through this procedure were illegitimate, if sperm was donated by a man that was not a woman's husband regardless of the husband's consent.[45] However, the procedures progressed to extracting eggs, fertilizing those eggs and then implanting embryos into a woman; this procedure is now known as in vitro fertilization (IVF).

The United Nations has also given input on assisted reproductive technologies and how they should be regulated. In 1966, the United Nations International Covenant on Civil and Political Rights states in Article 7 "no one shall be subjected without free consent to medical or scientific experimentation."[46] While the definition of personhood or when life begins is highly debated, many believe mitochondrial replacement would be subjecting the future child to scientific experimentation as the procedure may have unknown consequences. However, the actual procedure would be performed on eggs or newly fertilized embryos. The United States signed on to the Covenant in 1977 and finally ratified it in 1992.[47] UNESCO, the United Nations Educational, Scientific and Cultural Organization released the Universal Declaration of the Human Genome and Human Rights in 1997, which stated in Article 24 that germ-line intervention might be contrary to human dignity.[48] Mitochondrial replacement is germ-line intervention due to replacement of part of an embryo's DNA. In 2006, the United Nations adopted the Convention on the

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[37] *Id.*
[38] Beth Burkstrand-Reid *The More Things Change,* 79 UMKC L.R. 361, 363 (2011).
[39] June Carbone, *Negating the Genetic Tie: Does the Law Encourage Unnecessary Risks* 79 UMKC L. Rev. 333 (2011).
[40] Madeira, *supra* note 10.
[41] Baylis, *supra* note 17.
[42] *Fertility FAQs,* Centers for Disease Control and Prevention, (April 16, 2015), http://www.cdc.gov/reproductivehealth/Infertility/Index.htm#a
[43] *Id.*
[44] George Radler, *Legal Problems of Artificial Insemination*, 39 Marquette L.Rev. 146 (Fall 1955), *available at* http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=3058&context=mulr
[45] *Id.* at 152, (*discussing* Doornbos v. Doornbox, N. 54 S. 14981 (Superior Ct., Cook Co. Dec 13, 1954) where the court concluded any baby conceived through artificial insemination, entitling them test tube babies, was legally an illegitimate child).
[46] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1967), *available at* http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[47] *Id.*
[48] *Universal Declaration on the Human Genome and Human Rights,* G.A. Res. 152, U.N. GAOR, 53d Sess., U.N. Doc. A/53/625/Add.2 (1998), *available at* http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/human-genome-and-human-rights/

Rights of Persons with Disabilities, which the United States has signed but not yet ratified.[49] In this convention, infertility was defined as a disability, and specifically the convention says in Article 23 that there should be respect for the home and family, and states should eliminate discrimination in marriages, families, parenthood and relationships.[50] In Article 25 it says there is the right of enjoyment to attain health without discrimination.[51] Both of these relate to 3IVF as parents should have the right to avoid discrimination in their methods to become parents. Further, the right to enjoyment includes attaining health without discrimination, which includes parents choosing to get treatment for their children.

Currently, the United Kingdom is the only nation to pass a law allowing for 3IVF to be practiced, but in the United States, the FDA is in the process of deciding if clinical trials will be allowed. The laws regarding the regulation of assisted reproductive technologies in the United States has been slow and often retroactive. It is helpful to consider the history of regulations for IVF, surrogacy, egg and sperm donation as well as the FDA's reaction to cytoplasmic transfer, a precursor of 3IVF. This will help create an understanding of the challenges and concerns as well as the likely regulations that would be adopted in regards to 3IVF,

A. United States Law

As IVF has grown in popularity and success, more technological innovations have been produced to increase the likelihood of fertilization, implantation, and storage (such as cryopreservation), leading to more legal, political, and social issues. While most law regarding reproductive technologies is regulated by the state, there are some federal regulations, but there are no federal statutes or policies in place governing assisted reproductive technology.[52] The Uniform Parentage Act, revised in 2002 has been adopted in some form by every state.[53] Though the UPA has been adopted in some form states still vary greatly and some states lack regulations on assisted reproductive technologies.[54] In 2008, the American Bar Association released the Model Act Governing Assisted Reproductive Technology, which clarifies further legal issues associated with ART and is largely consistent with the UPA regarding parentage.[55]

1. In Vitro Fertilization

As IVF and artificial insemination began to gain popularity in the 1960s, public perception was largely negative, where a majority of Americans considered the procedure to be unnatural.[56] Despite the negativity, research continued, and in 1971, the Human Embryo Research Panel formed and advised the National Institute of Health to fund human fetal tissue experimentation, though their report was largely ignored.[57] Research in IVF lead to vigorous political, scientific, legal and moral debate for the next decade.[58]

In 1973, the Supreme Court ruled on *Roe v. Wade*, which aided IVF progress as the experiments included the destruction of human embryos.[59] The same year, a doctor in New York removed an egg from a woman and fertilized it with plans to implant the embryo four days later.[60] Before being able to attempt the implantation, the university where the doctor was employed ordered the embryo destroyed.[61] The couple later brought suit for intentional inflection of emotional distress and to help prevent it from hap-

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[49] *Convention on the Rights of Persons with Disabilities*, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007), *available at* http://www.un.org/disabilities/convention/conventionfull.shtml
[50] *Id.*
[51] *Id.*
[52] Jennifer K. Botts et. al., *Legal Issues Concerning Assisted Reproduction*, Department of Legislative Services, 1 (2012), *available at* http://dlslibrary.state.md.us/publications/OPA/I/LICAR_2012.pdf
[53] *Id*. at 3-4.
[54] *Id.* at 5. States without ART regulations as of 2012 are Georgia, Hawaii, Maine, Mississippi, Pennsylvania, Rhode Island, South Dakota and Vermont.
[55] *Id.* at 7.
[56] *The History of In Vitro Fertilization*, PBS, 1, (April 14, 2015), http://www.pbs.org/wgbh/americanexperience/features/timeline/babies/
[57] *Id*.
[58] *Id*.
[59] *Id.*
[60] Del-Zio v. Presbyterian Hospital, U.S.D.C., S.D.N.Y., 74 Civ. 3588, 1978.
[61] *Id.*

pening to future couples.[62] They sought 1.5 million in damages resulting from the destruction of their embryo.[63]

Shortly after, the U.S. Government declared that federal grants for fetal research would require approval by a National Ethics Advisory Board (the "Ethics Board"), which would not be created until January 1978.[64] In the meantime, Britain scientists successful implanted a woman using the IVF procedure.[65] The trial began in 1978, with crowds and TV crews swarming the courthouse, resulting in street closures.[66] As it progressed Louise Brown, the first IVF baby was born, requiring a quick shift from the initial defense strategy that had set forth that a baby could not be born through IVF procedures.[67] After a month, the jury entered deliberations and came back in favor of the Del-Zio's with $50,003 in damages for the intolerable acts committed.[68] Following the verdict, and the birth of Louise Brown a shift in public opinion occurred where a poll found that 60% of Americans supported IVF and that over half would be willing to try it.[69]

The Ethics Board approved federal funding for IVF research in 1979 and IVF clinics began to open up the next year.[70] While no federal law governs IVF, the 1992 Fertility Clinic Success Rate and Certification Act requires clinics using IVF procedures to report their success rates to the CDC.[71] Overall, IVF is highly unregulated in the United States with only about 20% of clinics following the clinical and ethical guidelines put in place by the Ethics Board.[72]

A man who provides sperm or consents to IVF or artificial insemination of a woman will be able to form a father-child relationship with the child if he intends to be the parent.[73] A man whose wife gives birth following the use of ART will be the presumed father and will be unable to challenge the presumption of fatherhood unless he does so within two years of learning of the birth of the child, and he did not consent to the ART.[74]

Increasing use of IVF procedures led to use of donor sperm and egg from individuals who did not intend to be parents of the child as well as increases in use of surrogacy. Surrogacy and IVF led to the development of gestation surrogates where the woman carrying the child has no biological relation to the child. These developments required new regulations in order to determine parenthood, though parenthood determination was often left to be decided through litigation.

2. Donor Egg and Sperm

The use of assisted reproductive technologies such as artificial insemination and IVF has led to the option of using donor egg, sperm, or embryo, which has raised subsequent concerns and regulations as well. Some of the major concerns with donation include compensation given, who would be granted parental rights, the number of children that could born from one donor and lack of regulation for donating. In the 2002 Uniform Parentage Act, Article 7 stated that a donor of either egg or sperm would not be the parent of a child resulting from ART, and that a donor could not establish parental rights nor be held liable for child support.[75] Though a man who provides sperm could be the father of the child if he intends to be a parent. This holds true for most states as well, though some states require that the donor be anonymous and the use of a medical professional for insemination.

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[62] *Id*.
[63] PBS, *supra* note 55 at 2.
[64] *Id*.
[65] *Id*.
[66] *Id.*
[67] *Id*.
[68] *Id*.
[69] *Id.*
[70] *Id*.
[71] Dr. Malpani, *Regulating, Reporting and Validating ART*, (April 14, 2015), *http://www.drmalpani.com/articles/regulating-ivf*
[72] Kirsten Riggan, MA, *Regulation (or Lack Thereof) Of ART in the U.S. and Abroad* (March 4, 2011), https://cbhd.org/content/regulation-or-lack-thereof-assisted-reproductive-technologies-us-and-abroad
[73] Botts, *supra* note 51 at 4.
[74] *Id.*
[75] *Id.*

The FDA regulates human reproductive tissue, which includes sperm and egg donation.[76] They require that the donations be screened for certain illnesses and that any place that is involved with the process register with the FDA. FDA regulations do not prevent the donor from being paid for their donation, nor does it limit the number of donations an individual could make or how many children can be born using a single donor's genetic material. The American Society for Reproductive Medicine produces guidelines to address these issues but clinics are free to adopt or ignore them.[77]

Some states have attempted to regulate IVF procedures using donor egg or sperm, which would require the intended parents to adopt the resulting child.[78] Though generally this regulation has been proposed as a way to regulate IVF procedures and prevent unmarried or single people from having children.[79] Some couples or individuals may choose to have a donor embryo, where neither the egg nor sperm is from the intended parents, either by paying for each component or obtaining an embryo. When a couple or individual chooses to use an embryo entirely from donors, it is called embryo exchange or adoption.[80] Embryo exchange is rarely regulated by states and there is debate as to whether it should be treated like traditional adoption regardless of whether the intended mother carries the child because the child is not biologically related to either intended parents, just like in traditional adoption.[81]

3. Surrogacy

A surrogate is a woman who carries a child that may be biologically related to her, by the surrogate providing the egg, or alternatively, may only be a gestational carrier where there is no biological relation between the child and the woman, and the woman does not intend to be the parent of the resulting child. Surrogacy has been considered more controversial than IVF and donors due to the presence of a third party (intended mother, intended father and surrogate or gestational mother), as well with the use of donor egg or sperm. Article 8 of the UPA governs surrogacy agreements and permits for payments to be made to the gestational mother.[82] It sets forth that a surrogate and her husband, if married, can agree to relinquish their parental rights and duties and allow the intended parents to assume these rights. This agreement is reviewed and approved by the court and is there after enforceable, but only six states had adopted this provision as of 2012.[83]

States vary greatly on their views of surrogacy. Some states require that the surrogate be only a gestational carrier and have no biological ties to the child.[84] Some states prohibit surrogacy or have found agreements to be void, unenforceable[85], or even illegal.[86] The ABA Model Act proposes two ways to han-

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[76] FDA Human Cells, Tissues, and Cellular and Tissue-Based Products Regulations, 21 C.F.R. § 1271 (2014).

[77] Samantha Pfeifer, et. al., *Recommendations for Gamete and Embryo Donation: A Committee Opinion,* 99 Fertility and Sterility 1, 47 (2013), *available at* http://www.npg-asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Practice_Guidelines/Guidelines_and_Minimum_Standards/2008_Guidelines_for_gamete(1).pdf.

[78] Botts, *supra* note 51 at 4

[79] Sarah Lawsky and Naomi Cahn, *Embryo Exchanges and Adoption Tax Credits,* Tax Notes, GWU Legal Studies Research Paper No. 468, 1365 (2009), *available at* http://www.law.uci.edu/faculty/full-time/lawsky/EmbryoExchanges.pdf Tennessee Proposed a Bill in 2009 which would prohibit single or unmarried people from adopting and one that would make couples using donor egg, sperm or both adopt the child, which would result in preventing single or unmarried couples from using IVF procedures.

[80] *Id.* at 1367. Georgia passed an act where couples who used embryo exchange or adoption would not be granted the adoption credit, requires the embryo donors to relinquish parental rights through contract and allows the intended parents to petition to adopt the child.

[81] Polina Dostalik, *Embryo "Adoption"? The Rhetoric, the Law and the Legal Consequences*, 55 NYLS L.J. 869-870 (2010/11), *available at* http://www.nylslawreview.com/wp-content/uploads/sites/16/2013/11/55-3.Dostalik.pdf. Currently embryos are treated as property and allow parents to contract for them, and disputes are brought to court regarding parental rights, use and destruction.

[82] Botts, *supra* note 51 at 4.

[83] *Id*. These states include Florida, Illinois, New Hampshire, Texas, Utah and Washington.

[84] *Id*. Utah and Texas both largely follow the 2002 UPA but prohibit the use of the surrogates egg, requiring the use of the intended mother's egg or another donor that would not be the surrogate.

[85] *Id*. at 7. Arizona, Indiana, Kentucky, Louisiana, Michigan, Nebraska and New York prohibit or do not enforce surrogacy agreements. Michigan further has made that the surrogate could be convicted of a felony, with a punishment of 5 years imprisonment and/or a 50,000 fine.

dle surrogacy agreements, differentiating surrogacy where neither intended parent is biologically related to the child from agreements where at least one of the intended parents is biologically related, but no states have adopted this model yet.[87]

Often one major concern raised over surrogacy is the rights of the surrogate, who may or may not be biologically related to the child. These concerns include the right of the surrogate to parental rights, changing her mind and the possibility of a couple or individual taking advantage of the woman. When surrogacy agreements go wrong, it is often due to the surrogate wanting to keep the baby, though intended parents have also wanted to not become the intended parents after signing the agreement.

In one case, the New Jersey Supreme Court held that the surrogacy agreement between an infertile couple and a surrogate mother must be enforced even though the surrogate wished to revoke the agreement and keep the baby.[88] The patchwork of laws can result in prospective parents seeking out surrogates in pro-surrogacy states, or hoping for the best, and turning to the courts to decide the fate of the child after the deal goes array.

4. 3 Person In Vitro Fertilization

One form of 3IVF is cytoplasmic transfer, where cytoplasm with healthy mitochondria is injected into an egg or embryo, to help revitalize an egg. Cytoplasmic transfer began in the 1990s and was halted in the United States by the FDA in 2001 after the successful birth of 30-50 children due to safety and ethical concerns.[89] The FDA has said clinics using the procedure must treat it like a new drug and first perform clinical trials.[90] 3IVF and other gene transfer procedures are banned until tested and proven safe. However, due to the federal funding not being available for this research, it is unlikely that the FDA will allow the practice, at this time.[91] Recently though, following Britain's shift in allowing 3IVF, the National Institute of Medicine has been conducting a study into ethical and social policy concerns this technique uses, in order to advise the FDA on how to continue.[92] While many prominent members of bioethics committees have supported 3IVF, clinics are currently unable to proceed with the procedure due to the FDA's standing regulation.[93]

Nita Farahany, a member of the Presidential Commission for the Study of Bioethical Issues, and professor at Duke University for law, philosophy and genome sciences and policy has spoken out many times in favor for 3IVF.[94] Ms. Farahany has argued that the concern over designer babies is misplaced because the procedure is about energy and not about selecting traits.[95] She believes that this would not lead to further genetic engineering of babies but instead offer an alternative for woman with mitochondrial disease to have a baby in a limited, safe and ethical way.[96] However, Ms. Farahany voiced concern that the cost in

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[86] Theresa Erickson, *Fertility Law*, ABA GPSOLO (Jan/Feb 2010), *available at* https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/erickson.html Arizona, Michigan, New York and Washington make it a crime to pay for surrogacy.

[87] *Id.* at 7-8. When neither parent is biologically related a court must approve the surrogacy agreement, but if either intended parent is biologically related then they would not need judicial approval. However, all parties would be required to have a mental health evaluation, health insurance and consult with an attorney.

[88] In Re Baby M, 109 N.J. 398, 537 A.2d 1227 (1988).

[89] Charlotte Pritchard, *The Girl with Three Biological Parents,* BBC, Sept. 1, 2014, *available at* http://www.bbc.com/news/magazine-28986843

[90] *Id.*

[91] Jody Lyneé Madeira, *Conceivable Changes: Effectuating Infertile Couples' Emotional Ties to Frozen Embryos Through New Disposition Options,* 79 UMKC L. Rev. 315, 317 (2010).

[92] Anna Claiborne, *Ethical and Social Policy Considerations of Novel Techniques for Prevention of Maternal Transmission of Mitochondrial DNA Diseases,* The National Academies, *available at* http://www8.nationalacademies.org/cp/projectview.aspx?key=IOM-HSP-14-25

[93] Brittany Shoot, *3-Parent IVF: Why Isn't it Available in the United States*, The Guardian, Feb. 27, 2015, *available at* http://www.theguardian.com/sustainable-business/2015/feb/27/3-parent-ivf-us-mitochondria-dna-babies

[94] *Id. See also* Karen Weintraub, *FDA Weighs Risks of 3-Person Embryo Fertilization,* USA Today, Feb. 24, 2014, *available at* http://www.usatoday.com/story/news/nation/2014/02/24/fda-three-person-embryo-fertilization/5777869/

[95] Shoot, *supra* note 92.

[96] Weintraub, *supra* note 93.

the United States would be prohibitive for many women who could use it to have healthy babies, but in the UK it would be more widely available.[97]

Another bioethics professor in religion and law, Dena Davis weighed in on the debate by saying that often people's opposition is due to confusion and that 3IVF "is only an ethical problem if one has the misguided idea that babies and children are created by only two parents."[98] She references gestation carriers as one way three person babies already exist, as carrying the baby leaves a mark on the child as well as the use of wet nurses that was once a common and well accepted practice.[99]

Some critics, argue that 3IVF should not be allowed for numerous reasons such as ethical concerns, cost and safety. Travis Rieder, a bioethics fellow suggested that parents should adopt instead due to costs associated with 3IVF and other assisted reproductive technologies.[100] Klaus Reinhardet, an evolutionary biologist in Germany, raised concerns over mixing chromosomal DNA with mtDNA that could lead to incompatibility problems as the two DNA's may not complement each other.[101]

Further, 3IVF might also help infertility in older woman due to mitochondrial age making their eggs less efficient, which may be the root for infertility for some woman who have had trouble conceiving through IVF or otherwise.[102] Some scientists believe that infusing a woman's egg with younger mitochondria may revitalize the egg, increasing viability. Though this claim is much less substantiated in comparison to using 3IVF to help avoid mitochondrial disease.[103]

The FDA Advisory committee met in February to discuss whether to allow trials but has not reached a decision.[104] They invited many experts and concerned parties to the meeting and generated discussion for using the procedure for both preventing mitochondrial disease and to help treat infertility.[105] However, while the United States continues to consider legalization, the UK has forged ahead as it has routinely done so in the history of ART.

B. UK Law

Many treaties and conventions have addressed the concerns with 3IVF, including the Oviedo Convention, which allows for genetic modification if done for preventive, diagnostic or therapeutic purposes, though the UK did not adopt it, the Council of Europe did.[106] The 2004 European Union treaty, which established the European Constitution outlawed the genetic modification of human embryos, but the treaty was never ratified[107] In February 2015 the House of Lords voted to approve 3IVF, overturning the ban on manipulation of embryos for reproductive issues.[108] In 1990, the UK passed the Human Fertilization and Embryology Act, which created the Human Fertilization and Embryology Authority (the "HFEA") to regulate and oversee human embryo research and fertility clinics and their procedures.[109] This has created numerous regulations over infertility and ARTs that the United States lack. In 2005, the UK expanded the

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[97] Shoot, *supra* note 92.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Weintraub, *supra* note 93.
[102] *Id.*
[103] Kim Tingley, *Brave New World of IVF,* The New York Times Magazine, June 27, 2014, *available at* http://www.nytimes.com/2014/06/29/magazine/the-brave-new-world-of-three-parent-ivf.html?_r=0
[104] Matt Smith, *FDA Considering 3-Parent Embryos,* CNN, Feb. 27, 2014, *available at* http://www.cnn.com/2014/02/26/health/ivf-mitochondria/
[105] FDA, *Oocyte Modification in Assisted Reproduction for the Prevention of Transmission of Mitochondrial Disease of Treatment of Infertility,* Cellular, Tissue and Gene Therapies Advisory Committee, 2014, *available at* http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/BloodVaccinesandOtherBiologics/CellularTissueandGeneTherapiesAdvisoryCommittee/UCM385461.pdf The FDA Briefing Document outlines the scientific background to the procedure, the ethical concerns, feasibility and benefits of allowing the procedure
[106] *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine,* Oviedo 4.IV (1997), *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm
[107] European Union, *EU Treaties*, *available at* http://europa.eu/scadplus/constitution/introduction_en.htm
[108] James Gallagher, *MPs Say Yes to Three-Person Babies,* BBC, Feb. 3, 2015, *available at* http://www.bbc.com/news/health-31069173
[109] Human Fertilisation and Embryology Act 1990 c. 37, *available at* http://www.legislation.gov.uk/ukpga/1990/37/contents

rules regulating sperm donation to include private business after an increase in popularity resulting from a rule revoking a donor's right to anonymity.[110] Instead, children conceived with the use of donor sperm may contact their biological father when they reach 18, which has caused a drop in the number of men willing to donate.[111] Further, the donors are limited to creating ten families, allowing siblings to share a biological father through sperm donation.[112] These rules also apply to women for egg donation and couples donating embryos.[113] The UK also does not allow for donors to be paid for the donation, but does allow reasonable compensation, which for men is currently at 35 euros for each clinic visit and 750 euros for the donation cycle for women.[114]

While the intended parents are placed on the birth certificate, the child can independently contact the HFEA upon reaching 18 for information regarding their conception and, if the child was conceived after 2005, the identity of the donor, or donors involved.[115] Unlike in the United States, the UK has allowed, since 2009, for donors to receive information about their donations, including successful donations, the number of children born as a result of the donation as well as the gender and year of birth of the children.

Surrogacy is also regulated in the UK but not by the HFEA.[116] Like some states, the UK does not recognize surrogacy agreements.[117] The surrogate mother is the legal mother to the child born, but after birth the surrogate can transfer her right to the intended parents through adoption by signing a parental order. This is true even when the surrogate is not genetically related to the child, if the intended parents have paid for the surrogate's expenses and includes the right of the surrogate to keep the child born.[118] It is also illegal to pay the surrogate, except the intended parents may, however, pay for the surrogate's reasonable expenses.[119] If the surrogate is married, her husband will be the second parent to the child born, unless the surrogate transfers the parent rights or if the woman did not obtain consent from her spouse before the procedure.[120]

The UK does allow for one of the intended parents to be placed on the birth certificate with the surrogate if she is single, and if the treatment was performed in a licensed clinic, regardless of gender or biological relation to the child.[121] The intended parents may expedite gaining legal rights to the child if they are biologically related, otherwise they will need to go through the adoption process. Many couples in the UK choose to go abroad for surrogacy or seek alternative treatments to avoid surrogacy because in the event that the surrogate changes her mind, the couple faces a difficult uphill legal battle to retain parenthood.[122]

Before the 3IVF technique was allowed, by a vote of 382 to 128, the topic was hotly debated, and continues to be a topic for contention.[123] Dr. Gillian Lockwood, a reproductive ethicist stated that three-parent IVF would be more appropriately called 2.001-parent IVF due to the small amount of DNA being

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[110] Marie Woolf, *Ban on the Sale of 'Fresh' Sperm Over the Internet*, The Independent, Aug. 27, 2006, *available at* http://www.independent.co.uk/news/uk/politics/ban-on-the-sale-of-fresh-sperm-over-the-internet-413563.html

[111] *Id.*

[112] HFEA, *Sperm Donation,* Aug. 15, 2012, http://www.hfea.gov.uk/sperm-donation-eligibility.html

[113] National Gamete Donation Trust, *Donation and the Law*, http://www.ngdt.co.uk/donation-and-the-law

[114] *Id.*

[115] *Id.*

[116] HFEA, *Legal Issues Around Surrogacy*, Oct. 22,2013, http://www.hfea.gov.uk/1424.html

[117] Gov.UK, *Rights for Surrogate Mothers*, Nov. 12, 2014, https://www.gov.uk/rights-for-surrogate-mothers

[118] *Id.*, *see also,* HFEA, *supra* note 115. *See also,* Padmini Cheruvu, *Three-Parent IVF and Its Effect on Parental Rights,* 6, Hastings Sci. & Tech. L. Journal 73 (2014).

