LJN LAW JOURNAL NEWSLETTERS

The Matrimonial Strategist®

An ALM Publication

Volume 35, Number 12 • December 2017

Children of a Married Same-Sex Couple

The Presumption Of Legitimacy

By Janice G. Inman

In what is being hailed as a landmark decision, New York's Appellate Division, First Department, recently held that the presumption that a child born to a married couple is their legitimate offspring applies not only to biological children of both spouses, but also to children born through more modern means — even when the married parties are in a same-sex marriage. *In re Maria-Irene D., Carlos A., Marco D. v. Han Ming T.*, 2017 N.Y. App. Div. LEXIS 6713; 2017 NY Slip Op 06716 (1st Dept, 9/28/17).

A Marriage and an Agreement

The case involved a same-sex couple — identified in court papers as Marco D. and Han Ming T. (Ming) — both of whom are British citizens. In 2008, they entered into a civil union in the United Kingdom. Later, when full marriage status for same-sex partners was made legal in the UK, the parties were able to convert their civil union to a marriage. Their civil union was so converted in 2015, and the marriage was deemed by law to have existed since the 2008 date of the couple's civil union.

In 2013, wishing to become parents, Marco D. and Ming

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To Relocate, or Not to Relocate; Was That Even the Intriguing Question in *Bisbing*?

Part One of a Two-Part Article

By Laurence J. Cutler and Alyssa M. Clemente

As of August 2017, the seminal case in New Jersey deciding the issue of the appropriate legal standard for a divorced parent seeking to relocate outside of the state is *Bisbing v. Bisbing*, __ N.J. ___ (2017). This case is an important example that can be used to explore this topic throughout the country. Not only did it redefine the legal standard to be applied when a parent seeks to relocate, but the New Jersey Supreme Court did so, effectively, *sua sponte*, with only slight presentation of the issue by an amicus. That is to say, the court reversed its own prior decision when that was not the precise issue being appealed.

Because of this, two thought-provoking issues arise: First, there is the substantive issue addressing the standard for a custodial parent seeking to relocate outside of a state, and, second, there is the institutional issue of a state's highest court changing an earlier, precedential decision. The first of these issues is discussed herein, while the second issue will be explored more fully in Part Two of this article.

The *Old Baures* Standard

Prior to *Bisbing*, New Jersey state courts had very clearly articulated tasks to perform when evaluating the situation of a parent asking to move outside of the state with a child. The first layer of analysis turned on the custodial arrangement: Did the parents share physical custody, or was one parent designated as the parent of primary residence? If the parents had a shared physical custodial arrangement, the court would make a best-interest analysis in determining whether a parent could relocate outside of the state with a child. *O'Connor v. O'Connor*, 349 N.J. Super. 381 (App. Div. 2002). However, if the parents did not share physical custody of the child, and one parent was the primary parent, there was an entirely different, two-part analysis. In accordance with *Baures vs. Lewis*, 167 N.J. 91 (2001), the court would first make a determination that the request to move was made with a "good faith" reason, and then make a second determination that the

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proposed move was "not inimical to the child's interests" and would not "adversely affect" the non-moving parent's visitation (now referred to in New Jersey as parenting time).

To be sure, the *Baures* standard did not instruct the court to determine that the move was affirmatively in the child's best interest but, rather, just that the move not be contrary to the child's best interests. In evaluating the second prong — namely, that the move not be inimical to the child's interests — 12 non-exhaustive factors were delineated.

Other States, Compared

New Jersey necessarily created a standard lesser than the broad concept of the "best interest" of the child in utilizing the afore-stated *Baures* standards, which were based on the then-state of social science. When looking at how other states approached the issue of a custodial parent relocating, however, it appears that New Jersey was in the minority.

New York, for example, is a best-interest state. While it does delineate factors that are akin to those set out in *Baures* — namely, New York questions whether the noncustodial parent will lose meaningful access to the child and asks what the moving parent's reason for the move is — the ultimate decision on whether or not to permit a custodial parent to relocate is the child's best interest. So, while courts in New York are free to consider all relevant factors and afford them the appropriate weight, the key factor is whether the move is in the child's best interest (*Tropea v. Tropea*, 87 N.Y.2d 727 (1996)), and it is the relocating parent's burden to prove that this is so. (At first blush, New York's query may appear similar to the now-replaced *Baures* standard, but it is not. The *Baures* decision turned on the move in that case not being contrary to the child's best interest. New York affirmatively looks to the child's best interest. As will be shown in *Bisbing*, discussed in detail below, there is a significant difference.)

