

THE YEAR IN FAMILY LAW 2004-2005: PAST CURRENTS, FUTURE TRENDS

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Issues of family law seemed to dominate the headlines this past year. From same-sex marriage to the rights of third-parties to custody, from relocation, to family autonomy, the newspaper reminded us every day that family law is the unique area of practice that touches more lives in a real and tangible way than any other.

Any attempt to summarize the myriad developments across the fifty-four jurisdictions of the United States, the federal government, as well as Uniform law will necessarily be wanting. Nonetheless, certain developments warrant out attention.

I. Same-Sex Marriage, Civil Unions, Domestic Partnerships

President Bush made “moral values” a centerpiece of his re-election campaign, and the “protection of traditional marriage” brought out the vote.² In the 2004 election and in 2005

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²In one speech, Sen. Bill Frist said Vermont and Massachusetts had ignited a “wild-fire of same-sex marriages in cities and towns across the nation.” *See* “Senate Mulls Same-Sex Marriage” <<http://www.cnn.com/2004/allpolitics/03/03/congress.marriage.ap/index.html>>

election, thirteen states passed state constitutional amendments banning same-sex marriage, bringing to 18 the total number of state that have approved measures defining marriage exclusively as a union between one man and one woman (Alaska, Arkansas, Hawaii, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Utah).³ As of June 9, 2005, measures to limit marriage

In the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003), Justice Kennedy's lead opinion was careful to state that the case did not involve "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578, 123 S.Ct. at 2484. Nevertheless, *Lawrence* has been widely cited in constitutional challenges to same-sex marriage bans. *See generally* Jason Montgomery, *An Examination of Same-Sex Marriage and the Ramifications of Lawrence v. Texas*, 14 Kan. J. Law & Pub. Policy 687 (Spring 2005).

Justice Scalia feared this slippery slope, and complained that the majority decision would open the door to the downfall of all morals legislation, including polygamy, "adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity." 539 U.S. at 590, 123 S.Ct. at 2490.

Virginia did, in fact, rely on *Lawrence v. Texas* to hold that its criminal fornication statute was unconstitutional. *Martin v. Zihlerl*, 269 Va. 35, 607 S.E.2d 367 (2005).

³As you know, on April 14, 2005, Oregon's Supreme Court nullified nearly 3,000 marriage licenses issued to same-sex partners. *Li v. State*, 338 Or. 376, 110 P.3d 91 (2005).

by constitutional amendment were pending in seven states (Minnesota, Wisconsin, Illinois, North Carolina, Delaware, New Jersey, Massachusetts),⁴ measures were approved by the legislature, but must be voted on again in two states (Indiana, Virginia); and measures were approved by the legislature and are awaiting ratification by the voters (South Dakota, Texas, Tennessee, Alabama, South Carolina). Moreover, forty states have mini-“Defense of Marriage Act” statutes were generally upheld from constitutional attack. *E.g.*, *Morrison v. Sadler*, 821 N.E.2d 15, 18-19 (Ind. Ct. App. 2005).

On the other hand, four states have bills pending to legalize same sex marriage or civil unions (California, Maine, New York, Rhode Island), and Connecticut *passed* a law recognizing and codifying civil unions. Lower courts in California, New York, and Washington recently ruled that same-sex couples should be allowed to marry. On June 29, 2005, the California Supreme Court let stand an opinion turning back a challenge to a law creating a domestic partnership registry for same-sex couples. *Knight v. Superior Court*, 128 Cal. App.4th 14, 26 Cal. Rptr.3d 687 (2005), rev. den. (June 29, 2005). And internationally, same-sex marriage is legal in the Netherlands, Belgium, Canada, and Spain (officially recognizing same-sex marriage on June 30, 2005), while registered partnerships which grant most of the same rights as marriage are recognized in Denmark, Norway, Sweden, Iceland, and Finland. Less expansive same-sex partnerships are recognized in Hungary, France, Germany, and Portugal. Note, *Inching Down the Aisle: Differing Paths Towards the Legalization of Same-Sex Marriage in the United States and*

⁴On June 14, 2005, the New Jersey Superior Court, Appellate Division, held that the New Jersey constitution does not recognize same-sex marriage. *Lewis v. Harris*, 2005 WL 1388578 (N.J. Super). App. Div. June 14, 2005).

Europe, 116 Harv. L.Rev. 2004, 2005 (2003).

The federal Defense of Marriage Act faced its first constitutional challenges and survived. *Smelt, et al. v. County of Orange*, 2005 WL 1429918 (C.D. Cal. June 16, 2005); *In re Kandu*, 315 B.R. 123 (Bkrctcy. W.D. Wash. 2004); *Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005).

