New Jersey Family Lawyer

Volume 31 • Number 4
February 2011

CHAIR'S COLUMN

Open Adoption

by Thomas Snyder

Each year November is recognized as National Adoption Awareness Month. For nearly a decade, New Jersey courts have joined the 49 other states and the District of Columbia in opening their doors to celebrate the adoptions of thousands of children. In contrast to these celebrations, the fate of New Jersey Senate Bill 799, commonly known as the Open Adoption Records Bill, continues to spark an emotionally charged controversy in the area of adoption.

The bill, if signed into law, would permit adult adoptees to obtain copies of their original birth certificates. In effect, it would permit adoptees access to the names of their biological parents.

The proposed legislation has been presented in New Jersey in one form or another for the past 30 years. The most recent version of the bill was approved by the New Jersey Senate in March of 2010. The bill still requires Assembly approval before it can be presented to Governor Chris Christie.

The New Jersey State Bar Association, along with the National Conference for Adoption, New Jersey Right to Life, the Lutheran Office of Governmental Ministries, the New Jersey Catholic Conference and the American Civil Liberties Union of New Jersey have, as a coalition, opposed S-799 for a variety of reasons. While each member of the coalition brings different perspectives to the group for opposing the bill, perhaps the most often cited objection involves its retroactive application.

Pursuant to the bill, a biological parent who had previously surrendered a child for adoption would have one year to file a notification with the state registrar to maintain anonymity. He or she would also be required to provide certain non-identifying family/medical history information. If the biological parent does not notify the state registrar within the prescribed time and provide the necessary family/medical history information, a qualified applicant will be granted access to the applicant's original birth certificate.

The bill contemplates the use of public service messages to inform the public of the detailed procedures for a birth parent to request non-disclosure. However, it is unrealistic to expect that sufficient funding will be available to effectuate meaningful public awareness.

A birth parent who placed a child for adoption and does not submit a written, notarized request for non-disclosure, effectively forfeits his or her privacy rights. The effect of the bill in this regard is harsh.

A birth parent who placed a child for adoption and does not submit a written, notarized request for non-disclosure, effectively forfeits his or her privacy rights. The effect of the bill in this regard is harsh. It is unlikely that every woman who surrendered a child in New Jersey for adoption will be properly informed of the new procedures within the one-year notification period. This deficiency in the bill is especially problematic for rural, uneducated or non-English speaking communities. Further, it is unrealistic to conclude that a birth parent who lives outside the state of New Jersey will be provided sufficient notice of the necessity for filing with the state. A birth parent who has relocated to Europe, Cana-

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da, or South America will undoubtedly not receive notice of the necessity to file for non-disclosure with the New Jersey state registrar.

Birth parents should not be forced to take an affirmative step to maintain their privacy rights. Fairness dictates that the waiver of the right of anonymity should be by way of affirmative election. A woman who was once assured that she would remain anonymous should not lose her right to anonymity because she is simply unaware of a requirement that she has to file for non-disclosure with the state registrar.

The interest of adoptees in having access to non-identifying medical and family history information is unquestionably compelling. However, access to this information should not come solely at the expense of the right of anonymity promised to birth parents.

The use of mutual consent registries to provide adoptees with access to birth parent information, to medical history and to link birth parents and adult adoptees must be the foundation of any legislation that seeks to accomplish fairness in addressing the issue of open adoption. The enactment of legislation that fairly addresses the interests and concerns of both adoptees and birth parents would truly be something to celebrate in New Jersey next November. ■

EDITOR-IN-CHIEF'S COLUMN

A Pillar of the Matrimonial Law Community Retires

by Charles F. Vuotto Jr.

The Honorable Joseph P. Testa, J.S.C. (ret) is a man whose career has taken many paths, each exceptional and each complementing the other. From a retired colonel in the United States Army, to a fellow of the American Academy of Matrimonial Lawyers, Judge Testa seems to have done it all. Prior to becoming a judge, he practiced matrimonial law for the majority of his legal career. He was instrumental in founding the matrimonial portion of the New Jersey Association for Justice's (formerly ATLA) annual Boardwalk Seminar. After taking the bench in 1995, Judge Testa sat in the Family Division for almost 14 years. During that time, he continued to be a distinguished panelist for Institute for Continuing Legal Education seminars and adjunct professor of family law courses at Rutgers University School of Law–Camden. In sum, Judge Testa epitomizes New Jersey matrimonial law.

Now that he has retired from the Judiciary, Judge Testa continues to remain active in the field through the New Jersey State Bar Association, sitting on the Family Law Executive Committee of its Family Law Section.

Judge Testa was honored at a retirement dinner on Sept. 24, 2010. His comments about his service to our country, his patriotism and strong passion to help children going through divorce are worth our considered attention. The text of his speech follows:

I know it is appropriate to recognize honored guests on these special occasions. So first, it is my pleasure and privilege to recognize all of you: *my family, my friends*, as each one of you is very special to me. I thank each of you for coming to share this night with me.

When trying to decide what to say tonight, two things very quickly came to mind, both of which my dad said many times to me over the years. "When you are going to make a speech, remember what Abraham Lincoln said, 'There is nothing wrong with a short speech!' and more importantly, 'Think it out and write it down, but always remember to speak from the heart!'" My dad gave many speeches in his career and although he always wrote them down, he rarely ever needed to use it—he was that great! Tonight, I will attempt to use his wise advice.

God, family, duty, honor, country, and children. As most of you know, "duty, honor and country" is the motto and creed of the prestigious United States military academy West Point—a creed quoted by many and lived by even more. West Point is a place that I learned to call a home away from home for a number of years. Growing up as a boy, I became interested in the military as my dad and uncles had served in the military during World War II. (And yes, despite my youthful appearance, I am a World War II baby!) My uncle, Colonel Louis P. Testa, who is now deceased, was an active duty Army combat officer and a decorated veteran of World War II, who continued to serve when I began my career in the Army. I had read about the academy and learned their immortal creed, adopting it as a guide to my life. As I grew older and developed a deeper understanding, I expanded that creed to include God almighty, family—where life begins and ends—and my goal of helping children.

You see before you a blessed man, a man whose life has had its ups and downs, good and bad times, but through it all, I have always been guided by God. When times were tough, especially during the many attempts to reach my goal of becoming a judge or when litigants would accuse me of various crazy things, or during my years promoting my dream, the Kids Count Program for children of divorce and separation (while being told I should not), those times were times when God was just reminding me what I already knew—that he was in charge, not me. While all of those instances tested my fortitude, I fought through each one and HERE I AM!

My family is the greatest gift that God has bestowed upon me and I could absolutely devote hours and hours to tell you about each member. My beautiful wife Jeanne, who, as a special education teacher perfected her teaching skills on me, her number one challenged student. But with her continued love and dedication—HERE I AM!

My beloved parents, brothers and sister, my in-laws, and extended family members, who each, in their own special way, helped mold me—HERE I AM!

From my grandfather, Joseph Testa, and my father, the Honorable Frank J. Testa, I learned how to live and work with honor in a very, very simple way. Not by reading a

book or listening to a lecture because they never told me *how* to live, they lived and let me watch them do it! I miss them both so very much!

My two sons, *the loves of my life*, the true bookends to my life, who kept each chapter in order and made it all meaningful and purposeful and full of love—HERE I AM!

My two lovely and talented daughters, Kelly and Joelle, and my four wonderful grandchildren, Enzo, Elenna, Kate, and Giuseppe, who have given me a second chance in life to try to be a better parent, and a grandfather—HERE I AM!

All these people, with their continued love, respect and support, many of whom are here tonight, including my young, 88-year-old mom, are the reason I stand before you tonight, retiring from the Judiciary of the state of New Jersey.

Duty is a powerful word. It is also a responsibility difficult to live by and up to. In my life, my duty was and continues to be to my family, my God, my country, and to the children I worked with and for these past 15 plus years. Duty to my country was always simple, as I was a soldier even before I wore the uniform for 25 years.