By way of another contrary example, in the leading case in Texas, *Lenz v. Lenz*, 79 S.W.3d 10 (2002), the Texas Supreme Court looked to three other states — New Jersey, New York, and California — in making a decision on how to treat the issue of relocation. There, the Texas Supreme Court gave consideration to the social science relied on by New Jersey as noted in *Baures* — specifically, that there is a link between the best interests of the custodial parent and the best interests of the child. (However, this is the very same social science which was later shown to be unpersuasive.) The Texas Supreme Court's reference to the *Baures* social science-based reasoning is purely anecdotal, because it is clear that Texas also took the best interest approach in determining a request to relocate in *Lenz*.

By statute, Arizona relies on the best-interest standard as well. Specifically, if parents share legal custody (decision-making) or time, the child's best interest is the paramount consideration in deciding whether a move out of state will be authorized. Ariz. Rev. Stat. Ann. § 25-408(A)(G).

Ohio goes even one step further: If a parent wishes to relocate with a child "to a residence other than the residence specified in the parenting time order or decree of the court," he or she must seek permission, and the court is to apply the best-interest standard. Ohio Rev. Code Ann. § 3109.051(G)(1). This Ohio statute goes beyond the issue of relocation out of the state to address any relocation, whether in-state or out.

The applicable Florida statute effectively is a hybrid of the old-New Jersey approach (as expressed in *Baures*) and the new-New Jersey

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The Matrimonial Strategist®

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The Matrimonial Strategist® (ISSN 0736-4881) is published by Law Journal Newsletters, a division of ALM.
Telephone: 800-756-8993
Editorial e-mail: wampolsk@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

The Matrimonial Strategist 023146
Periodicals Postage Paid at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271

Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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Ferri v. Powell-Ferri: A Critical Planning Case for Practitioners

The Trust Ferri Could Be Better Than the Tooth Fairy

By Martin M. Shenkman and Rebecca Provder

Practitioners should encourage all clients with existing irrevocable trusts to meet to review those trusts. Whether for marriage, divorce, tax planning (whatever the future law changes provide), general asset protection planning or other reasons, modifying old irrevocable trusts through decanting (or other means) might make improvements, or as in the *Ferri v. Powell-Ferri* case, save the trust assets. *Ferri v. Powell-Ferri*, 326 Conn. 438 (2017).

Timing is key, and it is important to try to avoid any taints of impropriety. To that end, it would be preferable, unlike in the *Ferri* case, to have the decanting completed well in advance of the divorce or other event that poses to attack the old trust. Practitioners should also address these issues when clients are entering into marriage and contemplating prenuptial agreements.

Clients need to be told that traditional or historic trust drafting commonly relied on techniques and provisions that are less than optimal. Mandatory income distributions, mandatory principal distributions at specified ages, or as in the *Ferri* case, permissible withdrawal rights of trust principal may not provide the utmost protection to clients, especially amidst a divorce.

Too many clients (and non-matrimonial practitioners) assume erroneously that an irrevocable trust is inviolate and that with tax laws in flux no planning is necessary. However, just because assets are in an irrevocable trust does not mean the assets are completely untouchable in a divorce scenario. Modifying old, inefficient trusts can be about much more than tax planning considerations, as the *Ferri* case illustrates.

The *Ferri* case also suggests an important point that should not be overlooked: Decanting is a process, unless the governing instrument provides to the contrary, to be carried through by the trustees, not by the beneficiary. Practitioners and clients alike should be cautious to monitor communications and the process to assure that the beneficiary seeking protection is not directing the decanting process, or the favorable result achieved in *Ferri* may not be replicated. It should also be noted that the Massachusetts court did not have a state decanting statute to influence the outcome of the decision. If there is applicable state law — and more than 20 states now have decanting statutes — the contents of that statute might be critical to the outcome.

Facts in the *Ferri* Case

The key time events in *Ferri* included:

- 1983 — Creation of a trust for child/beneficiary.
- 1995 — Child/beneficiary's marriage.
- 2010 — Child/beneficiary's divorce starts.
- 2011 — Decanting of trust.

