THIS BOOKLET CONTAINS THE FILING INSTRUCTIONS AND PUBLICATION UPDATE

Route to: ☐ _____ ☐ _____ ☐ _____ ☐ _____
☐ _____ ☐ _____ ☐ _____ ☐ _____

Child Custody and Visitation Law and Practice

Publication 213 Release 38 April 2003

HIGHLIGHTS

Domestic Violence and Abuse

- New Chapter 7, "Domestic Violence and Abuse in Child Custody Cases," discusses the psychological aspects and then warns of legal hurdles when representing clients in child custody proceedings in which these issues arise.

Updated with Recent Developments

- Analysis updated throughout plus selected summaries added to the State Highlights section at the front of Volume One to alert you to significant new cases and legislation.

Domestic Violence and Abuse in Child Custody Cases, New Chapter 7

This new chapter is written for professionals involved in child custody and visitation matters. Family law attorneys, in particular, may be called on to handle the domestic abuse or violence aspects of child custody proceedings that require them to deal with complexities for which their traditional legal training may not have prepared them. By providing an understanding of the psychology of domestic abuse and violence, and by further offering specific, goal-oriented guidance for handling the legal proceedings in which they arise, the authors seek to prepare their colleagues to deal effectively with domestic abuse or violence.

Dina L. McMillan, Ph.D., the author of Part I of this chapter, Psychological Aspects, has practiced as a social psychologist in California since her graduation from Stanford University in 1994. She has worked as a domestic violence specialist at the Orange County Superior Court and was an active member of the Orange County Domestic Violence Death Review Team. Dr. McMillan is presently working on several books on dysfunctional interpersonal relationships and is in private practice in Brentwood, California. Part I of this chapter carefully reviews the psychological aspects of domestic abuse or violence to heighten your ability to accurately interpret the dynamics and assist in a more comprehensive manner.

Beginning with an overview in 7.02, Part I alerts the family law practitioner to the psychology that may explain and predict behavior while cautioning that a thorough diagnosis by a qualified professional is necessary to attribute any specific condition to a particular individual. A psychological understanding of abuse, so necessary to effectively represent those impacted by abuse, is presented in 7.03 and the cycle of violence is detailed in 7.04. The psychology of abuse is covered in 7.06. Section 7.07 analyzes the pathology of abusers, while 7.09 covers the psychology and pathology of the victim. The psychological impact of a restraining order is explained in 7.11. Section 7.12 discusses the enormous impact of abuse on children. In 7.13, the author explains the predictable outcomes for children when common orders sought in legal proceedings are obtained.

Merritt L. McKeon, Esq., the author of Part II of this chapter, Legal Representation, practices in Newport Beach, California, and limits her private family law practice to Writs and Appeals. She is a graduate of the Benjamin N. Cardozo School of Law in New York City. Ms. McKeon is the founder of the Domestic Law Project, a non-profit legal services center for battered women in Orange County, California. She has also written on Custodial Parent Relocation ("move-away cases") and Parental Kidnapping. Part II of this chapter begins with a brief overview of statutes and cases regarding child custody and domestic violence in 7.20. Section 7.21 covers in detail the initial interview and seeking an initial restraining order. Section 7.22 is focused on psychological evaluations when domestic violence is an issue. Section 7.23 reviews the response to a domestic violence application. Section 7.24 assists in creating a trial checklist for evidence, testimony, and putting on an effective case. Section 7.25 reviews settlement. Section 7.26 covers appeals and writs in a reviewing court, and strategies in the face of a loss at hearing. Section 7.27 covers enforcement of protective custody orders. Section 7.28 reviews post-trial or settlement issues, which may arise, and Section 7.29 covers ethical concerns counsel may have, along with safety issues which arise in these cases.