My duty to our country really came to light when I swore the oath as a young officer in the United States Army Judge Advocate General's Corps, a proud and unforgettable moment in my life. I had the great privilege of wearing the Army uniform and serving many places, including the United States Military Academy at West Point. I still to this day get goose bumps at the unfurling of our flag and at the singing of our national anthem. America is the best country in the world and may God bless it and those who serve it, each and every day.

My duty and personal creed then expanded when I swore another oath and put on the robe on May 18, 1995. It was then I had reached another goal in my life, to serve in the Family Division of the state of New Jersey Superior Court. I will always cherish my days as a judge as I consider it both an honor and a privilege. I chose family court because to my dying day I will always believe that there is no other court more important than family court. What can be more important than helping our children?

Serving in family court certainly had its moments and certainly tried every ounce of my patience, my knowledge, my skills and my common sense. And yes, to the charge of bending or stretching the envelope at times when I heard those difficult cases concerning children, I am too guilty! I tried everything I could to make sure the resolution was one that would serve that child's best interest. Doing so was quite an onerous task; a task where the only reward is in your heart and in your soul. Was I successful in all those thousands of cases over the last almost 16 years? That I do not know. Only those children's lives will tell the story long after I am gone. My duty to those children turned into a burning desire and a passion.

Without a doubt, the greatest achievement of both my legal and judicial career is the Kids Count Program. Kids Count was a program created to help children of divorce and separation as well as those children in homes of domestic violence and custody disputes, a program created by Pam Homan of the Cumberland County Court and myself.

The program was unpopular with many and shut down after only three years, but it will always remain my badge of honor for children. In my retirement, I shall strive to recreate the program with the help of one of our major universities in New Jersey. I will continue my efforts of recreating the Kids Count program until it is implemented statewide. For as the quote says: "A hundred years from now it will not matter what my bank account was, the sort of house I lived in, or the kind of car I drove...but the world may be different because I was important in the life of a child."

My passion and desire to help children could not have been carried out each day without the help and support of the great staff of the Family Division. These people choose to serve children and their families while witnessing each day child abuse and neglect, sexual abuse, domestic violence of all kinds, and children caught in the middle of custody wars, children suffering and crying out for our help. I salute each staff member for your hard work, dedication, and loyalty. Most importantly, I thank you on behalf of all those children *you* helped! You are the best!

I could not, because of my hearing loss, have worked these last six years without my real time court reporters, who each day put the words on the screen of those lawyers and litigants in the most highly charged emotional court. Their skill goes without equal, and I thank you from the bottom of my heart!

I also thank the sheriff's officers of the Cumberland County Courthouse. Each of them is very special and dedicated to service. In my humble opinion, they are the best in the state of New Jersey.

I saved to mention last, my true soldiers—my secretaries and law clerks. My secretary of many years, Cassie Yakow, you may know her as the "quiet one"! And my new secretary of one year, Elissa. Both did a wonderful job. Cassie definitely covered my backside for 14-plus years, which is a difficult task when your boss sits in the Family Division.

My 15 law clerks, what can I say. Each so special and unique in their own way, but each exceptionally smart, dedicated and hard working. Each one of them has touched my heart and has been and will continue to be a part of my family forever. I could never have done this job without them! I love each one of you!

To serve in family court for many judges in our country and in New Jersey is considered 'bad duty' or 'punishment.' It is neither. It is an honor and a privilege to serve children and their families each day.

I invite the state of New Jersey and our Judiciary to do more to

help the family court staff and judges to do their jobs with better resources and more staff. Pick up that invitation and you will be rewarded in knowing that you have helped our children, the future leaders of this state, and our country.

I invite our legislators to pass simple but extremely important legislation. To amend our laws to include as part of the mandatory parent-education program, a program for their children as well. An easy task to do with one or two lines of legislation, but legislation so vital to our children.

I invite our Supreme Court to amend our Rules of Court to include a children's program as part of our parent education program. Also a simple task, but so critical to our children's welfare.

All in all, those three things will help over 100,000 children each year in our state.

While they say you should interject a joke or humor in a speech, I say personally this is not the time for me to do that. Besides you all know I have more practice being on the receiving end!

While for some retirement may be sad event, for me it is simply the closing of one chapter in my life and the opening of another—another which I know will include my continued duty to children. It also serves as an opportunity to convey a message here tonight, for all memorable speeches that are remembered over time leave one with a message or food for thought.

Let's get back to the basics. It is very simple to say and not that difficult to do. Let's work each day to support our country and our troops, to keep our families close, and to find a way to help a child.

I challenge you to get up tomorrow, put up the American flag, and fly it high every day.

I challenge you to put yellow ribbons on your front door and mailbox. American men and women are still serving us and dying for us each day. They need to know we love and support them. I love them with all my heart and I salute them.

I challenge you to ask your neighbors to put up their flags and ribbons and to help them if they need help to do it. I would love to drive through each neighborhood in this county and this state and see a sea of flags and ribbons. Do it not for me but for our troops—may God bless them! I love this crazy mixed-up country and our flag. Have you figured that out yet?

I also love and cherish my Italian heritage. The Italian language for me sings, and when couched with an Italian saying or proverb, it is the best music in the world!

Vivi la tua vita di ogni giorno al massimo, l'amore il vostro paese, amo la tua famiglia, mantenere i vostri figli vicini e brindo alla vita ogni giorno con un bicchiere di vino italiano! Con l'aiuto di Dio. Questi sono i segreti caro ad una vita lunga e felice a pieno riempimento! Che tu possa vivere una ogni Cento anni!

Live your life each day to the fullest, love your country, love your family, keep your children close and toast life each day with a glass of Italian wine! With the help of God, these are the cherished secrets to a long and happy fulfilling life! May you each live a 100 years!

Tonight I shall pray that God blesses each of you and your families as he has blessed me. May God bless you, and may God bless America. ■

Michael J. Stanton Receives 2010 Tischler Award

by John P. Paone Jr.

The 2010 Saul Tischler Award was presented to Michael J. Stanton at the Family Law Section annual dinner on April 26, 2010, at Dolce Restaurant in Basking Ridge. The evening was a celebration of Mike's distinguished career with longtime friends and colleagues and over 200 attendees honoring him. Among those present were the greatest joys in Mike's life, his lovely wife Joanie and his wonderful children Jessica and Michael Jr.

The Tischler Award is the Family Law Section's recognition of its best and brightest members. The selection of Mike as the 2010 recipient continues that fine tradition. He is a member of the firm of Norris, McLaughlin & Marcus and heads that firm's matrimonial department. He is a certified matrimonial law attorney, a fellow of the American Academy of Matrimonial Lawyers, a member of the Matrimonial Lawyers Alliance, and past chair of the Family Law Section. He is a long-time editor of this publication and is presently a trustee of the New Jersey State Bar Association.

More important than these brilliant credentials, Mike is truly a role model for all matrimonial attorneys. He is reliable, intelligent and a person of the highest integrity. He understands the line between advocacy and the need for respect and decency in a practice, which directly affects children and people from all walks of life.

I first met Mike when we were both co-counsels on the opposite side of the *DeLorean* case. That was 25 years ago. Even then, however, it was readily apparent that Mike was destined to be one of the superstars in this profession. It didn't have to be that way. He could have chosen a career in the United States Navy, where he served with honor. Mike undoubtedly would have been successful in any path in which he dedicated himself.

All too often, the public hears only of the negative side of our practice. Attorneys like Mike go unheralded doing their job day in and day out, not seeking notoriety, but building a stellar record nevertheless. It is, therefore, fitting that our section takes time each year to recognize those practitioners who make an outstanding contribution to our profession. The family bar is indeed fortunate that Michael J. Stanton elected to become a matrimonial attorney. He is a very worthy recipient of the Tischler Award. ■

What's in a Name?

A Comparison and Review of Custody and Child Support Designations

by Michael A. Weinberg

This article will explore the development of both custodial designations and child support guideline designations and the differences between these designations. Also discussed will be the reasons for, and importance of, providing for separate and distinct custodial designations and child support guideline designations when representing a client in a family law matter.