A parent created a trust for the sole benefit of his child in 1983. The trustee had the discretion whether or not to pay trust assets to the child/beneficiary or to instead set them aside for the child/beneficiary. In addition, the child/beneficiary could demand increasing percentages of trust corpus at specified ages beginning with 25% of trust corpus at age 35 and increasing in increments up to 100% of trust corpus after age 47. The child/beneficiary's spouse filed for divorce in Connecticut in October 2010. Prior to the divorce, the child/beneficiary had not exercised his withdrawal rights.

At the time of the divorce proceeding, the child/beneficiary had the right to demand 75% of the corpus of the old trust based on the trust terms. This made the trustees concerned that the child/beneficiary's ex-spouse might reach trust corpus.

Decanting the Old Trust

To endeavor to reduce the risk that the ex-spouse might reach the trust corpus, the trustees decanted the trust assets into a newly created trust. While the decanting was in process, the child/beneficiary's right to withdraw principal blossomed to 100% of corpus.

The specific process of the decanting was that the trustees of the old trust created a new trust naming themselves as trustees and maintaining the child as its sole beneficiary. Then they distributed assets from the old trust to the new trust in a decanting. The decanting was done without the consent of the child/beneficiary. The new trust, as would be anticipated, eliminated the child/beneficiary's right to demand trust corpus at specified ages. Both trusts were governed by Massachusetts law.

The Connecticut court requested that the Massachusetts court determine whether the trustees of the old trust validly distributed trust corpus from the old trust to the new trust. The court determined that because there is no specific decanting power under Massachusetts law, the trustee's power to decant depended on the governing instrument and the facts.

The rationale justifying decanting in the *Ferri* case was based on the fact that, since the trustees had the discretion to distribute trust property to or for the benefit of the beneficiary, the power of the trustee to distribute the property to another trust for the benefit of the same beneficiary should be subsumed under the broader distribution power. The court noted broad discretion afforded the trustees in the old trust, the anti-alienation provision, the

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Irrevocable Trusts

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beneficiary's withdrawal rights, and the settlor's affidavit regarding his intent in creating the trust. The Massachusetts court concluded that the terms of the old trust and the facts involved corroborated the parent/trustor's intent to permit decanting.

Accordingly, the Connecticut court permitted the decanting. Further, the court rejected the argument made by the child/beneficiary's spouse that the decanting resulted in a self-settled trust.

Planning Considerations For Practitioners

Query whether the same result would have been realized if the child/beneficiary had requested that the trustees decant, or if he was actually involved in the process (*e.g.*, by consent to a non-judicial modification of the trust — as permitted, for example, under Delaware law). This could make the success of the decanting in similar situations very fact-sensitive as to the child/beneficiary's involvement. Practitioners should caution beneficiaries to remain out of the process entirely. Stray emails or other documentation might well have resulted in a different conclusion in the *Ferri* case.

The application of decanting in the *Ferri* case suggests that matrimonial practitioners should make inquiring about the status of any irrevocable trusts a standard part of any client intake interview, whether in connection to a prenuptial agreement, postnuptial agreement, support matter or divorce. In particular, practitioners should recommend having any irrevocable trust of which the client is a beneficiary reviewed, perhaps by trusts and estates counsel, to ascertain if a decanting may increase the protection that the trust affords. Whatever the client might opt to do, practitioners should be alert to at least consider putting the client on notice as to the possibilitly of *Ferri*-like planning.

Beware that divorce laws vary from state-to-state. It is important to consider not only where the trustor resides, but also where the beneficiaries reside, as residency determines the forum of a divorce. We also live in an increasingly transitory society; people move all the time. When a move takes place, it is advantageous for clients to check in with their advisers to see if any updates are necessary, to optimize planning. Trust laws also vary markedly from state to state and it may be feasible to move an old irrevocable trust to a different or new state in order to take advantage of the decanting or other laws of that new state. The combination of all of these variables makes planning more complex than it had been.

Conclusion

Irrevocable trusts are not as ironclad as many clients might presume. The *Ferri* case outcome is a valuable reminder of the possibility of decanting prior to a divorce. Even during the pendency of a divorce, benefit might be achieved, although practitioners might warn clients of the possible negative perceptions decanting might create. However, the real lesson to be learned from the *Ferri* case is to adopt a more proactive approach, and timely meet with your advisers to make sure the trust structure is in fact set up to function in the most advantageous way possible.

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jointly executed an egg donor and surrogacy agreement. Both of them contributed sperm, but the donated egg, which was then implanted into the surrogate, was fertilized by Marco D.'s sperm. The resulting child, named for both of the couple's mothers, was born in September 2014.