Where does this leave us, the family law practitioner? Probably litigating whether the full faith and credit clause of the constitution requires recognition of a same-sex marriage or civil union entered into in another state. *E.g., Hennefeld v. Township of Montclair*, 22 N.J. Tax 166 (N.J. Tax Ct. 2005) (civil union in Vermont did not mandate New Jersey's recognition of rights preserved to married persons, such as ability to hold property as tenants by the entirety); *Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005) (lesbian couple married in Massachusetts was not entitled to have marriage recognized in Florida); *In re Kandu*, 315 B.R. 123 (Bkrctcy. W.D. Wash. 2004) (lesbian couple who married in Canada filed joint Chapter 7 petition; case dismissed for improper joint filing of unmarried individuals). *See generally* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Penn. L.Rev. 2143 (June 2005); Linda Silberman, *Same-Sex Marriage: Refining the Conflict of Laws Analysis*, 153 U. Penn. L.Rev. 2195 (June 2005); Tobias Barrington Wolf, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. Penn. L.Rev. 2215 (June 2005).

II. Supreme Court

At the end of the 2004 term, the Court decided *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301 (2004). There, the father of an elementary school student brought an action challenging the constitutionality of the school district's policy requiring

teacher-led recitation of the Pledge of Allegiance. The Supreme Court held that the father did not have standing to pursue the claim on behalf of his daughter because the mother had been granted “sole legal custody as to the rights and responsibilities to make decisions relating to the health, education, and welfare of” the child.

On June 27, 2005, the Court decided *Town of Castle Rock, Colo. v. Gonzales*, 2005 WL 1499788 (U.S. June 27, 2005). In that case, a wife brought a civil rights action against a municipality and its police officers based on the officers’ refusal to enforce a domestic abuse restraining order against the husband. In particular, the wife made repeated reports to the police over several hours that the husband had taken their three children in violation of a restraining order against him. The police, in response, did nothing. The husband murdered the three children.

The Court held that Colorado law and the restraining order she obtained did not create a personal entitlement to police enforcement of a domestic abuse restraining order, and thus the wife did not have a protected property interest in police enforcement of the order. Rather, a tradition of police discretion exists such that the police could not be held liable for their failure to act.

Along with the Supreme Court’s decision in *U.S. v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740 (2000), holding the civil enforcement provisions of VAWA unconstitutional, it is clear that federal law offers no refuge for victims of domestic violence.

III. Hague Conventions

The new Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance is being drafted. It is expected that the final draft will be presented by the end of 2006. Drafts and Reports on the proposed law can be found at:

http://www.hcch.net/index_en.php?act=progress.listing&cat=3

A few interesting decisions under the Hague Convention on the Civil Aspects of International Child Abduction. In *Adams ex rel. Naik v. Naik*, 363 F.Supp.2d 1025 (N.D. Ill. 2005), the father sought return of the child, claiming the child was wrongfully taken. While the father had been visiting the child and paying support, the father, had never had a paternity order entered. The court determined he did not have “rights of custody.”

In *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004), the court adopted the “mixed standard” of review for determining habitual residence: reviewing the district court’s findings of fact for clear error and its legal determinations and application of the law to the facts de novo.

IV. Uniform and Federal Law

Congress has increasingly legislated in the family law area, despite the U.S. Supreme Court’s recognition that family law, more than any other area of law, is in the purview of the states. There has been no recent federal family law legislation of note, other than the Terry Schiavo bill.

Uniform law has also been relatively stable of late. The UCCJEA was enacted by four more jurisdictions in the 2004-2005 session (Ohio, Wyoming, South Dakota, Virgin Islands); the 2001 version of UIFSA was enacted in four more jurisdictions (Virginia, Wyoming, New Mexico, Delaware); the 2002 Uniform Parentage Act was approved in two more states (Utah, North Dakota).

V. Third-Party Visitation/Custody Rights

The Supreme Court case of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000) continues to reverberate. A number of states considered their third-party visitation statutes in light of the opinion.

In *In re B.R.S.*, 2005 WL 1244582 (Tex. App. – Waco, May 25, 2005), the court held its grandparent visitation statute was not unconstitutional on its face. *Accord In re Marriage of Harris*, 34 Cal. 4th 210, 17 Cal. Rptr.3d 842 (2004).

