LJN LAW JOURNAL NEWSLETTERS

The Matrimonial Strategist®

An ALM Publication

Volume 32, Number 2 • February 2014

Swimming in the Wake of *Windsor*

Evolving Employment Law Impacting Family Law

By Karen A. Kalzer

When the United States Supreme Court announced its pair of same-sex marriage decisions on June 26, 2013 (*Perry v. Hollingsworth* and *United States v. Windsor*), commentators began to forecast the tsunami of tangible changes that would result. And as predicted, one of the most prominent impacts has been the effect on employment law benefits and statutes, and the expanded field of those who can now access them.

In sum, Edith Windsor sought a refund of federal estate taxes, which she had been required to pay following the death of her wife. Ms. Windsor had married her same-sex spouse in Canada and the couple resided in New York, which recognized the marriage. However, under the federal Defense of Marriage Act (DOMA), Ms. Windsor did not qualify as a "surviving spouse" and she was required to pay estate taxes.

Practitioners will recall that the *Windsor* court invalidated Section 3 of DOMA, which had prohibited the federal government from acknowledging same-sex marriages and spouses even where those marriages had been solemnized in states that recognized them as legal and valid. But the Court did not invalidate Section 2 of DOMA, and thus it

continued on page 5

How to Succeed in a Relocation Case

By Jerome A. Wisselman and Eyal Talassazan

There is a growing trend of custodial parents asking the courts to allow them to relocate with their children, taking them farther away from the non-custodial parent. For example, in New York, like many metropolitan areas, many different factors have led to this situation. These include: 1) the increase in the cost of living in the metropolitan area; 2) the inability of the custodial parent to afford to remain in the jurisdiction on his or her income alone; 3) difficulty in obtaining employment; and 4) a desire to relocate to reside near family and friends.

What the Courts Say

It can be a difficult task to persuade a court that it should permit the relocation of a child. Some of the problems custodial parents can encounter in this regard are illustrated by a lower-court case in which permission to move was denied. In *In The Matter of Verhulst v. Putnam*, a mother sought to relocate to northern Massachusetts with the parties' son, purportedly because she wanted to reside closer to her parents and was having difficulty finding suitable employment on Long Island. The court, however, ruled against relocation and ordered the mother to remain on Long Island because it became clear during the trial that she primarily wanted to distance herself and the parties' son from the father, to make it difficult for him to have contact with their child.

Further, the mother failed to establish why she needed to move and why it was in the best interests of her child to relocate. Notably, although she alleged that she had lost her job on Long Island, she failed to provide any documentary proof verifying why her employment was terminated, and also neglected to provide the court with proof demonstrating her attempts to seek commensurate employment in the Long Island area.

In addition, she failed to provide the court with a detailed parenting time schedule that would provide the father with a suitable amount of parenting time. The court, in denying the mother's petition, wrote: "Unfortunately, the mother's

continued on page 2

In This Issue

PERIODICALS

Relocation

continued from page 1

anger at the father's refusal to have a continued relationship with her has caused the mother to make every effort to minimize the father's role in [the child's] life. To allow the mother to relocate [the child's] residence to Massachusetts would undermine the father's relationship with [him] in a way for which there is no appropriate means to ensure future contact with the non-custodial parent."

Helping Your Client

With the *Verhulst* case in mind, it is obvious that when considering how best to help your client to relocate with children successfully, several factors must be taken into account. As with any other legal issue, it is important to analyze court decisions that have both granted and denied relocation, taking a close look at and addressing the factors that were analyzed in the courts' decisions. It is also imperative that thorough planning be implemented concerning all of the various areas the court considers well before, and not on the heels of, a hearing.

The 'Best Interests' Inquiry

When reviewing an application for relocation, the court's primary focus must be on the best interests of the children. *Martino v. Ramos*, 64 A.D.3d 657 (2nd Dept. 2009); Matter of Tropea v. Tropea, 87 NY2d 727 (1996). In *Martino*, the court stated: "Relocation may be permitted if the custodial parent demonstrates, by a preponderance of the evidence, that the proposed move is in the child's best interests. When evaluating whether a proposed move will serve a child's best interests, the factors to be considered include, but are certainly not limited to, each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and non-custodial parents, the impact of the move on the quantity and quality of the child's future contact with the non-custodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the non-custodial parent and child through suitable visitation arrangements."