After the child was born, her two fathers petitioned a Missouri court together to terminate any parental rights held by the egg donor and the gestational surrogate. In October 2014, the Missouri court declared Marco D. sole exclusive custody of the child, on the basis that he was the genetic father. Ming's legal relationship to the child was not addressed in the order. Marco D., Ming and the baby returned to their home in Florida and lived together there for a year as a family. In October 2015, Ming moved to the UK to look for work.

Meanwhile, as far back as 2013, Marco D. had entered into a relationship with another man, identified as Carlos A. When Ming moved to the UK, Carlos A., Marco D. and the baby moved to New York. Three months after this group moved to New York together, Carlos A. petitioned to adopt the now-toddler as a co-parent with Marco D.

The adoption papers explained that Marco D. had been married to Ming at the time of the child's conception and birth, but claimed that the married couple had lived apart after 2012 and that Carlos A. and Marco D. had been the only ones to continuously care for the child since her birth. A home study was done, and the report that resulted claimed that Marco D. and Ming separated in 2013. Carlos A. did not disclose to the New York court that, during the pendency of the adoption proceeding (in March 2016), Ming had filed for divorce from Marco D. in Florida, and had sought joint custody of the child in that petition. Ming was unaware at this time of Carlos A.'s attempt to adopt the child.

New York Family Court granted Carlos A.'s adoption petition in May 2016. Ming soon learned of this and moved to vacate the adoption, claiming pertinent information had been kept from the Family Court —

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Social Media: Questions of Admissibility And Ethics

Part Two of a Two-Part Article

By Khizar A. Sheikh, Lynne Strober and Jennifer Presti

Social media evidence can be acquired both informally — through an attorney's own investigation or from the client — or more formally through the use of discovery and the rules of discovery. While each gives rise to practical and ethical issues, this section will focus on informal methods of acquisition.

Many of the cases cited in Part One of this article (*see* http://bit.ly/2zuYUq3) relate to evidence that is publicly available. Generally, evidence that is publicly available may be gathered freely and used in any matter allowed by law or the Rules of Professional Conduct. *See, e.g.*, Colorado Bar Association Ethics Committee Opinion 127.

Issues arise however when attempting to communicate by misrepresenting one's identity to represented or unrepresented parties, attempting to communicate with represented parties, and trying to contact judges.

Unrepresented Parties

Sending a "friend" request to an unrepresented person without making attempts to mislead that person about the requestor's identity or motive is ethically in-bounds. *See, e.g.*, New York State Bar Ass'n, Formal Op. 843 (Sept. 10, 2010). More "creative" deceptive tactics, however, likely constitute violations of ethical rules or other laws.

Misrepresenting one's identity to another for the purpose of obtaining information, for example, by using a false identity to send a "friend" request to an adverse witness on Facebook to obtain impeachment evidence likely violates American Bar Association Model Rules 4.1 and 8.4(c). Those rules prohibit lawyers and the employees and agents of the law firm on the attorney's behalf from making false statements of material fact to a third person and from engaging in conduct that involves dishonesty, fraud, deceit, or misrepresentation.

Even if the identity used is not false, however, an attorney may need to disclose the reason for making the request, depending on the jurisdiction. Compare, for example, the ethics opinions from the New York City and Philadelphia Bars. The Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010-2, addressing whether an attorney's "direct or indirect" use of affirmatively deceptive behavior to "friend" potential witnesses is proper, concluded that although New York Rule of Professional Conduct 4.1 prohibits lawyers from making false statements, and Rule 8.4(c) prohibits lawyers and firms from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, ethical boundaries are not crossed when an attorney uses truthful information to obtain access, subject to all other ethical requirements. Thus, an attorney may use her real name and profile to gain access to an unrepresented person's social networking website "without also disclosing the reasons for making the request.".

The Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02, on the other hand, concluded that a third party "friending" an unrepresented party, truthfully stating his or her name but not disclosing the intent behind the "friend" request, would violate the Pennsylvania Rules of Professional Conduct 5.3, 8.4 and 4.1, as the planned communication by the third party with the witness was deceptive, omitting a highly material fact — namely, that the purpose of the "friend request" was to obtain information to share with a lawyer for use in a lawsuit. *See also* San Diego County Bar Association Legal Ethics Opinion 2011-2 (May 24, 2011) (concluding that an attorney may not make friend requests to unrepresented witnesses without disclosing the purpose of the request); Pennsylvania Bar Association Formal Op. 2014-300 ("Ethical Obligations for Attorneys Using Social Media") (Sept. 2014) (Attorneys may not use a pre-textual basis for viewing otherwise private information on social networking websites.).