[119] Gov.UK, *supra* note 116.

[120] HFEA, *supra* note 115.

[121] *Id.*

[122] Pinder Reaux, *UK Surrogacy Law and the Need for Change*, TheGayUK, April 15, 2013, *available at* http://www.thegayuk.com/magazine/4574334751/UK-Surrogacy-Law-And-The-Need-For-Change/5420405. Outlines the recent laws and shift to considering the child's welfare in determining parenthood for surrogacy cases. It discusses also court cases in the UK which have been decided for both the surrogate and the intended parents. http://www.pinderreaux.com/news/article/uk-surrogacy-law-and-the-need-for-change

[123] James Gallagher, *MPs say Yes to Three-Person Babies*, BBC, Feb. 3, 2015, *available at* http://www.bbc.com/news/health-31069173

transferred.[124] She also reinforced the fact that the mtDNA would not change the child's physical traits such as height or eye color or mental abilities like intelligence or musical skill to contrast concerns raised over creating designer babies.[125] The former health secretary stated the concern over safety and certainty was misplaced because IVF would never have been allowed if they had required absolute certainty.[126]

Others spoke against allowing the procedure, including one minister, Robert Flello, who was concerned that the technique could give false hope to families as the practice may not result in the birth of a healthy child, and compared 3IVF to the UK's disapproval for genetically modified crops.[127] While others, including groups such as the Human Genetics Alert, and the Catholic and Anglican Churches of England, argued that the procedure was not safe, nor ethical, as it involved not only the destruction of embryos but could also lead to further genetic modification of children and introduce designer babies.[128]

The HFEA has answered some concerns while they are in the process of deciding how to regulate and implement the procedure.[129] Currently, they plan to restrict the procedure to only women with dysfunctional mitochondria.[130] HFEA's current suggestion is to treat the donor woman like an organ donor, where the resulting children would not be given the identity of the mitochondria donor, unlike children born from sperm, egg or embryo donation.[131] While the debate over the procedure continues, the regulations were to be put into place by October of 2015, and clinics can begin attempting the procedure by the end of 2015.[132]

IV. Challenges and Concerns to Legalization

There are many challenges and concerns to legalizing 3IVF in the United States. First, the technology used in 3IVF is similar to that used in cloning, and genetic manipulation raises concerns over genetic engineering children, eugenics, and the use of stem cells. Second, the FDA currently has stopped the ability of clinics in the United States to use the procedure until further studies are completed, though they may be beginning these trials soon. Third, the public is concerned for the moral, ethical and legal repercussions of the procedure. These repercussions include how 3IVF would affect how parentage is assigned, the definition of the family unit and changes in creating a family.

In considering the new legislation, the UK considered many of the same policy concerns that would be present in the United States. The HFEA in UK found that the ethical concerns were outweighed by benefits of replacement, and even suggested that it would be unethical to not offer the procedure due to the suffering 3IVF would mitigate for children.[133]

A. Eugenics and Cloning Concerns

When scientists first announced mitochondrial replacement technology, many were concerned about the use of cloning techniques being applied to human children.[134] The main concerns faced are the ability to engineer the "perfect child", and the creation of unnatural children through science manipulation. However, these concerns fail to take into consideration the current selection process used on embryos and the possibility that this procedure could eventually be used to eliminate or reduce other genetic defects.

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] James Gallagher, *The Person Baby Details Announced,* BBC, Feb. 27, 2014, *available at* http://www.bbc.com/news/health-26367220
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] HFEA, *Mitochondria Replacement Consulatation: Advice to Government* (March 2013), *available at http://www.hfea.gov.uk/docs/Mitochondria_replacement_consultation_-_advice_for_Government.pdf*
[134] Carbone, *supra* 38 at 338

3IVF is a unique technique currently because it is the first that would allow scientists to alter a human's genetic inheritance, and could be passed to the child's own children.[135] Often, new technologies are subject to the same concerns and arguments that came with the previous technological advancement, including artificial insemination and IVF.[136] These debates are frequently centered on the ethical and moral grounds for creating children, and whether the act would create unnatural babies.[137]

1. Choosing Health Not Designing Babies

Parents using 3IVF would be doing so in order to select having a healthy baby, as mitochondrial DNA does not influence traits such as hair or eye color, intelligence or height.[138] Further, the purpose is to replace damaged dysfunctional mitochondria, which does modify the egg, but overall, the nuclear DNA would remain intact.[139] 3IVF is a therapeutic gene intervention and not an enhancement; therapeutic procedures are more highly accepted in comparison to enhancement.[140] Also, the DNA transferred is very small, akin to just .01% of a person's genetic makeup, which should mitigate some concerns, as the child does not truly have three parents, but more like 2.001 parents.[141]

Choosing to have a healthy baby is already a common practice. Currently, embryos may go through a screening process called preimplantation genetic diagnosis (PGD).[142] This is done when couples have inheritable genetic disorders, chromosomal abnormalities, history of miscarriages or when the mother is older or premenopausal.[143] When this screening is done, any embryos that are found to carry genetic disorders, such as Huntington's disease, or spinal muscular atrophy, are usually not implanted into the mother or surrogate's uterus.[144] However, this practice is also used to screen for sex of the potential child, and may influence the parents' choice on which embryo to implant.[145] Prenatal screening also takes place after the implantation, to test for disorders such as Down's syndrome.[146] Due to the risks associated with prenatal screening, one purpose for this testing is to give woman the option to terminate, in the event that a disease is present in the fetus.[147] As shown by these screening practices, the United States has already accepted selection of embryos based on health.

Though widely used, PGD and prenatal screening are still contentious techniques.[148] Those opposed to PGD are concerned about the creation of extra embryos for testing in order to be selected or disposed of and the burden placed on the woman to select an embryo.[149] Those in favor of PGD may consider the embryo to not be a human being until implantation occurs, or that the well-being and health of the mother and prospective child justify the testing. Further debates include whether the testing is effective, especially when severity of the diseases can be difficult to predict.[150]

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[135] Fergus Walsh, *Ethics of Using Three People's DNA to Create One Baby*, BBC, Sept. 17, 2012, *available at* http://www.bbc.com/news/health-19604004

[136] Judith F. Daar, *The Future of Human Cloning: Prescient Lessons from Medical Ethics Past*, 8 S. Cal. Interdisc. L.J. 167, 169 (1998).

[137] *Id.*

[138] Baylis, *supra* note 17.

[139] Craven, *supra* note *4.*

[140] *See supra* note 105.

[141] Gallagher, *supra* note 122.

[142] Penn Fertility Care, *Preimplantation Genetic Diagnosis (Embryo Screening),* Penn Medicine, *available at* http://www.pennmedicine.org/fertility/patient/clinical-services/pgd-preimplantation-genetic-diagnosis/

[143] *Id.*

[144] Paul Brezina, et al., *New Genetic Testing Technology for IVF Embryos,* Johns Hopkins Medicine, May 23, 2011, *available at* http://www.hopkinsmedicine.org/news/media/releases/new_genetic_testing_technology_for_ivf_embryos

[145] Susannah Baruch, J.D. et al., *Genetic Testing of Embryos: Practices and Perspectives of U.S. IVF Clinics,* 89 Fertil Steril, 6 (2008), *available at* http://www.dnapolicy.org/resources/PGDSurveyReportFertilityandSterilitySeptember2006withcoverpages.pdf

[146] Anne Gjerris, et al., *First Trimester Prenatal Screening Among Women Pregnant After IVF/ICSI,* 18 Oxford Journal 350 (2012), *available at* http://humupd.oxfordjournals.org/content/18/4/350.long

[147] *Id.*

[148] Hans Galijaard, *Report of the IBC on Pre-Implantation Genetic Diagnosis and Germ-line Intervention,* UNESCO, April 24, 2003, *available at* http://portal.unesco.org/shs/en/files/2397/10554294261ReportfinalPGD_en.pdf/ReportfinalPGD_en.pdf

[149] *Id.* at 8.

[150] *Id.* at 9.

3IVF, as well as PGD and prenatal screening are part of individual's and couple's right to make reproductive choices free from discrimination and social control.[151] Parents should be allowed to choose to have biological children while avoiding a potential fatal or debilitating genetic disorder that would be prevented through the use of 3IVF.[152] The United States could ease some of these concerns by regulating 3IVF to people with a substantial chance at passing on mitochondrial disease, which would limit the number of people using the procedure to only those in need of the genetic therapy.

2. 3IVF Could Lead to Other Genetic Manipulations

One of the concerns often brought up regarding 3IVF in debates is about avoiding designer babies or allowing parents to pick and choose certain traits.[153] However, further use of 3IVF technology could lead to germ-line intervention for other genetic diseases, so it would improve the lives of many more children than only the relatively few affected by mitochondrial disease.

Some scientists in favor of 3IVF believe that this new procedure is just the beginning of learning how to cure genetic diseases such as Alzheimer's, Parkinson's, Tay-Sachs, Huntington's or even diabetes, which could impact the lives of many children.[154] Even though 3IVF has been accepted by many fertility specialists, its future continues to be uncertain.

3. FDA Regulations and Safety

Although most ARTs are regulated by the states, 3IVF would likely be under the authority of the FDA due to their previous intervention in the use cytoplasm transfer.[155] One of the major concerns the FDA had with cytoplasmic transfer is with the lack of regulation and safety for both mother and child involved.[156]

a. FDA Cytoplasm Transfer Ban

The FDA intervened in 2001, and stopped fertilization in the United States from continuing the new practice of cytoplasm transfer.[157] This procedure was used in the hopes that cytoplasm with healthier or younger mitochondria would revitalize or aid in fertilization and implantation of eggs for women undergoing IVF.[158] While this procedure was successful with 30-50 children, the practice was highly unregulated, not clinically tested and often done without the informed consent of parties.[159]

In the UK, the HFEA found that 3IVF was safe to proceed with as long as the proper regulatory framework was put into place.[160] The FDA is currently undecided as to its stance, but has met to consider whether trials would be beginning and did order a study to be done regarding the ethical and social concerns.[161] This study will not be completed until mid-2016 so it is unlikely that the FDA will change its stance before then. However, the FDA would allow clinics to privately begin testing the procedure, and clinics may be able to qualify for the more streamlined processes.[162] If the FDA decides in favor of 3IVF, federal funding would be available for clinics to obtain, increasing the chance for the trials to be completed.[163] Currently, federal funding is not available for procedures where human embryos are destroyed, and unfertilized eggs may be considered embryos, both of which are used in 3IVF.[164]

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[151] *Supra* note 48.
[152] *Supra* note 147 at 10.
[153] *See supra*, part III A 4 and III B regarding debates on 3IVF legalization.
[154] See e.g. David McKeon, *Major Step Toward Cell-Based Therapies for Life-Threatening Diseases*, NYSCF, Oct. 5, 2011, *available at* http://nyscf.org/images/pdf/NYSCF-PR-2011-10-05-Nature-nuclear-transfer-paper.pdf.
[155] *See supra* Part III A 4 regarding the legal status of 3IVF in the United States.
[156] Pritchard, *supra* note 88.
[157] Madeira, *supra* note 90.
[158] *Id.*
[159] *Id.*
[160] HFEA, *supra* note 132.
[161] Claiborne, *supra* note 91.
[162] Gary Ingenito, et al., *Inventory of Clinical Trial Protocols and Clinical Study Data*, FDA, Aug. 31, 2011, *available at http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/ConductingClinicalTrials/UCM309552.pdf*
[163] Pritchard, *supra* note 88.
[164] Madeira, *supra* note 90.

b. Safety Concerns

A scientific review concluded that there were no safety concerns that should prevent a couple from using the 3IVF procedure.[165] However, others believe that the procedure has not been tested thoroughly enough, especially considering the impact it may have on the children or grandchildren who are born to children with a mitochondria donor.[166] Currently, the procedure has been tested in various animals, which have mainly shown few or no negative side effects, but it is difficult to predict how humans would react to the procedure.[167]

Other safety concerns involve the risk of birth defects caused from incompatible mitochondria DNA and nuclear DNA.[168] The procedure used to transfer the mitochondria could lead to inadvertently damaging the egg or embryo involved, which could lead to failure to implant, miscarriages or birth defects.[169] The FDA noted concerns in which a similar process was used in mice that led to impairments, though cited others where no defects were found and compared them to other ARTs where similar concerns have been noted.[170]

Some concerns were raised for the women, embryos and potential children impacted by the procedure.[171] Including the lack of oversight and who should be allowed to make the decision of whether a woman undergoes a potentially risky procedure. Currently, the market is the driving force behind most ART, but it is not clear whether the market and consumers will address the public policy concerns.

During the 90s when cytoplasm transfer was taking place in fertilization clinics, few children were monitored following the procedure.[172] At one clinic, seventeen children were born from twelve pregnancies; one pregnancy resulted in an early miscarriage.[173] While this is comparable to the normal rate of miscarriages seen, the clinic noted that another child was born with a missing X chromosome.[174] Combined, these two made the fertilization doctors at the clinic concerned with the efficacy of the cytoplasm transfer procedure, but given the relatively small number, it was inconclusive if the procedure caused the abnormalities.[175] Though the majority of fertility doctors are supportive of 3IVF or further investigation of the process, some have spoken in concern on the safety of the procedure.[176] Many others, including government officials and members of the public, have raised concerns over 3IVF.

4. Policy Concerns Regarding 3IVF

As with any new form of technology, there are many concerns over whether it should be used and what regulations and procedures will follow the use of the new technology. Most of the concerns for 3IVF include those relating to how it will impact the family unit and children involved, whether the benefit for the procedure is worth the cost and risks involved and if the procedure is morally and ethically acceptable. Even though in the UK the public showed general support for the procedure, some voiced concerns, and no similar study has been completed in the United States.[177]

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[165] Fregus Walsh, *Ethics of Using Three People's DNA to Create One Baby*, BBC, Sept. 17, 2012, *available at* http://www.bbc.com/news/health-19604004.
[166] *See e.g.* Kim Tingley, *The Brave New World of Three-Parent IVF,* The New York Times, June 27, 2014, *available at* http://www.nytimes.com/2014/06/29/magazine/the-brave-new-world-of-three-parent-ivf.html?_r=0
[167] *Id.*
[168] Cellular, Tissue and Gene Therapies Advisory Committee, *Oocyte Modification in Assisted Reproduction for the Prevention of Transmission of Mitochondrial Disease or Treatment of Infertility,* FDA, Feb. 25, 2014, pp 16, 18, *available at* http://www.fda.gov/downloads/advisorycommittees/committeesmeetingmaterials/bloodvaccinesandotherbiologics/cellulartissueandgenetherapiesadvisorycommittee/ucm385461.pdf
[169] *Id.* at 16.
[170] *Id.* at 18.
[171] *Id.* at 16-17.
[172] Pritchard, *supra* note 88.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *See e.g. supra* page 13, paragraph 3.
[177] James Gallagher, *Three-Person IVF Moves Closer in the UK,* BBC, March 20, 2013, *available at* http://www.bbc.com/news/health-21806911

a. Family Building Concerns

Some of the concerns raised for 3IVF include worries over the public perception or stigma of children conceived through the procedure and identity questions that these children might face.[178] Further, others have raised concerns over whether this would legitimize multi-parent families by allowing three legal parents for a child.[179]

A few people surveyed raised concerns that though some children born through the 3IVF procedure may be stigmatized, they were generally more concerned whether it would lead to discrimination against those with disabilities or parents who choose to not use the method.[180]

Donor or adoption children may have issues with identity, as they have an unknown source of DNA, whereas with 3IVF the children are biologically related to both parents, but also have a small bit of DNA from another person.[181] In the HFEA study conduct, many people raised concerns for identity issues that a child would face as the result of 3IVF, though more felt that this was not likely to be an issue as mtDNA does not impact identity, or that the donation is more similar to that of an organ donation so that it would not cause significant concerns about identity.[182]

Few people believed that 3IVF would result in three legal parents or voiced concern that it would possibly lead to the third party being recognized as a parent.[183] Though some felt that the healthy mitochondria helped the child exist and function as the child they would be and thus that the donor should be allowed to be recognized in some form.[184] Finally, only 15% of those surveyed felt negatively about the procedure being used to create children with the genetic material of a third person.[185]

b. Whether the Cost of 3IVF Outweigh the Benefits

3IVF would likely be a costly procedure so some believe that instead of creating a new procedure, parents should instead adopt.[186] Others believe that because few children would benefit, the procedure is unnecessary.[187] However, IVF has seen a reduction in cost as the procedure becomes more popular and in the UK the costs can be covered through health care.[188] Further, putting a framework in place for when further genetic replacement techniques are discovered would help create regulation before children are born using newer techniques that could result in more litigation and more diversity in state laws.

3IVF would also give couples with frozen embryos an additional option in determining the fate of embryos. Couples who have frozen embryos have been found to have an emotional bond to the embryos.[189] These couples cited they have concerns for the welfare of the embryos and concern for the fate of the embryos, (either continued storage, donation or destruction) for many of the estimated more than 500,000 cryopreserved embryos in the United States.[190] In one study, couples cited curing disease, preventing another couple from raising the children produced from the couple's embryo, and avoiding waste of the embryo as the major priorities in deciding what to do with excess embryos.[191] Allowing couples to donate extra embryos for 3IVF would allow them to donate the embryo while aligning with their major priorities. First, it would be able to cure mitochondrial disease. Second, the child born from the procedure would not be the donor couple's genetic child, except for the minimal amount of mitochondrial DNA transferred. Third, it would avoid the embryo from being wasted and destroyed without being used. It

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[178] HFEA, *supra* note 132 at 4-5, 16-33.
[179] *See id.* at 21.
[180] *Id.* at 18.
[181] *Infra* note 219.
[182] HFEA, *supra* note 132 at 21-22.
[183] *Id.* at 21.
[184] *Id.*
[185] *Id.*
[186] Shoot, *supra* note 92.
[187] James Gallagher, *Three-Person Babies, Not Three-Parent Babies,* BBC, Feb. 1, 2015, *available at* http://www.bbc.com/news/health-31044255
[188] Shoot, *supra* note 92.
[189] Madeira, *supra* note 90 at 318.
[190] *Id.*
[191] *Id.* at 327

would also allow couples with altruistic motives and those who wish to give the embryo some chance at a life to be part of the embryo that would potentially become a child.[192]

Using donor embryos from couples would reduce the cost of extracting an egg from a mitochondria donor. It would also benefit the couple in disposing of additional embryos. Couples have to pay to store frozen embryos and can also have later disputes of what to do with the embryo following a divorce.

c. Moral and Ethical Concerns Regarding Scientific Manipulation

Often, the public and courts have been slow to accept the ART advances, including artificial insemination, surrogacy and IVF.[193] Some of the major moral and ethical concerns raised include the use of stem cells, the destruction of eggs and embryos, and creating babies using unnatural methods.

While 3IVF does involve the use and destruction of human embryos, it is not the only practice that does so, as shown through current screening and testing procedures used.[194] A study in the UK found that the majority of the public was positive or neutral regarding the manipulation of the germline, instead focusing on the right of parents to choose.[195] Others did not see mitochondria replacement as intervening with the germ line, as it does not impact the nuclear DNA, and were in favor of the procedure, providing that it was safe for the mother and child.[196]

No broad study has been done in the United States as to views Americans hold regarding the process or the implications of 3IVF. The FDA has ordered a study be completed regarding the ethical and social implications, which should be completed in 2016; this will allow a better understanding of the moral and ethical concerns that Americans have with 3IVF.[197]

V. Proposals on How to Classify 3IVF

If the United States were to legalize 3IVF the treatment of the mtDNA donor regarding parental rights is unclear. The FDA should pass a national regulation legalizing the procedure, but let individual states decide if the procedure would be allowed and how to treat the mitochondria donor. This is because family law is relegated to the states. Though this would result in a possible disparity amongst states, it would not be different from the current state of regulations for other ART that is currently in place.[198] Looking at how other ARTs are treated in the United States allows some speculation as to how the mtDNA donor and the donation would be classified.[199] The proposed classification in the UK is another source for how to deal with the legal ramifications of 3IVF.[200]

A. Liken to Egg, Sperm and Embryo Donation

One option states could consider for regulating 3IVF is treating the mitochondria donor like an egg, sperm or embryo donor. States treat donors differently, but the 2002 Uniform Parentage Act in Article 7 states that the donor is not a parent of a child conceived using assisted reproduction, such as artificial insemination or in vitro fertilization.[201] Further, the donor does not have the right to sue for custody or parental rights, and cannot be sued for support.[202] However, only thirteen states have adopted laws similar to this.[203] Many states do not address parental rights stemming from donation, or egg donation at all.[204] Some states without egg donor statutes, do address sperm donation. These states often state that if a wom-

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[192] *Id.* at 328
[193] *Supra, see* part III A Regarding the legal history of ARTs in the United States.
[194] *Supra,* see part IV A 1 Regarding the use of PGD and prenatal screenings
[195] HFEA, *supra* note 132 at 16.
[196] *Id.*
[197] Claiborne, *supra* note 91
[198] *Supra*, *see* part III A Regarding the legal history of ARTs in the United States.
[199] *Supra*, part III A.
[200] *Supra,* part III B.
[201] Botts, supra 51, at 4.
[202] *Id.*
[203] *Id.* at 5.
[204] *Id.*

an conceives with donor sperm with the help of a doctor, in an appropriate clinic then the donor is not liable.[205]

Further, egg donors should be compensated for only their "time, inconvenience, and physical and emotional demands and risk" according to the ASRM (American Society for Reproductive Medicine) Ethics Committee report.[206] The ASRM suggests that payments over $5,000 would need a justification, while over $10,000 would be inappropriate.[207] While the mitochondria donor would not be giving an egg that is used entirely in the conception of a child, her egg would be unviable following the procedure, and the women would go through the same extraction procedure like a regular egg donor.[208]

Currently, most donors sign a waiver of their rights, and are able to contract away their liability and parental rights to any child conceived or embryo created through the use of their donation.[209] However, these contracts are not always enforced, and some donors have challenged them.[210]

While many states continue to rely on sperm donation laws to apply to egg donation, this method is not always sufficient.[211] The California Supreme Court held that this law, where a sperm donor is not liable when using ARTs, does not apply to an egg donor, when the egg donor is in a relationship with the intended and birth mother and the two plan to raise the child conceived in a joint house hold.[212] As such, anonymous or known donors have caused much legal turmoil in the states and abroad.[213] However, almost all of these are regarding sperm donation or custody battles between the two intended parents, leaving little statutory or case law to guide states.[214]

Reform or uniformity would benefit intended parents, perspective donors and potential children, because the current system is not sufficient when applied to 3IVF. Currently, the system relies heavily on individual contracts and waiving of rights that may or may not be enforced.[215] Parents using 3IVF in order to have a healthy biological child through the use of donor mitochondria may be hesitant to enter into an agreement where the third party would potentially be able to make a claim as to parentage over the child. While the trend for intended parents helps strength their assurances, it may be preferred to follow the UK's proposal and treat mitochondria donation like organ donations.