Expounding on that same theme, New York's highest court, the Court of Appeals, stressed in *Tropea* that courts should consider all relevant facts and circumstances when considering a proposed relocation and should not be bound to the approach that had previously been used by the courts to determine relocation cases. The court in *Tropea* wrote:

> Each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. While the respective rights of the custodial and non-custodial parents are unquestionably significant factors that must be considered, it is the rights and needs of the children that must be accorded the greatest weight since they are innocent victims of their parents' decision to divorce and are the least equipped to handle all the stresses of the changing family situation.

The Successful Case

Attorneys may be aware that relocation may be possible if it can be established that the child's quality of life will be improved if the custodial parent is permitted to relocate. But what factors do courts consider when gauging quality of life?

Certainly, the financial well-being of the family is important. In *Wirth v. Wirth*, 56 AD3d 787 (2nd Dept. 2008), the appellate court permitted a mother to relocate with the parties' child because of economic factors. In *Wirth*, the court wrote: "[T]he mother established by a preponderance of the evidence that the proposed relocation to Florida was in the subject child's best

continued on page 4

Jerome A. Wisselman is a partner in the Great Neck, NY, firm of Wisselman, Harounian & Associates, P.C. **Eyal Talassazan** is an associate with the firm.

The Matrimonial Strategist®

CHAIRMAN . . . . . Willard H. DaSilva, DaSilva Hilowitz & McEvily LLP, Garden City, NY
EDITOR-IN-CHIEF . . . . . Stephanie McEvily
EDITORIAL DIRECTOR . . . . . Wendy Kaplan Stavinoha
MARKETING DIRECTOR . . . . . Jeannine Kennedy
GRAPHIC DESIGNER . . . . . Evelyn Fernandez

BOARD OF EDITORS

LAURENCE J. CUTLER . . . . . Laufer, Dalena, Cadicina, Jensen & Boyd, LLC, Morristown, NJ
MARIAJOSE DELGADO . . . . Shemtob Law P.C. Blue Bell, PA
PAUL L. FEINSTEIN . . . . . Paul L. Feinstein Ltd. Chicago
LYNNE GOLD-BIKIN . . . . . Weber Gallagher Simpson Stapleton Fires & Newby LLP Norristown, PA
JONATHAN W. GOULD, PH.D. . . . . Psychologist Charlotte, NC
FRANK GULINO . . . . . Private Practice Chatham, PA
DAVID A. MARTINDALE Ph.D. . . . . Forensic Psychological Consulting St. Petersburg, FL
CHARLES J. McEVILY . . . . . DaSilva Hilowitz & McEvily LLP Garden City, NY
MARK MOMJIAN . . . . . Momjian Anderer, LLC Philadelphia
REBECCA PALMER. . . . . Lowndes, Drosdick, Doster, Kantor & Reed, P.A. Orlando, FL
JUDITH L. POLLER . . . . . Pryor Cashman LLP New York
LLEWELYN G. PRITCHARD. . . . . Helsell Fetterman LLP Seattle, WA
CURTIS J. ROMANOWSKI . . (Private Practice) Metuchen, NJ
ROBERT E. SCHLEGEL . . . . Houlihan Valuation Advisors Indianapolis, IN
ERIC L. SCHULMAN . . . . . Schiller DuCanto and Fleck LLP Lake Forest, IL
MARTIN M. SHENKMAN . . . (Private Practice) Paramus, NJ
LYNNE STROBER . . . . . Mandelbaum, Salsburg, P.C. West Orange, NJ
JULIA SWAIN . . . . . Fox Rothschild LLP Philadelphia
TIMOTHY M. TIPPINS . . . . . (Private Practice) Latham, NY
THOMAS R. WHITE 3rd. . . . University of Virginia School of Law Charlottesville, VA
WILLIAM R. WRIGHT . . . . . Wright Law Firm, P.A. Jackson, MS

The Matrimonial Strategist® (ISSN 0736-4881) is published by Law Journal Newsletters, a division of ALM. © 2014 ALM Media, LLC. All rights reserved. No reproduction of any portion of this issue is allowed without written permission from the publisher.
Telephone: (877) 256-2472
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

ALM
Insights. Innovation. Connected.