Just a few of the Selected Recent Developments Analyzed This Release:

Admission That He Was Not Biological Father Did Not Necessarily Rebut Presumption of Fatherhood [§ 30.04[3]]. The California Supreme Court has held that even though a man admitted he was not an out-of-wedlock child's biological father, he was the presumed father and entitled to custody, rather than the local social services agency. The man had held himself out as the child's father, and under California's statutory scheme, he was the presumed father and his admission that he was not the biological father did not necessarily rebut that presumption. Since the mother was unfit to parent and the biological father had not come forward, rebutting the presumption of fatherhood would have rendered the child fatherless and subject to the custody of the county social services agency. *In re Nicholas H.,* 28 Cal. 4th 56, 120 Cal. Rptr. 2d 146, 46 P.3d 932 (Cal. 2002).

Custody Order Can Include Relocation Restriction Even in Absence of Intent to Relocate [§§ 13A.03, 13A.04[1]]. The Florida Court of Appeal has held that a trial court has the discretion to include in a final judgment a clause prohibiting the custodial parent's relocation without the approval of the noncustodial parent or a court order, even absent evidence that the custodial parent intends to move. *Leeds v. Adamse,* 832 So. 2d 125 (Fla. Ct. App. 2002).

Sperm Donor Is Not Entitled to Visitation [§ 11A.06[1]]. The Florida Court of

Appeal has held that a sperm donor is not a parent and has no parental rights, so that the trial court erred in establishing a visitation schedule. Both the contract between the donor and the mother and the Florida statute controlling these arrangements provided that there are no parental rights or responsibilities resulting to the sperm donor. If the sperm donor has no parental rights, the sperm donor is a nonparent and a statutory stranger to the children, and any stipulations or agreements into which the parties entered to give the donor visitation were also not enforceable. *Lamaritata v. Lucas,* 823 So. 2d 316 (Fla. Ct. App. 2002).

Emergency Jurisdiction Under UCCJEA Not Jurisdiction to Enter Custody Order [§§ 4.02[1], 4.04]. The Maine Supreme Court has held that under the UCCJEA, the exercise of emergency jurisdiction will not provide a state that is not the home state with jurisdiction over a separate complaint for custody or in this case for paternity, parental rights and responsibilities and child support. *Campbell v. Martin,* 2002 ME 112, 802 A.2d 395 (Me. 2002).

Grandparent Visitation Statute Constitutional [§ 16.12[3]]. The Missouri Supreme Court has upheld the constitutionality of Missouri's grandparent visitation, both on its face and as applied. In *Blakely v. Blakely,* 83 S.W.3d 537 (Mo. 2002), the trial court had granted the grandparents two hours of visitation every 90 days under a statutory provision allowing court-ordered grandparent visitation when a grandparent is "unreasonably denied" visitation for a period exceeding ninety days, and finding it in the children's best interests that they be awarded reasonable visitation. The Missouri Supreme Court had previously upheld the constitutionality of the grandparent visitation statute in *Herndon v. Tuhey,* 857 S.W.2d 203 (Mo. 1993). The court rejected that parents' argument that any statute granting grandparents visitation in the absence of a finding that the lack of visitation will cause the child harm is unconstitutional, and found that the provisions of the Missouri statute as narrowly interpreted in *Herndon* and cases following it, comport with the standards in *Troxel.* Requiring the grandparents to prove that the denial of visitation was unreasonable accords the parents' decision the kind of rebuttable presumption of validity *Troxel* suggests is appropriate.

One Parent's Permission for Child to Marry Violated Other Parent's Due Process Rights [§ 28.03]. The Nevada Supreme Court has found that a Nevada statute that allowing a child under the age of 16 to marry with the consent of only one parent violated a non-custodial father's fundamental right to the parent-child relationship without a compelling reason, in violation of his procedural due process rights. The statute did not violate his substantive due process rights. However, the statute violated his procedural due process rights because it his right to care, custody and control of his child without first providing him the opportunity to be heard, and affording him an opportunity for meaningful participation would not impinge on the child's limited interest in applying for permission to marry. *Kirkpatrick v. Eighth Judicial Dist. Court,* 43 P.3d 998 (Nev. 2002).