A. Liken to Organ Donation

The UK has proposed that the mitochondria donation be treated like organ donation.[216] The purpose behind the UK's proposal is likely to keep the donor anonymous and avoid later legal disputes or social repercussions for the conceived child. Currently, the UK does not allow for donors to remain anonymous

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[205] *Id.* at 3. The 1973 Uniform Parentage Act allowed for a sperm to not be the legal father, if the woman's husband consented to artificial insemination. Thirteen states have adopted, the 1973 Act or a statute similar.
[206] 22 Ill. Prac.,The Law of Medical Practice in Illinois § 31:6 (3d ed.)
[207] *Id.*
[208] Pritchard, *supra* 35.
[209] 22 Ill. Prac.,The Law of Medical Practice in Illinois § 31:6 (3d ed.)
[210] *See,* JoAnn Zuniga, *Fertile Ground for Dispute: Houston Couple, Donor in Power Struggle over Frozen Embryos,* Houston Chronicle 6/1/02 at A33. Which discusses a case in which the donor sued the doctor for provided her eggs to a second couple without her consent. *See also, K.M. v. E.G.,* 37 Cal. 4th 130, 33 Cal. Rptr. 3d 61, 117 P.3d 673 (2005). A California case in which the birth mother was granted legal parent over the genetic other following a custody battle with a same-sex couple. The California Supreme Court overruled the decision and granted both mothers parental rights even though the birth mother argued that neither intended for the genetic mother to be the legal parent of the children conceived.
[211] Susan L. Crockin, JD, *Where Is Anonymous Reproduction Taking Us Now*?, 12 DePaul J. Health Care L. 241,243 (2009).
[212] *K.M. v. E.G.,* 37 Cal. 4th 130, 134, 117 P.3d 673, 675 (2005).
[213] Susan L. Crockin, JD, *Where Is Anonymous Reproduction Taking Us Now*?, 12 DePaul J. Health Care L. 241 (2009).
[214] *Id.* at 243-244, *citing McDonald v. McDonald,* 196 A.D.2d 7 (N.Y. App. Div. 1994). Where a husband was not granted sole parent following a divorce when this child was conceived through use of egg donor. *Citing also, In re C.K.G.,* 173 S.W.3d 714, 716 (Tenn. 2005). In which the intended mother and gestational carrier was held to be the legal mother against the biological and intended father's contentions that she should lack standing due to no genetic connection. Citing also, *J.F. v. D.B.,* Ohio 6750, 116 Ohio St. 3d 363, 363, 879 N.E.2d 740, 740-41 (2007). Where a gestational carrier was unable to assert parental rights over children conceived when she was not the intended parent nor the biological parent.
[215] Susan L. Crockin, JD, *Where Is Anonymous Reproduction Taking Us Now?,* 12 DePaul J. Health Care L. 241, 247 (2009).
[216] See supra, 128. Discussing the proposed HFEA regulations for 3IVF.

so a child can request the donor information when the child reaches 18.[217] Unlike the UK, the US does not have uniform laws on how donor eggs are treated.

The US does, however, have federal regulation regarding organ donation.[218] However, though fetal organs are included in the definition for organ donation, embryos or eggs are not. Mitochondria are organelles of the cell, much like the kidney is an organ in the body.[219] Though the donor would be giving a full egg, 3IVF would use only part of the egg, and the reason for the procedure is to transplant mitochondria from the donor to the child.[220]

Human cells and tissue are regulated by the FDA.[221] This includes the human cells or tissue intended for implantation, transplantation, or transfer into a human recipient.[222] Currently, this requires the cells and tissues to be screened and tested for certain diseases and for establishments using the cells and tissues to be registered.[223]

Applying the standards for organ donation would also help address how the donor should be treated regarding compensation. Organs cannot be sold or purchased,[224] the donor can, however, be reimbursed for travel and other expenses incurred.[225] It would also allow willing donors with healthy mitochondria to be matched to parents in need, through the use of the Organ Procurement and Transplantation Network.[226]

Further, because the mitochondria does not necessary impact the child, except for helping to ensure the child is healthy, it is less necessary for the child to know the identity of the donor.[227] Children conceived through the use of donor sperm, egg or embryo as well as children who are adopted may later face identity issues or have questions as to where they came from.[228] These children, seeking information regarding their donor or their half-siblings, are not seeking a parental relationship or financial support.[229] Instead, most are looking to find out information about who they are and get a sense of their own identity.[230]

The child born through 3IVF would have a third party's genetic material, but the material would be so small and have little to do with the child's identity.[231] The genetic material would not influence traits, history or medical concerns, other than having healthy functioning mitochondria.[232] It would however have pervasive material that would interact with the child's DNA continuously.[233] Further, the child would not be able to consent to the donation before, like most organ donors, but parents are allowed to make medical decisions for their children.[234]

If the federal government decided to classify 3IVF as an organ transplant, it may have resounding impacts on egg donation for people using IVF. Currently, egg donors and recipients are not required to meet the standards set forth under organ transplant regulation. If the egg for 3IVF is however classified, it may cause analogous treatment to be applied back to egg and sperm. To avoid this issue, the FDA could

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[217] Supra, 112.
[218] 42 U.S.C.A. § 274 (West) (2007).
[219] See Taylor, supra 16.
[220] Claiborne, supra 91.
[221] 42 U.S.C.A. § 274 (West) (2007), C.F.R. § T. 21, Ch. I, Subch. L, Pt. 1271.
[222] 21 C.F.R. § 1271.3
[223] 21 C.F.R. § 1271
[224] 42 U.S.C.A. § 274(e) (West) (2007).
[225] 42 U.S.C.A. § 274 (f) (West) (2007).
[226] 42 U.S.C.A. § 274 (West) (2007).
[227] Pritchard, *supra* 88.
[228] Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law,* 35 Cap. U. L. Rev. 303, 338 (2006).
[229] Amy Harmon, *Hello, I'm Your Sister, Our Father is Donor 150*, N.Y. TIMES, Nov. 20, 2005, at 1.
[230] Katheryn D. Katz, *The Legal Status of the Ex Utero Embryo: Implications for Adoption Law*, 35 Cap. U. L. Rev. 303, 340 (2006).
[231] Gallagher, *supra 107.*
[232] *Id.*
[233] Center for Genetics and Society, *3-Person IVF,* March 9, 2015, http://www.geneticsandsociety.org/article.php?id=6527
[234] *Id.*

simply include in their regulations that eggs donated for the purpose of 3IVF would be treated like organ transplants and other eggs donated would be regulated by the human cell and tissue regulations.

B. Mitochondria Donor Granted Parental Rights

Another option for regulated 3IVF would be to allow the mitochondria donor to have parental rights over a child conceived using part of the donor's egg. However, allowing this as the general procedure for 3IVF would likely cause numerous policy concerns and heated litigation. Currently, only two people are allowed to be the legal parents of a child in the United States in most states.[235]

Allowing more than two legal parents for a child could lead to problems.[236] These include concerns regarding inheritance, custody, who would be in charge of making decisions for the child and other issues that are raised in the rearing of a child.[237] Currently though, less than half of children live in a traditional two parent household.[238]

A traditional family, defined as a married heterosexual couple in their first marriage, made up only 46% of children's living situation in 2012, compared to 73% in 1960 and 61% in 1980.[239] A few reasons given for this included an increase in children born outside of marriage, a higher frequency of people re-marrying and an increase in single parents.[240] With an increasing number of step-parents and step-children, more children have more than two parents.[241]

Also, with the use of surrogacy, especially gestational surrogacy, a third party is already intimately involved with the conception or birth of a child.[242] While some states give rights to the surrogate, by finding the birth mother the natural mother, others allow the surrogate to either waive parental rights or not create them.[243] A gestational carrier has no genetic tie to the baby born, but the 3IVF mitochondria donor would have a very small genetic tie to the child.

Although the mitochondria donor would have a genetic tie, this does not necessarily grant the donor the right to be found a legal parent of the child conceived.[244] However, at times it could be in the child's best interest to allow the mitochondria donor to be granted parental rights. For example, if the mitochondria donor is one of the intended mothers. This would likely be regulated to only same-sex couple, as it is likely that the procedure would be limited to those who medically required. Though it is possible that 3IVF would not be limited to only those with dysfunctional mitochondria or alternatively have the procedure allowed when the mother has healthy mitochondria but not a healthy egg over all.

In the case of a same-sex couple, where one donates mitochondria to the other's egg, it is possible for the donor to be given rights as the intended parent. However, if the couple later have a custody dispute, the birth mother who gave the nuclear could raise a suit to try to prevent the other from gaining custody, similar to in *K.M. v. E.G.*, 37 Cal. 4th 130, 134, 117 P.3d 673, 675 (2005).[245] Here, the egg donor was given parental rights because they had intended to jointly raise the children and there was no competing father figure.[246]

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[235] *Sharon S. v. Superior Court*, 31 Cal. 4th 417, 441, 73 P.3d 554, 571 (2003). Which held that the relevant California statute did not specifically regulate how many parents a child could have. Dissent argues this is against not only California precedent, but the legal norms and public policy of the country. *Citing e.g.* Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 Alb. L. Rev. 733, 755 (1994). Which discusses the many state and federal laws that limit a child to two legal parents.

[236] Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 Hofstra L. Rev. 1091, 1195 (1997).

[237] Id. at 1206-07.

[238] Gretchen Livingston, *Less Than Half of U.S. Kids Today Live in a 'Traditional' Family*, Pew Research Center (Dec. 22, 2014), *available at* http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] Shoot, *supra* 92.

[243] *Supra, see* Part III, A, 3 regarding Surrogacy in the United States.

[244] *Supra, see* Part III, A, 1 regarding rights of an egg donor.

[245] K.M. v. E.G., 37 Cal. 4th 130, 134, 117 P.3d 673, 675 (2005).

[246] *Id.*

Some people have expressed support for allowing a child to have more than two legal parents.[247] Most of these arguments revolve around allowing people who have formed a parent-child relationship be allowed to maintain that relationship for the benefit of the child. This can include a biological parent's right to have an opportunity to develop this relationship, but this simple genetic connection is not often to establish a relationship for donors.[248]

While in a few rare circumstances a mitochondria donor and child conceived using the genetic material would benefit from the creation of a legal parent-child relationship, it would over all create more problems to grant a relationship by default. Instead, it would be more beneficial for the intended parents and the child to have the mitochondria treated similar to an egg donor or an organ donor.

C. Alternatives to 3IVF and Not Allowing 3IVF

Just like some states do not allow surrogacy, it is probable that some states would ban the practice of mitochondria replacement. Women or couples in those states would have the option of going elsewhere for the procedure, or they could use the currently alternatives available.

Currently, these options include using a donor egg, using a donor embryo or adoption. While these currently are all viable options, some couples would prefer to have children that are genetically related to both parents.

Due to the likely high cost of 3IVF, like other ART, many women with mitochondrial disease would be unable to afford the procedure. However, the women or couples who would be unable to use 3IVF due to the cost would likely also be unable to partake in other ART alternatives. Though domestic adoption would still be an option, the difficulties regarding adoption are outside of the scope of this paper.

Some couples, who are able to afford the procedure, who wish to have children biologically related to the mother with a dysfunctional mitochondria and the father, would face the choice to travel to another location for the procedure. This would lead to further complications caused by interstate surrogacy, where states' differing regulations lead to difficulties in assigning parental rights. If the nuclear DNA egg provider gives birth to the child, and is married to the sperm provider this would likely cause few issues, even in states that did not allow 3IVF. However, the use of a surrogate, a same sex couple, or many other routes to parenthood could cause additional litigation.

VI. Conclusion

The United States should allow for 3IVF to be performed. Though family law is largely up to each state and assisted reproductive technologies are largely unregulated, parents and children would benefit from a federal statute or regulation allowing 3IVF. In response to FDA concerns, it would likely be appropriate to limit initial use of the procedure to mother's who are at risk of passing on dysfunctional mitochondria. However, further studies and more successful procedures will help discover if mitochondrial replacement could help older woman hoping to conceive, treat infertility.

By the Federal Government allowing 3IVF, states would likely be allowed to mandate how they treated the procedure, or ban it from being conducted in their state, leaving the regulation of ARTs in the domain of state governments. It is likely that mtDNA donors would be treated similarly to egg or sperm donors in states where donors have no parental rights or alternatively, like an organ donor, which would allow reduced litigation that could follow 3IVF if the process was not regulated. While the US could adopt policies allowing more than two parents to be on a birth certificate, this would be an additional legal, social and political hurdle to overcome for people hoping to avoid the transfer of life threatening genetic diseases through mitochondrial replacement.

Allowing 3IVF to be legalized and practiced in the United States would help eradicate an incurable genetic disease that can have debilitating and devastating side effects. 3IVF would also enable families to

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[247] *See e.g.* Raizel Liebler, *Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships After Reproductive Technological Mistakes,* 5 DePaul J. Health Care L. 15 (2002), Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies,* 25 Hofstra L. Rev. 1091, 1202 (1997).

[248] Raizel Liebler, *Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships After Reproductive Technological Mistakes,* 5 DePaul J. Health Care L. 15, 28 (2002).

have healthy biological children if they choose to. Further, it would allow couples more freedom in their reproductive choices. Not only would 3IVF help those affected by mitochondrial disease, legalization would help further scientific procedures that would help avoid other genetic diseases for many more children than just the limited number that face mitochondrial diseases.

Keeping Justice Blind: Parents with Disabilities and Their Struggle for Equality Under the Eyes of the Law

By Connor Folse[1]

I. Introduction

Behind the veil of the author's experience as a law student and future lawyer are personal experiences that shape and mold the way that he thinks about and perceives his surroundings. The farther along in the transformation of his thought processes, the more it becomes possible to lose sight of these experiences. The topic of this article revolves around the legal rights of parents with disabilities and their struggle for equality under the eyes of the law. This is a topic that directly impacts the author's life along with the lives of the estimated 4.1 million[2] parents with disabilities in the United States. And because of that, along with the legal analysis, argumentation, and research that will unfold through the course of this paper, this article aims to break the mold of how the author has been engineered to think by showing that the legal puzzles that he has been trained to crack contain a deeply personal piece often missing from the final product.

In order to do this effectively, the author begins with his story as the backdrop. From there, he will discuss the history of the eugenics movement and involuntary sterilization that have formed the backdrop for the legal rights of disabled parents. This backdrop has created a presumption of societal fear that stems from social science, research, and the legal capabilities and constitutional rights of disabled parents. The article will then move into discussion of the balancing act between the interests of a child and the disabled parent or parents and how those interests affect visitation and custody cases through the lens of the Rehabilitation Act and the Americans with Disabilities Act. Finally, the author will discuss the recent letter of findings regarding the rights of parents with disabilities and how current law will impact his future as well as the future of all disabled parents.

II. My story: a future father with a disability

Although my parents are not disabled, they gave birth to a child who is. Sometime in the near future, I aim to be a father that just so happens to have a disability. Because I am male, I carry the dominant genetic trait, and thus, my child has an approximately a fifty percent chance of being born with my disability. This is a scary thought because I want to take every precaution possible to prevent my future children from having even the slightest chance of enduring the same physical torture and pain that I did as a kid. However, I refuse to let that risk stop me from raising a child and passing on the lessons and perspectives that I have gained through a lifetime of perseverance and dedication.

I was born with a rare genetic disability called Osteogenesis Imperfecta. There is no known history of it in my family, and it was transferred to me recessively, the chances of which are around one in fifty thousand. The disability is borne from a single missing letter out of the vast genetic code, and results in insufficient amounts of collagen protein. This severely affects bone density as well as the body's ability to produce new bone at the same rate that old bone is replaced. In sum, the bone growth process that occurs before adulthood is comparable to taking one step forward and two steps back. The disability has not only

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[2] Kaye, H. Steven, Current Demographics of parents with disabilities in the U.S., Berkley, CA: Through the Looking Glass, (2012), http://www.lookingglass.org/services/national-services/220-research/126-current-demographics-of-parents-with-disabilities-in-the-us.

made me more susceptible to fractures, particularly before I stopped growing, but has also resulted in a number of physical defects: short stature, curved back, barrel chest, distinct facial features, hyperextended joints, etc. I estimate that in total, I have broken close to forty bones, including seventeen femur fractures. This resulted in much of my childhood being spent in the hospital in body casts or traction, staring blankly up at the endless voids that are white hospital ceilings.

When I was born in 1989, not much was known about Osteogenesis Imperfecta because of its rarity and technology had not quite caught up to the medical understanding of many genetic disorders. For this reason, when I was born with multiple fractures, initially the doctors didn't know what was wrong with me. At seventeen days old, the police were called into the hospital, and it was suspected that my parents were abusing me because of the then unexplainable fractures. To this day, I imagine what the look on my parents' faces must have been when they were accused of hurting their newly born disabled child. There is an aspect of guilt when it comes to disability, both on the part of the parents and the child. Questions like "why our child?," "what did we do wrong?," and "how do we move forward?" shift to the forefront of a family that in the course of an instant is permanently altered.

Growing up, I was filled with endless amounts of rage and guilt. I refused to accept that I was different, and never understood what I did to deserve the life that was handed to me entirely outside of my control. My family had just as difficult a time. My mother struggled with alcoholism and a gambling addiction during the time I was in middle school. My father worked nonstop to stay busy and distracted. My sister began to feel that all of the attention from our parents was transferred to me out of necessity. I often felt more like a burden to my family than anything else; my disability was in either the front or back of my mind at every waking moment, dramatically changing how I interacted with others.

It was only as I entered the crux of my adulthood after my first experience with total independence while in college where I was able to make my own choices outside of the constant omniscience of my parents that my viewpoint shifted. I have been able to defeat the boundaries of my disability by achieving independence, living on my own in a state away from my parents, graduating college and attending a top notch law school, traveling to nationals as a starter for a wheelchair basketball team, being employed as a clerk at Disability Rights Texas, and maintaining meaningful friendships and relationships all over the country. I no longer see my disability as a curse. Rather, I now see it as a blessing, giving me a perception of the world that most will never have. This has allowed me to understand people and their stories in a deeper and more meaningful way. As a budding lawyer, my disability has become a gift. It allows me to fit pieces into puzzles that are invisible to most. I believe I have a more complex and complete understanding of how families with a child or a parent who is disabled are affected by the outcome of visitation, custody, and parental rights cases.

With a brief summary of my journey to reaching independence and my current endeavors as a disabled law student in mind, I hope that you the reader are better able to understand why the issue of legal rights equality for parents with disabilities is such an important issue in my life, and has an impending impact on my future. If it is this important to me, I can guarantee that it is just as important if not more so to the many other prospective parents with disabilities in this country. The potential of being a parent with a disability is already frightening enough without the added fear of inequality under the law. Therefore, it is crucial that disabled parents have the same legal rights and be judged by the same objective standards as all parents in the United States. The discrimination standards of the Americans with Disabilities Act[3] should be rigorously applied to the family law system in order for disabled parents to achieve equal parenting rights with the rest of society.

[3] Americans With Disabilities Act, 42 U.S.C.A. § 12101, (2009). (Congress finding that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." Its purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.")

III. Background to unequal treatment: a history of the eugenics movement and involuntary sterilization

Arguably, imbalance between the legal rights of parents with disabilities and the legal rights of "normal" parents can be retraced to the eugenics movement of the 20th century, during which, more than thirty states legalized involuntary sterilization.[4] The eugenics movement was a legislative trend based on the belief that people with disabilities and other "socially inadequate" populations would produce offspring that would burden society.[5] The original English eugenics movement focused on promoting eugenics through selective breeding for positive traits.[6] In contrast, the United States movement focused on eliminating negative traits that were common in poor, uneducated, and minority populations.[7] As the state statutes developed through the course of the movement, by 1970 more than 65,000 Americans were involuntarily sterilized.[8] To put this number in perspective, between 300,000 to 400,000 people were sterilized in Germany by the end of World War II in order to achieve Adolf Hitler's notion of a "pure population."[9] Comparing the eugenics movements of Germany and the United States is more reasonable than might be supposed by today's U.S. citizens. California's program in 1931 was so alluring that the Nazis turned to California for advice in improving their own efforts.[10] One source reports that Hitler even admitted to following the laws of several American states that allowed for the prevention of the reproduction of the "unfit."[11]

The most well-known point of evidence for the view stated above is that the United States Supreme Court showed its approval of the eugenics movement in the 1927 decision of *Buck v. Bell*.[12] There, the state of Virginia sought to sterilize Carrie Buck for promiscuity as evidenced by her giving birth to a baby out of wedlock, although some allege she was raped.[13] The case came to the Supreme Court upon contention that the statute authorizing the mother's sterilization was void under the fourteenth amendment and thus denied her due process and equal protection of the law.[14] The state argued that heredity plays an important part in the transmission of insanity and imbecility and therefore, sterilization may be performed upon any patient with said hereditary forms.[15] The Supreme Court held that the mother was the probable potential parent of socially inadequate offspring and that she may be sexually sterilized without harm to her general health for the betterment of the public welfare.[16] In ruling against the mother, Justice Holmes stated ""It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for imbecility, society can prevent those who are manifestly unfit from continuing their kind....Three generations of imbeciles is enough"[17]

To this day, *Bell* has never been overruled, and has been cited in cases since.[18] For example, in the more recent case *Vaughn v. Ruoff,* the plaintiff was found to have a "mild" intellectual disability and her

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[4] Robyn Powell, Rocking The Cradle: Ensuring the Rights of Parents With Disabilities and Their Children, National Council on Disability (September 27, 2012), https://www.ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf.
[5] *Id* at 13.
[6] Laura Rivard and Teryn Bouche, America's Hidden History: The Eugenics Movement, Scitable By Nature Education (September 18, 2014), http://www.nature.com/scitable/forums/genetics-generation/america-s-hidden-history-the-eugenics-movement-123919444.
[7] *Id.*
[8] Powell at 13.
[9] Forced Sterilization, United States Holocaust Memorial Museum, (last visited Nov. 15, 2015), http://www.ushmm.org/learn/students/learning-materials-and-resources/mentally-and-physically-handicapped-victims-of-the-nazi-era/forced-sterilization.
[10] Rivard and Bouche, citing Black, Edwin. "The Horrifying American Roots of Nazi Eugenics." History News Network. N.p., Sept. 2003. Web. 07 May 2014. <http://hnn.us/article/1796>.
[11] *Id.*
[12] Powell, at 43.
[13] Rivard and Bouche, discussing the *Buck v. Bell* decision.
[14] *Buck v. Bell*, 274 U.S. 200, 205 (1927).
[15] *Id.* at 206.
[16] *Id.* at 207.
[17] *Id.*
[18] *see Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1991) (holding that a case cannot be overruled unless there is a holding that is somehow related to the first).

two children were removed by the state as a result.[19] Following the birth of her second child, the social worker told the mother that if she agreed to be sterilized, her chances of regaining custody of her children would improve.[20] The mother agreed and yet, approximately three months later, the state informed her that it would recommend termination of her parental rights.[21] The district court found that the plaintiff had a protected liberty interest via the fourteenth amendment and that the social worker's actions violated due process rights.[22] Though the U.S. Court of Appeals for the Eighth Circuit affirmed the judgment, the court acknowledged, citing *Bell*, that "involuntary sterilization is not always unconstitutional if it is a narrowly tailored means to achieve a compelling government interest."[23]

Although progress has been made since the *Bell* decision in 1927, the eugenics mindset curated by cases like *Bell* and *Vaughn* still continues today. The Americans with Disabilities Act (ADA) was passed in 1990. Twenty-five years later, several states still have some form of involuntary sterilization law and a few retain the original statutory language, which states that the best interests of society would be served by preventing people with physical and intellectual disabilities from procreating.[24] In fact, another source states that there seems to be a growing national and international trend towards sterilizing people with physical and intellectual disabilities as some families still subject their disabled children to procedures like growth stunting and removal of reproductive organs.[25] The familial rights of people with disabilities continue to decline. In 1989, twenty-three states restricted the rights of people with psychiatric disabilities and by 1999 this number had grown to twenty-seven.[26] These numbers and the sterilization procedures and laws that remain in use suggest that the eugenics ideology continues to persist in today's American society.