On the other hand, in *In re Parentage of C.A.M.A.*, 154 Wash.2d 52, 109 P.3d 405 (2005), the court held that its grandparent visitation statute governing visitation for children born out of wedlock, which contained presumption that visitation was in the best interests of the child, was unconstitutional on its face. *See also Medaris v. Whiting*, 695 N.W.2d 226 (S.D. 2005) (trial court improperly presumed that grandparent visitation was in the best interests of the child which improperly placed burden on mother to prove it wasn't); *In re Marriage of Engelkens*, 354 Ill. App.3d 790, 821 N.E.2d 799 (2004) (statute allowing court to grant reasonable visitation to stepparent if court determines it is in child's best interest is unconstitutional on its face).

The trend in cases concerning the parental rights of same-sex partners is that of “the intended parent.” Thus, when one woman is artificially inseminated with the intention that she and her partner are the parents, then the non-biological “parent” has the standing to pursue parental rights and custody. In *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004), the court held that the mother's former partner was the psychological parent of the child, and thus had standing to seek custody/visitation. In *In re A.B.*, 818 N.E.2d 126 (Ind. Ct. App. 2004), a former partner brought a parentage action seeking recognition as parent under the Parentage Act. The court allowed the action. *See also In re J.D.M.*, Ohio Ct. App. Oct. 11 2004. (where one woman donated an egg that was fertilized and then implanted in the donor woman's same-sex partner, the trial court should not have dismissed a shared custody petition filed by the two women to establish their parental rights); *A.G. v. D.W.*, 2005 WL 1432744 (Cal. Ct. App. 2 Dist. June 21, 2005) (same); *T.B. v. L.R.M.*, 874 A.2d 34 (Pa. Super. 2005) (same). *Contra T.F. v. B.L.*, 442

Mass. 522, 813 N.E.2d 1244 (2004) (parties cannot have agreement to create a child and thereby both become parents).

VI. Relocation

The courts continue to struggle with relocation cases. In the last year (June 30, 2004 to June 30, 2005), over 50 cases considered relocation requests and standards for those requests. As noted in the recent *Hawkes v. Spence*, ___ A.2d ___ (Vt. May 6, 2005), relocation cases are among the most difficult because they address a seemingly irreconcilable conflict between two legitimate interests: the custodial parent's interest in making decisions for the benefit of the new family, and the noncustodial parent's interest in maintaining a close bond with the parties' children.⁵

In *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005), the court examined the amendments to the child custody statute which eliminated the presumption *in favor* of the custodial parent seeking to relocate, and held both parents to share equally the burden of

⁵There are basically four approaches to relocation cases: (1) the moving parent has the burden of showing the move is in good faith and in the best interests of the child (this is the model endorsed by the AAML in its AAML Model Relocation Act); (2) the moving parent has the burden of showing the move is in good faith, and then the burden shifts to the opposing parent to show that the move is not in the child's best interests; (3) presumption in favor of good faith relocation (this is essentially *In re Marriage of Burgess*, 913 P.2d 472 (Cal. 1996)); (4) the objecting parent has the burden of showing the relocation endangers the child and lacks mitigating benefits (this is essentially the approach taken by the Uniform Marriage and Divorce Act)).

demonstrating what is in the child's best interests. The court held that these amendments did not unconstitutionally infringe on the right of travel of the custodial parent.

In *Latimer v. Farmer*, 360 S.C. 375, 602 S.E.2d 32 (2004), the court abandoned the presumption *against* out of state relocation, and like the above cited case, adopted a best interests analysis. In *Latimer*, however, the burden was not equally allocated; it was incumbent upon the custodial parent to show that the move is in the best interests of the child. *See also Dupre v. Dupre*, 857 A.2d 242 (R.I. 2004) (trial court improperly applied "compelling reason" test, and should have applied "best interests" analysis in relocation case).

Perhaps the most interesting relocation case of the past year is *Hawkes v. Spence, supra*. In that case, the court adopted Section 2.17 of the ALI Principles of the Law of Family Dissolution. Under that section, relocation is a substantial change in circumstances justifying a re-examination of parental rights and responsibilities only when the relocation significantly impairs either parent's ability to exercise the responsibilities that parent has been exercising or been attempting to exercise under the parenting plan.

Quite possibly, the ALI Principles are the wave of the future.

VII. Child Support

There has been a trend away from the Percentage of Income Model child support guideline that is in use in, for example, Illinois, toward the Income Shares Model. In the last year, Tennessee, Georgia, Minnesota, and Guam all switched from Percentage of Income to Income Shares model. The trend is in response to pressure by non-custodial parents' groups that feel the percentage of income model, by looking only to the noncustodial parent's income, is unfair. (The same states that use Percentage of Income have the greatest number of constitutional challenges to their guidelines as well.)

As UIFSA becomes more familiar to practitioners and judges, more UIFSA decisions are consistent with its concept of continuing exclusive jurisdiction.