Grandparent Visitation Constitutional [§ 16.12[3]]. The New Mexico Court of Appeals has upheld New Mexico's grandparent visitation law as consistent with *Troxel.* The grandparents sought visitation under the statutory provision

allowing them to seek visitation when the child had resided with them for at least six months after the age of six. The parents, although divorced, challenged the law as unconstitutional as applied on the ground that the trial court failed to give special weight to their wishes opposing visitation. The court found that the statute and order complied with *Troxel,* and the court gave appropriate weight to the parents' wishes and did its best to accommodate their wishes in fashioning the visitation order. The court interpreted *Troxel* as requiring the presence of special factors before a court can order grandparent visitation over the wishes of the parents, and special factors regarding parental unfitness supported the court's order based on the mother's lack of a significant relationship with the child and the court's specific significant concerns as to the father's fitness. *Williams v. Williams,* 132 N.M. 445, 50 P.3d 194 (N.M. Ct. App. 2002).

Daughter's Abandonment of Visitation Justified Modification of Support [§ 16A.01]. In entering into a settlement agreement, the mother and father departed from support guidelines which would have entitled the mother to support from the father, and agreed the child would spend 35% of her time with her father, during which he would pay all her expenses, and that the father would pay for the child's clothing. After the daughter stopped visiting her father, the mother sought modification of his support obligations and he cross petitioned to be relieved of his support obligations on the grounds the daughter had abandoned him. The New York Court of Appeal held that the complete breakdown in visitation, which effectively extinguished the father's support obligation, constituted an unanticipated change in circumstances creating the need for modification of the support obligation, and the necessity of ensuring the father continued to support his child as agreed, despite the inability to perform under the original terms of the agreement, justified modification of the support provisions. *Gravlin v. Ruppert,* 98 N.Y.2d 1, 743 N.Y.S.2d 773, 770 N.E.2d 561 (N.Y. 2002).

Placing Texas Child in County's Custody Was Error [§4.04[6]]. The North Carolina Court of Appeals has held that a North Carolina trial court's order placing a child that the noncustodial mother had removed from Texas without the father's knowledge in the custody of the county after finding the child to be neglected did not comply with the UCCJEA or PKPA in light of the Texas court order awarding the father custody. The language used by the trial court indicated an immediate need necessitating protection of the child so that the trial court was within its power to invoke the exercise of emergency jurisdiction under the UCCJEA and PKPA to protect the child. However, the trial court's order did not comply with the UCCJEA statutory framework because it was not temporary, and although the trial court had notice of the Texas decree, it did not immediately contact the Texas court as required by statute. Further, the North Carolina order was inconsistent with the requirements of the PKPA, because it did not defer adjudication on the merits pending notice from Texas concerning whether Texas would exercise jurisdiction. *In re Brode,* 566 S.E.2d 858 (N.C. Ct. App. 2002).

Grandparent Visitation Statute Is Constitutional [§ 16.12[3]]. The South Dakota Supreme Court has upheld the constitutionality of South Dakota's

grandparent visitation law, with the exception of a provision that improperly creates a presumption in favor of grandparents where their deceased child was the parent of the grandchild. The South Dakota Supreme Court held that the statute properly places the burden of proof on the grandparents and does not unreasonably deprive the custodial parent of the fundamental right to make decisions concerning the care, custody and control of the children. The provision creating a presumption in favor of the grandparents is unconstitutional under *Troxel,* but it was severable and did not apply in the case at bar. The court went on to hold that the trial court erred in terminating the grandparents' visitation rights without considering the best interests of the children. *Currey v. Currey,* 2002 SD 98, 650 N.W.2d 273 (S.D. 2002).