In particular, there is a pervasive myth that people with disabilities are sexually unwilling or unable.[27] Michael Stein, an internationally recognized expert on disability law and policy, elaborates on this myth by asserting that "mainstream society's discomfort with the notion of people with disabilities' relational intimacy is well documented. One poll found that 46 percent of nondisabled people stated they 'would be concerned' if their teenage son or daughter dated a person with a disability, and 34 percent 'would be concerned' if a friend or relative married a person with a disability."[28] Stein adds,

> The main consequences of the disabled non-sexuality myth are (1) difficulty in the formation of intimate interpersonal relationships between disabled and nondisabled people; (2) limited awareness and availability of health care services to women with disabilities; and (3) as a corollary to the myth, severe misperceptions about and often prejudices against individuals with disabilities acting in parental or guardianship capacities.[29]

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[19] Powell, at 44.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001).
[24] Powell, at 44. (citing states that still retain dangerous and offensive statutory language authorizing a court to order the involuntary sterilization of a person with a disability. As of the time of the *Rocking the Cradle* study in 2012, these states included Arkansas (Ark. Code Ann. §20-49-101), Colorado (Colo. Rev. Stat. §27-10.5-130), Delaware (16 Del.C. §5712), Georgia (Ga. Code. Ann. §31-20-3), Maine (34-B M.R.S.A. §7010), North Carolina (N.C.G.S.A. §35A-1245), Oregon (O.R.S. §436.205), Utah (U.C.A. 1953 §62A-6-102), Vermont (18 V.S.A. §8705 et seq.), Virginia (Va. Code Ann. §54-1-2975 et seq.), and West Virginia (W.Va. Code, §27-16-1 et seq.)).
[25] Ed Pilkington and Karen McVeigh, 'Ashley Treatment' on the rise amid concerns from disability rights groups, The Guardian (March 16, 2012), https://web.archive.org/web/20150716062440/http://www.theguardian.com/society/2012/mar/15/ashley-treatment-rise-amid-concerns/print. (discussing a cocktail of medical interventions to keep nine-year old developmentally disabled girl from growing any further).
[26] Powell, at 45.
[27] *Id.*
[28] Michael Ashley Stein, Mommy Has a Blue Wheelchair: Recognizing The Parental Rights Of Individuals With Disabilities, 60 Brook. L. Rev. 1069, 1073 (1994).
[29] *Id.* at 1075

The close-minded attitude towards individuals with disabilities created by the societally constructed myth as discussed by Stein poses a difficult challenge in becoming a parent with a disability. This attitude has carried over into the judicial system, which has had a profound effect on the outcome of custody and visitation cases as well as on the rate of removal of children from parents with disabilities. The rate of removal of children from families with parental disability, particularly psychiatric, intellectual, and developmental disabilities, has skyrocketed above the rates of removal of children whose parents are not disabled.[30]

> Removal rates where parents have a psychiatric disability have been found to be as high as 70 percent to 80 percent; where the parent has an intellectual disability, 40 percent to 80 percent. In families where the parental disability is physical, 13 percent have reported discriminatory treatment in custody cases. Parents who are deaf or blind report extremely high rates of child removal and loss of parental rights."[31]

Removal of children from a parent with a disability is carried out with far less requirements than most termination cases and can be attributed to preventable issues within the child welfare system.[32] Additionally, a parent with disabilities is far more likely to lose custody of the children after divorce, have more difficulties in the assessment of reproductive health care, and face significant barriers in adopting children.[33] The legal system is not adequately protecting a parent with disabilities since two-thirds of dependency statutes allow the courts to reach the determination that a parent is unfit on the basis of the parent's disability, a determination necessary for the termination of parental rights.[34] Furthermore, in every state disability can be taken into consideration in determining the best interests of a child for purposes of a custody decision. Thus, in theory, there needs to be a tighter separation between the disability of the parent and harm to the child so that the child is taken away only when the disability of the parent is creating an issue that cannot be remedied.[35] This is a defect in the family law legal system for parents with disabilities, and creates a presumption of fear towards disabled individuals as parents that add to the already destructive myths and stereotypes surrounding the disabled population.

IV. A presumption of fear: social science, research, and the legal capabilities and constitutional rights of disabled parents

There is an estimated 4.1 million parents with disabilities in the United States and documentation of the population of disabled parents is limited.[36] Of the estimated 4.1 million in the United States, there is an estimated 447,600 parents with disabilities in Texas, 13,900 in Travis County alone.[37] The central obstacle in obtaining accurate numbers of parents with disabilities and their demographic characteristics is the absence of data.[38] There is almost no regional or national data source that considers the combination of the number of people with disabilities and the number of parents within a given locale.[39] "Reasons for this missing information include the lack of attention to the needs and experiences of parents with disabilities and their families, the lack of administrative and research data on parents with disabilities, and the lack of funding for research."[40] Because of the shortage of data at local and national levels, parents with

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[30] Powell, at 48.
[31] Robyn Powell, Can Parents Lose Custody Simply Because They Are Disabled, American Bar Association (March, 2014), http://www.americanbar.org/publications/gp_solo/2014/march_april/can_parents_lose_custody_simply_because_they_are_disabled.html.
[32] Powell, at 48.
[33] *Id.* at 49.
[34] Can Parents Lose Custody, *Id.*
[35] *Id.*
[36] Powell, at 49.
[37] Through The Looking Glass, Number and Characteristics of Parents With Disabilities Who Have Children Under 18, 2008-2009 (2012), http://www.lookingglass.org/pdf/States-Data/Texas-number-disabled-parents-with-children.pdf.
[38] Powell, at 48.
[39] *Id.*
[40] *Id.* at 51.

disabilities remain largely invisible.[41] According to Paul Preston, co-director of the National Center for Parents with Disabilities called Through the Looking Glass (TLG), "Erroneous assumptions about the low prevalence of parents with disabilities affect the availability of resources or the motivation to create new resources specifically for parents with disabilities and their families."[42] TLG estimates that at least 6.1 million children in the United States have parents with disabilities, approximately 9.1 percent of children in this country.[43] Preston concludes that many of these children are inappropriately removed from their parents' care and many of the parents with disabilities in this country do not have the financial or social means to retain or regain custody of their children.[44]

It is clear to Preston that millions of parents in the United States have a disability of some kind and these numbers are likely to grow as people with disabilities become increasingly independent and integrated into their respective communities.[45] For example, recent research from the Center of Disease Control (CDC) reveals that nearly one in eighty-eight children have some kind of autism spectrum disorder (ASD) and along the same lines, there has been a dramatic increase in the number of veterans who are returning from War with service-related disabilities.[46] Doubtless, some veterans are already parents, and others will become parents after acquiring their disability. More and more people with disabilities are creating families without adequate data and information surrounding their circumstances, goals, and needs. Sufficient policy development and programs badly need to be integrated into the current law to address the issues at hand.[47]

To gain a more complete understanding of the issues that face parents with disabilities in the legal system, the distinct lack of prevalent data and research on the matter must be combined with an analysis of their constitutional rights. The Supreme Court has consistently held that parents' rights to the care and custody of their children are protected under the due process clause of the Fourteenth Amendment.[48] The seminal case of *Meyer v. Nebraska*[49] declared that parents have the due process right to decide the education of their children along with the duty to give their children a suitable education.[50] Justice McReynolds quotes Plato in his opinion, illustrating:

> That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.[51]

Interestingly, Plato foreshadows to the eugenics movement with his condemnation of "the offspring of the inferior"[52] and unsurprisingly, four years prior to the *Bell* decision, the court offers no comment on these lines. Two years after *Meyer,* the court ruled in *Pierce v. Society of Sisters* that parents have the liberty "to direct the upbringing and education of children under their control."[53] The Supreme Court further held

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[41] *Id.* at 49.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 50. (citing Preston's explanation of the absence of adequate research and data on parents with disabilities in the United States)
[45] *Id.*
[46] *Id.* at 51.
[47] *Id.*
[48] *Id.*
[49] *Meyer v. Nebraska*, 262 U.S. 390 (1923)
[50] Powell, at 51.
[51] *Meyer*, 262 U.S. at 401-402 (Justice McReynolds citing Plato's *Republic*).
[52] From Book V of Plato's *Republic*
[53] *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[54]

More recent Supreme Court cases have continued to unflinchingly hold that the right to one's child is more substantial than one's property rights.[55] One of these recent Supreme Court cases ruled that a Washington state grandparent-visitation statute failed to respect "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[56] In *Troxel v. Granville,* the court declared in a plurality decision that the right of parents to direct the education and upbringing of their children is a fundamental right.[57] The grandparent-visitation statute in *Troxel* did not respect this fundamental right and instead gave preference to what the state decided was the best interest for the child.[58] Because of the fundamental nature of parents' rights, it was held that the government could not overrule a parent's decision simply by questioning that decision.[59] Yet, despite the conclusion that the substantive liberty interest of parents requires strict scrutiny of any government intervention into family affairs, Justice O'Connor's plurality opinion in *Troxel* does not apply strict scrutiny.[60] Therefore, given that differential treatment of people with disabilities does not require strict scrutiny, when combined with O'Connor's opinion in *Troxel*, it seems clear that parents with disabilities may not seek strict scrutiny of state decisions to interfere with the lives of their families.[61] *Meyer, Pierce,* and *Troxel* all point to the difficulty that parents with disabilities have in using their fundamental constitutional rights to contest state decisions in custody cases when their child is removed and their parental rights are terminated, often based almost entirely on the challenges that their disability presents. To summarize this conclusion, attorney for disabled parents Dave Shade wrote,

> The right to establish a home and raise children is among the most basic of civil rights, long recognized as essential to the orderly pursuit of happiness. Cherished as this right may be, however, it has been violated, abused or just ignored for people with disabilities. Although persons with disabilities have made significant gains in recent years in overcoming the invidious discrimination with which they have long been burdened, the legal rights of parents with disabilities remain in question.[62]

V. The interests of the child versus the interests of the parent: when is a parent deemed unfit and how does this change when the standard is applied to disabled parents?

While freedom to parent without interference from the state is a fundamental right protected by the fourteenth amendment, it is balanced by the right of the state to protect its children from harm.[63] In this way, the state that I was born in was justified in investigating when it was thought that my parents were abusing me at seventeen days old. The doctrine that gave the state that right is called *Parens Patriae.*[64] Under this doctrine, the state has a fundamental interest in protecting the interests of children and thus, states are able to claim authority to protect the best interests of children by limiting or severing parents'

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[54] *Id.* at 535.
[55] Powell, at 52.
[56] *Troxel v. Granville,* 530 U.S. 57, (2000)
[57] *Id.* at 59
[58] *Id.* at 57
[59] *Id.* at 59
[60] Powell, at 53
[61] *Id.*
[62] Dave Shade, Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act, 16 Law and Inequality 153, 154 (1998).
[63] Powell, at 53-54.
[64] "***parens patriae*** [Latin "parent of his or her country"] (18c) **1.** *Roman law.* The emperor as the embodiment of the state. **2.** The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves <the attorney general acted as parens patriae in the administrative hearing>. **3.** A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit <*parens patriae* allowed the state to institute proceedings>. • The state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit." Black's Law Dictionary (10th ed. 2014), parens patriae.

rights, typically under extreme instances like that of abuse or neglect.[65] The Supreme Court has held that while the state may completely temporarily separate the parent-child relationship without the parent's consent, it must do so under the guidelines of the standards of due process.[66] However, to pass the test of due process standards and to terminate the relationship between parent and child the state must prove unfitness through individual inquiry rather than through presumptions based on status.[67] For instance, the state must look at each termination case on an individual basis and weigh all the factors in each case rather than creating assumptions based on a single aspect like an intellectual or physical disability.[68] Termination is a "unique kind of deprivation"[69] and therefore, the standards need to be strict and the requirements the same across the board, whether or not the parent has a disability.

In 1982, the Supreme Court held in *Stanosky v. Kramer* that the state must overcome a strong presumption against termination because "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[70] Before terminating a parent's rights, the state must prove parental unfitness by clear and convincing evidence and if this burden cannot be met, the child must remain with the parents.[71] "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[72] Family law custody and visitation cases are decided by "best interests of the child" standards, which allow for the parents' health to be considered in determining whether to terminate a parent-child relationship.[73]

Parents with disabilities are often forced into the child welfare system and once involved, lose their children at much higher rates than parents without disabilities.[74] According to Powell, the child welfare system applies the "unfit parent" standard in custody cases and thus, presumptions about "fitness to parent" single out parents with disabilities as a key population that is forced to unreasonably prove its ability to parent in American society.[75] In order to apply these standards to parents with disabilities, the child welfare system must comply with the Americans with Disabilities Act as long as it receives federal funding.[76] Furthermore, it may not discriminate on the basis of disability and must provide "reasonable accommodations" to parents with disabilities.[77] And yet, in August 2005, a study revealed that thirty-seven states still include disability as grounds for termination; thirty-six states list psychiatric disabilities, thirty-two states list intellectual or developmental disabilities, eighteen states list emotional illness, and seven list physical disabilities.[78] Most of these state statutes use outdated and offensive terminology, have inaccurate definitions of disability, and emphasize conditions rather than behaviors or instances of abuse and neglect.[79] In one rather disturbing example, Utah's termination statute reads: "(1) The court may terminate all parental rights with respect to a parent if the court finds any one of the following: (c) that the parent is unfit or incompetent."[80] The language of this statute is so vague that "unfit or incompetent" could refer to any disability and none of the categories of disability are listed directly. The language in the statute needs to be clarified in order to refer to the responsibility or behavior of the parent and not imply a parent's mental or physical disability alone as a reason for termination. To comply with ADA discrimina-

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[65] Powell, at 54.
[66] *See* Powell, *Id.*
[67] *Id.*
[68] *See* Powell, *Id.*
[69] Lassiter v. Department of Social Services of Durham County, N.C., 452 U.S. 18 (1981).
[70] Santosky v. Kramer, 455 U.S. 745 (1982).
[71] Powell, at 55.
[72] *Stanosky*, 455 U.S. at 753.
[73] *See* Powell, *at 58.*
[74] *Id.* at 97
[75] *Id.* at 94
[76] *Id.* at 87
[77] *Id.* at 88
[78] *Id.* at 100
[79] *Id.* at 99
[80] U.C.A. § 78A-6-507 (1953)

tion standards, unfitness must be more clearly defined and "incompetence" either needs to be defined or removed completely from the statute.

In 1997, the Adoption and Safe Families Act (ASFA) was signed into law and established the modern federal foster care system. One particular provision of this act entitled the "fast track" provision has significant consequences for parents with disabilities. The provision allows states to bypass the reasonable efforts standard required to reunite parents with their children in the event that the parent's rights to a sibling of the child have been previously terminated involuntarily.[81] Often, states use disability as one reason to deny parents the "reasonable efforts" standard and many parents with disabilities find it difficult to comply with the strict timelines of the provision.[82] Because of the strict timelines, often the result is termination of custody purely because the "reasonable efforts" standards that states apply have not been clearly defined. Therefore, this means that Congress should amend ASFA to protect the rights of parents with disabilities and their families by extending the timeline as necessary and allowing for a more lenient application of the reasonable efforts standard for parents with disabilities. Additionally, despite the ADA's application to the child welfare system, state courts resist ADA defenses in termination proceedings.[83] Some courts refuse to apply the ADA because termination proceedings are not a "service, program, or activity" within the meaning of the ADA. Other courts have held that the ADA does not apply to termination proceedings because the jurisdiction is limited to the interpretation of state child welfare law rather than conducting "an open-ended inquiry into how the parents might respond to alternative services and why those services have not been provided."[84]

> Family courts use the best interest of the child standard to decide custody matters:
> Typical factors include which parent best meets the physical, emotional, intellectual and basic health and safety needs of the child; what does the child want (if the age and maturity of the child render an expressed desire reliable); length of the current custody arrangement and whether it is positive; whether the alternative arrangement is suitable and stable; primary caretaking history; evidence of domestic violence or substance abuse; evidence of lying to the court about domestic violence or other matters; whether either placement involves a significant other with history of violence or dependency issues.[85]

The bias towards parents with disabilities in the family court system indicates that the best interests standard is too vague and doesn't offer enough guidance to the courts.[86] Cases often reflect the underlying presumption that it is not in the best interest of the child to live with or visit a parent with a disability.[87] For example, courts will often assume that children will be forced to provide care for their parents with physical disabilities, which goes directly against social science research that has found that most physically disabled adults are independent and fully capable of taking care of themselves in addition to a child. Because of these presumptions and biases, disabled parents face an uphill battle to prove their ability to care for their children, even if they have been doing so prior to divorce or custody proceedings without any trouble.[88] "Although the best interest standard necessarily requires a comparison of two parents, a presumption cannot exist that a disabled parent is per se the weaker parent."[89] Unfortunately, many states remain silent on the issue of whether a parent's disability should affect child custody and visitation matters and most states do not have proper protection under the ADA in place for parents with disabilities in

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[81] *See* Powell, at 107.
[82] *Id.* at 102.
[83] *Id*. at 111
[84] *Id.* at 112.
[85] *Id.* at 146.
[86] *Id.* at 147. *see* Tex. Fam. Code § 161.001-.006 for more details of guidance to courts
[87] *Id.*
[88] *Id.* at 150.
[89] Duffy Dillon, Child Custody and the Developmentally Disabled Parent, 2000 Wisconsin Law Review, 130, 131 (2000)

child custody proceedings so that they are viewed as equals under the eyes of the law to parents without disabilities.[90]

VI. The Americans with Disabilities Act and the Rehabilitation Act and their application in and effects on divorce and custody cases

The ADA and its predecessor, the Rehabilitation Act of 1973, established comprehensive national mandates prohibiting discrimination on the basis of disability and collectively, Section 504 of the Rehabilitation Act and Title II of the ADA mandates access to family law courts.[91] "Under federal law, a person is defined as having a disability if he or she (a) has a physical or mental impairment that substantially limits one or more major life activities; (b) has a record of such impairment; or (c) is regarded as having such impairment."[92] Section 504 of the Rehabilitation Act states:

> No otherwise qualified individual with a disability . . . Shall, *solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance….[93]

Furthermore, the ADA states, "a state or local government may not discriminate against individuals or entities because of their known relationship or association with persons who have disabilities."[94] Together, these two acts provide the basis for protection against discrimination of individuals with disabilities and should be more strictly applied to parents with disabilities in divorce and custody cases. It seems that the purpose of the two acts has been lost in a sea of societal presumptions and fears regarding the ability of parents with disabilities to care for their children.

The inability of the courts to apply the principles that run through the ADA and Rehabilitation Act and the bias against parents with disabilities is on full display in *In re Marriage of Carney*[95], one of the most widely recognized decisions to address the custody rights of parents with disabilities. In *Carney,* the mother of two children petitioned the courts to have a previous custody order changed because the father had sustained a spinal cord injury and had developed quadriplegia.[96] The lower court granted the mother's motion to change custody, determining that because of the father's disability, his relationship with his children would no longer be "normal."[97] The father appealed, and the California Supreme Court reversed the trial court's decision, holding that the father's disability did not suggest an insufficient ability to be a good parent to his children.[98] The court felt that the parent-child bond was not merely the ability to engage in physical interaction, and thus the father should not have his parental rights taken away simply because of his disability.[99]

> In particular, if a person has a physical handicap it is impermissible for the court simply to rely on that condition as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child; rather, in all cases the court must view the handicapped person as an individual and the family as a whole.[100]

Despite the landmark decision in *Carney,* the view that a parent's disability should not be a factor in determining custody has not been enforced consistently enough and many parents continue to experience discrimination in child custody and visitation cases.[101]

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[90] *See* Powell, at 150.
[91] *Id.* at 68
[92] Americans with Disabilities Act, 42 U.S.C. § 12102 (1990).
[93] Rehabilitation Act, 29 U.S.C. § 701 (1973).
[94] *See* Powell, at 68
[95] In re Carney, 598 P.2d 36 (Cal. 1979).
[96] Id.
[97] *See* Powell, at 141 (discussing the lower court decision in *Carney).*
[98] *In re Marriage of Carney*, 24 Cal.3d 725, 727 (Cal. 1979).
[99] *See* Powell, at 141.
[100] *In re Marriage of Carney*, 24 Cal.3d 725 at 737.
[101] *See* Powell, at 142.

In custody and visitation cases involving parents with intellectual or developmental disabilities, the courts apply an even more ambivalent approach.[102] In *Holtz v. Holtz,* the North Dakota trial court heard argument regarding the need for changing custody from a custodial mother with a developmental disability, dyslexia, a low IQ, and a learning disability.[103] The father sought primary physical custody, despite admitting that he had almost no contact with his 7-year-old child prior to the lawsuit.[104] The trial court's basis for granting the father custody, who had a history of domestic violence and anger management issues, was that the mother had a "mental incapacity to develop as [the child] grows….Therefore, [she] would not be capable or competent to raise the minor child…."[105] The Supreme Court affirmed the decision using a clearly erroneous standard of review and finding that there was no reversible error, upheld the trial court's determination even though the trial court did not make an adequate connection between the child's best interest and the mother's parenting skills.[106]

The main issue with the North Dakota Supreme Court's decision is the bias against the mother due to her disabilities without an offer of any assistance. Instead, the Court chose the easier route by transferring custody to a father with a history of domestic violence and abuse. The trial court's findings focused on the "general best interests factors" and their assumption that the mother's intellectual disabilities were at the root of her inability to care for her daughter implied that a change of custody was in the child's best interests.[107] The court made the assumption that because the daughter's needs would change as she got older, there was a "material change of circumstances" that was sufficient for a change of custody since in the court's opinion, the mother's intellectual disabilities would not allow her to keep up with her child's growing needs.[108] "The trial court did not expressly state this material change of circumstances "requires" or "compels" changing custody of Jessica from April to James. Instead, the trial court's findings focus on the general best interests factors appropriate for an original custodial placement."[109] *Holtz* is a striking example of the additional bias that is present in cases involving parents with intellectual or developmental disabilities. The long-term consequences of these stereotypes are significant: some parents on the autism spectrum have said that fear of discrimination in child custody proceedings has kept them from leaving relationships with abusive partners.[110]

Both *Carney* and *Holtz* demonstrate that parents with disabilities continue to battle discriminatory practices even after the passage of both the ADA and Rehabilitation Act, which reflects attitudinal bias on the part of family courts.[111] As noted by Jennifer Spreng, professor at Phoenix School of Law, a "'well' father or husband can have an advantage in obtaining custody even if he is an inferior caregiver or has maltreated the children himself."[112] The bias on the part of the courts trickles down past parents with disabilities to their children and can impose long-lasting traumatic side effects. "Children who are removed from their parents because of parental disability experience the same trauma from separation and loss of the primary caregiver that they face in dependency cases."[113] Children with a parent who has a disability are more frequently placed with the other nondisabled parent or an extended family member with a history of abuse, addiction, poor parenting, and has had little to no contact with the child.

> For many, many children, the trauma of losing their families—one of the greatest traumas a child can endure—is heightened when they are abused or neglected…by co-parents or extended

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[102] *Id.* at 143
[103] *Holtz v. Holtz,* 595 N.W.2d 1 (N.D. 1999).
[104] *Id.*
[105] *Id.* at 4
[106] *See* Powell, at 144 (discussing the North Dakota Supreme Court's affirmation of the trial court's decision to grant custody to the father).
[107] *Holtz,* 595 N.W.2d at 6.
[108] *Id.*
[109] *Id.*
[110] *See* Powell, at 145.
[111] *Id.* at 146
[112] Jennifer Spreng, The Private World of Juvenile Court: Mothers, Mental Illness and the Relentless Machinery of the State, 17 Duke Journal of Gender Law and Policy 196 (2010).
[113] Powell, at 123.