PRELIMINARY COMMENTS

Custody determinations, and the allocation of parental rights and responsibilities, will often be among the most, if not *the* most, difficult and challenging aspects of a family law dispute. In determining the appropriate custodial arrangement, N.J.S.A. 9:2-4 mandates the consideration of specific enumerated factors, including but not limited to the needs of the child, the parents' willingness to accept custody, the parents' ability to communicate and cooperate in matters relating to the child, and the stability of the home environment offered. This fact-sensitive analysis is designed to assist in the determination of the custodial arrangement that is in the child's best interests, and is grounded in the premise that both parents have equal rights to their child and are each charged with the care and maintenance of their child.

Within the context of N.J.S.A. 9:2-4, our courts have developed certain defined custodial terms, such as "legal custody," "physical custody," "primary caretaker" and "secondary caretaker." These terms are designed to designate and define parental rights and responsibilities of the child. This becomes important in several respects: It is important to the family law practitioner, who must be able to satisfactorily negotiate or litigate a custodial arrangement on behalf of the client; it is important to the litigants so that they each are aware and understand their respective custodial rights and obligations; and it is important to the court when called upon to interpret and enforce the custodial arrangement in the event of a future dispute.

Separate and apart from the custodial designations, there are defined terms that have been created within the context of the child support guidelines. Recognizing the need to provide for each party's custodial rights and responsibilities, attention must also be given to the fundamental interest of the child to receive fair and adequate financial support from both parents. In this regard, New Jersey first adopted the child support guidelines in 1986. The premises of the child support guidelines, as noted in paragraph 1 of Appendix IX-A, include the recognition that child support is a continuous duty of both parents, and that the child is entitled to share in the current income of both parents.

Paragraph 14 of Appendix IX-A to the New Jersey Rules of Court establishes and defines the terms of "parent of primary residence" and "parent of alternate residence" for use in determining the child support guideline obligation in a shared parenting situation. These child support guideline terms are separate and distinct from the custodial designations that have been established by our courts, as discussed below.

Over the years, practitioners and the court have seemingly blurred the lines between custodial designations and child support designations, and failed to recognize the potentially significant difference between a party's status for child support purposes and a party's status for custodial purposes.

THE DEVELOPMENT AND CURRENT STATUS OF CUSTODIAL DESIGNATIONS AND CHILD SUPPORT GUIDELINE DESIGNATIONS

The following is an examination of the development and current status of custodial designations and child support guideline designations.

Custodial Designations

The Legislature has, together with the authority to grant divorces, conferred upon our courts the power to make such order regarding "the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just…."[1] Indeed, it has long been a mandate of this state that our courts should endeavor that children of separated parents should be imbued with love

and respect for both parents, and where children are in custody of one parent, the court should endeavor to effect this facet of the children's welfare by conferring reasonable rights of visitation on the other parent.[2]

N.J.S.A. 9:2-4 provides for custody of a minor child where such issue is raised, and incorporates the longstanding public policy of this state "to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage…." Moreover, the statute provides that in any proceeding involving the custody of a minor child, "the rights of both parents shall be equal…."Thus, both parents are deemed to have equal rights to the custody of their children under the statute, and each parent is charged with the care, education and maintenance of the children.[3] The statute further provides that in any proceeding where custody of a child is at issue, the court shall enter an order that may include:

a. Joint custody of a minor child to both parents, which is comprised of legal custody or physical custody which shall include: (1) provisions for residential arrangements so that a child shall reside either solely with one parent or alternatively with each parent in accordance with the needs of the parents and the child; and (2) provisions for consultation between the parents in making major decisions regarding the child's health, education and general welfare;
b. Sole custody to one parent with appropriate parenting time for the noncustodial parent; or
c. Any other custody arrangement as the court may determine to be in the best interests of the child.

In making an award of custody, N.J.S.A. 9:2-4 mandates consideration of the following enumerated factors:

> [T]he parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children….

In *Beck v. Beck*,[4] the Supreme Court of New Jersey preliminarily addressed the issue of whether our courts are empowered to order joint custody of children. Consistent with the provisions of N.J.S.A. 9:2-4, which indicates "a legislative preference for custody decrees that allow both parents full and genuine involvement in the lives of their children following a divorce," the Court found that "joint custody comports…with the established policy of this state."[5]

The Court in *Beck* then addressed the concept of joint custody, and explained that it "is comprised of two elements–legal custody and physical custody."The Court defined these terms as follows:

> Under a joint custody arrangement legal custody—the legal authority and responsibility for making "major" decisions regarding the child's welfare—is shared at all times by both parents. Physical custody, the logistical arrangement whereby the parents share the companionship of the child and are responsible for "minor" day-to-day decisions, may be alternated in accordance with the needs of the parties and the children.
>
> …Through its legal custody component joint custody seeks to maintain these attachments by permitting both parents to remain decision-makers in the lives of their children. Alternating physical custody enables the children to share with both parents the intimate day-to-day contact necessary to strengthen a true parent-child relationship.[6]

In examining the concept of joint custody as an alternative to sole custody, the Court in *Beck* explained that "despite our belief that joint custody will be the preferred disposition in some matrimonial actions, we decline to establish a presumption in its favor or in favor of any particular custody determination."[7] In so holding, the Court expressed concern that a presumption of this sort "might serve as a disincentive for the meticulous fact-finding required in custody cases."[8]

Approximately 14 years later, in *Pascale v. Pascale*,[9] the Court discarded the traditional term of "joint custody" and recommended that the terms "legal custody" and "physical custody" be adopted in defining each party's custodial status. In this regard, the Court cautioned that "[i]n common parlance, the term 'joint custody' can mean the sharing of both physical and legal custody of children, or the sharing of legal custody, but not physical or residential custody between divorced parents."[10] In citing *Beck* with approval, the Court explained:

> Joint legal custody, meaning the "authority and responsibility for making 'major' decisions regarding the child's welfare," is often shared post-divorce by both parents…. Joint legal custody provides rights and responsibilities to custodial parents, but it also confers rights with less significant responsibilities to non-custodial parents…. Indeed, that type of joint venture is found in the majority of custody arrangements throughout the country today….
>
> On the other hand, "joint physical

> custody" means joint "responsib[ility] for 'minor' day-to-day decisions" and the exertion of continuous physical custody by both parents over a child for significant periods of time…. Although there is no established norm for such custody, experts cite common schedules for a child within a joint physical custody framework as spending three entire days with one parent and four entire days with another parent or alternating weeks or even years with each parent.... Thus, the import from the voluminous literature on the subject is that "joint physical custody" means that the child lives day in and day out with both parents on a rotating basis. Numerous "parenting times" with a child do not constitute joint physical custody; to constitute joint physical custody, each parent must exert joint legal and physical custody over the child.[11]

The Court in *Pascale* also replaced the traditionally used terms of "custodial parent" and "noncustodial parent" with the terms "primary caretaker" and "secondary caretaker." In doing so, the Court explained:

> In cases of only joint legal custody, the roles that both parents play in their children's lives differ depending on their custodial functions. In common parlance, a parent who does not have physical custody over her child is the "non-custodial parent" and the one with sole residential or physical custody is the "custodial parent." Because those terms fail to describe custodial functions accurately, we adopt today the term "primary caretaker" to refer to the "custodial parent" and the term "secondary caretaker" to refer to the "non-custodial parent."
>
> Although both roles create responsibility over children of divorce, *the primary caretaker has the greater physical and emotional role.* Because the role of "primary caretaker" can be filled by men or women, the concept has gained widespread acceptance in custody determinations…. Indeed, many state courts often determine custody based on the concept of "primary caretaker"….
>
> In one of the earliest cases using the concept of "primary caretaker," the Supreme Court of Appeals of West Virginia articulated the many tasks that make one parent the primary, rather than secondary, caretaker: preparing and planning of meals; bathing, grooming, and dressing; purchasing, cleaning, and caring for clothes; medical care, including nursing and general trips to physicians; arranging for social interaction among peers; arranging alternative care, i.e., babysitting or daycare; putting child to bed at night, attending to child in the middle of the night, and waking child in the morning; disciplining; and educating the child in a religious or cultural manner. *Garska, supra*, 278 S.E. 2d at 363. As do many other jurisdictions, we find that that State's highest court's definition articulates many of the duties of a primary caretaker.
>
> Factoring the role of the primary caretaker in child-support matters will serve the child's best interest. Accordingly, we adopt the concept of primary caretaker and establish standards to allocate the financial resources between separated and divorced parents who have chosen to have one parent be the primary caretaker and the other parent be the secondary caretaker. That arrangement may have been patterned during their marriage or may have been chosen during divorce proceedings. Most important, the person who continues as or becomes the primary caretaker may be father or mother. More fathers are becoming primary caretakers. *Child Support*, *supra*, at 1 (finding 1.6 million custodial fathers to 9.9 million custodial mothers). All caretaking represents a major contribution to our society. Fineman, *supra, The Sexual Family*, at 9. Thus, once the roles of primary caretaker and secondary caretaker have been established, the courts should make determinations about child support based on the assumption of those roles.
>
> In producing a stable financial and legal foundation post-divorce for the children of divorce, courts should allow the primary caretaker to provide the children with their basic needs and the secondary caretaker to maintain a close relationship with the children. For the success of that structure, it makes sense that the person who has assumed the role of primary caretaker not be involved in a daily relationship with the secondary caretaker about the financial needs of the children. Rather, when joint custody is merely legal in nature, the primary caretaker should be accorded autonomy over the day-to-day structure of the new family in which he or she is the primary caretaker. That structure is established by the courts, not to leave out the secondary caretaker, but to assure that the child is as undisturbed as possible in the implementation of the child's parents' decision to make one parent the child's primary caretaker. The primary caretaker who makes those day-to-day decisions needs autonomy over the financial resources drawn from both parents' salaries to effectuate those decisions without endless discussion with the secondary caretaker.[12]

Child Support Guideline Designations

New Jersey first adopted the child support guidelines in 1986 in response to a federal mandate.[13] The New Jersey child support guidelines were adopted as a Court Rule, rather than as a statute, and are set forth in Rule 5:6A and Appendix IX. Within this context, Rule 5:6A provides, in part:

> The guidelines set forth in Appendix IX of the New Jersey Court Rules shall be applied when an application to establish or modify child support is considered by the court. The guidelines may be modified or disregarded by the court only where good cause is shown. Good cause shall consist of a) the considerations set forth in Appendix IX-A, or the presence of other relevant factors which may make the guidelines inapplicable or subject to modification, and b) the fact that injustice would result from the appli-

> cation of the guidelines. In all cases, the determination of good cause shall be within the sound discretion of the court….

Appendix IX-A, paragraph 1 reflects that the guidelines were developed to provide the court with "economic information to assist in the establishment and modification of fair and adequate child support awards." It further provides that the premise of the guidelines "is that (1) child support is a continuous duty of both parents, (2) children are entitled to share in the current income of both parents, and (3) children should not be the economic victims of divorce or out-of-wedlock birth."

Appendix IX-A, paragraph 14 provides that the awards set forth in Appendix IX-F support schedules reflect spending on children in intact families and are accurate only if the child resides in the custodial parent's household 100 percent of the time. It further provides that in shared-parenting situations, each parent incurs expenses for the child while the child is with that parent. Thus, to accommodate shared-parenting situations, Appendix IX-A, paragraph 14 provides that "each parent's income share of the Appendix IX-F support award may be adjusted based on expenses assumed to be duplicated or shifted and the amount of time spent with the child." It further provides that "[a]lthough these guidelines are designed to accommodate shared-parenting arrangements when appropriate, shared-parenting adjustments or awards are not presumptive, but are subject to the discretion of the court in accordance with the factors listed in paragraphs 14(c) and 14(d)."

In shared parenting situations, a parent's designation for child support purposes is related to the time that the child spends in the residence of that parent. Within this context, paragraph 14(d) to Appendix IX-A of the guidelines provides that the "parents should be referred to as the Parent of Primary Residence (PPR) and the Parent of Alternate Residence (PAR)." Depending upon the income of and time spent with the child, either the PPR or the PAR may be the obligor of the child support order. Indeed, paragraph 14(d) to Appendix IX-A provides that the designation of PPR and PAR *"is not related to the gender of either parent or the legal designation of custodial parent."*

Recognizing that the designation of PPR and PAR is specifically not dependent upon the legal designation of "custodial parent," paragraph 14(d) to Appendix IX-A provides the following definitions of PPR and PAR:

> (1) Parent of Primary Residence (PPR) — The parent with whom the child spends most of his or her overnight time. The primary evidence is the home where the child resides for more than 50% of the overnights annually. If the time spent with each parent is equal (50% of overnights each), the PPR is the parent with whom the child resides while attending school. *Overnight* means the majority of a 24-hour day (i.e., more than 12 hours).
>
> (2) Parent of Alternate Residence (PAR) — This is the parent with whom the child resides when not living in the primary residence.

Reference must also be made to Appendix IX-B to the guidelines, which incorporates the definitions of PPR and PAR in shared parenting situations set forth above, and which also defines parental roles in "sole parenting" situations. In this regard, Appendix IX-B provides:

> Sole Parenting—A Custodial Parent is a parent who has physical custody of the children and provides for their needs on a day-to-day basis. This parent is generally the obligee of the support order. A *Non-Custodial Parent* is a parent who does not have physical custody of the children on a regular basis but may exercise periodic PAR Time privileges (if time sharing exceeds the substantial equivalent of two or more overnights per week, a shared-parenting situation may exist). This parent is generally the obligor of the support order. See Appendix IX-A, paragraph 13.

The significance of the designation as PPR for purposes of child support was explored by our Appellate Division in *Benisch v. Benisch*.[14] In *Benisch*, custody of the parties' teenage son was the subject of lengthy dispute at trial. The trial court ultimately accepted the recommendation of a court-appointed psychologist and directed that the parties share an equal number of days throughout the year with their teenage son. Specifically, the trial court directed that during school months, the child was to spend one week with one parent and then, on Friday evening, move to the other parent and spend the next week with that parent. During the summer months and vacation, the trial court directed that the child spend the same number of days and nights with each parent.[15]

Consistent with the parties' stipulation that child support should be computed according to the guidelines, the trial court employed formulations based on what the guidelines term "Shared Parenting Arrangements," as defined in paragraph 14 to Appendix IX-A.[16] On appeal, the defendant/husband acknowledged that the parties had stipulated to the application of the guidelines, but argued that the trial court misapplied the guidelines and thereby overstated his child support obligation for the parties' son.[17]

In reviewing the matter, the Appellate Division noted that in applying the shared parenting formula to establish a child support obligation, "a critical first step is a designation of each parent as either the Parent of Primary Residence (PPR) or the Parent of Alternate Residence (PAR)" since either the PPR or the PAR may be the obligor of the child support order depending upon income and time spent with

the child.[18] Thus, the Appellate Division held:

> Those definitions of PPR and PAR, quite clearly, cannot be applied to this case. The most significant aspect of the court's custody determination was a precise equality of custodial time between plaintiff and defendant. Since the designations of PPR and PAR are premised on one parent having greater custodial time than the other, the normal definition simply does not work here. Even with the alternate, fall back, position set out in the rule— when total time is equal, the PPR is the parent with whom the child resides while attending school—is inapplicable since school nights are also equally divided between plaintiff and defendant.[19]

The Appellate Division then explored the significance of designating one parent as PPR and thereby affording that parent the benefit of a presumption that he or she will bear all of the child's "controlled expenses," and explained:

> In short, the differences which result from two possible designations of PPR and PAR in this case are substantial indeed. And while there may be bond fide reasons why plaintiff should be designated as PPR and defendant as PAR, those reasons are not apparent from the record submitted to us, nor from the court's otherwise carefully constructed, comprehensive opinion. We do note that the court assigned different responsibilities to the two parties respecting different aspects of Chip's life. However, with one minor exception, no financial responsibility was assigned with those responsibilities. Thus, consistent with the recommendation of the psychologist who testified in this matter, the court directed that plaintiff would have "primary decision making" regarding "Chip's health, including medical, psychological and psychiatric treatment"; that defendant would have "primary decision-making regarding items related to Chip's high school education and religious activities and education"; and defendant would have such decision-making authority "regarding Chip's college education." In addition, in the only demarcation of responsibility which included a specification of financial obligation, the court determined that the parties should equally pay for Chip's medical insurance, but plaintiff should pay the first $250 of any unreimbursed expenses in a given year, with defendant to pay 53% of any additional amount and plaintiff to pay the remaining 47%. Since the $250 represents approximately $5 per week, it would not seem likely that the court would have determined, on that basis alone, to designate plaintiff as PPR and thus entitle her to the much more substantial benefits which flow from that designation….[20]