Best Interest of Child Is Best Interests of Both Siblings [§ 10.06[4]]. The South Dakota Supreme Court has found that a trial court did not abuse its discretion in awarding custody of a boy to his mother, concluding that although it was in the boy's best interest individually for custody to be changed to his father, it was in his half-brother's best interest to remain with his mother and there was no compelling reason to separate the siblings so that it was in both siblings' best interests to remain with their mother. *Hathaway v. Bergheim,* 2002 SD 78, 648 N.W.2d 349 (S.D. 2002).

Contract With Fertility Clinic Controls Disposition of Pre-Embryos [§ 11A.06[2][a]]. In *Litowitz v. Litowitz,* 145 Wn. 2d 514, 48 P.3d 261 (Wash. 2002), which involved a determination, in a parenting plan incident to a divorce, of the contractual rights of a married couple to two cryopreserved pre-embryos, the Washington Supreme Court held that the cryopreservation contract controlled disposition of the pre-embryos despite the couple's conflicting desires. In the contract, the couple chose the option for disposition that the pre-embryos be thawed but not allowed to undergo further development when the pre-embryos had been cryopreserved for five years after the initial date of preservation. The husband wanted to put the pre-embryos up for adoption; while the wife wanted to implant them in a surrogate mother and bring them to term. The trial court awarded them to the husband, using the best interest of the child standard and concluding that it was better that they be brought to term in a two-parent family. The Washington Supreme Court found that because the wife was not a progenitor, any right she had to the pre-embryos would be based solely on contract. The court found it unnecessary to engage in a legal, medical or philosophical discussion as to whether the pre-embryos were "children," or whether the wife was a progenitor. The court based its decision solely on the cryopreservation contract, and held that under terms of the contract, the pre-embryos would have been thawed out and not allowed to undergo further development five years after the initial date of cryopreservation, which would have occurred on March 24, 2001.

- **Father Must Cover Torso During Visitation** [§ 16.04[5]]. The Appellate Division has upheld a trial court's directive that while exercising visitation with his daughters, the father wear non-revealing clothing covering his genitalia and lower torso whenever in the presence of his daughters whether waking or sleeping. Whatever privacy issues potentially might be implicated had to

yield to the trial court's authority to impose reasonable restrictions upon visitation consistent with the children's overall best interests. *Nelson v. Nelson*, 290 A.D.2d 826, 736 N.Y.S.2d 532 (N.Y. Sup. Ct., App. Div. 3d Dept. 2002).

- **Sperm Donor Entitled to Increased Visitation** [§ 16.03[3]]. The Appellate Division, has held that a gay man who donated sperm to a lesbian pursuant to her plan to form a family with her partner, as a result of which she bore two children, was entitled to increased visitation with the children after the woman and her partner ended their relationship. The trial court found expanded visitation to be in the children's best interests. The Appellate Department rejected the mother's contention that he was merely a sperm donor who should be restricted to the terms of the parties' written agreement, and her claim that he had either waived or was estopped from obtaining increased visitation since he had been actively exercising the parental rights permitted under the agreement throughout the children's lives. *Tripp v. Hinckley*, 290 A.D.2d 767, 736 N.Y.S.2d 506 (App. Div. 3d Dept. 2002).
- **Grandparent Visitation Statute Is Facially Constitutional and Constitutional as Applied** [§ 16.12[3]]. The Appellate Division has upheld New York's grandparent visitation statute concluding that *Troxel* does not call into question the statute's facial validity, and the application of the statute to this case to grant the maternal grandmother visitation in the face of the parents' opposition did not violate the parents' rights under the Due Process Clause. Unlike the trial court in *Troxel*, the trial court did not presume that the grandmother's request for visitation would be granted in the absence of a showing that the children would be adversely impacted. By requiring her to establish standing, the court gave the parents' decision some presumptive or special weight, which is all that *Troxel* requires. *Morgan v. Grzesik*, 287 A.D.2d 150, 732 N.Y.S.2d 773 (N.Y. App. Div. 4th Dept. 2001). The Second Department has also held that Dom. Rel. Law. § 72 is facially constitutional. *Hertz v. Hertz*, 291 A.D.2d 91, 738 N.Y.S.2d 62 (N.Y. App. Div. 2d Dept. 2002).
- **Presumption of Legitimacy Rebutted** [§ 30.02[1]]. The North Carolina Court of Appeals has held that even though a child was born during a marriage and the husband acknowledged paternity, where the trial court found that the putative father and the mother regularly engaged in unprotected sexual intercourse surrounding the time of conception at a time when the mother was separated from her husband, that the husband and mother both had very white skin and appeared to be Caucasian, while the putative father and the child appeared to be of a mixed ancestry, including African-American ancestry, and that the child resembles the putative father and not the husband, thus finding that the putative father was the biological father and concluding that it was in the best interest of the child to visit with him, the trial court erred in dismissing the putative father's complaint for visitation. *Jeffries v. Moore*,