> family members who have histories of violence, substance abuse, or neglect and would never have won custody from an able-bodied parent. Such suffering has repercussions not only for the children, but for society.[114]

The evident bias in the family court system against intellectual, developmental, and physical disability coupled with the refusal to consistently apply ADA and Rehabilitation Act discrimination standards to custody and divorce cases clearly has deep-rooted personal impact not only on the parents with disabilities but on their children as well. Courts will often rush to justify a move from the parent with a disability to an able bodied caregiver, which allows courts to accept alternatives that would be unacceptable if a parent's disability were not a factor.[115]

VII. What's next? The Sara Gordon story and the recent letter of findings

While there is still a long way to go until legal equality in family courts in achieved for parents with disabilities, the recent story of Sarah Gordon breathes new life into that fight. The Department of Justice and the Department of Health and Human Services issued a letter of findings on January 29, 2015 to the Massachusetts Department of Children and Families (DCF), accusing them of violating the rights of Sara Gordon, a parent with a mild intellectual disability.[116] The departments found that the Massachusetts DCF systematically and illegally discriminated against the rights of Gordon, whose baby was removed from her care at two days old.[117] The investigation has revealed that DCF has violated both the ADA and the Rehabilitation Act by discriminating against Gordon on the basis of her disability and denying her opportunities to benefit from supports and services multiple times over the last two years.[118] The departments' letter is historic because for the first time in history, the federal government is interpreting the ADA to apply to parenting: "this is a game-changer. Now we have the DOJ supporting us in saying that these referrals to child-welfare services and failures to provide parenting supports are violations of the ADA."[119]

Gordon gave birth to her child Dana at the age of 19 and lives with her parents, Kim and Sam Gordon.[120] Kim quit her job, planning to be a full-time support to Sara in raising her child.[121] However, while still in the hospital, Sara was referred to DCF because of her intellectual disability.[122] DCF sent a team to the hospital to monitor Sara and observed that at one point, Sara missed her feeding because she had trouble reading an analog clock and at another point, she failed to burp her child.[123] As a result, Dana was removed and placed in foster care.[124] At the time of the letter of findings, Sara and Dana had not lived together since, despite Sara visiting at every possible opportunity and making an appearance at every DCF-offered parenting class.[125] Sara was only permitted to visit Dana once a week at first and then once she turned seven months old, only once every two weeks after Dana was placed in a foster home.[126] Not even the most dedicated people can be expected to learn how to be a good parent when only one day out of every two weeks is spent with the child.[127] What is most disturbing about the situation is that although DCF highly criticized Sara's parenting abilities, they did not seem to think it as important that Dana suffered bruises and burns in her foster home.[128] Once again, the break between actual harm inflicted and the

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[114] *Id.*
[115] *Id.* at 128.
[116] Elizabeth Picciuto, Baby Taken Away Because Mom's 'Disabled', The Daily Beast (Feb. 10, 2015), http://www.thedailybeast.com/articles/2015/02/10/baby-taken-away-because-mom-s-disabled.html.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

disability of the parent is evident, because unlike the foster home, Sara's care of Dana never resulted in actual injury.[129]

Even after DCF received recommendations from multiple sources, including a psychologist, an expert on parenting with disabilities, and their own internal review board that Dana should be reunited with Sara, DCF continued their pursuit of Gordon's parenting rights.[130] DCF believes that it acted in the best interests of the child but "Plain and simple, this is a case of discrimination against the person with a disability and a clear violation of the ADA."[131] Mark Watkins, the attorney for Sara Gordon states that, "in 24 years in child welfare practice, this is the worst case that I've ever had in terms of the department's behavior as well as the state court's unwillingness to intervene."[132] Furthermore, "[t]his is a single issue case. There's nothing else. No domestic violence. She never had a drug problem or an alcohol problem."[133] The DCF's treatment of Gordon is yet another example of the failure of the family law system to consider the totality of the circumstances when dealing with custody cases involving parents with disabilities. Robyn Powell, principle author of Rocking the Cradle, a source used to establish the backbone of this paper is of the opinion that "there is a lot of strong recent social science research that shows that parents with disabilities are very capable of raising their children. Being raised by a parent with a disability can result in a lot of positive traits such as resiliency and open-mindedness. Nonetheless, there is a belief that people with disabilities simply cannot parent a child."[134]

On Monday March 9th, 2015, Sara Gordon won her battle with DCF and was reunited with Dana, representing an unprecedented leap forward for the rights of parents with disabilities.[135] DCF has agreed to provide services to Sara and Dana going forward and has also agreed to partner with the DOJ in order to figure out the right steps to take so that situations like Sara's can hopefully be prevented in the future.[136] Sara and Dana's case represents a landmark in the struggle for equality under the eyes of the law for parents with disabilities and thirty-six years after *Carney*[137], society may finally be ready to remove the "disabilities" from "parents with disabilities" because at the end of the day, people like Sara are simply parents who love their children. As Sara's mother stated: "we were discriminated [against] a lot. But I raised my daughter to be herself and accept that. She is the best, after everything she has been through. She's a wonderful mom."[138]

VIII. Conclusion

Sara Gordon's case provides a glimmer of hope for parents with disabilities that struggle to maintain the same rights as non-disabled parents under the eyes of the law. Several steps must be taken in order to eliminate bias towards parents with both intellectual and physical disabilities. In Robyn Powell's opinion, states must eliminate disability as grounds for removal and must enact legislation that protects the rights of parents with disabilities.[139] Additionally, the Department of Justice should issue guidance to states on their legal obligations in regards to the ADA and all allegations of violation of the ADA in regards to parents with disabilities involved in custody and visitation cases must be investigated.[140] While the author of this article agrees with these suggestions, he would like to add that this is primarily an issue that is above the law. Steps must be taken to educate society as whole at a state and national level on the ADA and people with both intellectual and physical disabilities. Much of the time, biases and stigmas are created

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] Susan Donaldson James, 'We Can Keep Her': Disabled Mom Wins Daughter Back After Legal Battle, Today (Mar. 13 2015), http://www.today.com/parents/disabled-mom-gets-daughter-back-after-legal-battle-t8511.
[136] *Id.*
[137] *See* discussion on pps. 21-24.
[138] We Can Keep Her, *Id.*
[139] *See* Powell, at 129.
[140] *Id.*

because people don't have an adequate understanding of those different from themselves. Without awareness of what it's like to be disabled, the stereotypes in the legal system towards parents with disabilities will continue to be pervasive. The discrimination standards of the ADA must be applied to all custody and visitation cases involving parents with disabilities and potential removal of children from parents with disabilities must be investigated first-hand by the Department of Justice on a state level like that of Sara Gordon's case. This way, the interaction between parent and child can be witnessed first-hand and the biases and mistreatment can be lessened in hopes of clarifying state statues and making legal rights clear to every family that has a member with a disability, whether intellectual or physical.

My main intention in writing this article is not just to bring awareness to the legal hurdles that parents with intellectual and physical disabilities must jump through in order to be treated equally through the eyes of the law but also to remind those in the legal profession that behind every custody or visitation case is a story and a unique personal journey. Growing up with a disability is incredibly challenging but it is also rewarding. The fight for independence and the unique perspectives afforded to me through my hardships have gotten me where I am today, sitting in front of my computer, writing to each of you and asking for changes to be made, even if those changes are as simple as having a deeper, more empathetic connection with future disabled clients. A parent's love for his or her child is universal. It is the strongest bond on this planet and it goes beyond explanation, rules, statutes, and a courtroom. Disability may make it more difficult to be a parent but it does not weaken this bond. This author will likely one day be a father and until that day comes, I cannot completely understand stories like Sara Gordon's. But what I do understand is that like you and me, it's a story and it has the same weight and importance as everyone else's because we are all human. For this reason, above all others, I cannot stress how crucial it is that this pure human condition of love and perseverance that we can all relate too is recognized in the courtroom. The law will always be at the forefront of every custody and visitation case but nonetheless, it must remain blind, for we are all members of the same species, disabled or not.

Guest Editors this month include Jimmy Verner (*J.V.),* Michelle May O'Neil (*M.M.O.)*, and Jessica H. Janicek (*J.H.J.*)

DIVORCE
PROPERTY AGREEMENTS

PARTITION OR EXCHANGE AGREEMENT HAD NO EFFECT ON PARTIES' SEPARATE PROPERTY; ALLOCATION OF INCOME AGREEMENT VOID FOR FAILING TO INCLUDE REQUIRED DISCLAIMERS.

¶16-2-01. *Robertson v. Robertson*, No. 13-14-00523-CV, 2015 WL 7820814 (Tex. App.—Corpus Christi 2015, no pet. h.) (mem. op.) (12-03-15).

Facts: Husband was injured in a workplace accident that left him quadriplegic. Twenty years later, he met Wife online, who was living in Ukraine at the time. They married that year. A few years later, Husband disputed his insurance carrier's failure to pay cost-of-living adjustments in its monthly payments for his injuries, and the insurance carrier agreed to pay Husband a one-time large lump sum, part of which Husband gifted to Wife and her son. Subsequently, Husband filed a separate lawsuit against the insurance carrier alleging bad faith settlement practices. Some years later, Husband and Wife signed a "Partition of Property and Allocation of Income Agreement" that partitioned community property into separate property, allocated income between the parties, and stipulated that Wife would receive half of any future recovery received in Husband's lawsuits against his insurance carrier. A year later, Wife filed for divorce and sought to enforce the marital agreement. Husband asserted the agreement was unenforceable under the Texas Family Code and Texas Constitution and that he had signed the agreement under duress. Husband claimed that Wife threatened to inform the insurance carrier that he was misusing his insurance funds, which Husband believed would cause the insurance company to reduce or stop his monthly payments. The trial court determined the marital agreement was valid and enforceable and entered a divorce decree enforcing the agreement and implementing its terms. Husband appealed.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Partition or exchange agreements can only affect community interests. To the extent the agreement purported to affect property that was already undisputedly either party's separate property, the agreement had no effect. However, the agreement met the statutory requirements to partition or exchange the parties' community property. The portion of the agreement purporting to allocate the income failed to include the explicitly required disclaimer and was void.

While duress can be a common-law defense to enforcing a partition or exchange agreement, there can be no duress unless there is a threat to do some act that the demanding party has no legal right to do. Additionally, the party seeking to establish duress must show the threat was imminent as such to destroy free agency without the present means of protection. Husband raised no fact question on the imminency of alleged threats. In fact, before signing, he reviewed a draft of the agreement and searched the internet regarding means to nullify the agreement.

Finally, Husband's recovery from his insurance carrier arising out of his personal injury claim was separate property, including any future recovery in related law suits. Thus the trial court had no discretion to include Husband's future recoveries in a just and right division of the community estate.

Editor's comment: *The court states that TFC 4.205(b) "requires that [a conversion agreement] include specific statutorily prescribed disclaimers identifying the consequences of the transmutation agreement."*

That's incorrect. TFC 4.205(b) says that if the statutory language is included, there's a rebuttable presumption of "a fair and reasonable disclosure of the legal effect of converting property to community property." The language is not required for validity. J.V.

Editor's comment: *I find this case interesting in terms of the fact that the partition and exchange agreement can only affect community interests. What if a partition and exchange agreement partitions "community property", but the property it specifies is later determined to be a spouse's separate property? What if the partition and exchange agreement doesn't specify property, only sets forth it partitions "community"? I believe at that point, under this case and other case law, if you later determine that property is actually separate, and not community, the partition agreement would essentially be void to that property. I question, however, whether you could utilize a party's admissions in a partition and exchange agreement as to certain property being "community", in an effort to combat any claim that the property is separate. J.H.J.*

Editor's comment: *So the agreement was invalid to the extent it applied to the separate property future insurance payments to be received by husband after the divorce. And, it was invalid as to the conversion of separate property income to community. So, wife "wins" the case by upholding the agreement, but it is a mere shell of what she thought she agreed to. M.M.O.*

DIVORCE
DIVISION OF PROPERTY

NO LEGAL AUTHORITY SUPPORTED HUSBAND'S CLAIM THAT DELIVERY OF A GIFT COULD BE MADE RETROACTIVE TO AN EARLIER DATE.

¶16-2-02. *Pearson v. Pearson*, No. 03-13-00802-CV, 2016 WL 240683 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (01-15-16).

Facts: Long before the marriage, Wife's grandparents started a family-owned and -operated manufacturing Business. It was incorporated and issued 100 shares of stock. The Business's records were informally kept. During the marriage the Business was struggling and in debt. Husband was a computer programmer with a background in design. He worked for a plumbing and air conditioning contractor for $250,000 a year. Wife encouraged Husband to work at her family's Business with her parents to help them improve the Business. Husband personally researched Texas property laws regarding community and separate property and learned that gifts were considered separate property. After discussing the situation with "lots of lawyer friends" and "lots of friends who had divorced," he told Wife that he would work at her family's Business only if 50% of the stock was his separate property. He did not recall whether he discussed his legal research with Wife. Subsequently, Husband agreed with Wife's parents that he would work for the company on the condition that he be given 50 shares of stock as his separate property. Wife's parents agreed but because Wife's grandparents were still living, the parents did not own 50 shares of stock to transfer at that time. The agreement was written and signed by Wife's parents and by Husband. Wife's parents testified that the agreement to transfer 50 shares to Husband was contingent on his working for the Business and successfully turning the Business around. They testified that they had no intention to cut Wife out of the Business and never saw the transfer as a "gift."

Husband began working at the Business for less than a third of his prior salary, and the Business became profitable again within 2 years. Within a year after starting work, Wife's grandmother died, which meant Wife's parents had enough stock to transfer 50 shares to Husband, but no formal transfer of stock occurred until the end of that year (10 months later). Nevertheless, gift tax returns and the Business tax

return prepared the following tax year showed the transfer effective the day after Wife's grandmother's death. Seven months after the Grandmother's death (before the formal transfer of sock), the Business was converted to a limited partnership, and the partnership agreement showed that Husband had a 50% partnership interest.

After hearing testimony, the trial court determined that the transfer was not a gift but was in consideration for Husband's improving the company. Thus, the interest was community property. Husband appealed, arguing that the trial court erred in finding the transfer of stocks was community property and that the restriction on his piloting unreasonably restricted his recreational activities with his Children.

Holding: Affirmed

Opinion: All the testimony at trial showed that the transfer was dependent on Husband working at the Business, improving its performance, and increasing its profits. He accepted the position for a substantial decrease in salary on the basis that he would work to improve the Business in exchange for an ownership interest. Thus, the evidence suggested the transfer was consideration and not a gratuitous gift.

Additionally, a gift requires delivery, and it was undisputed that no formal transfer took place for ten months. Although a partnership agreement can have a retroactive date, Husband cited no law stating a gift could be made retroactive to an earlier date. There was no delivery at the time of the agreement.

Editor's Comment: *Husband, a pilot, also complained of the trial court's requirement that until both children reached age 8, a licensed pilot other than Husband must fly Husband's plane when Husband's children were aboard so Husband could tend to the children. After both children reached age 8, Husband could fly the children himself, but another adult was required to care for the children during flight. No abuse of discretion: Although Husband was a skilled pilot and owned a safe airplane, "The contested issue concerned whether, as the only adult onboard, he could safely pilot his plane while simultaneously caring for the children." J.V.*

WIFE FAILED TO ESTABLISH INSURANCE PROCEEDS FOR BURNED SEPARATE-PROPERTY HOME WERE ALSO SEPARATE PROPERTY.

¶16-2-03. ***In re Bradshaw,*** ___ S.W.3d ___, No. 06-15-00038-CV, 2016 WL 519660 (Tex. App.—Texarkana 2016, no pet. h.) (02-09-16).

Facts: Wife owned a separate-property house in which the parties lived. During the marriage, Husband purchased furniture and other items for the house. When the house burned down, Wife's insurance company compensated her for the total loss of the house and its contents. Wife used the proceeds to pay the remaining balance on the burned house's mortgage and to purchase a new house outright. The trial court granted Wife a divorce on fault grounds and awarded her 80% of the real property. Wife appealed, arguing that because the burned house was separate property, the insurance proceeds and the subsequently purchased house were also separate property.

Holding: Affirmed

Opinion: While it was undisputed that the burned house was purchased by Wife before marriage, there was also evidence that Husband purchased personal items that were in the house when it burned. Further, while Wife traced the purchase of the new house to the insurance proceeds, Husband's name was included on the check from the insurance company, and there was no evidence that a portion of the insurance proceeds was not compensation for Husband's personal property inside the house.

Editor's comment: *This is another case that shows that even if you have an admission or proof that some asset may be separate property, the confirmation of separate property still requires that funds (or proceeds) that are commingled with community funds must be clearly and concisely traced. It is not enough to simply say that part of the house proceeds were from Wife's separate property house, as she did not provide evidence as to how much were related to the house, and how much were related to community assets. J.H.J.*

DIVORCE
ENFORCEMENT OF PROPERTY DIVISION

WIFE ENTITLED TO MONEY JUDGMENT FOR UNDISCLOSED ASSET PURCHASED BY HUSBAND BEFORE DIVORCE AND SUBSEQUENTLY LOST, BUT VALUE HAD TO BE CALCULATED BASED ON DATE OF DIVORCE.

¶16-2-04. *Meyer v. Meyer*, No. 05-14-00655-CV, 2016 WL 446895 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (02-04-16).

Facts: Husband and Wife's divorce decree included provisions that (1) any undisclosed asset was awarded to the party not in possession of the asset; and (2) any unpaid liability not listed in the decree was the sole responsibility of the party who incurred it. Several months after the divorce, Wife learned that Husband had purchased two seat options at the new Dallas Cowboys Stadium for $150,000 apiece. The options were located on the 50-yard line and gave Husband the option of purchasing tickets for Cowboys games and other events at the stadium. Husband borrowed $60,000 from his company for the purchase, and Cowboys Stadium, LP financed the remaining balance over 30 years. Wife believed that under the decree, she was entitled to the seat options free and clear of any debt. Husband offered to give her the options if she would assume the debt, but she refused. Wife filed a petition to enforce the decree, and during the proceedings, Husband forfeited the seat options by missing a regularly scheduled payment. Husband testified that due to the economic conditions in 2008, the value of the seat options had dropped significantly—that people were selling them at a reduced price, but no one was buying them.

Wife offered into evidence a settlement offer letter from Husband to establish the value of the seat options. Husband did not object to the letter itself but explained the letter was written for the purpose of settlement and not intended to be a confession of value. The trial court specifically admitted the settlement offer letter but "not for the truth of the matters asserted therein." Subsequently, Wife's attorney read aloud the contents of the letter.

The trial court awarded Wife a $300,000 judgment as compensatory damages for Husband's failure to disclose and transfer the seat options awarded her by the divorce decree. On appeal, Husband argued the trial court erred in valuing the seat options at their purchase price. Wife argued that because she read the contents of the settlement offer letter into evidence without objection, Husband's stipulated value of $300,000 became substantive evidence.

Holding: Affirmed in Part; Reversed and Remanded in Part
Opinion: The seat options were an undisclosed asset purchased by Husband before the divorce, so Wife was entitled to them under the decree. However, the only evidence of their value was Husband's purchase price, not the value at the time of divorce. Further, evidence showed that the value likely decreased significantly during that time. The appellate court remanded the case for a further determination of value.

Due to the trial court's limited admission of the letter, Husband was not obligated to further object when Wife attempted to read the letter into evidence. The letter's contents were not evidence of the value of the seat options.

Editor's comment: *Husband made several arguments to the effect that the value of the seat options could not be separated from the debt incurred to buy them, but the court of appeals considered only one of them - an argument based on a fraudulent transfer statute that the court rejected - because the rest were inadequately briefed. J.V*

Editor's comment: *This case is interesting on two fronts. First, the court of appeals upheld an undisclosed asset clause in a divorce decree. So the undisclosed asset was awarded to the opposing party per the clause, but the debt on that same assets was awarded to the party incurring, thus separating the asset from the corresponding liability. Second, this case is interesting for the evidentiary ruling. The settlement agreement was admitted but not for the truth of the matters asserted. Then Wife tried to rely on the truth of the matters asserts in the letter. But the court of appeals said it wasn't evidence of that. So, the case was remanded for a new trial on the value of the asset at the time of divorce. M.M.O.*

DIVORCE
SPOUSAL MAINTENANCE/ALIMONY

PARTIES' AGREEMENT INCIDENT TO DIVORCE WAS UNAMBIGUOUS AND ENFORCEABLE.

¶16-2-05. ***Hallsted v. McGinnis,*** ___ S.W.3d ___, No. 01-14-00967-CV, 2015 WL 9241689 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (12-17-15).

Facts: Husband and Wife signed an AID that was incorporated into their divorce decree. The AID provided that Husband would pay monthly alimony to Wife. In 2010, Husband stopped paying alimony. Wife sued to enforce the AID because she claimed Husband was required to pay her until 2014. Husband argued that the AID provided for permanent alimony that only terminated upon the death of a party, which violated public policy and was, thus, an unenforceable agreement. The AID provided in pertinent part:

Alimony

…

3.2 Terms, Conditions, and Contingencies

Amount – [Husband] wil pay**…**

In addition, [Husband] will pay**…**as additional alimony**…**

[terms regarding additional alimony]**…**

Term – …last payment being due on January 1, 2014…

Death of Receiving Party – **…**

Death of Paying Party –**…**

(emphasis added). Husband argued that because the "Term" provision was indented under the additional alimony provisions, it only applied to that section. Wife argued that the "Term" provision was headed similarly to other major section of 3.2 and applied to all alimony payments. The trial court denied Wife's requested relief, and she appealed.

Holding: Reversed and Remanded

Opinion: The express language of the contract supported the contention that "Term" applied to both the alimony payments and the additional alimony obligations. Thus, Wife was entitled to receive alimony payments until January 1, 2014.

Additionally, Husband's argument that a provision for "permanent" alimony would be unenforceable as a matter of public policy was without merit. The public policy limits a court's authority, not what can be agreed to between two individuals.

PRESUMPTION AGAINST SPOUSAL MAINTENANCE DID NOT APPLY BECAUSE MAINTENANCE WAS AWARDED BASED ON WIFE'S INCAPACITATING PHYSICAL DISABILITY.

¶16-2-06. *Benoit v. Benoit*, No. 01-15-00023-CV, 2015 WL 9311401 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (12-22-15).

Facts: Husband and Wife had been married over 20 years. During the divorce proceedings, the parties reached an agreement on all issues except spousal maintenance. Wife had been receiving disability benefits for about 10 years because she suffered spasms in her neck, back, legs, arms, and hands, and she had carpal tunnel syndrome. Wife had only a GED with no college education. After a bench trial, the court ordered Husband to pay monthly spousal maintenance for 7 years. Husband appealed, raising a number of issues, including that Wife failed to rebut the presumption against spousal maintenance and that the trial court erred in calculating the amount awarded.

Holding: Affirmed in Part; Reversed and Remanded in Part

Opinion: Tex. Fam. Code § 8.053 specifically creates a rebuttable presumption against spousal maintenance pursuant to Tex. Fam. Code § 8.081(2)(B), which provides for maintenance when spouses have been married for 10 years or longer. The presumption is not applicable to Tex. Fam. Code § 8.051(2)(A), which provides for maintenance when a spouse suffers an incapacitating physical or mental disability. Thus, the presumption did not apply in this case.

To the extent that Husband argued that certain expenses, debts, or assets should or should not have been considered or included in the court's determination of the amount of spousal maintenance, nothing in the record suggested a one-to-one correspondence between Wife's expenses and the amount awarded. Consistent with the Family Code, Husband was ordered to pay 20% of his gross monthly income, which was less than the amount by which Wife would be deficient each month.

Editor's comment: *This case is a good reminder that the presumption against spousal maintenance does not always apply, and does not apply in situations in which maintenance is awarded due to a spouse's disability. J.H.J.*

WIFE PETITION TO ENFORCE CONTRACTUAL SPOUSAL SUPPORT BY CONTEMPT DISMISSED WITH PREJUDICE.

¶16-2-07. *In re L.R.P.*, No. 05-14-01590-CV, 2016 WL 514174 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (02-09-16).

Facts: During their divorce, Husband and Wife, both pro se, agreed to terms of a divorce decree. The decree included the following: "*see Addendum for additional agreements*." The Addendum provided, "[s]pousal support shall continue at $750 per month until the sale of our home. At that point it will be increased to $1800 per month for remainder of 3 years from the date of our divorce."

Wife remarried less than 3 years after the divorce. Husband believed that the remarriage terminated his support obligation and stopped paying. Wife, represented by an attorney, filed a petition for enforcement of spousal maintenance. Husband hired an attorney and filed a response that either the obligation was contractual alimony that could not be enforced by contempt or that it was spousal support that terminated upon Wife's remarriage. After a hearing, the trial court determined that the support was not enforceable by contempt and dismissed Wife's petition with prejudice. Wife appealed.

Holding: Affirmed

Opinion: A provision in a divorce decree ordering payment of support to a former spouse may be enforced as a contractual obligation, but it cannot be enforced by contempt unless it is authorized by statute or constitutional provisions. Contractual alimony cannot be enforced with a withholding order. The mere fact a trial court approves a contractual spousal support agreement and incorporates it into the divorce decree does not transform the obligation into Chapter 8 court-ordered maintenance.

Here, there was no decretal language order Husband to pay support. No reference was made to Chapter 8 of the Texas Family Code, nor was there a reference to the statutory requirements or limits placed on spousal maintenance in the Texas Family Code.

In her petition for enforcement, Wife sought an order finding Husband in contempt and finding him for each "violation," an order authorizing a withholding order, and, if necessary, a "clarifying order" sufficient to allow enforcement by contempt. Wife did not seek to enforce the agreement as a contract and did not seek contractual relief. The trial court had no authority to grant any of Wife's requests.