How *Windsor* Has Made Hiding Money Harder

Anastasia Wincorn and Philip Segal

The Supreme Court's decision in *United States v. Windsor*, 570 U.S. ___ (2013), which struck down as unconstitutional Section 3 of the Defense of Marriage Act (DOMA) (*see* article on page 1, *infra*), will hamper same-sex spouses' ability to hide assets from each other, from the government, and from the public.

Windsor invalidated the provision of DOMA that defined marriage as a union between a man and a woman for the purposes of federal law. The case involved tax law and the right of legally married same-sex couples to provide tax-free bequests to their spouses. Because DOMA's definition of "marriage" and "spouse" applied to all federal laws, the impact of its demise has resonated throughout the federal government.

Now, not only do same-sex couples get many of the federal benefits other married couples do, they are burdened with the same restrictions: It is now harder to hide money or avoid sharing money in a same-sex marriage than it was before the Court's decision.

Pensions and Military Survivor Benefits

Pension income is often one of the largest assets in a marriage, and a single life pension without survivorship benefits results in much higher monthly payouts to the pensioner than a joint pension with survivorship rights. Until now, married same-sex partners could easily keep pensions hidden from one another.

Under the Retirement Equity Act, government and private employees entitled to a traditional pension must obtain spousal consent if they wish to designate anyone other than their spouse as the recipient of the survivorship benefits of their pension. Federal law also requires spousal notification before a married pension recipient can forego survivorship rights.

Similar to pension recipients, a married member of the military cannot opt out of the Survivor Benefit Plan, which requires them to pay monthly premiums, unless his or her spouse has waived participation in the plan in writing. Opting out of the Survivor Benefit Plan means a higher monthly paycheck for service members.

Under DOMA, two people of the same gender could not be "spouses" under federal law. They were therefore exempt from the spousal notification rules. They also had no right to review their spouses' beneficiary designation. Same-sex couples could easily hide benefits or take in substantially higher military pay, all while keeping one another in the dark. Now that DOMA's definition of "spouse" has been struck down, same-sex spouses will need to provide their consent before their partners can fritter away their nest egg.

This means that service members in same sex marriages could, in the past, opt out of the Survivor Benefit Plan and keep the premiums for themselves, all without telling their spouses. Now, they must notify their spouses of the existence of this valuable marital asset, and must get a written waiver before they can elect to forego survivor benefits.

Federal Aid and Individual Benefit Programs

The end of DOMA's definition of marriage also means that married gay couples will now have to disclose their spouse's income on applications for federal benefits that are allocated based on household income. Under DOMA, the agencies that administer federal entitlement programs did not recognize same-sex marriages, and thus did not require applicants to disclose their spouse's assets or income.

The Supreme Court briefly addressed this issue in *Windsor*, but focused solely on eligibility for federal student loans. The court's reasoning nonetheless applies to all federal programs that determine eligibility based on a potential recipient's household income, and has already been expressly taken up by a number of agencies, such as the Department of Education and the Social Security Administration.

The Department of Health and Human Services (HHS) announced in September 2013 that it had adopted the IRS's state of celebration policy, which recognizes any legal gay marriage regardless of the couple's state of residency. However, because Medicaid and other HHS programs are administered through unique federal/state partnerships, HHS declined to impose a state of celebration rule on its partner states, but instead permits states to determine their own policies regarding whether to recognize same-sex marriages. This makes for a confusing and potentially conflicting set of rules to follow, and little certainty for same-sex couples who wish to take advantage of HHS programs.

Nonetheless, one thing is clear: Individuals in same-sex marriages who live in states that permit gay marriage and who wish to apply for Medicaid benefits will need to do so as a couple, not as individuals. This benefits the couple if the ill spouse has a higher net worth than the well spouse, who can shield a certain amount of the ill spouse's money from Medicaid spend-down requirements. If the healthy spouse's income is higher, then the couple will be in a worse position than they would have been in terms of their ability to retain assets while collecting Medicaid benefits.