Thus, the Appellate Division remanded the matter for further proceedings, with the directive that "if the court has additional reasons for its designation of plaintiff as PPR and defendant as PAR, it should set out those considerations and its reasoning in that respect, for the enlightenment of the parties and, if necessary, this court."[21]

CLOSING REMARKS AND RECOMMENDATIONS

New Jersey law makes clear distinction between the designations that are to be utilized for purposes of custody and for purposes of child support. In part, the purpose of the Court's holdings, first in *Beck* and later in *Pascale*, was to avoid the confusion that had been created by simply designating parents as "joint" or "sole custodians." Our law now provides for a clear distinction between the designation of "legal" and "physical" custody, and further provides for an allocation of custodial rights and responsibilities within the context of the designation of "primary caretaker" and "secondary caretaker." Based upon the time the child spends in the residence of a parent, so too does our law now designate parties as the *parent of primary residence* or the *parent of alternate residence* for child support guideline purposes.

For a variety of reasons, the utilization of custodial designations and child support guideline designations has become blurred over the years. Indeed, it is not uncommon for reference to be made to a sharing of joint legal custody, with one parent simply being designated as the parent of primary residence and the other as the parent of alternate residence. In doing so, this creates a risk of uncertainty and a lack of guidance to not only the parties, but also to the court, should a dispute later arise regarding the child that exceeds the scope of a 'major' decision involving the child's welfare. While it is recognized that the designated parent of primary residence in such example may often be the *de facto* primary caretaker, would not the better practice be to specifically delineate that parent as such at the time of the initial custodial designation, and thereby seek to avoid the need for future judicial or other interpretation?

Within the context of this issue, it must be recalled that the family part is a court of equity. Our courts have recognized that the family part is not bound by the labels provided for in the parties' written agreement, and, instead, can look to the actual practices of the parties in their day-to-day lives. By way of illustration, in a post-judgment application by one parent to permanently remove a child from New Jersey, the court will consider not only the labels used by the parties, but also the arrangement between the parties to determine whether the application is a motion for a change of custody or for removal using the lesser removal application standard set forth in *Baures v. Lewis*.[22] The specific issue of "labeling" was discussed by the Appellate Division in *Mamolen v. Mamolen* within the context of a relocation application:

> We initially state our agreement with the trial judge that defining the true

> essence of a custodial relationship does not turn on the labels utilized by the parties. It has long been de rigueur for divorcing parents to recite in their separation agreements that they will share "joint custody" of their children. Such was the case here. However, such labels do not provide conclusive proof of the relationship's inherent nature.Our family courts are courts of equity and are bound not by the form of agreements, only substance. *See, e.g., Applestein v. United Bd. & Carton Corp.,* 60 N.J. Super. 333, 348, 159 A.2d 146 (Ch. Div.) ("The courts of equity in New Jersey, and elsewhere, have never hesitated to look behind the form of a particular ... transaction" and determine that it is something else "regardless of its deceptive outward appearance"), *aff'd o.b.,* 33 N.J. 72, 161 A.2d 474 (1960). In short, while the terms of the parties' separation agreement might be probative of their intentions, a court of equity is not only freed from but obligated to determine the true nature of the relationship regardless of labels and artificial descriptions.[23]

Recognizing that designations in a written agreement may not be conclusive proof of the inherent nature of a relationship, the appropriate custodial and child support guideline designations are clearly evidentiary. Further, our law still mandates that the parties appropriately be given the custodial designations as provided for in *Beck* and *Pascale*. Separate and apart from the custodial designations, the appropriate child support guideline designations should also be established. Moreover, by establishing each party's custodial and child support guideline designations as mandated by our law, the parties and the court will be afforded a clearer understanding of the allocation of the rights and responsibilities of each party pertaining to the child. ■

ENDNOTES

1. N.J.S.A. 2A:34-23.
2. *Daly v. Daly*, 21 N.J. 599 (1956).
3. *Scanlon v. Scanlon*, 29 N.J. Super. 317 (App. Div. 1954).
4. *Beck v. Beck*, 86 N.J. 480 (1981).
5. *Id*. at 485.
6. *Id*. at 486-87.
7. *Id*. at 488.
8. *Id.*
9. *Pascale v. Pascale*, 140 N.J. 583, 597-600 (1995).
10. *Id*. at 595.
11. *Id*. at 596-97.
12. *Id*. at 597-600.
13. 42 U.S.C.A. §667.
14. *Benisch v. Benisch*, 347 N.J. Super. 393 (App. Div. 2002).
15. *Id*. at 395.
16. *Id*.
17. *Id*. at 394.
18. *Id*. at 395-96
19. *Id*. at 396.
20. *Id*. at 400.
21. *Id*. Reference is made to *Wunsch-Deffler v. Deffler*, 406 N.J. Super. 505 (Ch. Div. 2009), where the Chancery Division, family part in Burlington County established a three-step procedure to determine child support per the child support guidelines when the parents have a true, 50/50 shared parenting arrangement.
22. *Baures v. Lewis*, 167 N.J. 91 (2001).
23. *Mamolen v. Mamolen*, 346 N.J. Super. 493, 498 (App. Div. 2002).

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Whose Child is This Anyway?

Law, Ethics and Assisted Reproductive Techology (ART)

by William S. Singer

In the 22 years since the *Baby M* case,[1] assisted reproductive technology (ART) and its use have infiltrated mainstream culture. Television sitcoms like "Friends" and "Frasier" and the summer hit movie "The Kids are All Right" all use aspects of ART in their plots. In addition, by sensationalizing celebrities' use of ART to create families, popular media generates further public interest. Soon, everyone will know someone who has benefited from ART. Yet, while the science of ART evolves and its implementation mushrooms, the law on these issues in New Jersey stagnates.

New Jersey lawyers advising clients who are considering taking advantage of ART have few statutes or cases on which to rely. Therefore, attorneys must learn to be creative in devising strategies for their clients using ART and, simultaneously, remain cautious in weighing what a court may countenance when adjudicating the rights of such families.

ART: TECHNIQUES AND TERMS

The following list sets forth some of the major useful terms in discussing ART:

1. **Sperm donation.** The oldest ART technique, sperm donation is used by female same-sex couples, transgender people and heterosexual couples unable to conceive due to male infertility. N.J.S.A. 9:17-44, the Artificial Insemination Statute enacted in 1983 as part of the New Jersey Parentage Act,[2] is the only New Jersey law that addresses the use of ART. The Artificial Insemination Statute provides that unless there is a contrary written agreement, if a woman, with the consent of her husband and under the supervision of a physician, is inseminated with sperm from a donor other than her husband, the husband's name will be placed on the birth certificate when the child is born.
2. **Egg donation.** Also known as ova/oocyte donation, egg donation refers to the use of an egg from a donor for purposes of creating an embryo for parents who cannot use their own eggs, or choose not to do so.
3. **Traditional surrogacy.** This term refers to the use of an egg from a donor who also carries the resulting embryo to full term and gives birth to a child or children.
4. **Gestational surrogacy.** A woman carries an embryo (or embryos) to full term and gives birth to one or more children, but the woman has no genetic connection to the child or children.
5. **Co-maternity.** A same-sex female couple harvests an egg from one partner of the couple, the egg is fertilized using sperm from a known (or unknown) donor, and the resulting embryo (or embryos) is implanted in the uterus of the other partner of the couple who carries the child to full term and gives birth.
6. **Intended parent.** The person(s) who initiate the ART process for purposes of creating a child or children. Intended parents do not necessarily either contribute genetic material or gestate the child. They can use donors and carriers for the entire process.
7. **In vitro fertilization (IVF).** Fertilization of an ovum (or ova) outside a woman's body with implantation of the resulting pre-embryo(s) in uterus of a woman who carries the child to full term and gives birth.
8. **Preimplantation genetic diagnosis (PGD).** Use of medical technology to ascertain whether pre-embryos have genetic disorders and the possible gender of the embryo.
9. **Pre-birth order.** An order from a court issued before the birth of a child to clarify who are the parents of the child about to be born. In New Jersey, the office of the state attorney general (on behalf of the Bureau of Vital Statistics) has opposed pre-birth orders unless the person seeking declaration of parentage has contributed genetic material to the child about to be born. Thus, for example, in a co-maternity, with the consent of the attorney general, courts have approved orders directing that the ovum-donating mother be included on the birth certificate without an adoption.
10. **Medical tourism.** Individuals travel to a foreign country to take advantage of ART tech-

niques either at less cost or not available in their home country.