Represented Parties

The rules are clearer when dealing with a represented party. If a social media user is represented by counsel, opposing counsel must obtain consent from that counsel to view the social media posts and/or comments. *See, e.g.*, Colorado Bar Association Ethics Committee Opinion 127. *See also* Assn. of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2010-2 (noting that communications of a lawyer and her agents with parties known to be represented by counsel are still governed by Rule 4.2, which prohibits such communications unless the prior consent of the party's lawyer is obtained or the conduct is authorized by law); San Diego County Bar Association Legal Ethics Opinion 2011-2 (May 24, 2011) (concluding that while a lawyer may ethically view or access profiles which are publicly available to everyone, different rules may apply when an individual has a profile visible only to his or her "friends." Thus, an attorney may not make *ex-parte* friend requests to a represented party.); Pennsylvania Bar Ass'n Formal Op. 2014-300 ("Ethical Obligations for Attorneys Using Social Media")

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(Sept. 2014) (attorneys may not contact a represented person through social networking websites).

Nor can an attorney obtain access to a witness or information through a client that the attorney otherwise would not have. *See, e.g.*, New York State Bar Association Social Media Ethics Guidelines (2014) (stating that "[a] lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain confidential information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person."); and New Hampshire Bar Association's Ethics Advisory Committee Opinion 2012-13.05 (2012) (opining that "a lawyer's client may, for instance, send a 'friend' request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety 'depends on the extent to which the lawyer directs the client who is sending the [social media] request,' and whether the lawyer has complied with all other ethical obligations.").

JUDGES

Finally, at least one bar association has indicated that attorneys may ethically connect with judges on social networking websites, provided the purpose is not to influence the judge. *See* Pennsylvania Bar Ass'n Formal Op. 2014-300.

CONCLUSION

As we move further and further into this digital age — where almost all of our communication with others is in writing, through either social media, text messages, or emails — it is painstakingly clear that the inappropriate use of social media and networking sites can create a dangerous evidentiary tool in family law matters. For an attorney, knowing the potential evidentiary hurdles is half the battle, and attorneys must speak with clients early on in their representation to warn them about the potential use of their social media as evidence in their divorce, domestic violence or child custody matter.

Attorneys must learn to use social media as a source of information in their cases. Social media can be both a benefit and a detriment in case presentation. Without a doubt, it is a reality.

Regarding the gathering of evidence, although the majority of ethics opinions appear to agree that public social media postings are fair game, most also warn that using deceptive tactics to gain information contained on privacy-protected accounts can run afoul of an attorney's ethical obligations. It is important to research the jurisdiction in which you are litigating a matter for guidance on the ethical parameters of using social media forums as part of the investigation of a case.

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namely, that he was a parent of the child and was entitled to notice of the adoption petition, and that he had a right to be heard in any adoption proceeding. Family Court granted Ming's motion on the basis that Carlos A. and Marco D. had kept material information from the court that was relevant to the decision. *See* Domestic Relations Law § 114(3). Family Court also determined that Ming was entitled to notice and an opportunity to be heard in the adoption matter. But the court left the possibility of adoption by Carlos. A. open, should it be appropriate, once the Florida divorce proceeding was completed. Carlos. A. appeaed.

The Appellate Division determined that Family Court did not err in vacating the adoption after observing that there was no dispute as to the validity of Marco D. and Ming's marriage, and no dispute that it lasted from 2008 to the time that the adoption was granted, and beyond. The court noted that New York recognizes out-of-state marriages that are legal in those other jurisdictions, and that the child was born in accordance with a surrogacy agreement entered into by both Marco D. and Ming.

Most importantly, the appellate court said that because of the jointly signed surrogacy agreement, coupled with the fact that Marco D. and Ming were married at the time the child was conceived and born, the child must be presumed by law to be the legitimate offspring of both Marco D. and Ming. *See* Domestic Relations Law § 24; *Matter of Fay*, 44 N.Y.2d 137 (1978), appeal dismissed 439 U.S. 1059 (1979). This result was bolstered, said the court, by the facts that Marco D. and Ming had in fact lived together with the child for some time after her birth, and had undertaken steps to establish Ming's parental rights to the child under UK law after Ming moved there. "Under these circumstances," stated the court, "the Missouri judgment in 2014 awarding Marco sole and exclusive custody of the child, as opposed to the egg donor and surrogate, was insufficient to rebut the presumption of legitimacy."