Editor's comment: *So would a subsequent suit based on breach of contract be barred by res judicata? J.V.*

Editor's comment: *This case is another example of proper drafting in a decree. If you intend for support payments to apply under Chapter 8 of the Texas Family Code, it is vital that 1) the payments qualify for Chapter 8, and 2) the order itself specifically makes reference and findings for Chapter 8 maintenance. Otherwise, there is a substantial risk that the support payments may be termed contractual alimony, thus restricting the ability to enforce the payments. J.H.J.*

Editor's comment: *Say it all together now… contractual alimony is not enforceable by contempt of court. We don't need to keep doing this. It is clear. M.M.O.*

SAPCR
STANDING AND JURISDICTION

FATHER COULD NOT CREATE JURISDICTION UNDER UCCJEA BY VIOLATING COURT'S ORDER.

¶16-2-08. *In re Majors*, No. 12-15-00193-CV, 2015 WL 7769555 (Tex. App.—Tyler 2015, orig. proceeding) (mem. op.) (12-03-15).

Facts: Mother and Father divorced in Texas with three Children. Mother was given the primary right to designate the Children's primary residence. Father subsequently moved to Virginia. While the Children were visiting Father during the summer, Mother and Father agreed that the Children would remain with Father for one school year while Mother finished nursing school. No written agreement or court order was entered. When the school year was over, Father refused to return the Children. He filed a SAPCR asking

for the right to designate the Children's primary residence. Father then asked the Texas court to dismiss the case for lack of jurisdiction under the UCCJEA. Mother argued that but for Father's violation of their agreement and of the divorce decree, all of the Children's relationships and records would still be in Texas, rather than Virginia. The trial court denied Father's motions, and he filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: Public policy encourages parents to enter agreement with regard to their parenting duties; however, when they are unable to agree, they are required to follow the trial court's decrees in effect. Here, Mother, Mother's mother, and Father's father each testified that the parents agreed that the Children would remain in Virginia with Father for only one year. The final divorce decree provided that Mother had the exclusive right to designate the Children's primary residence. Any connections between the Children and Virginia would not have existed had Father not wrongfully retained the Children in Virginia. Additionally, Mother and her extended family, with whom the Children had close relationships, remained in Texas.

Editor's comment: *This case is interesting because the court of appeals does not interpret the agreement for the children to reside with Father for a year as an implied change of conservatorship. I wonder if the result would have been different had they entered an order confirming their agreement?M.M.O.*

NO ORDER PREVENTED FATHER FROM MOVING CHILD TO DIFFERENT COUNTY, SO TRIAL COURT REQUIRED TO TRANSFER SAPCR TO COUNTY WHERE CHILD HAD RESIDED LONGER THAN SIX MONTHS.

¶16-2-09. *In re Henry*, No. 04-15-00606-CV, 2015 WL 9434394 (Tex. App.—San Antonio 2015, orig. proceeding) (mem. op.) (12-23-15).

Facts: A court order adjudicated Father to be the Child's father, but the order did not address conservatorship. Subsequently, Father filed a SAPCR seeking sole managing conservatorship. A temporary order granted Father temporary sole managing conservatorship. Father had to get a writ of attachment to get possession of the Child from Mother. Subsequently, the SAPCR was dismissed for want of prosecution. A few years later, Mother drove to a hotel where the Child was staying with family and took the Child without giving notice to Father. Father filed another SAPCR seeking the exclusive right to designate the Child's residence and sought to transfer the case to where the Child had been living for the prior six months. Mother alleged that transfer was inappropriate because the Child had been living illegally with Father. After a hearing, the trial court denied Father's motion to transfer, so he filed a petition for writ of mandamus.

Holding: Writ of Mandamus Conditionally Granted

Opinion: Father's affidavit averred that the Child had resided in another county for at least six months, and Mother did not controvert that fact. Although Mother may not have wanted the Child to go with Father, Father's possession of the Child was not "illegal" because a temporary order gave him the right to designate the Child's residence.

RETURN OF SERVICE REVIEWED IN TANDEM WITH ATTACHED DOCUMENTS WAS SUFFICIENT TO SHOW PROPER SERVICE ON MOTHER.

¶16-2-10. *In re S.C.*, No. 02-15-00191-CV, 2015 WL 9435937 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (12-23-15).

Facts: Father filed a petition to modify a prior conservatorship order. The citation and petition were served on Mother in Japan by CMRR. Mother personally signed the return receipt. The return stated that service of "a true copy of this writ together with a copy of Chapter 158 Texas Family Code" was "by delivery certified mail, return receipt requested, *to the employer named within*, as herein directed." The return receipt, the first page of the petition, and the citation were attached to the return of service filed with the clerk. Mother did not answer, and the trial court granted Father a default judgment. Mother filed a notice of restricted appeal and argued that the return of service was defective, rendering the default judgment void.

Holding: Affirmed

Opinion: In determining whether service was proper, the court must consider the return of service together with any attached documents, including the petition and citation. The clerk's stamp on the filed return of service was sufficient to satisfy the time requirement of Tex. R. Civ. P. 107(b)(4). Although the return of service incorrectly stated service was "to the employer named within," the CMRR (signed by Mother) and citation indicated Mother was served in Japan by certified mail. The first page of the petition was attached to the return of service and included handwritten notations regarding the service on Mother.

Editors comment: *Here, even if a portion of the service was incorrect, the service documents, taken altogether, equal proper service. J.H.J.*

DEFAULT JUDGMENT REVERSED BECAUSE AFFIDAVIT OF SERVICE FAILED TO SPECIFY WHAT DOCUMENTS WERE SERVED ON RESPONDENT.

¶16-2-11. *In re J.B.*, No. 02-15-00040-CV, 2015 WL 9435961 (Tex. App.—Fort Worth 2015, no pet. h.) (mem. op.) (12-23-15).

Facts: Mother filed a SAPCR and enforcement seeking to modify and enforce a prior conservatorship and child-support order. A return of service was filed with an affidavit of service indicating that "the documents" were served on Father. Father did not appear, and Mother received a default judgment. Father appealed.

Holding: Reversed and Remanded

Opinion: For a default judgment to withstand direct attack, strict compliance with rules governing service must affirmatively appear on the face of the record. A return of service must include a description of what was served. Here, the affidavit of service reflected that "the documents" were delivered but did not specify what documents were delivered, and no documents were attached to the affidavit. Even if Father was actually aware of the suit, actual notice is not a substitute for service in a no-answer default situation.

CHILDREN'S FATHER COULD NOT RELY ON COURT ORDER CHANGING HIS GENDER IDENTITY TO MALE TO CONFER STANDING TO ADJUDICATE PARENTAGE.

¶16-2-12. *In re Sandoval*, No. 04-15-00244-CV, 2016 WL 353010 (Tex. App.—San Antonio 2016, orig. proceeding) (mem. op.) (01-27-16). (prior opinion: ***In re Sandoval***, __ S.W.3d __, No. 04-15-00244-CV, 2015 WL 4759972 (Tex. App.—San Antonio 2015, orig. proceeding) (08-12-15)).

After the appellate court granted Mother's petition for writ of mandamus, Father filed a motion for rehearing en banc. The appellate court denied Father's motion but withdrew its prior opinion and substituted a new opinion to clarify the panel's reasoning. This new opinion was accompanied by one concurring and two dissenting opinions, which were drafted by justices who had not sat on the original panel.

Facts: Some of the facts below come from the first case involving these parties: *In re N.I.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913 (Tex. App.—San Antonio 2015, no pet. h.) (mem. op.) (03-11-15).

Father was born female but self-identified as male and had been raised as a boy. When Father and Mother met, Mother knew that Father had been born female. The two began a romantic relationship, and during the relationship, Mother adopted two Children as newborns, the second adoption occurring when the first Child was two-years old. The Children referred to Father as their father, and Father was known as the Children's father to family, friends, school officials, and church officials. When the Children were six- and four-years old, Father quit his job to be a stay at home parent. Three years later, Mother and Father separated, and Father moved out of the family home. He continued to care for the Children after school, in the mornings, and on weekends. Nearly three years later, Mother refused to allow any contact between Father and the Children. About a week later, Father obtained an order to legally change his female birth name to the masculine name he had gone by since he was a Child. A few weeks later, Father filed a SAPCR seeking joint managing conservatorship and equal periods of possession and access. Father subsequently filed a voluntary statement of paternity. Father then obtained an order changing his identity from female to male. Mother filed a motion to dismiss Father's petition for lack of standing, which the trial court granted. Father appealed, asserting standing under Tex. Fam. Code § 160.602(a)(3), § 102.003(a)(8) and (9), and under the common law doctrines of *in loco parentis*, unconsionability, estoppel, and psychological parent.

The court of appeals determined that because Father was not a "man" at the time that he filed his SAPCR, he lacked standing under both Tex. Fam. Code § 160.602(a)(3) and Tex. Fam. Code § 102.003(a)(8). Additionally, Father lacked standing under Tex. Fam. Code § 102.003(a)(9) because, after their separation, which occurred almost three years before he filed suit, Father was not as involved with the actual care, control, and possession of the Children.

Moreover, Father failed to show that he had standing under the asserted common law doctrines. *In loco parentis* has never been applied when the actual parent has maintained custody of the child. Further, Father cited no authority that unconscionability or estoppel were independent grounds for standing. Finally, Father pointed to no Texas law recognizing the concept of psychological parent.

Five days after losing that appeal, Father filed a second suit to adjudicate parentage, asserting standing under Tex. Fam. Code § 102.003(a)(8). Father asserted he was "a man alleging himself to be the father of minor children." Mother again filed a plea to the jurisdiction, which the trial court denied. The trial court entered temporary orders allowing Father possession of the Children, appointing an amicus attorney, and enjoining the parties from initiating any adoption proceedings. Mother filed a petition for writ of mandamus.

Holding: Motion for En Banc Reconsideration Denied

Majority Opinion: (J. Pulliam, C.J. Marion, J. Alvarez, J. Angelini, J. Barnard) In 2009, the Tex. Fam. Code § 2.005(b)(8) was added to allow a court order relating to an individual's sex change to be an acceptable form of identification to establish a person's identity and age for the purpose of obtaining a mar-

riage license. The San Antonio Court of Appeals refused to extend the applicability of this section to confer standing to maintain a suit to adjudicate parentage under Tex. Fam. Code § 160.602(a)(3). The appellate court reasoned that:

> even if [Father was] considered a man from birth for legal purposes, [Father's] status as a man is not sufficient to confer statutory standing as "a man whose paternity of the child is to be adjudicated." Tex. Fam. Code ann. § 160.602(a)(3). If all that was required for standing was to be a man, then any man could maintain a suit to adjudicate parentage of any child. We do not believe that to be what the Texas Legislature intended.

Father did not meet the statutory requirements for standing as a presumed Father or as the acknowledged Father. Father's suit was not brought within 90 days of the date on which his actual care, control, and possession of the Children terminated. Father did not raise any basis on which he would have standing to file a SAPCR.

Concurring Opinion: (J. Alvarez, C.J. Marion, J. Pulliam, J. Angelini, J. Barnard) Courts of Appeals are not free to mold Texas law but are bound by precedents of the Texas Supreme Court and constrained by the Texas Family Code. When a statute does not define a term, the court turns to its ordinary meaning. Father did not meet the definition of "man" as defined by Webster's Dictionary, so he could not have standing under Tex. Fam. Code § 160.602. Additionally, Father failed to file within the time period during which he would have had standing under Tex. Fam. Code § 102.003(a)(9). Justice Alvarez asked the Texas Legislature to remedy the "unfair," "heart-wrenching" situation in which Father found himself.

Dissenting Opinion: (J. Chapa) Mandamus relief cannot be appropriate merely to correct any incidental ruling that would cause any delay in a child-custody dispute. While some erroneous jurisdictional rulings could lead to conflicting custody orders from different courts in different territorial jurisdictions, there was no such risk of that occurring in this case. Additionally, as the trial court did not divest Mother of possession of the Children, there were no extraordinary circumstances for which mandamus relief was necessary. Thus, because appellate relief would have been adequate, Mother should not have been entitled to mandamus relief. "Due to the extraordinary number of child-custody disputes in this court's jurisdiction, including those involving parental termination, mandamus cannot be appropriate to correct any incidental ruling that would cause a delay in a child-custody dispute.

Dissenting Opinion: (J. Martinez) In 1985, the Texas Legislature enacted the Code Construction Act, which provides that "[w]ords of one gender include the other genders." The Legislature's clear intent was to apply its provisions gender-neutrally. Additionally, the Texas Legislature previously adopted an understanding of gender that is broader than one's anatomy at birth by granting legal recognition as a "man" to a person born anatomically female. Here, a court of law ordered legal recognition to Father's identity as a man. "That he was born female is now altogether secondary." "[Father] asked for equal dignity in the eyes of the law, and both the Constitution and the trial court granted him that right." "The statute does not impose biological sex as the fixed marker of gender identity, nor should it be interpreted to use it as a mechanism for discrimination." Both *Windsor* and *Obergefell* struck down laws discriminating against same-sex couples, in part, because of the harm to the couples' children. "What good is the right to same-sex marriage if it does not include a right to be a parent to your children?" Father was male as a matter of law, and whether he could meet his burden to prove his allegation of paternity—which was still to be adjudicated—was not before the appellate court for review.

TRIAL COURT'S ORDERS VOID BECAUSE ANOTHER COUNTY RETAINED CONTINUING EXCLUSIVE JURISDICTION.

¶16-2-13. ***In re C.G.,*** ___ S.W.3d ___, No. 13-14-00544-CV, 2016 WL 455390 (Tex. App.—Corpus Christi 2016, no pet. h.) (02-04-16).

Facts: Mother and Father were divorced in County 1 (Sherman) and were appointed JMCs of their Child. Mother was granted the exclusive right to designate the Child's primary residence. Mother subsequently moved from County 1 to County 2 (Moore). Subsequently, in County 1, Father filed a motion to modify in with a motion to transfer the SAPCR to County 2, where the Child had lived for the preceding six months. After Father filed his motion to transfer, Mother and the Child moved to County 3 (Randall) and Father moved to County 4 (Ellis). The County 1 trial court granted Father's motion to transfer and transferred the case to County 2.

Subsequently, Mother and the Child moved to County 5 (Nueces), but 1 hour after arriving, Child was put on a plane for visitation with Father in County 4. During this period of possession in County 4, the Child made an outcry and Father sought and obtained a protective order in County 4. After the Child had been in County 3 for more than six months, Father filed in County 2 a second motion to transfer the case to either of Counties 3 or 4 (Randall or Ellis). However, after a hearing, the County 2 trial court transferred the case to County 5, where Mother had relocated even though the Child had only been in County 5 for 1 hour. Nevertheless, a bench trial was held in County 5. After the County 5 trial court entered a final order, Father asserted that County 5 never acquired subject-matter jurisdiction over the case because County 2 lacked the authority to transfer it continuing, exclusive jurisdiction to any other court. The County 5 trial court agreed, vacated its prior orders, and ordered that the record be forwarded to County 2. Mother appealed.

Holding: Affirmed

Opinion: The continuing, exclusive jurisdiction statutory scheme is "truly jurisdictional," meaning when a court has continuing, exclusive jurisdiction, any order or judgment issued by another court pertaining to the same matter is void. Transfers from courts of continuing, exclusive jurisdiction are governed by Tex. Fam Code §§ 155.201–155.207. While a transfer under Tex. Fam. Code § 155.201(b) [on filing of a divorce…] may be filed at any time, a transfer based on the child's 6-month residency must be "timely" filed. Tex. Fam. Code § 155.204 provides that a timely filed motion is filed at the time the initial pleadings are filed.

Here, Father filed his second motion to transfer in County 2 almost four months after filing his initial pleadings. Thus, his motion was untimely, and the County 2 trial court lacked authority to transfer the cause pursuant to that motion. Additionally, any orders by the County 5 trial court on the same matter were void.

SAPCR
CONSERVATORSHIP

MOTHER ENTITLED TO NEW TRIAL IN CUSTODY PROCEEDING WHEN FATHER WAS ARRESTED AND SUSPECTED OF DEALING DRUGS A WEEK AFTER AN ORDER AWARDED HIM PRIMARY CUSTODY OF THE CHILDREN.

¶16-2-14. ***In re Calzadias,*** ___ S.W.3d ___, No. 07-16-00002-CV, 2016 WL 383300 (Tex. App.—Amarillo 2016, orig. proceeding) (02-01-16).

Facts: About a week after the trial court entered a custody order granting Father primary custody of the parents' three Children, Father was arrested during a traffic stop for driving with a suspended license, failure to display a vehicle inspection sticker, and money laundering. Although no drugs were found during a search of Father's vehicle, a police canine alerted on the driver's side door and on a large amount of cash held together by a rubber band. Additionally, Father was found in possession of four cell phones and two hotel room keys, and he had previously been arrested for drug-related activity. Although the district attorney opted not to prosecute, Mother filed a motion for new trial in the custody case. After hearing testimony from the involved officer, Father, and Father's brother, the trial court granted Mother a new trial and entered temporary orders awarding Mother primary custody of the Children. Father filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: A new trial in a custody suit is appropriate when new evidence strongly shows that the original order would have a seriously adverse effect on the interest and welfare of the children, and presentation of that evidence at another trial would probably change the result. Due to the relaxed new-trial standard in a child-custody matter, the evidence need not have existed during the previous trial. The ordinary rules restricting the granting of a new trial for newly discovered evidence should not be applied rigidly in child custody proceedings. In such cases the children are the primary parties in interest, and they are rarely represented by counsel. Counsel for the contending parents cannot always be relied upon to protect the interests of the children because the parents often attempt to promote their own interests and vindicate their own asserted rights rather than to protect the children's interests. Consequently, the court's duty to protect the children's interests should not be limited by technical rules. Pertinent facts which may directly affect the interests of the children should be heard and considered by the trial court regardless of the lack of diligence of the parties in their presentation of information to the court.

Here, the trial court determined that while the evidence against Father was likely insufficient to support a criminal conviction, it was more likely than not that Father was dealing drugs and that such activity would be harmful to the Children.

Editor's comment: *If new evidence arises after the trial (or after the entry of the order), make sure and not only file a motion for new trial within the adequate time period, but also do not forget to ask the court to re-open the evidence. It is necessary to ask the court to re-open the evidence, and to grant your motion for new trial, if you want the court to re-open the case and hear newly discovered evidence. J.H.J.*

Editor's comment: *Let the flood gates open! The court's duty to protect the children's interests should not be limited by technical rules. What???!!! Rules… we have them for a reason! M.M.O.*

SAPCR
GRANDPARENT POSSESSION AND ACCESS

GRANDMOTHER'S CONCLUSORY STATEMENT INSUFFICIENT TO SUPPORT FINDING THAT THE CHILDREN'S EMOTIONAL DEVELOPMENT WOULD BE SIGNIFICANTLY IMPAIRED IF THEY NEVER GOT TO SEE HER.

¶16-2-15. *In re G.L.A.*, No. 11-14-00351-CV, 2015 WL 9311644 (Tex. App.—Eastland 2015, no pet. h.) (mem. op.) (12-10-15).

Facts: Father died, and his mother sought grandparent access to the two Children. The trial court signed a temporary order giving Grandmother possession at times mutually agreed upon between her and Mother. During the proceedings, Mother and the Children moved to Louisiana, and Grandmother only had access to the Children via telephone. After a final hearing, the trial court granted Grandmother possession one weekend per month and one week during the summer. Mother appealed, arguing that Grandmother failed to show that denial of possession would significantly impair the Children's emotional well-being.

Holding: Reversed and Remanded

Opinion: Evidence is insufficient if it essentially consists of an affirmative response from an interested witness to a question that tracked the language of the statute. Here, the only evidence to support a significant impairment finding was the Grandmother's affirmative response to her attorney's question of whether she thought "it would significantly impair [her] grandchildren's emotional development if [she] never got to see [her] grandchildren?"

SAPCR
CHILD SUPPORT

ORDER FOR RETROACTIVE CHILD SUPPORT PRESUMPTIVELY REASONABLE BECAUSE IT DID NOT EXCEED AMOUNT FATHER COULD HAVE BEEN ORDERED TO PAY OVER PREVIOUS FOUR YEARS.

¶16-2-16. *Young v. Terral*, No. 01-14-00591-CV, 2015 WL 8942625 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (12-08-15).

Facts: Mother and Father were not married when the Child was born. Father contributed to the family's living expenses while employed, but he was unemployed for about 6 months and contributed nothing during that time. About a year after the Child was born, Father moved out, and the couple agreed that instead of child support, Father would pay Mother's car insurance and the Child's healthcare expenses. A few years later, Mother asked Father to pay child support instead. Father stopped paying the car insurance without notice before he started paying child support, which caused Mother to almost lose her car. She responded by preventing Father from seeing the Child. Father filed a suit to establish paternity and obtain a possession order. Mother filed a counterpetition for conservatorship, a restraining order, retroactive child support, and attorney's fees. Agreed temporary orders set child support for Father. At trial, Father admitted that he had been promoted and was making significantly more money. Mother testified that she

had hired her attorney at a reasonable rate, and at the end of trial, Mother's attorney asked for her attorney's fees. The trial court entered a conservatorship order, ordered Father to pay child support and retroactive child support, and awarded Mother her attorney's fees. Father appealed, arguing the trial court erred in calculating his retroactive child support because the trial court failed to consider the amounts that were being withheld from his income under the temporary orders. Father also disputed the award of Mother's attorney's fees.

Holding: Reversed and Remanded in Part; Affirmed as Modified in Part

Opinion: An order for retroactive child support is presumptively reasonable if it is in the child's best interest and if it does not exceed the total amount of support that would have been due for the four years preceding the date of the petition. Here, regardless of the temporary orders, the order for retroactive support did not exceed the difference between the amount Father could have been ordered to pay and the amount he actually paid.

The only evidence regarding Mother's attorney's fees was the total dollar amount and that her hourly rate was reasonable. While the invoices were disclosed in discovery, they were not submitted to the trial court. The trial court abused its discretion in determining the amount of the award for fees. However, because there was "some evidence" of fees, the appellate court remanded the case for further proceedings on that issue.

ADULT CHILD'S COMPETENCY TO TESTIFY DID NOT CONTROVERT TRIAL COURT'S DISABILITY FINDING OBLIGATING FATHER TO PAY CHILD SUPPORT INDEFINITELY.

¶16-2-17. ***Thompson v. Smith,*** ___ S.W.3d ___, No. 01-15-00010-CV, 2015 WL 9242216 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (12-17-15).

Facts: Mother and Father divorced when the Child was 7-years old. The Child was born with a congenital defect that caused a malformation of her jaw and tongue, and she suffered from brain damage that affected her motor skills. Additionally, when the Child was 5-years old, she was injured and left intellectually disabled. Mother had primary custody of the Child, and Father paid child support. Father had little contact with the Child after the divorce. When the Child was almost 30-years old, Mother filed a petition seeking support for the adult disabled Child. At trial, multiple witnesses testified that the Child could not be left unsupervised and had harmed herself on purpose (cutting and suicide attempts) and on accident (fires while attempting to cook). The trial court granted Mother's petition and ordered Father to provide indefinite support for the Child. Father appealed, arguing that the evidence did not support findings that the Child was disabled because, in part, the Child was competent to testify. Additionally, Father argued that the evidence did not support the statutory factors for determining the amount of support because Mother allegedly did not disclose all the financial resources available to her. Father pointed to Mother's testimony that her current husband had supported the Child until the age of 18 and thereafter refused to do so.

Holding: Affirmed

Opinion: The standard for competency to testify does not correspond to the factors used to determine whether an adult child is disabled under the family code.

Mother's husband had no legal obligation to support the Child. Mother provided an estimate of her current husband's net monthly income, giving the trial court sufficient evidence to calculate Mother's half of the community property.

Editor's comment: *This case is interesting, as it shows that a child, or an adult child, can be competent to testify, but still be considered "disabled" for purposes of support under the Texas Family Code. J.H.J.*

MOTHER SHOWED A MATERIAL AND SUBSTANTIAL CHANGE IN HER INCOME BECAUSE AT THE TIME SHE AGREED TO NO CHILD SUPPORT, MOTHER HAD NOT ANTICIPATED STEADILY DECREASING COMMISSION CHECKS.

¶16-2-18. ***In re Moore,*** ___ S.W.3d ___, No. 05-14-01173-CV, 2016 WL 80205 (Tex. App.—Dallas 2016, orig. proceeding) (01-07-16).