11. **Donor sibling registry.** A website that brings together children who were conceived using the same 'anonymous' donor. Donors are identified by the name of the sperm bank and the donor's identifier. Occasionally, donors use the website to locate their offspring. Similar websites for egg donors could be developed.

NEW JERSEY CASE LAW IN ART MATTERS

The case of *Baby M* awoke New Jersey and the rest of the country to the legal ramifications of ART.[3] In that case, the wife in a married couple was infertile and unable to carry a child full term. As a result, the married couple contracted with a married woman to assist them in a traditional surrogacy. The surrogate was to be paid $10,000. After the child was born, the surrogate disavowed her alleged contractual obligation to surrender the child and petitioned for recognition of her parentage.

Under New Jersey law, termination of parentage can only be achieved through a private placement, through an approved adoption agency, or through the Division of Youth and Family Services (DYFS). New Jersey law also specifically bars a pre-birth surrender of parental rights.[4]

Under the facts of *Baby M*, the Court held that a traditional surrogacy contract is unenforceable under the law and against public policy. First, the Court noted that paying money to a parent to secure an adoption is prohibited by law. Secondly, the Court held that in a private placement as planned by these parties, the parties failed to meet the statutory requirement of proving the unfitness of the birth parent necessary to terminate her parental rights. As a result, the New Jersey Supreme Court upheld the parental rights of the traditional surrogate.

The *Baby M* Court invited the Legislature to revisit the current New Jersey statutory requirements, within constitutional limits. However, the Legislature has not acted. As a result, the holdings of *Baby M* remain a strong influence on all New Jersey ART-related cases.

In *A.H.W. v. G.H.B*,[5] another ART-related case arose in 2000 when a married couple entered into an uncompensated gestational carrier agreement with the wife's unmarried sister using ovum from the wife and sperm from the husband. The couple sought a pre-birth order clarifying the identity of the legal parents of the child about to be born. Considering *Baby M*, the court in *A.H.W.* recognized that although the Supreme Court had ruled that certain surrogacy contracts were void, the *A.H.W* court specifically found "no offense to our present laws where a woman voluntarily and without payment agrees to act as a surrogate mother, *provided that she is not subject to a binding agreement to surrender her child*."[6]

The *A.H.W* court declined to grant the pre-birth order because doing so would terminate the gestational carrier's parental rights before the birth of the child. Importantly, however, the *A.H.W* court did not find the subject uncompensated gestational contract to be void or against public policy.

Five years later in 2005, in *In re Parentage of Robinson*,[7] a same-sex female couple petitioned a New Jersey court for a pre-birth order naming both as parents without an adoption. One of the women, with the consent of her partner, had become pregnant through insemination of sperm from an anonymous donor under the supervision of a physician. The women asked the *Robinson* court to give the Artificial Insemination Statute a gender-neutral reading. They submitted proof of their long-term relationship, including their marriage in Canada. Despite opposition by the attorney general, the *Robinson* court found in favor of the couple's request.

The *Robinson* court found the women had proven their commitment to each other and a commitment to raise the expected child jointly. In reaching its decision, the court relied on the strong public policy in New Jersey focusing on the best interests of the child. Noting that the laws of this state have not kept pace with the scientific advances, the court reasoned that "the dynamic times dictated law sensitive to the advances of science and to evolving family structures."[7] The *Robinson* court concluded that the couple was entitled to the statutory presumption of parenthood afforded by the Artificial Insemination Statute.

AND NOW...

Two recent unreported trial court decisions have further churned the uncharted state of the law concerning ART.

In *A.G.R. v. D.R.H. and S.H.*,[9] the defendants, a gay male couple legally married in California, entered into a written surrogacy agreement with the plaintiff, the sister of one of the defendants. Initially they planned a traditional surrogacy using the plaintiff's ova and sperm from the unrelated defendant. When it was discovered the plaintiff could not conceive, the plan was altered so the plaintiff would serve as a gestational surrogate via in vitro fertilization (IVF) using a donated egg and sperm from the unrelated defendant. A doctor successfully implanted two embryos in the plaintiff. As a result, two girls were born.

After giving birth, the plaintiff refuted the written surrogacy agreement and petitioned the court for recognition of her parental rights. Relying on *Baby M*, the *A.G.R.* court held that the surrogacy agreement was unenforceable. The court noted that the New Jersey Parentage Act bars any agreement in which one party promises not to seek enforcement of parentage rights.[10]

The *A.G.R.* court found that the lack of genetic connection between the plaintiff and the children was of no import, nor did the court find any distinction between *Baby M*, a

case involving traditional surrogacy, and the case before it involving a gestational surrogate. In reliance on *Baby M*, the *A.G.R.* court found issues of intent, estoppel and detrimental reliance were irrelevant. The court found the plaintiff possessed parental rights relative to the infants under the New Jersey Parentage Act[11] and that the gestational agreement was void, and, therefore, the gestational agreement could not serve as a basis for terminating the plaintiff's parental rights. Further, the *A.G.R.* court stated that "surrogacy as a whole is bad for women even if in any one particular case the surrogacy agreement is entirely satisfactorily [sic] to all of the parties involved."[12] The plaintiff has also commenced medical and legal malpractice lawsuits. If these claims are litigated, the resulting opinions could provide much-needed guidance regarding the standards for conduct of lawyers—and doctors—in these tricky situations.

Several months later, in *In re the Parentage of a Child by TJS and ALS, h/w*,[13] the court granted a motion by the state to vacate an order of parentage. The facts are straightforward. After ascertaining that they needed to employ ART in order to have a child, a married heterosexual couple, TJS and ALS, acquired a donated egg that was inseminated with the sperm of TJS. A physician transferred the resulting embryo to a gestational carrier.

Prior to the birth of the resulting child, TJS and ALS filed an application for a pre-birth order requesting that both their names appear on the child's birth certificate and that the rights of the gestational carrier be terminated. In making their application for an order of parentage, the plaintiffs did not notify the office of the attorney general or the New Jersey Bureau of Vital Statistics and Registration.

According to the court's opinion vacating the original order of parentage, the requested relief had been granted by a trial court in the Camden vicinage, and a Gloucester County trial court followed a similar procedure. Accordingly, the court granted the plaintiffs the requested relief. The Bureau of Vital Statistics issued a birth certificate naming ALS as the mother.

Upon learning of the facts underlying the order of parentage, the state moved that the order be vacated. The state argued that there is no legal support for that order under the Parentage Act. The state contended that since ALS had no genetic relationship to the child, she could only be declared a parent through a formal adoption.

The trial judge ultimately agreed with the state's position and vacated his prior order of parentage. The judge ruled that the current birth certificate would remain in effect for 90 days while ALS applied for a stepparent adoption to avoid problems arising from the "inadvertently issued" birth certificate.