A second, independent, basis for vacating the adoption order was the omission of relevant information from the petition. *See* Relations Law § 114(3). "The adoption petition required petitioner to give a sworn statement that the child to be adopted was not the subject of any proceeding affecting his or her custody or status," the court observed. "Even though petitioner was aware of the Florida divorce action before finalization of the adoption, he failed to disclose the action to the court, instead averring in a supplemental affidavit that there had been no change in circumstances

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Case Notes

Divorcing Spouses' Verbal Strife Sufficient to Support Eviction in Children's Interest

Family Court, Monroe County New York, granted a wife exclusive use of the marital home while her divorce was pending because verbal altercations between the parties were detrimental to the couple's children. *L.M.L. v. H.T.N.*, 17/7645 (Oct. 3), N.Y.L.J. 10/20/17, Pg. p.21, col.3 Vol. 258 No. 77.

The wife, in the process of divorce, applied for "exclusive use and possession" of the marital residence during the pendency of the parties' divorce. The parties jointly owned the residence as tenants by the entirety. Both parties presented contrasting affidavits of what was occurring in the home; the wife alleged that the husband had a violent temper, while the husband alleged that the wife was an alcoholic and manipulative. Both parties also indicated their intention to purchase the home in the equitable distribution.

The attorney for the parties' two sons filed an affidavit, recounting how they had been observing fights between their parents, and characterizing the family's home as a "very stressful environment" and "unhealthy."

The court first noted that a hostile home environment during a divorce runs contrary to the best interest of the children. Although the court also noted prior cases requiring violence or threat of violence to support an order evicting a spouse, the court held that social science had indicated that even verbal strife inflicted emotional harm on children. Therefore, despite the court's inability to identify the perpetrator of the strife, the court ordered the husband to vacate the residence based on the wife's provision of funds for his relocation.

In Georgia, Parents' Marriage at Implantation Does Not Equal Legitimacy For IVF Child

The Supreme Court of Georgia has declared that a child who was conceived through in-vitro fertilization (IVF) is not presumed the biological father's legitimate offspring, even when the parties are married at the time of fertilization and implantation, unless the parties are still married at the time of birth. *Patton v. Vanterpool*, 2017 Ga. LEXIS 896 (Ga. 10/16/17).

The parties were in the process of divorce when the husband gave his consent for the wife to be implanted with embyos created from donor sperm and donor eggs (this was apparently required in the Czech Republic, where the procedure took place). Four days after the embryos were implanted, the couple's divorce was granted. No provision was made for any possible children.

Two fetuses developed but only one survived, and she was born prematurely at about 30 weeks' gestation. The wife then moved to have the divorce decree set aside so that a new one could include consideration of the child. This motion was denied.

The wife instituted a paternity action, alleging that the husband gave his written consent for the IVF procedure and that OCGA § 19-7-21 created an irrebuttable presumption of paternity. The husband claimed he gave his permission only to speed the divorce, and that, at any rate, OCGA § 19-7-21 was unconstitutional. The trial court sided with the wife, but the state high court agreed to hear the husband's appeal.

The high court reversed. It noted that in 2009, Georgia's legislature enacted GA (1)(1) Family Law. Paternity & Surrogacy. OCGA § 19-7-21, which created an irrebuttable presumption of legitimacy for a child conceived through artificial insemination — through the introduction of sperm into the mother's body — who is born during the mother's marriage or during the normal period of gestation thereafter. The ability to create embryos outside the body through IVF — which could then be transferred to a woman's womb for gestation — existed at that time, yet the legislature did not choose to create such an irrebuttable presumption of legitimacy for children conceived in this manner. "Further," stated the court, "the irrebuttable presumption of legitimacy in OCGA § 19-7-21 is an exception to the general rule, found in § 19-7-20 (b), that legitimacy may be disputed, and an expansive reading of OCGA § 19-7-21 would allow the exception to swallow the rule."