Whether they are financially helped or harmed by the new rules, same-sex spouses who apply for Medicaid will now need to disclose far more information about their personal finances both to the HHS and to their partners under HHS' current policies.

continued on page 4

Anastasia Wincorn is an attorney and case manager with Charles Griffin Intelligence LLC in New York City. **Philip Segal** is the founder of Charles Griffin Intelligence, which specializes in fact investigation for lawyers. An attorney, he spent 19 years as a journalist with *The International Herald Tribune*, *The Wall Street Journal*, The Economist Group, and NBC News, among others. He can be reached at philip@charlesgriffinllc.com.

Windsor and Money

continued from page 3

Federal Ethics Laws

Prior to *Windsor*, DOMA exempted same-sex spouses of government employees from certain federal ethics laws, which meant that all of the spouse's financial information and ties to particular donors or industries could remain safely shielded from public view. For example, as the decision mentions, federal law mandates that executive branch officials and federal judges recuse themselves from working on matters in which their spouse has a financial interest. Additionally, spouses of senators and senate employees cannot accept certain high-value gifts and honoraria. Same-sex couples were also exempt from complying with rules concerning financial disclosures, nepotism, lobbying, and insider trading.

In 2010, the House ethics committee attempted to implement rules defining married same-sex couples as spouses for the purposes of congressional financial disclosure rules. The rules were roundly rejected by advocates for and against gay marriage alike. Those opposed to gay marriage pointed out that the rules contradicted DOMA. Those in favor of gay marriage objected to the rules because they imposed the obligations of marriage on gay couples that were not afforded the same benefits and privileges that straight married couples enjoy.

Citizens for Responsibility and Ethics in Washington filed an amicus brief in *Windsor* pointing out the gaps in federal ethics laws as applied to gay couples. In its decision, the Supreme Court specifically mentioned DOMA's inequitable effects on the federal government's ability to enforce ethics rules in reaching its conclusion. The Office of Government Ethics has since issued guidance providing that ethics rules will be equally applied to same and opposite-sex couples, and the Federal Election Commission has issued advisory opinions stating that legally married same-sex couples are spouses for the purpose of FEC regulations.

Post-*Windsor* Developments

Soon after *Windsor*, the IRS and the Treasury department announced that they would recognize all same-sex marriages performed in states that recognize those marriages as valid even if the couple lived in a state that did not consider them legally married. The policy is especially helpful because *Windsor* left standing a provision of the law permitting states to refuse to recognize same-sex marriages that are legally performed in other states. Couples wed in states that permit gay marriage will thus have more or less uniform access to the benefits and obligations that flow from *Windsor* and its consequent shifts in federal policy.

An increasing number of federal entities are adopting state of celebration policies. Agencies that have followed the IRS and Treasury Department's lead include the Office of Personnel Management, the U.S. Citizenship and Immigration Services under the Department of Homeland Security (DHS), the Department of Defense, the Securities and Exchange Commission (SEC), the Department of Labor (DOL), the Employee Benefits Security Administration, and the Federal Election Commission, among others.

Since *Windsor*, both the DOL and the Employee Benefits Security Administration, which enforce ERISA and other federal laws relating to pension plans, have adopted policies expressly acknowledging any same-sex marriage that is valid in the state in which it was solemnized, regardless of whether the state where the couples resides permits gay marriage. The Department of Defense also adopted a "state of celebration" rule soon after *Windsor*. However, Title 38 of the U.S. Code, which included language defining marriage as between a man and a woman, impeded the Defense Department and the Department of Veterans' Affairs from providing health and survivor benefits to same-sex spouses of service members. In early September, Attorney General Eric Holder announced that the executive branch would no longer enforce the law, and would remove all impediments to providing benefits to same-sex couples.

The Department of Defense has also created a special category of leave for people who wish to take advantage of the department's new benefit policies. Individuals who are stationed in states that do not permit same-sex marriage can take a brief leave to get married in a state that allows gay marriage.

—❖—

Relocation

continued from page 2

interests [citing *Matter of Tropea*, *supra*]. Economic necessity … may present a particularly persuasive ground for permitting the proposed move."

The court found that the mother amply demonstrated that, even if she were to obtain full-time employment at a salary commensurate with her prior employment, she could not afford both an apartment and daycare fees on Long Island, where the father was then living. Therefore, the appellate court found that the family court should have granted her permission to relocate.