WHAT WE KNOW

We know the following about New Jersey law:

1. Sperm donation is permitted by statute. The statute provides a procedure to permit the name of the husband of a married couple to appear on the birth certificate from birth and insulates the donor from claims of parentage and support.
2. Using a known sperm donor without following the procedure in the statute can result in the donor asserting paternity or the mother or child seeking support from the donor.
3. There are no statutes or case law covering egg donation.
4. Paid traditional surrogacy is prohibited.
5. The state will oppose any pre-birth order addressing parentage unless the person seeking to be on the birth certificate can prove a genetic connection to the child about to be born. The state will not oppose a pre-birth order for a co-maternity.
6. As a result of *Lewis v. Harris*,[14] a female same-sex couple who are in a civil union or an out of state marriage recognized as a civil union by New Jersey will both be listed on the birth certificate without the need for a stepparent adoption.
7. Both members of a same-sex male couple cannot be on the birth certificate from birth. The state will oppose any pre-birth order because one member of the couple has no genetic link to the child. In addition, under New Jersey law, the birth mother cannot surrender her rights until 72 hours after birth. In these cases, the second father must pursue a second parent adoption as well as request termination of any rights of the egg donor, gestational carrier and husband of the donor and carrier.
8. New Jersey law prohibits discrimination due to sexual orientation, marital status and gender identity. As a result, in New Jersey, ART is accessible to gay men, lesbians, single people and transgendered persons.
9. Whether a court will enforce a gestational carrier agreement is unsettled. Certainly, under the Parentage Act, a birth mother can assert parentage based on giving birth to the child. Also, a woman who has given birth to a child cannot surrender the child for adoption until 72 hours after birth.
10. In some jurisdictions, notably California, courts have relied upon the intention of the parties in determining parentage in contested matters. The New Jersey sperm donation statute also recognizes and validates the intention of the parties. Otherwise, in some cases the intention of the parties has been recognized and respected (*A.H.W v. G.H.B., In re the Parentage of Robinson*); in others, intention has been disregarded (*Baby M, A.G.R. v. D.R.H. & S.H.,* and *In re the Parentage of a Child by TJS and ALS*).

OBSERVATIONS AND ETHICAL CONSIDERATIONS

When advising clients on the use of ART, consider these observations, including the myriad of ethical issues raised:

1. The center of all of this activity, the child born as a result of ART, is often an unrepresented party whose rights are rarely considered. The *Robinson* court was guided by best interests of the child. Otherwise, courts have looked only to the exact wording of the current statutes to decide who is a parent, with no weight given to what might be in the best interest of the child. A more open, inclusive model should be created that recognizes the legitimate concerns of the children, as well as each adult.
2. In determining whether an ART agreement is enforceable, should the rules of contract law apply? In other words, should a court be looking at contract-based solutions, or should a court instead consider what is in the best interest of the child?
3. What role should the intent of the parties play? New Jersey recognizes intent in its alternate insemination statute. Future cases could build on this legislative recognition of intent.
4. Multiple-parent families have been created in New Jersey, and in other states. In situations rivaling the quandary faced by King Solomon, the multiple-parent option should be considered by judges called upon to determine parentage of ART children.
5. The intent of the parties should be memorialized by a written agreement. Even if it is uncertain whether the agreement will be enforced, the writing is a tangible, contemporary record of the intent of the parties.
6. To assist in navigating the complicated legal rights and responsibilities arising from the use of ART, each party must have independent counsel. To increase the chance that an ART agreement will be enforced, there must be full disclosure and informed consent.
7. All parties should be screened and provided psychological counseling. The long-term ramifications of ART are too profound to be undertaken without making sure that all parties can psychologically accept the results.
8. Parties making these contracts often live in different states. In ART cases, the attorney must investigate the differing laws in the various states.
9. Experts in ART agree that only a woman who has already been pregnant and given birth to a child should be considered as a gestational or traditional surrogate.
10. As long as laws regarding consanguinity are respected, it is considered ethically acceptable in ART cases for parties to use family members as gamete donors and surrogates. However, parties should examine issues such as the psychological impact upon a child conceived using ART. Proceed with caution.
11. Egg donation is not analogous to sperm donation. Egg donation is more complicated, requires medication to stimulate and increase ovulation, and is certainly more invasive than sperm donation. Since no one knows whether the courts in New Jersey would enforce an egg donor agreement, attorneys should be especially cautious when advising clients with respect to this type of agreement.
12. The continued anonymity of a donor or carrier is uncertain at best. Given the availability and affordability of DNA testing, old concepts of anonymity are no longer valid. Parties to ART and their attorneys should consider whether children will be informed and, if so, how and when that information will be disclosed.
13. Pre-implantation genetic diagnosis (PGD), used to detect inheritable genetic familial diseases, is now readily available. What are the ethical considerations of PGD as a vehicle for gender selection? Does the use of PGD perpetuate gender oppression? Is PGD part of the right to reproductive choice?
14. Is it ethical for egg and sperm donors or surrogates to be compensated? Organ donation is common in our country, but there is a prohibition against payment for these donations. In other countries, it is illegal to compensate sperm and egg donors. If compensation is to be allowed, how should it be determined? Is it ethical to base payment on the ethnic or other personal characteristics of the donor?
15. What happens to unneeded embryos? After successfully completing IVF, what should a couple do with extra cryopreserved embryos? If they are to be donated, should there be legal standards, similar to the adoption of a child?
16. Unlike adoption agencies, which are licensed and regulated by states, ART agencies and brokers that arrange sperm and egg donations as well as carrier agreements are free of any government oversight. ART has grown into a lucrative industry devoid of supervision. Procreative decisions usually are considered private, but are there countervailing concerns for the welfare of the resulting children?
17. If ART is subjected to regulation by the government, should such regulation be on a state by state basis or by federal laws since the parties are often from different states?
18. Donors and carriers should have access to their own independent medical providers

*See **ART** continued on page 106*

Collaborative Divorce Explained

The Newest Alternative in Alternate Dispute Resolution

by Amy Zylman Shimalla

Whether due to the economy or the backlog in New Jersey family courts, people are seeking alternatives to traditional divorce litigation. Fewer people are looking for a 'scorched earth' approach to divorce and more are seeking mediation, arbitration, or the newest divorce process to come to New Jersey—collaborative divorce.

Collaborative divorce is a natural for those of us who have always looked at our cases in a resolution-oriented way. We have sought to resolve issues before seeking court intervention. We have utilized neutral experts when possible. We have gathered together at four-way conferences in an attempt to resolve issues. We have used mediation and arbitration as alternatives to the court process. We have collaborated with one another to reach a resolution.

Collaborative divorce is a process in which the parties and counsel agree not to litigate, but rather to work jointly until they reach a resolution. Neutral experts are added to the process as agreed. In addition to retainer agreements, a participation agreement is signed by the parties and counsel. The agreement provides, in part, that if the process ends, neither lawyer can represent their client in litigation.

THE BEGINNING

Collaboration was a natural evolution for Stu Webb, who developed the collaborative law process. Webb was an attorney in Minnesota practicing divorce law in the 1980s. The impact of divorce litigation on his clients and, as a result on him, resulted in Webb becoming more and more disenchanted with the process. During a particularly high-conflict case, Webb found himself in the difficult position of feeling the need to be a zealous advocate while, at the same time, trying to come up with creative resolutions. The thought occurred to him that divorcing couples should work with settlement specialists, and only turn to litigation specialists if settlement was unsuccessful. Thus, the idea of collaborative divorce was born. [1]

Today the International Association of Collaborative Practitioners has over 3,800 members in 20 different countries, including the United States, Canada, Austria, Australia, Bermuda, Channel Islands, Dominican Republic, Germany, Hong Kong, Italy, Switzerland, Uganda, Israel, Japan, France, England, Scotland, the Netherlands, Ireland, Northern Ireland, and the Chez Republic.[2] In New Jersey, there are currently five collaborative law practice groups including practitioners from throughout the state. The groups are Jersey Shore Collaborative Law Group, North Jersey Collaborative Law Group, New Jersey Collaborative Law Group, New Jersey Collaborative Divorce Alliance, and Mid-Jersey Collaborative Alliance.

THE TEAM APPROACH

The collaborative process always involves two clients and two collaboratively trained lawyers. Beyond that, team members are added to the process as deemed appropriate by the parties and their legal counsel. Frequently utilized team members are:

A. *The Divorce Coach:* The divorce coach is a mental health expert who will work with the parties individually and in the process itself (*i.e.*, four-way conferences), as needed. In some models, a divorce coach, or two coaches, are always involved. In others, it is a choice made by the parties. The divorce coach aids the parties in working through the emotional issues and how to effectively communicate with one another. A divorce coach is also useful to the attorneys when communications become difficult during the process.