Facts: When they divorced, Mother and Father agreed that neither would be required to pay child support for their only child. Both parents earned a salary plus regular fluctuating commissions. In the years following the divorce, Mother's commission began steadily decreasing due to factors outside of her control. Mother filed a SAPCR seeking child support from Father. She entered evidence showing her decreased income and Father's increased income since the divorce. Additionally, Mother showed that she had to dip into the Child's college savings in order to pay household expenses. The trial court ordered Father to pay child support, retroactive child support, and attorney's fees. Father appealed. Mother then filed a motion for temporary orders pending appeal seeking conditional appellate attorney's fees. The trial court granted her motion, and Father filed a petition for writ of mandamus challenging that order.

Holding: Affirmed; Writ of Mandamus Denied

Opinion: The evidence showed that Mother did not anticipate a steadily decreasing income at the time she agreed to no child support. Based on her decreased income, Father's increased income, and Mother's need to use her savings to cover expenses, the trial court did not abuse its discretion in finding a material and substantial change in circumstances.

The order for conditional appellate attorney's fees would not be enforceable until the completion of the appeal. Thus, because Father's petition for writ of mandamus could adequately be addressed simultaneously with his appeal, he was not entitled to mandamus relief.

Mother's attorney testified about his experience and familiarity with family law cases, including appeals, the work to be done, and the reasonable rates associated with those cases. Mother's attorney entered an exhibit, without objection from Father, containing an opinion of the value of services required if Father appealed. The trial court was familiar with the lawyer's hourly rate and was familiar with reasonable rates in family law cases.

Editor's comment: *In deciding that the attorney's fee order was not subject to review by mandamus, the Dallas Court of Appeals acknowledged that Houston's First District, as well as the Fort Worth and San Antonio Courts of Appeals, had ruled otherwise. J.V.*

SAPCR
ADOPTION

TRIAL COURT ERRED IN DETERMINING GRANDPARENT ADOPTION WAS NOT IN CHILD'S BEST INTEREST.

¶16-2-19. *In re C.J.T.*, No. 04-14-00621-CV, 2016 WL 413262 (Tex. App.—San Antonio 2016, no pet. h.) (mem. op.) (02-03-16).

Facts: When the five-year-old Child's parents died, he went to live with his Maternal Grandparents. The Maternal Grandmother was appointed as the Child's permanent guardian. About 4 years later, the Maternal Grandparents filed a petition to adopt the Child. The Paternal Grandparents intervened and contested the adoption. The Paternal Grandparents stated that they did not object to the adoption but did not want the Child's name changed or to be denied access to the Child. A social worker, who had conducted two social studies, testified that he recommended adoption so long as the Child retained his surname and so long as the Paternal Grandparents had access to the Child. The Maternal Grandparents encouraged the Child to see his Paternal Grandparents, but the Child did not always want to see them. The Maternal Grandparents had no criminal history, but the Paternal Grandmother had been arrested eight times, and there was some evidence that Paternal Grandfather had a "rap sheet" with the FBI.

The trial court found that adoption was not in the Child's best interest and denied the Maternal Grandparents' petition to adopt. The Maternal Grandparents appealed.

Holding: Reversed and Remanded

Opinion: Tex. Fam. Code § 153.434 provides that a biological grandparent may not request possession of or access to a grandchild if the child's biological parents have died and the child is a subject of a pending suit for adoption. The plain language of this statute provides that the Paternal Grandparents could not seek possession or access to the Child during the Maternal Grandparents' suit for adoption. However, the statute did not prevent the trial court from considering whether an adoption would result in the Child's loss of access to family and whether that would be in the Child's best interest.

The Child was safe and comfortable with the Maternal Grandparents. The Maternal Grandparents wanted to adopt the Child, and the Child wanted to be adopted by them. The Maternal Grandparents allowed the Child's paternal relatives to spend time with the Child. There were only two instances when the Maternal Grandparents prevented the Paternal Grandparents from seeing the Child: once when the Child was out of town; and once when the Paternal Grandfather confronted Maternal Grandmother at her home and called the police on her. The Paternal Grandparents had little contact with the Child over the years until seeking access during the adoption proceeding. The Child did not want to spend time with his Paternal Grandmother, although it was unclear why not.

Considering and weighing all of the evidence, the appellate court determined that finding that adoption by the Maternal Grandparents was so against the great weight and preponderance of the evidence to be clearly wrong and unjust.

SAPCR
MODIFICATION

TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONDITIONED FATHER'S FUTURE FILINGS REGARDING THE CHILDREN ON AN ACCOMPANYING SWORN AFFIDAVIT STATING GOOD CAUSE AND PREPAYMENT OF ATTORNEY'S FEES.

¶16-2-20. *Byars v. Evans*, No. 07-14-00064-CV, 2016 WL 105671 (Tex. App.—Amarillo 2016, no pet. h.) (mem. op.) (01-08-16).

Facts: Mother and Father were designated joint managing conservators of their three Children in a final decree based upon their MSA. Mother was given the exclusive right to designate the primary residence of the Children with a geographical restriction. Less than a year later, Father filed a petition to modify. Mother filed a counter-petition, asking for the exclusive right to manage the Children's education, health, and welfare, and to remove the geographical restriction on the Children's residence. Mother asked for a protective order against Father and asked that Father be denied access to the Children because he had terrorized her and her family. After a final hearing, the trial court signed an order maintaining the parents as joint managing conservators. The trial court granted Mother's request to move to Florida on the condition that Father failed to visit the Children for three months for any reason other than deployment, hospitalization, or physical inability. The court also awarded Mother attorney's fees and authorized a wage withholding order to satisfy the award. Twenty days later, Mother filed a motion to modify, correct, or reform the judgment. Father then filed a motion to recuse the judge and a motion for new trial. Mother argued that Father's motion to recuse was untimely. After a post-judgment hearing, the trial court denied Father's motions, granted Mother's motion, and entered a new order unconditionally removing the geographical restriction and conditioned any future filings by Father regarding the Children on payment of no less than $10,000 attorney's fees and the requirement to file a supporting affidavit stating good cause for the motion. Father appealed, arguing that the trial court erred in signing an order substantively modifying the prior order without granting him a new trial. Father additionally asserted that the trial court erred in denying his motion to recuse, in placing a condition on future filings, and in authorizing an income withholding order to collect the attorney's fees award.

Holding: Affirmed as Modified

Opinion: A trial court has plenary power to reverse, modify, or vacate its judgment at any time before it becomes final. A timely filed post-judgment motion extends the trial court's plenary power to reconsider its ruling until thirty days after the post-judgment motion is overruled. Mother and Father each filed post-judgment motions, and the trial court retained its plenary power when it entered a new order granting Mother's motion.

To be timely, a motion to recuse must be filed more than ten days prior to the date set for hearing *and* as soon as practicable after the movant knows of the ground stated in the motion. Father was aware of his alleged grounds for recusal well before the actual trial on the merits, so the fact that he filed more than ten days before the hearing on the post-judgment motions was irrelevant.

The trial court's conditions on further motions by Father regarding the Children were not an absolute denial of access to the courts. His access was reasonably conditioned—based on his prior behavior—upon a showing of good cause through a sworn affidavit. Additionally, the condition that he pay attorney's fees was akin to conditions imposed upon a vexatious litigant through the use of a pre-filing order.

Because the awarded attorney's fees were not incurred in a suit to enforce child support, the award was only enforceable as a debt and could not be collected by way of an income withholding order.

FATHER ESTABLISHED MATERIAL AND SUBSTANTIAL CHANGE SUFFICIENT TO SUPPORT MODIFICATION OF CONSERVATORSHIP RIGHTS.

¶16-2-21. ***Trammell v. Trammell,*** ___ S.W.3d ___, No. 01-14-00629-CV, 2016 WL 398597 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.) (02-02-16).

Facts: In their divorce decree, Mother and Father agreed that Father would pay Mother $6000 per month in child support, $8000 per month in spousal support, and 100% of the Children's expenses. Mother was granted the exclusive right to make decisions about the Children's education and the independent right to consent to medical treatment. After the divorce, Father's income decreased significantly—from around $800,000 to around $200,000. Struggling to maintain the financial obligations of the divorce decree, Father took out a line of credit to cover expenses. After exhausting the line of credit and maxing out his credit cards, Father filed a motion to modify the terms of the divorce decree. In addition to seeking to reduce his child support obligation, Father wanted to have input in decisions relating to the Children's education and medical treatments. Mother testified that she understood that Father was strained financially, but she believed that it was in the Children's best interest to "get their money." The trial court reduced Father's child support obligation, required Mother to contribute to the Children's education, and modified the conservatorship rights to have the parents share in decision making regarding the Children's education and medical treatment. Mother appealed, and, in addition to complaining of the child support reduction, Mother argued that the evidence was insufficient to support the modification of the conservatorship rights.

Holding: Affirmed

Opinion: During the pendency of the divorce, Father only had access to the Children for an hour or so on the weekends. At the time of the modification proceeding, Father saw the children every other weekend and every Thursday, and attended the Children's weekend activities when they were in Mother's possession. Father testified that his relationship with the Children was the best it had ever been, and Father had demonstrated a desire and ability to play a more significant role in the decisions affecting the Children's lives. Father explained that because the Children were transitioning into more specialized educational programs, he felt it was important to him to be involved in educational decisions. Additionally, although he had no criticism of any of Mother's decisions, he believed it would be in the Children's best interest if both parents had the incentive to consider the fiscal realities of decisions regarding the Children's educational or other needs; especially given that Father's income had decreased substantially, and he was in danger of declaring bankruptcy.

Editor's comment: *It makes sense that when the money dries up, both parents should have an incentive to keep costs down rather than one choosing the schools and the other having to pay for them. J.V.*

SAPCR
CHILD SUPPORT ENFORCEMENT

VALID CHARGING ORDER DIRECTED FATHER'S LLC TO SATISFY OAG CHILD SUPPORT LIENS ONLY UPON DISTRIBUTION OF FATHER'S INTEREST IN LAWSUIT IF, AS, AND WHEN THAT DISTRIBUTION OCCURRED.

¶16-2-22. ***Spates v. OAG,*** ___ S.W.3d ___, No. 14-14-00741-CV, 2016 WL 354417 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (01-28-16).

Facts: Father had three Children with three different mothers. Each had secured a judgment through the OAG for unsatisfied child support from Father. Father was the owner and sole member of an LLC, which sued another company for breach of contract and tortious interference with a contract. Upon learning of the suit, the OAG made an appearance and filed three child support liens against Father's interest in the proceeds of the suit. After the LLC and defendant company reached a settlement agreement, the OAG filed a request for a charging order, which the trial court granted. The charging order directed the clerk to disburse the settlement funds, which were in the court's registry, to the LLC and further ordered the LLC, upon distribution of the funds due to Father, to pay the OAG in satisfaction for the child support liens. Father and the LLC appealed.

Holding: Dismissed in Part; Affirmed in Part

Opinion: Because Father was not a party to the underlying suit, he had no standing to appeal. However, the appellate court had jurisdiction to review the LLC's interlocutory appeal of the charging order because it resolved property rights and imposed obligations on the LLC, an interested third party.

When Father's child support obligations were reduced to judgment, the OAG became a judgment creditor entitled to seek satisfaction of the debt as prescribed in the Business Organizations Code, which precludes the OAG from (1) foreclosing on the lien created by the charging order; (2) compelling the LLC to make a distribution to Father; (3) taking possession of Father's membership interest; or (4) exercising any other legal or equitable remedies with respect to company property. The charging order complied with the requirements of the Business Organizations Code, and the OAG was only entitled to collect on the debt if and when the LLC made a distribution to Father.

SAPCR
ENFORCEMENT OF POSSESSION

AWARD OF ADDITIONAL MAKE-UP POSSESSION COULD NOT EXCEED DURATION OF DENIED POSSESSION.

ATTORNEY'S FEES AWARD IN NON-ENFORCEMENT MODIFICATION SUIT COULD ONLY BE ENFORCEABLE AS A DEBT—NOT AS CHILD SUPPORT.

¶16-2-23. ***In re Braden,*** ___ S.W.3d ___, No. 14-15-00698-CV, 2015 WL 7739850 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) (12-01-15).

Facts: Mother and Father had one Child, of whom they were joint managing conservators. Father lived in New York, and Mother and the Child lived in Texas. Father filed a motion for enforcement of possession and a motion to modify. Father asked the court to hold Mother in contempt and to award him additional periods of possession to compensate for a four-day visit to New York for which Mother failed to surrender the Child. After a hearing, the trial court found Mother in contempt, awarded Father 62 days of make-up visitation, and awarded Father a judgment for attorney's fees. Mother filed a petition for writ of mandamus complaining that the trial court abused its discretion by providing that the attorney's fee award was enforceable by contempt and by awarding Father 62 days of make-up possession.

Holding: Writ of Mandamus Conditionally Granted

Opinion: A trial court may not characterize attorney's fees awarded in a non-enforcement modification suit as additional child support. Although Father's attorney testified about attorney's fees, he did not segregate fees incurred for work performed in connection with the enforcement proceeding from fees incurred for work performed in connection with the modification proceeding. Thus, the trial court erred in characterizing the entire award of attorney's fees as "in the nature of child support."

A trial court has the discretion to award additional periods of possession to compensate for the denial of court-ordered possession or access. However, the additional periods must be of the same type and duration of the possession or access that was denied. Here, the trial court abused its discretion in awarding 62 days of additional possession to compensate Father for the 4 days denied him.

Editor's comment: *This case is another good example of why it is important to segregate attorney's fees when a modification and an enforcement are involved. One good way to segregate the fees is to simply have two different billing accounts—one for enforcement, and one for the modification. Then, when it is time for the enforcement hearing, it is easy to pull out the bills related to the enforcement hearing, ensuring yourself that you will not run the risk of failing to segregate them from another part of the case. J.H.J.*

Editor's comment: *Award of makeup time in a possession enforcement cannot exceed the missed time. I think this is the first case I've seen setting a standard for possession enforcement. M.M.O.*

SAPCR
TERMINATION OF PARENTAL RIGHTS

COURT-APPOINTED COUNSEL HAD NO DUTY TO PURSUE FRIVOLOUS APPEAL OF TERMINATION OF PARENTAL RIGHTS.

¶16-2-24. ***In re A.F.,*** ___ S.W.3d ___, No. 08-15-00182-CV, 2015 WL 8949748 (Tex. App.—El Paso 2015, no pet. h.) (12-15-15).

Facts: After Father's parental rights were terminated, counsel was appointed to represent Father in his appeal. However, the court-appointed counsel concluded that the appeal was frivolous and without merit. Counsel notified Father, provided Father with a copy of an *Anders* brief and a motion to withdraw as counsel, and advised Father of his right to review the record and to file a *pro se* brief. Father filed a *pro se* brief appealing the termination of his parental rights.

Holding: Affirmed

Opinion: The procedures set forth in *Anders v. California*, 386 U.S. 738 (1967) apply to an appeal from a case involving the termination of parental rights when court-appointed counsel has determined that the appeal is frivolous. After reviewing the record, the court-appointed counsel's brief, and Father's *pro se* brief, the appellate court agreed that the appeal was frivolous and without merit.

MOTHER PRODUCED NO EVIDENCE THAT SHE COULD SATISFY HER DUTY TO PROVIDE FOR THE CHILD DURING MOTHER'S INCARCERATION.

¶16-2-25. ***In re H.B.C.,*** ___ S.W.3d ___, No. 06-15-00092-CV, 2016 WL 71942 (Tex. App.—Texarkana 2016, no pet. h.) (01-06-16).

Facts: Mother and Father lived with Paternal Grandmother when the Child was born. When both parents were jailed for drug-related offenses, the Child continued to live with Paternal Grandmother. After one year in a drug treatment facility, Mother was placed on probation. During that time, Mother lived in an apartment near Paternal Grandmother's home and saw the Child most days but continued using drugs and alcohol. Mother was again arrested, and due to her parole violation, she was sentenced to four years' imprisonment for the prior crime. Paternal Grandmother filed a suit to terminate both parents' parental rights and adopt the Child. The trial court granted Paternal Grandmother's requested relief, and Mother appealed.

Holding: Affirmed

Opinion: When a party seeks termination on the ground that the parent will be imprisoned for not less than two years, the parent must produce some evidence as to how she would provide or arrange to provide care for the child during her incarceration. If the parent satisfies that burden, the party seeking termination must then show that the parent's provision or arrangement would not satisfy the parent's duty to the child.

Here, there was uncontested testimony that Mother was unable to financially care for the Child. Mother failed to pay ordered child support even before she was incarcerated and had very little involvement in the Child's life.

Additionally, in considering the *Holley* factors, the evidence supported a finding that termination was in the Child's best interest.

Mother waived her complaint that the trial court abused its discretion in excluding evidence regarding her possibility of parole because Mother failed to make any offer of proof on that point.

MOTHER'S MENTAL DEFICIENCY PREVENTED HER FROM PROVIDING FOR HER CHILDREN NOW AND IN THE FUTURE.

¶16-2-26. ***In re B.J.C.,*** ___ S.W.3d ___, No. 14-15-00904-CV, 2016 WL 444612 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (02-04-16).

Facts: Mother allowed the children to play outside naked, where they urinated and defecated in the yard. TDFPS was initially contacted because Mother's neighbors complained of the smell. The apartment was dirty, smelled bad, and was infested with roaches. TDFPS was named managing conservator of the Children, but Mother's rights were not terminated. TDFPS attempted to find fictive kin placements for the Children, but Mother's belligerent behavior made the potential caregivers choose not to continue with the placement. A few years later, Mother filed a petition to modify asking to be named sole managing conservator. She signed a service plan that included a requirement that she complete a psychiatric evaluation through MHMRA and follow all recommendations. Two years later, TDFPS filed a motion to terminate Mother's parental rights. The trial court heard testimony from a doctor hired to assess Mother's parenting ability, a therapist hired to counsel Mother and the Children, and two TDFPS caseworkers. The trial court terminated Mother's parental rights pursuant to Tex. Fam. Code 106.003(a). Mother appealed.

Holding: Affirmed

Opinion: Tex. Fam. Code § 106.003(a) allows for termination of the parent-child relationship if:

> (1) the parent has a mental or emotional illness or mental deficiency that renders the parent unable to provide for the physical, emotional, and mental needs of the child;
> (2) the illness or deficiency, in all reasonable probability, proved by clear and convincing evidence, will continue to render the parent unable to provide for the child's needs until the 18th birthday of the child;
> (3) the department has been the temporary or sole managing conservator of the child of the parent for at least six months preceding the date of the hearing on the termination[;]
> (4) the department has made reasonable efforts to return the child to the parent; and
> (5) the termination is in the best interest of the child.

Here, subsections 3 and 4 were undisputedly established. Additionally, the appellate court determined that the evidence supported a finding that termination was in the best interest of the Children.

The record reflected the Children did not have severe problems and were not in need of special care. Nevertheless, Mother was unable to care for herself or the Children, provide a safe sanitary home for the Children, or keep the Children clothed and fed. The doctor who tested Mother's parenting ability testified that Mother's judgment and abstract reasoning appeared to be extremely limited, and her mental deficiency was permanent and incapable of treatment. Mother was incapable of parenting the Children without assistance. The caseworkers spent a considerable amount of time attempting to find a suitable adult to assist Mother with the Children, but Mother's behavior caused each of the suitable adults to refuse to help.

FATHER'S APPEAL OF AGGRAVATED CIRCUMSTANCES FINDING IN TEMPORARY ORDERS MOOT AFTER RENDITION OF FINAL ORDER.

¶16-2-27. ***In re A.K.,*** ___ S.W.3d ___, No. 04-15-00589-CV, 2016 WL 625252 (Tex. App.—San Antonio 2016, no pet. h.) (02-17-16).

Facts: When the Child was taken to the hospital for injuries, the hospital contacted TDFPS based on suspicions that the Child had been abused. After an investigation, Father and his girlfriend were arrested for injury to a child. In the subsequent termination proceedings, the trial court made a finding of "aggravated circumstances," which permitted the court to waive the requirements of a service plan and reasonable efforts to return the child to the parent and to accelerate the date of the final hearing. After a final trial, the trial court terminated Father's parental rights on endangerment grounds. Father appealed, challenging the "aggravated circumstances" finding in the trial court's temporary orders.

Holding: Affirmed

Opinion: A trial court may waive the requirements of a service plan and reasonable reunification efforts and may accelerate the trial schedule if it finds that a parent has subjected the child to "aggravated circumstances," which includes a criminal offense of injury to a child. Father was arrested for injury to a child and the trial court found in temporary orders that aggravated circumstances existed. Yet, the only "aggravated circumstances" finding was in the temporary orders. Father's appeal of the temporary orders was moot after the rendition of a final order.

MISCELLANOUS

PROCESS SERVER'S AFFIDAVIT SUFFICIENT TO SUPPORT ALTERNATIVE SERVICE BECAUSE FATHER'S CAR WAS SEEN AT ADDRESS WHERE SERVICE WAS ATTEMPTED AND WOMAN ANSWERED DOOR STATING FATHER WAS NOT HOME.

¶16-2-28. ***In re C.L.W.,*** ___ S.W.3d ___, No. 04-14-00556-CV, 2015 WL 8388185 (Tex. App.—San Antonio 2015, no pet. h.) (12-09-15).

Facts: Mother and Father had three Children when they divorced. A year later, Mother filed a SAPCR seeking to deny Father access to the Children because she claimed that Father's new girlfriend was physically and verbally abusive to the Children. Mother attempted service on Father through a process server. After three failed attempts, Mother filed a motion for alternative service and attached the process server's affidavit, which stated that service had been attempted three times at his home address—which was a different address than what was listed for Father in the final divorce decree. The trial court granted the motion for alternative service, and service was completed by attaching the petition to the door of Father's home. Father defaulted. Subsequently, Father filed a notice of restricted appeal, alleging error was apparent on the face of the record. Father argued the trial court erred in granting the motion for alternative service because the supporting affidavit was insufficient.

Holding: Affirmed in Part; Reversed and Remanded in Part

Majority Opinion: (J. Chapa, J. Martinez) The process server's affidavit noted that Father's vehicle was twice seen at the address where service was attempted. Additionally, on the second attempt, a woman answered the door, stated that Father was not home, and indicated that she would give Father a message.

The affidavit was sufficient to assure the trial court that alternative service would be reasonably effective to provide notice.

Dissenting Opinion: (J. Alvarez) The process server's affidavit included no evidence that the attempted service address was Father's residence or a place where he could probably be found. Although the process service indicated that she saw Father's vehicle there, she did not provide any information to support how she knew the vehicle to be Father's. Additionally, the default orders were later served on Father by mail to a different address—the address listed as Father's in the final divorce decree.

AWARD OF ATTORNEY'S FEES IN FAMILY LAW PROCEEDING NOT DEPENDENT ON WHICH PARTY PREVAILED.

¶16-2-29. ***In re R.E.S.,*** ___ S.W.3d ___, No. 04-14-00514-CV, 2015 WL 8392673 (Tex. App.—San Antonio 2015, no pet. h.) (12-09-15).

Facts: Mother filed a SAPCR asking the trial court to modify its prior order and appoint her the conservator with the exclusive right to designate their two Children's primary residence. Father filed a counter-petition asking only that the court maintain his exclusive right to designate the Children's primary residence. After a hearing, the trial court granted Mother the exclusive right to designate the Daughter's primary residence but provided that Father would maintain the exclusive right to designate the Son's primary residence. Additionally, the trial court granted Father's request for attorney's fees but denied Mother's request for the same. Mother appealed, arguing that the trial court abused its discretion in awarding Father attorney's fees because he was not the prevailing party.

Holding: Affirmed

Opinion: Tex. Fam. Code § 106.002 does not impose a prevailing-party requirement on an award for attorney's fees. Although success on the merits may be relevant, it is not a compulsory requirement under the statute. While Mother was successful in modifying custody of her daughter, Father was successful in maintaining the status quo of custody of his son, so, as in most family law cases, there was no "prevailing party."

Editor's comment: *How true: "Rarely is either party a clear-cut victor in a suit affecting the parent-child relationship." J.V.*

NO NEED TO FIND "GOOD CAUSE" TO SUPPORT AWARD OF ATTORNEY'S FEE IN DIVORCE PROCEEDING, RATHER AWARD OF ATTORNEY'S FEES MAY BE A PART OF JUST AND RIGHT DIVISION.