The proximity of relatives or others who can help care for a child can also be a good factor to argue when seeking relocation. For example, in *Blundell v. Blundell*, 150 AD2d 321 (2nd Dept. 1989), the Appellate Division reversed the ruling of the lower court and allowed the appellant mother to relocate to Londonberry, NH, where she owned a home and had strong family ties. The mother successfully argued that she wanted to live closer to her parents and brother because they would assist her in raising the children, and would also provide her with free babysitting while she worked. The mother did not have any immediate relatives in the Long Island area, the place from which she wanted to move.

It can also be helpful if your client is willing to be flexible with visitation by proposing to expand it, rather than limiting it as a result of the proposed relocation. In *Mathie v. Mathie*, 65 A.D.3d 527 (2nd Dept. 2009), the court permitted the relocation of the appellant mother from Merrick, NY, to Marlboro, NJ,

continued on page 6

Same-Sex Benefits

continued from page 1

did not require states to recognize same-sex marriage. The question that immediately followed that decision centered on what rights same-sex spouses have regarding their spousal employment benefits, estates, and family leave requirements. Answers are beginning to roll in as noted below.

Federal Employee Benefits

The Office of Personnel Management (OPM) announced on June 28 that under *Windsor*, same-sex spouses of federal employees and annuitants are eligible for coverage under the federal government's benefits programs. OPM promised to ensure "swift and seamless implementation" of the Court's ruling. This includes extending federal health benefits to spouses and children of same-sex marriages, recognizing spouses and children of same-sex marriages as eligible family members to federal life insurance coverage, use of Flexible Spending Accounts for claimed medical expenses for their spouses and children, and eligibility for federal long term care insurance.

Additional Benefits Impacts

As noted above, other benefits programs that are affected by federal law are likely to have an impact on private employers, as well as those employed by the federal government. That is, the federal laws governing employee benefit plans will require companies to treat employees' same-sex spouses equally as opposite-sex spouses.

For instance, health benefits under programs such as the Consolidated Omnibus Budget Reconciliation Act (COBRA) will now afford the same rights and benefits to married same-sex couples as have been traditionally afforded to opposite-sex married couples. Additionally, even as to private employers, reimbursement under a flexible spending account (FSA), health reimbursement account (HRA) or health savings account (HSA) may be made for covered expenses of same-sex spouses and their children on a tax-free basis for federal tax purposes to the same extent as available to opposite-sex spouses. Moreover, same-sex spouses are eligible for special enrollment rights under the Health Insurance Portability and Accountability Act (HIPAA) and applicable change-in-status events under Internal Revenue Code Section 125.

Family and Medical Leave Act

On Aug. 9, 2013, Labor Secretary Thomas Perez issued a staff memo advising that the Department of Labor (DOL) had updated its guidance documents to affirm the availability of spousal leave based on same-sex marriages under FMLA. Perez noted that "this is one of many steps the Department will be taking over the coming months to implement the Supreme Court's decision" and that the Department will "look for every opportunity to ensure that we are implementing this decision in a way that provides the maximum protection for workers and their families."

'State of Celebration' Decisions

As discussed above, because *Windsor* does not force any state to adopt same-sex marriages (currently, 13 states and the District of Columbia recognize them), questions immediately arose as to when a marriage would be valid and a spouse recognized for purposes of benefits where the union was validly formed in one state that recognizes such marriages ("state of celebration") but the couple resides in a state that does not. Two federal courts have thus far examined the issue.

First, the federal district court in Pennsylvania determined who had rights to a same-sex spouse's death benefits: one's parents, or the surviving same-sex spouse. In *Cozen O'Connor v. Tobits*, the parents of a deceased Cozen O'Connor employee, Sarah Farley, argued that DOMA prevented the law firm's Profit Sharing Plan (Plan) from recognizing and providing benefits to Ms. Farley's same-sex spouse (Jean Tobits), despite the fact that the couple legally married in Toronto, Canada, in 2006. The Plan defined "Spouse" as "the person to whom the Participant has been married throughout the one-year period ending on the earlier of (1) the Participant's annuity starting date or (2) the date of the Participant's death." Ms. Farley's parents argued that they, and not Ms. Tobits, were entitled to the death benefits under the Plan as Ms. Tobits was not a "spouse" per Pennsylvania law.