148 N.C. App. 364, 559 S.E.2d 217 (N.C. Ct. App. 2002).

- **Court Not Bound by Stipulated Relocation Provision** [§ 13A.04[3]]. The North Dakota Supreme Court has held that a stipulated divorce provision for an automatic change in custody on the occurrence of a future event is unenforceable. *Zeller v. Zelle* , 2002 N.D. 35, 650 N.W.2d 53 (N.D. 2002). Biological Parent Entitled to Custody Unless Found to Be Unfit [§ 10.05[1]]. In a custody dispute between parties to a marital dissolution over a child who was the biological child of the wife but not the husband, the trial court erroneously applied a comparative fitness analysis as between the parties and awarded custody of all three children to the husband, finding that the best interest of the children would be served by making the him the primary residential parent. The Tennessee Court of Appeals held that courts cannot award custody to a third party instead of a biological parent unless the biological parent is found to be unfit, and, having utilized the comparative fitness analysis, the trial court made no determination whether the child would be exposed to substantial harm if custody was awarded to the wife. *Poore v. Poore*, 2002 Tenn. App. LEXIS 101 (Tenn. Ct. App. 2002).
- **Wisconsin Grandparent Visitation Statute Does Not Require Finding of Parental Unfitness** [§ 16.12[3]]. In rejecting a challenge to its grandparent visitation statute as facially unconstitutional, the Wisconsin Court of Appeals has found that the trial court erred when it determined that it could not grant visitation rights to the paternal grandmother of a nonmarital child over the mother's objection absent a showing of parental unfitness. When applying the statute, trial courts must apply the presumption that a fit parent's decision regarding grandparent visitation is in the best interest of the child, but this is only a presumption and the trial court must make its own assessment of the child's best interest. *In re Paternity of Roger D.H.*, 2002 Wis. App. 35, 641 N.W.2d 440 (Wis. Ct. App. 2002).

www.lexis.com

Publication 213, Release 38, April 2003

Federal Law on Child Kidnapping: Congress has enacted numerous civil and criminal statutes to address Abduction and kidnapping and interstate and international child custody and visitation disputes. The United States is also party to a treaty aimed at resolving international child abduction case. The following are some of the Federal Statutes on KidnappingÂ The Uniform Child Custody Jurisdiction and Enforcement Act: Apart from jurisdiction in interstate custody and visitation cases, the Act authorizes public officials to play a role in civil child custody enforcement and cases involving the Hague Convention on the Civil Aspects of International Child Abduction. Child custody and visitation agreements can be modified with the consent of both parents or by court order. Learn more to find out what you need to do.Â If you and the other parent are able to come to an agreement on custody and visitation on your own, the court is less likely to get involved in the custody matters. By Court Order: If the parents arenâ€™t able to reach an agreement, then the court will end up making the decision. Generally this means that there will be a hearing in court, where both parents will have an opportunity to present their cases and explain their situation.