VIII. Electronic Discovery and Wiretapping

A number of interesting cases were decided in the past year concerning cyber-snooping. In *O'Brien v. O'Brien*, 899 So.2d 1133 (Fla. 5th DCA 2005), the court held that the wife had illegally "intercepted" her husband's electronic communications to another woman via instant messaging, within the meaning of the Security of Communications Act, when she installed spy ware program on computer which simultaneously copied electronic communications as they were being transmitted.

On the other hand, in *Evans v. Evans*, 610 S.E.2d 264 (N.C. Ct. App). 2005), the court held that sexually explicit e-mails that the wife had sent to her physician, offered by the husband in the divorce action in support of grounds for divorce and in support of denying post-separation spousal support to wife, were not illegally intercepted in violation of federal Electronic Communications Privacy Act (ECPA), where interception of e-mails was not contemporaneous with transmission, and rather the e-mails were stored on and recovered from hard drive of family computer.

So, should you advise your client to go rooting around the family computer for incriminating evidence? Probably not. A good idea would be to request that the hard drive of the suspected computer be impounded for inspection. Guidance in this area was recently provided in *Etzion v. Etzion*, 7 Misc.3d 940, ___ N.Y.S.2d ___ (Sup. Ct. 2005). In that case, claiming that her husband had a history of "past fraudulent conduct," the wife wanted her computer forensic experts to "impound, clone and inspect" her husband's "computer servers, hard drives, individual

workstation PC, laptop and other items containing digital data". She asked that he pay her attorney fees and computer forensic expert costs. The husband defended by claiming the request was overbroad, intrusive and burdensome. He also questioned his wife's counsel's ability to safeguard his data based on an alleged history of reckless and careless data handling. The court ordered: 1. Both parties' forensic experts will meet at the data collection center, along with a court-appointed referee; 2. Wife's expert will copy the hard drives and immediately turn them over to the referee; 3. After all drives are copied, the experts and referee will examine them; 4. Both parties will receive hard copies of relevant business records; 5. The referee will retain custody of the drive images until termination of litigation; 6. Wife will pay for all production costs; and 7. Each party will advance their own counsel fees and expert costs, subject to reallocation at trial.

Guidance in this new area of law can be found in Paul R. Rice, *Electronic Evidence: Law and Practice* (ABA 2005).

IX. Property Division

Issues in property division come and go. A few years ago, the hot issue was stock options. This past year, quite a few cases concerning "personal goodwill" have been decided, with a decided trend towards states decided that nonmarketable goodwill is not marital property. *E.g., In re Schneider*, 214 Ill.2d 152, 824 N.E.2d 177 (2005); *DeSalle v. Gentry*, 818 N.E.2d 40 (2004).

X. Collaborative Law

More and more family law attorneys are becoming interested in and participating in collaborative divorces. One of the primary differences between Collaborative Law and the more traditional litigation mode is that the participants undertaking a collaborative approach pledge

not to go to court to resolve differences. If it becomes necessary to ask for court intervention, both attorneys must withdraw and assist new counsel in “getting up to speed”. Another difference is the lack of formal discovery. Information is to be shared freely. The process involved four-way meetings where issues are discussed and “brain storming” occurs to develop alternative solutions that meet, to the greatest extent possible, both parties and the children.

One branch of Collaborative Law includes a collaborative team. In other words, if there is a question as to placement, a professional knowledgeable about child development might be included as a team member to help the parties understand what a child may need at various stages of his or her life. Accountants are frequently part of the team and are asked to not only assist in valuing a business, for instance, but also help the parties develop budgets and support options.

Collaborative Law is not limited to the United States, it is also being practiced in other countries and there is an international group, the International Collaborative Professionals, which involves lawyers, mental health practitioners, and those involved in providing financial advice.

XI. Cooperative Divorce Law

We in Wisconsin started Divorce Cooperative Institute approximately two years ago. The goal of the Institute is to foster an atmosphere of cooperation and professionalism within the family law bar. The concepts of collaborative law are encompassed within cooperative law with the exception that parties do not have to get new attorneys if it becomes necessary to seek relief from the court.

A seminar was presented last year and one is planned for this year. One of the goals is to develop “tool of the trade” to share with other family lawyers. Last year attendees and members

of the Institute were given as part of their materials a marital settlement agreement with various alternative clauses, both in hard copy and on a disk. We hope to add clauses to the agreement this year and also provide attendees with laminated sheets setting forth various issues, such as what elements do you need to be sure to include when drafting a maintenance/alimony provisions. The concept is to help other family lawyers in order to elevate the entire practice.