In this matter, at the time of Ms. Farley's death, the couple actually resided in Illinois, where same-sex unions are recognized, but the Profit Sharing Plan in question originated and was administered in Pennsylvania, which does not. The court found that Pennsylvania law was preempted under the Employee Retirement Income Security Act (ERISA), which promotes the principle of maintaining national uniformity among benefit plans. The court determined to apply the law of Illinois and to award the death benefit to Ms. Tobit.

In the second matter, the federal district court in Ohio even more directly looked to the "state of celebration" as the appropriate approach to determine the validity of a same-sex spouse claim. In *Obergefell v. Kasich*, a same-sex couple had lived together for 20 years in Ohio, which does not recognize same-sex marriage even if the couple has married in another state. The couple had traveled to Maryland to marry, a state that does recognize same-sex marriage. One of the spouses, Mr. John Arthur, was in hospice care for the final stages of life, and he did not wish to be identified as "unmarried" in state documents,

continued on page 8

Karen A. Kalzer practices professional and employment liability defense in Seattle's Helsell Fetterman. Her clients have included private employers, religious organizations, child caring agencies, schools, and non-profits. Reach her at kkalzer@helsell.com.

FL Supreme Court Rules on Lesbian Custody Case

A lesbian mother who separated from her partner does not lose her parental rights to a child born during the relationship, a divided Florida Supreme Court ruled in November 2013. The 4-3 opinion strikes down the state law on assisted reproductive technology as unconstitutional, and affirms a decision by the Fifth District Court of Appeal upholding parental rights for same-sex couples who jointly conceive a child.

The birth mother had moved to Australia and had cut access to the child born in 2004. The estranged partner, whose fertilized egg was used in the pregnancy, challenged the loss of rights and access in a state were same-sex marriage is barred.

The majority in the closely watched dispute, decided the case on federal equal protection and state privacy grounds. Three justices dissented.

Justice Barbara J. Pariente, writing for the majority, said the decision relied on "longstanding constitutional law that an unwed biological father has an inchoate interest that develops into a fundamental right to be a parent, protected by Florida and U.S. Constitutions, when he demonstrates a commitment to raising the child."

The statute is unconstitutional as applied under due process clauses of the state and federal constitutions and the privacy provision of the Florida Constitution, Pariente said. The law also violates federal and state equal protection law "by denying same-sex couples the statutory protection against the automatic relinquishment of parental rights that it affords to heterosexual unmarried couples."

Pariente said that the mother who took the child to Australia, identified in court records only as D.M.T., is not being denied her right to parent. The decision only requires that her estranged partner T.M.H.'s right to parent be recognized.

"D.M.T.'s preference that she parent the child alone is sadly similar to the views of all too many parents, who after separating prefer to exclude the other parent from the child's life," she wrote.

The case was distinct both for its approach to the subject of same-sex rights and parental rights involving conception by artificial means. — *Daily Business Review*

—❖—

Relocation

continued from page 4

based upon the custodial parent's offer of a liberal parenting time arrangement to make up for the missed weekday visits of the non-custodial parent. With regard to the respondent father's loss of weekday contact, the court wrote: "While the weekday contact with the defendant is neither trivial nor insignificant, a visitation schedule could be devised that would allow for the continuation of the meaningful relationship between defendant and his son."

The court noted that the plaintiff had proposed a liberal visitation schedule that would substantially expand the father's visitation time with his son when compared with the schedule set out in the parties' stipulation. The father would be able to see his child during alternating school recesses, long weekends and summer vacations. "Indeed," said the court, "the amount of quality time the defendant would spend with [the child] would actually increase notwithstanding the loss of the weekday evening visits." In this case, the court was able to come to the conclusion that the added access the father would have under the new custody arrangement would in fact improve the child's, and the father's, quality of life.

CONSIDERATIONS

Successful applicants for the right to relocate with their children are likely to give consideration to the following, and include them in their petitions:

- A detailed parenting time schedule that grants the non-custodial parent an equal or greater amount of parenting time than was provided for in the original time arrangement;
- A proposal for pick-ups and drop-offs that will alleviate the non-custodial parent's obligation to travel prolonged distances to see the children;
- Provision for monetary credits that the non-custodial parent will receive for the costs of securing parenting time in the custodial parent's proposed new domicile;
- Proof of how the children's life will be enhanced by the move, which would require researching the quality of the proposed new neighborhood, schools, child-care options, the general environment and extracurricular activities. Also to be considered here are the manner in which finances will be affected, and how the change in location will benefit the children's standard of living; and
- A showing that the relocating parent is cooperative and will accommodate the non-custodial parent's access to the children and to their activities.