¶16-2-30. *Roman v. Roman*, No. 09-14-00020-CV, 2015 WL 8476117 (Tex. App.—Beaumont 2015, no pet. h.) (mem. op.) (12-10-15).

Facts: Husband and Wife divorced after 26 years of marriage. Both parties spoke Spanish and testified through an interpreter. Father earned more than $100,000 a year. Wife had the equivalent of a 2nd grade education and limited job skills. She got a job shortly after filing for divorce that paid $1400 a month. After hearing evidence regarding Wife's minimum reasonable needs, the trial court signed a final decree of divorce that required Husband to pay Wife monthly spousal support for 7 years. Additionally, the trial court granted Wife's request for attorney's fees, though only half the amount she requested. Husband appealed. In addition to disputing the award for spousal maintenance, Husband argued that the court erred in

ordering him to pay attorney's fees when he had not taken any unreasonable action or caused undue delay during trial to support a conclusion that there was "good cause" to award attorney's fees.

Holding: Affirmed

Opinion: "Good cause" is not the standard used to determine if an award of attorney's fees is proper. Rather, in a divorce case, a court may award attorney's fees as part of a just and right division after considering the *Murff* factors. Husband presented no argument explaining why the award resulted in an unjust division.

SAPCR COULD NOT BE DISMISSED FOR WANT OF PROSECUTION WITHOUT NOTICE TO PETITIONER.

¶16-2-31. *Bonifazi v. Birch*, No. 09-14-00136-CV, 2015 WL 8476572 (Tex. App.—Beaumont 2015, no pet. h.) (mem. op.) (12-10-15).

Facts: Mother initiated a modification suit. At a hearing for entry of an enforcement order, Father's counsel appeared, but neither Mother nor her attorney appeared. At that hearing, the court advised that the case was set for entry or DWOP in one week. Mother did not receive notice that her case might be dismissed. Neither Mother nor her counsel appeared at the DWOP hearing and the case was dismissed for want of prosecution. Less than 30 days later, Mother's attorney filed a verified motion to reinstate, swore that he had received no notice of the DWOP, and requested an oral hearing on the motion to reinstate. No hearing was held, and the motion was overruled by operation of law. Mother appealed.

Holding: Reversed and Remanded

Opinion: Upon receiving a timely-filed properly verified motion to reinstate, the trial court shall set a hearing on the motion as soon as practicable and shall notify all parties or the attorneys of record of the date, time, and place of the hearing. Here, Mother filed a timely, properly verified motion to reinstate and properly requested an oral hearing, but the trial court failed to conduct a hearing. Additionally, Mother received no notice of the trial court's intent to dismiss her case before doing so.

FATHER'S ALTERNATIVE REQUESTED RELIEF AT TRIAL DID NOT CONSTITUTE "INVITATION OF THE ERROR" AND DID NOT BAR HIS POSITION ON APPEAL.

¶16-2-32. ***In re S.T.,*** ___ S.W.3d ___, No. 02-15-00203-CV, 2015 WL 9244913 (Tex. App.—Fort Worth 2015, no pet. h.) (12-17-15).

Facts: The Child was removed from Mother's care after it tested posited for cocaine at birth. Subsequently, Father's paternity was established by a DNA test. The Child was placed with foster parents, but TDFPS was interested in placing the Child with her maternal grandmother. Father was in prison when the Child was born, but he was paroled before the custody case went to trial. Father completed almost all of the services required of him and exercised all of his allotted visitation with the Child. TDFPS initially sought to terminate Father's parental rights, but those pleading were dismissed, and the only remaining question was who would be appointed the Child's permanent managing conservator.

In his pleadings, Father asked the trial court to name him permanent managing conservator, or in the alternative, appoint TDFPS managing conservator and Father possessory conservator. During his opening statement, Father asked to be appointed permanent managing conservator, or in the alternative, place the Child with her maternal grandmother. During his testimony, Father stated that he would be okay with the

trial court placing the Child with him or with the Child's grandmother. During closing argument, Father asked the trial court to return the Child to him but understood that TDFPS might reasonably prefer a monitored return with TDFPS being appointed managing conservator and Father appointed possessory conservator. However, Father finally asked the trial court to return the Child to him or place her with her maternal grandmother. Ultimately, the trial court appointed TDFPS the Child's managing conservator, and Father appealed. TDFPS argued that Father waived his appellate claims because the trial court granted relief requested by Father in his alternative request for relief, and Father "invited the error."

Holding: Reversed and Remanded

Opinion: Father's requested relief at trial was equivocal—his alternative requested relief in his pleadings differed from his opening statement, which differed from his testimony, which differed from his closing statement. However, Father consistently asked for the primary relief that he be named the Child's permanent managing conservator, and the trial court did not grant that requested relief. Additionally, nothing in the record suggested that Father's shifting positions were deliberate or an attempt to ambush the court, seed the record with error, cause the error complained of on appeal, or any other misdeed. Therefore, Father's requests for alternative relief were not clear and were not clearly adverse to his position on appeal.

FATHER ENTITLED TO NEW TRIAL BECAUSE RETURN OF SERVICE NOT ON FILE AT LEAST 10 DAYS PRIOR TO DEFAULT ORDER.

¶16-2-33. *Lancaster v. Lancaster*, No. 01-14-00845-CV, 2015 WL 9480098 (Tex. App.—Houston [1st Dist.] 2015, no pet. h.) (mem. op.) (12-29-15).

Facts: Mother and Father were married for 24 years and had 2 Children. Mother filed an application with the DA's office for a protective order against Father. After a hearing, the trial court found that Father was duly and properly served that day and had failed to appear. The trial court rendered a default two-year protective order against Father. A little over three years later, Father filed a petition for bill of review to set aside the default protective order. He alleged that he did not appear because he had been homeless, had no transportation to get to court, and had no money to obtain transportation or counsel. Additionally, Father alleged that the ADA failed to disclose pertinent facts during the temporary orders hearing. Finally, Father alleged that the return of service had not been on file the requisite 10 days before the hearing. The trial court denied Father's petition for bill of review, stating that Father failed to prove that he had a meritorious defense, that he was prevented from making his defense due to fraud, accident, or wrongful act or official mistake, and that his failure to act was unmixed with of his own fault or negligence. Father appealed.

Holding: Reversed and Remanded

Opinion: Although the disputed protective order had expired, the appellate court reviewed the merits of the appeal under the collateral consequences exception (e.g., collateral legal repercussions and social stigma) to the mootness doctrine.

When a bill-of-review plaintiff claims a due process violation, he is relieved from proving the other elements normally required to succeed on a petition for bill of review. Tex. R. Civ. P. 107 requires proof of service be on file with the clerk ten days prior to a default judgment. At the hearing, Mother stated that the return of service was filed on the same day the default protective order was granted. However, the clerk's record showed it was filed 5 days *after* the order. Either way, service of process did not strictly comply with Rule 107, and the default order was void. Father's admission that he was served a few days before the hearing (and had actual notice) was insufficient to invoke the court's jurisdiction to render a default judgment.

The appellate court noted that on remand, no new service would be necessary because Father appeared in the case by appealing the default judgment.

Editor's comment: *The collateral consequences exception to the mootness doctrine "applies when vacating the underlying judgment will not cure the adverse consequences suffered by the party." In this case, those consequences would be entry of information from the Protective Order into Texas' state-wide law enforcement system. See Amir-Sharif v. Hawkins, 246 S.W.3d 267, 270 (Tex. App.—Dallas 2007, pet. dism'd w.o.j.) (cited in Lancaster). J.V.*

INCONSISTENCIES IN PROCESS SERVER'S AFFIDAVIT FAILED TO SUPPORT ORDER FOR SUBSTITUTED SERVICE.

¶16-2-34. *Cancino v. Cancino*, No. 03-14-00115-CV, 2016 WL 234514 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (01-13-16).

Facts: Wife was from Poland, and Husband was from the U.S. They married and lived in Texas, where they had one child. A few years later, they separated, and Wife and the child moved to Poland. Husband filed for divorce and sent a waiver of service to Wife in Poland, but she did not sign it. A few months later, Husband heard that Wife was in Texas. The car Wife was seen driving belonged to a friend known to Husband, so he contacted a process server to attempt service on Wife at the friend's address. Husband filed a motion for substituted service and attached the process server's affidavit stating that he had attempted service three times. The trial court granted the motion, and Wife was served by leaving a copy of citation on the door of the friend's house. Wife later explained that she had stayed two non-consecutive nights at that house during a short trip to Texas. The citation was left on the door the day after Wife returned to Poland. The friend sent the citation to the trial court with a letter explaining Wife had left the country. The friend's wife took a picture of the citation and emailed the picture to Wife.

After the trial court denied Wife's special appearance, Wife did not participate further in the proceedings. Husband obtained a default judgment, and Wife appealed, arguing that she was not properly served with citation.

Holding: Reversed and Remanded

Opinion: The process server's affidavit referred to Wife's friend's house as Wife's residence or place of abode despite Husband's knowledge the Wife lived in Poland. During trial, Husband testified about packages he mailed to Wife in Poland for their child indicating he was fully aware that Wife lived in Poland. The first of the attempted dates listed by the process server was the day before Husband knew Wife was in Texas. The affidavit stated that Husband said he saw Wife at her friend's house, but Husband testified that he did not see Wife at all while she was in Texas. Because the attempted service of process did not strictly comply with the rules governing service of process, the default judgment could not stand. Actual knowledge of the suit does not relieve a plaintiff from strict compliance with rules of service.

FATHER'S FAILURE TO TIMELY OBJECT TO ASSIGNED JUDGE IMPLIEDLY WAIVED PRIOR PRO FORMA OBJECTION IN MOTHER'S PLEADINGS.

¶16-2-35. *In re Carnera*, No. 05-16-00055-CV, 2016 WL 323654 (Tex. App.—Dallas 2016, orig. proceeding) (mem. op.) (01-27-16).

Facts: Mother filed a SAPCR that was assigned to the 254th District Court. The elected judge died before finishing the case and a former judge was assigned to preside over the case. Both sides appeared, an-

nounced ready, and proceeded to trial before the assigned judge. The trial court determined that Father owed Mother about $25k in child support arrears. Father moved to vacate the judgment on the ground that the assigned judge was not permitted to hear the case because Mother had included a pro forma visiting judge objection in her pleadings. The trial court denied Father's motion, and he filed a petition for writ of mandamus.

Holding: Writ of Mandamus Denied

Opinion: An objection to an assigned judge must be timely made. A pro forma blanket objection in a petition is insufficient when no visiting judge has been assigned. Additionally, a party may withdraw a previously filed objection and impliedly does so when it participates in a proceeding without advising the assigned judge that an objection has been filed. The purpose of the statutory requirement of an immediate objection to an assigned judge is to avoid a party's attempt to "sample" the judge, as Father tried to do in this case.

ATTORNEY NOT ENTITLED TO RECOVERY OF FEES BECAUSE NO EVIDENCE OF TYPE OF WORK PERFORMED.

¶16-2-36. *Carney v. Ahmad*, No. 07-15-00252-CV, 2016 WL 368527 (Tex. App.—Amarillo 2016, no pet. h.) (mem. op.) (01-28-16).

Facts: Client hired Attorney to represent him in his divorce. At some point, Attorney withdrew based on Client's failure to pay attorney's fees in full. Attorney intervened in the divorce and served Client with requests for admission, which were never answered. Later, the trial court severed the intervention, and Attorney's suit was tried to the bench. At the final hearing, the trial court permitted Client to withdraw his deemed admissions. After hearing evidence, the trial court denied Attorney's requested relief, and Attorney appealed.

Holding: Affirmed

Opinion: An attorney seeking the recovery of attorney's fees from a client must establish a valid contract, performance by the attorney, breach by the client, and damages. Here, Attorney entered evidence of fees incurred and fees paid but did not provide any details at all of the work performed because of the attorney-client privilege. For a fact finder to determine whether the attorney is due unpaid compensation under the contract, it must have some evidence of the "services rendered."

The only admissions served on Client were served in the divorce proceeding. No discovery was served on Client in the suit for attorney's fees. Any admission made by a party through discovery may be used solely in the pending action and not in any other proceeding.

FATHER NOT ENTITLED TO ORALLYY REQUESTED TRIAL AMENDMENT.

¶16-2-37. *In re J.C.J.*, No. 05-14-01449-CV, 2016 WL 345942 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (01-28-16).

Facts: Mother and Father never married and separated soon after the Child was born. Father initiated a suit to establish his paternity. About a year later, Father was convicted of engaging in organized criminal activity and of making a false statement to obtain property or credit. While Father was incarcerated, the trial court held a final hearing in the SAPCR. The trial court ordered Father to post two bonds: one to offset the costs of recovering the Child if she were abducted by Father to a foreign country; and the second

conditioned on Father's compliance with the possession order. Additionally, because the trial court found a history of family violence, it ordered that Father's periods of visitation be supervised.

When Father was released from prison, he filed a motion to confirm his child support arrearages and to modify seeking unsupervised possession of the Child. Mother filed a counterpetition for enforcement, to modify the prior order to increase the bonds Father was required to post, and to require Father to pay for counseling for the Child.

At the final hearing, Father requested a trial amendment to include a specific request to eliminate the bond requirements. He believed the request was already implicitly included in his request for unsupervised possession but was requesting a trial amendment for clarification. Mother objected that she was not aware Father was seeking to eliminate the bonds. Her counsel stated that Mother would be prejudiced by the amendment because he had not researched or prepared for addressing a bond reduction request, had not looked at the appropriate standard for the trial court to apply in analyzing a bond reduction request, and had never dealt with the issue in a prior case. The trial court denied Father's request for a trial amendment. After the trial court entered a final order, Father appealed, complaining, among other issues, of the trial court's refusal to grant his trial amendment.

Holding: Affirmed

Opinion: A trial amendment must be filed as a written pleading; an oral amendment at trial is insufficient. Although the defect may be waived by a failure to object, here, Mother objected. Additionally, even if Father appropriately presented his requested trial amendment, the trial court did not err in denying his request. His request to remove a bond was a separate issue from whether he should have been allowed unsupervised possession and was a new cause of action. Further, although Father argued in a prior hearing that the bond was excessive, he offered no testimony that would have put Mother on notice that he was seeking to remove the bond entirely. Finally, to address the elimination of the bond requirement, Mother would have had been prepared to offer evidence of conduct by Father relevant to either a potential risk of child abduction or Father's ongoing refusal to comply with the court orders, which Mother's counsel indicated he was not prepared to do. Thus, Father's oral request to amend his pleadings was prejudicial on its face, and the trial court did not abuse its discretion in denying Father's request.

WIFE'S APPEAL MOOT UNDER ACCEPTANCE OF BENEFITS DOCTRINE BECAUSE SHE WAS NOT UNQUESTIONABLY ENTITLED TO RECEIVE THE ASSETS OVER WHICH SHE ASSERTED CONTROL AFTER THE DIVORCE.

¶16-2-38. *In re S.B.H.*, No. 05-14-00585-CV, 2016 WL 462495 (Tex. App.—Dallas 2016, no pet. h.) (mem. op.) (02-05-16).

Facts: Husband was an attorney, and Wife was a doctor. Each created an entity through which they practiced their respective professions. Additionally, they created a real estate business (a partnership with a general partner that was an LLC owned by the parties) that was partially community property and mostly Wife's separate property. Both parties used expert appraisers during trial to value the parties' assets. In the final decree, each party was awarded his or her practice. Wife was awarded 100% of the community interest in the real estate business, and Husband was awarded a money judgment as compensation for his community interest in the real estate business. Additionally, the community estate was awarded a reimbursement claim from Wife's separate estate, for which Husband was granted an equitable lien on the real estate business.

Wife appealed the final decree, arguing that the trial court erred divesting her of her separate property and in miscalculating the reimbursement claim. Wife also asserted that the trial court erred in failing to grant her a divorce on the ground of adultery because Husband admitted to committing adultery. Husband responded, arguing that Wife had accepted the benefits of the judgment which precluded her appeal.

Wife did not dispute that after the divorce, she sold her medical practice in return for the forgiveness of a debt, and she encumbered the real estate business to secure promissory notes for money borrowed from her sisters. However, Wife argued that the acceptance of benefits doctrine did not apply in this case because reversal of the judgment could not possibly affect her right to the benefits she accepted under the judgment. Wife contended that Husband could not be awarded the medical practice because he was not a doctor. Additionally, if the appellate court granted Mother's appeal and reversed the case, Mother would necessarily be entitled to a larger portion of the community. Husband had already been awarded a money judgment to compensate him for his interest in the real estate business, and there were sufficient other assets to compensate him for that interest.

Holding: Dismissed as Moot in part; Affirmed in part

Opinion: Despite the fact that Wife's business was a medical practice, the trial court could have entered orders regarding the operations of the business as long as all matters concerning the practice of medicine were handled by a licensed physician. Additionally, Husband could have been awarded cash assets of the medical practice. Thus, Wife was not unquestionably entitled to receive 100% of the medical practice, yet her sale of the practice precluded the trial court from making any disposition of it on remand.

With respect to the real estate business, because a portion of the business was community property, even if Wife prevailed on her claims regarding the mischaracterization of her separate property, the trial court would not be required to award her the same benefits she accepted under the prior decree.

Under the Texas Family Code, a trial court "may" grant a divorce for insupportability or for adultery. Wife asked for a divorce on both grounds, but Husband only asked for a divorce on the ground of insupportability. While Husband admitted to committing adultery, the evidence supported a finding of insupportability. The trial court was entitled to choose the ground on which to grant the divorce.

Editor's comment: *One of the first warnings when representing an appellant must be not to accept any benefits of the judgment without checking with counsel first. When representing an appellee, pay close attention to whatever benefits the appellant might have accepted. J.V.*

MOTHER FAILED TO PRESERVE LEGAL AND FACTUAL SUFFICIENCY COMPLAINTS AFTER JURY TERMINATED HER PARENTAL RIGHTS.

¶16-2-39. ***In re A.L.,*** ___ S.W.3d ___, No. 06-15-00097-CV, 2016 WL 519715 (Tex. App.—Texarkana 2016, no pet. h.) (02-10-16).

Facts: Following a jury trial, Mother's parental rights to her Child were terminated. Mother appealed, complaining the evidence was legally and factually insufficient to support the jury's finding that termination was in the Child's best interest.

Holding: Affirmed

Opinion: In a jury trial of a parental-rights termination proceeding, a parent must preserve a legal sufficiency challenge through a motion for instructed verdict; a motion JNOV; an objection to the jury question; a motion to disregard the jury's answer to a vital fact question, or a motion for new trial. Further, a motion for new trial is a prerequisite to present an appellate complaint regarding factual insufficiency.

MOTHER WAIVED RIGHT TO MANDAMUS RELIEF THROUGH UNJUSTIFIED DELAY IN SEEKING RELIEF FROM TRIAL COURT OR BY WAY OF MANDAMUS.

¶16-2-40. ***In re Abney,*** ___ S.W.3d ___, No. 07-15-00456-CV, 2016 WL 642129 (Tex. App.—Amarillo 2016, orig. proceeding) (02-17-16).

Facts: Mother and Father never married and had one Child. The parents were appointed joint managing conservators, and Mother was granted the exclusive right to designate the Child's primary residence without geographical restriction. Subsequently, Mother and the Child moved to Florida without providing the required written notice to Father. Father initiated a SAPCR seeking the exclusive right to designate the Child's primary residence. After a hearing, the trial court ordered that the Child's primary residence be in Texas until further orders of the court. About five months later, after Mother had returned to Texas, the trial court held a hearing on Mother's motion to modify the temporary orders. After her motion was denied, Mother filed a petition for writ of mandamus, arguing that the trial court impermissibly changed the person with the exclusive right to designate the Child's primary residence.

Holding: Writ of Mandamus Denied

Opinion: Almost six months passed between the time of the offending order and Mother's petition for writ of mandamus. During that time, Mother made no suggestion to the trial court that its order violated Tex. Fam. Code § 156.006(b).

Editor's comment: *Extraordinary writs are not equitable remedies yet are "largely controlled by equitable principles," one of which is that "equity aids the diligent, not those who sleep on their rights." J.V.*

COURT APPROVED ATTORNEY'S HOURLY RATE WHEN APPOINTING ATTORNEY AS TURNOVER RECEIVER.

¶16-2-41. *Blunck v. Blunck*, No. 03-15-00128-CV, 2016 WL 690669 (Tex. App.—Austin 2016, no pet. h.) (mem. op.) (02-18-16).

Facts: A final decree of divorce granted Wife a judgment for over $200,000. Subsequently, Wife filed a motion for a post-judgment receivership, alleging Husband had not paid the judgment awarded her in the decree. After a hearing, the trial court signed an order appointing a receiver, approving the receiver's fee of $300.00 per hour, and finding that rate to be the customary and usual fee for a turnover receiver. Among other complaints, Husband contested the court-appointed receiver's approved hourly rate. Husband argued the trial court failed to consider that the receiver was an attorney and that the attorney would be performing non-attorney functions in the role of receiver.

Holding: Affirmed

Opinion: The trial court found the rate to be "customary and usual" for a turnover receiver and had previously approved the same receiver at the hourly rate of $300.00 per hour. Further, even though the court already approved the hourly rate, the receiver would still have to submit a request and obtain approval of any request for fees prior to payment.

Editor's comment: *The "nonexempt assets in the divorce that could not be readily attached or levied on by ordinary legal process" included loan proceeds and a note receivable. J.V.*

DEFAULT JUDGMENT REVERSED FOR FAILURE TO STRICTLY COMPLY WITH RULES REGARDING SERVICE.

¶16-2-42. ***In re T.J.T.,*** ___ S.W.3d ___, No. 06-15-00096-CV, 2016 WL 748348 (Tex. App.—Texarkana 2016, no pet. h.) (02-26-16).

Facts: Maternal Great-Grandparents were the Child's managing conservators. They filed suit to terminate Father's parental rights to the Child. Father was personally served in a drug treatment facility, but the citation failed to include language informing Father that he needed to file an answer or that a default judgment could be entered against him for a failure to answer. Subsequently, the trial court held a final hearing and rendered a default judgment against Father, who had neither filed an answer nor appeared. After receiving notice of the default judgment Father appealed.

Holding: Reversed and Remanded

Opinion: A default judgment is improper against a defendant who has not been served in strict compliance with the law, even if he has actual knowledge of the lawsuit. Here, the citation served on Father failed to inform him that an answer was required or that he would risk a default judgment if he failed to answer.

★★★TEXAS SUPREME COURT ★★★

MOTHER ENTITLED TO RELIEF DESPITE INCORRECT DESIGNATION OF PLEADING.

¶16-2-43. ***In re J.Z.P.,*** ___ S.W.3d ___, No. 14-1072, 2016 WL 766654 (Tex. 2016) (02-26-16).

Facts: Mother and Father divorced and were appointed joint managing conservators with Mother having the exclusive right to designate the Children's primary residence. Subsequently, Mother moved, and Father filed a motion to modify, seeking the exclusive right to designate the Children's primary residence and to reduce his child support obligation. After unsuccessful attempts to serve Mother, Father obtained an order for alternative service. The citation was left on the front door of Mother's ole residence. Two days later, Father obtained a default judgment against Mother, granting Father the exclusive right to designate the Children's primary residence, terminating his child support obligation, and ordering Mother to pay child support. Fifty-seven days later, Mother filed a 'Motion to Reopen and to Vacate Order," alleging that neither Mother nor her attorney had received notice of Father's motion or the trial court's order until a few days prior to filing her motion. In a supporting affidavit, Mother averred that Father knew that Mother did not live at the address where service was attempted and that Father knew her current address. Father did not dispute either assertion but claimed that Mother was at fault for failing to notify the trial court of her new address. The trial court denied Mother's motion, and the appellate court dismissed Mother's appeal for want of jurisdiction, both reasoning that Mother's motion did not extend the trial court's plenary jurisdiction because her motion was not captioned a motion under TRCP 306a. Mother petitioned the Texas Supreme Court for relief.

Holding: Reversed and Remanded

Opinion: Courts should acknowledge the substance of the relief sought despite the formal styling of the pleading. Mother plainly requested relief on the ground that she had not been served and had not learned of the trial court's order until a few days before her motion was filed. Justice plainly required the trial court and the court of appeals to treat Mother's motion as extending post-judgment deadlines.