Because the legislature has not shown an intention that such children should be treated as presumptively legitimate, the presumption of legitimacy does not exist in Georgia for children conceived through IVF and born when the mother is not married, the Georgia Supreme Court determined. The trial court's judgment was reversed.

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approach (as expressed in *Bisbing*): The burden is undoubtedly on the relocating parent to show that it is in the child's best interest to make the proposed move. If that burden has been met, the opposing party must then show that relocation is not in the child's best interest. In assessing the child's best interest, the statute provides many factors for consideration, which look markedly similar to those outlined in *Baures*. Fla. Stat. § 314. 61.13001(7) and (8) (2017). There is no presumption in favor of or against relocation. It now seems that this approach is in the minority.

Bisbing Brings Changes

This past summer, *Bisbing* changed the landscape in New

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Jersey, bringing it into line with the majority of the states.

The heart of the factual issue in the case surrounded an initial custody agreement that prohibited either parent from moving out of the state without the other's consent. This was a provision within an agreement contracted for by the parties, not one imposed by the court.

Because the parties had agreed not to relocate, the parent opposing the move argued that there was fraud by the other in negotiating the terms of the custody agreement. From that issue flowed the debate as to which legal standard should be applied — traditional best interest, or *Baures* factors. The New Jersey Supreme Court took the case as an opportunity to reevaluate the *Baures* factors, depart from its previous holding 16 years earlier, and redefine the legal standard for a relocating parent. As detailed within the holding in *Bisbing*, New Jersey will hereafter apply the same "best-interest" factors and considerations in a relocation cases as it does in any other custody dispute.

In arriving at its precedential holding, the New Jersey Supreme Court revisited its initial analysis in the now-overturned *Baures* decision. Significantly, at the time *Baures* was decided, there was social science research that tended to support the proposition that what is good for the custodial parent is good for the child. Stated another way, if the relocation would be good for the moving party, so too would it be good for the child. Additionally, there was research to suggest that a certain parenting time schedule is not necessary for a child to feel the love and support of the noncustodial parent. The *Baures* court also looked to trends within the country.

In *Bisbing*, the New Jersey Supreme Court found that, with the passage of time and upon further reflection, the previously relied-upon social science research was not sound, and did not apply to every family (or even to most families). New research had supplanted the beliefs that had formed the basis of the *Baures* holding. Additionally, the perception of a nationwide trend toward a custodial parent's right to relocate had not materialized, as expected by the *Baures* court.

The Reception

Now, just a few months after the *Bisbing* decision was rendered, the holding seems axiomatic, at least for a family law practitioner in New Jersey. Of course a court should view a parent's request to relocate outside of the state the same way it does virtually every other decision or issue relating to the custody, care and welfare of a child — by determining what is in the child's best interest. It seems counterintuitive that there would be a lesser burden in moving a child outside of the state than when making an initial custody determination. In this vein, the holding in *Bisbing* appears to be the right and just result, and it certainly is in line with the majority of the country.

In addition to the thought-provoking issues that *Bisbing* addresses on the merits of relocation, it also raises another question: When can (or should) a state's highest court reverse its own prior ruling? When may it be appropriate for a court to acknowledge that a prior holding is not working, or never did? *Bisbing* provides some guidance, and we will explore this question next month in Part Two.

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Same-Sex

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'whatsoever' since the filing of the adoption petition."

For these reasons, the appellate court upheld Family Court's vacation of the adoption order.

The State of the Presumption of Legitimacy In New York

The unanimous decision in *Carlos A. v. Han Ming T.* is not binding on New York's other three appellate departments, but it may prove persuasive to those jurisdictions, which in some cases have seen family courts deny the presumption of legitimacy to children born to same-sex married couples. And the outcome — affirming that children born to same-sex couples are presumed legitimate — appears to be more in line with last year's Court of Appeals decision in *Matter of Brooke S.B. v. Elizabeth A.C.C.*, in which New York's highest court expanded the definition of "parent" to include a non-married former same-sex partner who had agreed with the biological parent to conceive and raise a child as co-parents.

Linda Genero Sklaren, a partner at Warshaw Burstein who served as of counsel to Ming T.'s adoption lawyers, explained that New York's First Appellate Department's legal recognition of the presumption of legitimacy is important because "with technology as it is today [for surrogate births] for same-sex couples, both spouses in same-sex marriage are not going to be biologically related to a child." She applauded the decision for protecting the rights of the children of same-sex partners to continue their relationships with each of the people they consider their parent.

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