CONCLUSION

It is important to discuss these issues with your client as soon as possible, so that he or she may take the steps necessary to meet the criteria set forth in the applicable case law. With advance planning and a careful gathering of evidence, you and your client can better present the court with the evidence it will need to find that a move is in the child's best interest. As we saw in *Verhulst*, a general, unspecific presentation to the court is unlikely to give him or her the chance to move to a new location, even if the move might arguably have benefited the child.

—❖—

Parental Illness And Custody

By Robert A. Epstein

To what extent can a parent's illness can have a bearing on a pending custody decision or existing custody arrangement? Often, the illness is of a mental nature, where one parent will argue that the other parent is unfit to care for the children because of that parent's history of mental illness, psychological/psychiatric treatment and/or use of prescription medications to treat such an illness (or lack thereof, which also often comes into the equation), and more. What happens, however, when the illness is physical in nature?

For instance, what if one parent is diagnosed with cancer? That was the issue presented in the newly published trial court decision, *A.W. v. T.D.*, in New Jersey. The most important question that the court will face in addressing the issue is whether — under the specific facts and circumstances at issue — the diagnosed parent can still appropriately care for the child's health, safety and welfare. In other words, are the best interests of the child still protected by the existing arrangement? If not, then a change may be necessary, through no fault of the ill parent.

FACTS

In *A.W.*, the parties shared joint legal custody of the three children, and the Mother served as the primary residential custodian and caretaker. The parties lived more than three hours away from each other, although the Mother had a substantial support network of relatives residing within minutes of her home. The Mother, at age 46, was diagnosed with Stage IV breast cancer, for which she was hospitalized and then discharged.

The Father immediately filed an emergency application for a transfer of custody based on the Mother's illness, arguing that the change was necessary to protect the children from irreparable harm. The Mother reasonably acknowledged, in opposing the Father's motion, that her condition could deteroriate in the future to the point that she could no longer care for the children, and that a transfer would possibly be necessary at some point — just not yet, and that her nearby relatives could assist her in caring for the children (physically, emotionally, and financially). The Mother's two treating doctors confirmed that the cancer was incurable and terminal, but that she was "presently stable and fully functional," her judgment was not impaired by her taking of prescribed medication, and she could continue caring for the children.

COURT'S DECISION

The court not only found that the Mother was able to continue as primary custodian but that, in fact, the children could suffer "immediate and irreparable" harm should the transfer occur — indeed, the exact opposite of what the Father was trying to prove: "The harm at issue is not physical harm, but emotional harm resulting from a forcible, premature separation of the children from their dying mother and primary caretaker." The court added:

> In this case, the parties' children may have a tremendous emotional need to remain with defendant, and to spend as much time with her as reasonably possible under the circumstances. For the children, the loss of this opportunity during what may be the final stages of defendant's life may be irreplaceable, and the resulting emotional damage irreparable. The fact that the parties are divorced, and live relatively far apart, only further complicates matters for the children.

The court then took the Father to task for his application while providing some guidance, noting:

> When a non-custodial parent files an application alleging a necessity to immediately transfer custody away from parent with a terminal illness, such application must at the very least logically acknowledge and address the critical questions of whether such immediate transfer of custody may cause the children serious and irreparable emotional trauma, and how the non-custodial parent specifically proposes to handle such trauma under the circumstances. Failure to address these issues leaves a gaping hole in the application, and may reflect poorly on the non-custodial parent's ability to fully grasp and understand the gravity of the situation which young children may face when their primary caretaker is dying. In this case, notwithstanding the clear need for careful exploration and consideration of the children's emotional needs at this time, [Father's] emergent custody application fails to satisfactorily reflect any real and thoughtful discussion or acknowledgement of this issue in any meaningful way.

The court also found that the Father completely failed to provide any plan as to how the children would continue to see the Mother if he were awarded custody, further failing to address the potential emotional impact upon the children — of which the court actually took what is called "judicial notice" under the Rules of Evidence, and failed to initiate any sort of discussions or transition plan, including any

continued on page 8

Robert Epstein is a member of Fox Rothschild's Family Law Practice in Roseland, NJ. He represents clients in all stages of family law litigation and his practice involves all aspects of family law. He may be reached at repstein@foxrothschild.com or 973-994-7526.

Practice Tip

continued from page 7

notion of meeting with therapists or other professionals to address the situation. The court, as a result, concluded:

> [G]iven defendant's diagnosis, it is appropriate for the parties, as joint legal custodians and parents, to attempt to constructively communicate with each other, and jointly and responsibly prepare and develop a mutually acceptable contingency plan for implementation of a possible future transfer of custody, if and when medically necessary. …
> In this case, the children's interests can be positively served if both parents jointly and consensually select a child psychologist or therapist who can provide them with important professional guidance on jointly helping the children through this ordeal. In this fashion, if and when a transfer of custody becomes medically necessary, such transfer may take place under amicable terms, which have been cooperatively constructed and consensually arranged by two caring parents in advance of a medical emergency. The terms of such arrangement can be reduced to a proposed consent order submitted to the court. Of course, any such joint arrangements should logically contain provisions for the children to have ongoing counseling, and should further include as many reasonable opportunities as medically possible for the children to maximize their remaining time with their mother under the circumstances.

The court then actually modified the summer parenting time schedule to provide the Father with longer stretches of parenting time, and indicated that it would interview the children at the end of the summer regarding their access to the Mother and their general well-being. The Father was to be provided with updates on the Mother's condition.

Conclusion

The decision strongly hints at the court's displeasure with the Father, implying that his application was less a product of emergency circumstances and more of an acrimonious relationship between the parents. Sympathizing with and understanding the Mother's position, and the children's needs, the emotions literally spill out onto the pages of the decision, and the underlying guidance for how to proceed in such an extremely delicate situation is clear. It is an unfortunate reality that emergency applications to transfer custody often do not include the degree of thought and concern sought by the court from the Father in this matter.

—❖—

The publisher of this newsletter is not engaged in rendering legal, accounting, financial, investment advisory or other professional services, and this publication is not meant to constitute legal, accounting, financial, investment advisory or other professional advice. If legal, financial, investment advisory or other professional assistance is required, the services of a competent professional person should be sought.

Same-Sex Benefits

continued from page 5

specifically, a death certificate. Mr. Arthur also wished his spouse to be recorded as a "surviving spouse."

Ohio does recognize certain opposite-sex marriages that are not lawful in Ohio but which have been lawfully performed in other states, such as marriages of first cousins or minors. The Ohio court held that treating opposite-sex out-of-state marriages differently from same-sex out-of-state marriage violates the U.S. Constitution's guarantee of equal protection. Thus, the court ordered the Ohio Registrar not to accept any death certificate that identified the deceased spouse as "unmarried."

Whether the approach of these two courts marks a trend or merely the beginning of a circuit split that will require Supreme Court resolution remains to be seen. It is unclear how legally married same-sex couples who reside in a state where same-sex marriage is not recognized should be treated for purposes of federal law, including spousal benefits under pension plans and the taxation of medical, dental and vision benefits.

Public Business Decisions

On Aug. 27, the nation's largest private employer, Wal-Mart (the largest employer being the federal government), quietly announced its decision to provide benefits to same-sex couples in all states, not just states that recognize same-sex marriage. This expansion embraces not only recognized marriages, but also domestic partnerships. Wal-Mart cited the need for a consistent policy throughout the United States, not one that applied in only a few select states. Although extending health care or other benefits to same-sex unions has grown dramatically in the last decade, this decision may well trigger the domino effect in other hold-out employers.

Final Watch Words

Employers that do not clearly define "spouse" and "dependent" under their retirement and welfare plans are vulnerable to challenges by same-sex spouses and partners if the employer denies benefits to such spouses and partners. Family law practitioners should also take heed and review the use of the term "spouse" in each of their client's benefit programs to determine whether they intend or are required to cover same-sex spouses and partners, regardless of whether the couple resides in a state that recognizes same-sex marriage.

—❖—

To order this newsletter, call:
1-877-256-2472

On the Web at:
www.ljnonline.com