B. *Child Specialist:* A child specialist will provide a voice for the children. The child specialist is a mental health expert who meets individually with the children and adds their voices to the collaborative process.

C. *Financial Specialist:* There can be joint or separate financial specialists who will work with the parties to project their future need and how different support scenarios, and equitable distribution scenarios, will impact each party. A neutral financial expert can be very useful in showing how different offers on the table impact both parties.

D. *Forensic Accountant:* When a business is involved, a neutral forensic accountant trained in collaborative divorce will work with both parties and counsel to evaluate the business in the most efficient way

possible. There is an exchange of information to facilitate the evaluation. The findings are discussed at a four-way conference with an open dialogue between all team members. A final report is not prepared, but rather spreadsheets are shared with the parties and counsel.

E. *Mortgage Specialist:* A mortgage specialist trained in collaborative divorce will work with the parties regarding refinancing, mortgages, or obtaining new mortgages during and following the divorce.

Each team member is trained in collaborative divorce. Each understands that his or her work is confined to the collaborative process, as defined by the terms of the participation agreement. The parties, counsel, and the other team members have an understanding that if the collaborative process is not successful, none of the work conducted by them will be admissible as evidence in future divorce litigation. This may seem like a risk of time and dollars; however, the research shows that 90 percent of these cases will be resolved in the collaborative process.[3] Successful parties will have saved tens of thousands, or perhaps hundreds of thousands of dollars in utilizing neutral experts and collaborative attorneys, rather than what they would have spent on counsel and experts fees in traditional litigation.

LITIGATION VERSUS COLLABORATIVE DIVORCE

In litigation the process may well begin with the filing of a complaint for divorce, perhaps an order to show cause, or a motion for *pendente lite* relief. By contrast, the collaborative process begins with a discussion between counsel and the scheduling of the first four-way conference. The *pendente lite* financial situation can be discussed and resolved together with any other issues that would normally have been the basis of the *pendente lite* motion.

In traditional litigation, the parties proceed to an exchange of discovery, the hiring of experts as necessary and the passing of several months, in some cases years. In the collaborative process, the parties and counsel sit at a conference room table, they discuss and agree upon neutral experts and the mutual transparent exchange of information without the need for formal discovery. Timelines are set by agreement of the team members.

In the litigation process, emotions often run high and conflict is an inherent part of the process. In the collaborative process, the parties can work with a divorce coach, or coaches, to help them deal with the emotional aspects of the divorce and their communications with one another.

In traditional litigation, the parties and counsel participate in case management conferences, early settlement panel appearances, mandatory economic mediation, perhaps depositions, and, ultimately, in a handful of cases, trial. Throughout that process there are usually motions filed both before and after the trial to seek the court's intervention and determination on the issues. In collaborative, all of these issues are brought to the table and addressed by the team.

The collaborative process is confidential and private. The parties set their own time frames and are not bound by time frames set by "best practices" and the courts.

At the conclusion of traditional litigation, the parties may be financially and emotionally drained. Then they must move forward to try to live within the constraints set by the court in their judgment of divorce, or by the terms of their marital settlement agreement. In collaborative, the parties have worked out their agreement with the help of their lawyers and other experts as needed and are more likely to embrace their agreement as their own. They will have the aid of divorce coaches, if necessary, as they move forward into their after divorce life.

LEGAL VERSUS EMOTIONAL DIVORCE

Research indicates that the most disruptive time for a family follows the conclusion of a legal divorce process. The first year following divorce is a particularly difficult time for families.[4] Involving mental health experts as coaches during the divorce process helps families through the legal divorce in a healthier and more effective way. This approach helps parties with the *emotional* divorce, the impact of which may be far greater reaching then that of the actual legal divorce. The coach, or coaches, can help the parties disengage emotionally and move forward in a healthier co-parenting relationship that will benefit their children. The post-divorce adjustment is a complex issue that is often ignored in traditional litigation.

ETHICAL ISSUES

When the collaborative divorce idea came to the forefront in New Jersey, a question arose regarding whether participation in a collaborative law practice group was in violation of the Attorneys Rules of Ethics. The result was Ethics Opinion 699 issued by the Advisory Committee on Professional Ethics appointed by the Supreme Court of New Jersey.[5]

The committee found that participation in a collaborative law group does not violate the Attorney's Rules of Ethics. The committee noted that such groups are made up of non-lawyers, as well as lawyers. The groups' purpose is to educate the public about collaborative law and identify individuals who are collaboratively trained. The group itself is not engaged in the practice of law, and the members of the group are not mandated to refer within the group, but rather they are free to exercise their independent professional judgment in making referrals to other professionals in accord with what they view to be the best interests of their clients.

Likewise, the committee found there was no conflict of interest in members of the same practice group representing opposing parties in a divorce action. Again, the

collaborative group members are not practicing law with one another, as are lawyers within the same law firm.

The committee went on to address the issue of a lawyer's termination of services in the event the collaborative process ends. The committee noted that RPC 1.6(b)(1) provides that an attorney can withdraw only if the withdrawal *can be accomplished without material adverse effect on the interest of their client*. The committee noted that because the limitation on the attorney's representation is known from the outset, it is more of a limitation on the scope of representation rather than an issue of a withdrawal as counsel. The ruling notes that lawyers are permitted to impose some limitations on the nature of their practice pursuant to RPC 1.2(c), so long as the client gives informed consent.

The ruling went on to note that the lawyer must assess the client's needs and whether or not the collaborative process is likely to be successful for that client. They must assure that the client is aware of the risks of the process (*i.e.*, the need for the lawyer to withdraw if the process is unsuccessful and the matter proceeds to litigation and the waiver of traditional discovery). This wavier of discovery does not mean the exchange of information and documentation does not occur. However, rather than interrogatories and depositions, the parties share information in an open, transparent manner without need for formal demand. The client must also be made aware of all of the alternatives available to them, including litigation, mediation, arbitration, etc. This exchange of information is essential so the client can give informed consent to the collaborative process. Thus, in order to comply with rules of ethics it is incumbent on a collaborative law practitioner to assure that the client is aware of the risk of failure of the process resulting in the need to retain other counsel, and the limited discovery process involved.

As stated above, approximately 90 percent of these cases are successful. The research into why the remaining 10 percent are not successful indicates that the number one reason for failure is lack of trust between the parties, resulting in one or both clients invading the privacy of the other.[6] This may result in a party reading the other party's e-mail, listening to the other's telephone messages, stalking, or having the other followed. This type of behavior is indicative of a total lack of trust. Some level of trust is essential to the collaborative process, and an attorney must make an assessment in the initial consultation with the client regarding whether or not the necessary level of trust exists.

THE PARTICIPATION AGREEMENT

The cornerstone of collaborative divorce is the aforementioned participation agreement signed by the parties and counsel at the onset of the process. The agreement provides for full disclosure and transparency during the process. It also provides that in the event the process does not work, and one or both parties choose to move on to litigation, or one or both attorneys finds it necessary to terminate the process due to a violation of the agreement, both parties must retain other attorneys. Some might question why the attorneys involved in the process cannot represent their clients if they move forward in litigation after the process fails. Stu Webb has recently written on this exact topic, noting: "Without the Rule, our settlement process would be colored by, and anticipate the possibility of, going to trial. The attorneys are forced to be the part-time lawyer (litigator) and the part-time peacemaker (collaborator) at the same time bringing his or her full attention to neither role."[7]

Webb goes on to note that fear drives the litigation process and interferes with settlement. It impacts on the client's behavior and ability to address the issues. It impacts on how the parties and attorneys communicate with one another. It impacts on the choice of experts, (*i.e.*, independent rather than neutral experts might be favored).

Webb goes on to state: "the Rule allows us to work with our clients in a positive, open settlement climate where the client feels safe to express their needs and interests without the fear that someone in the room might some day be cross examining them."[8]

CONCLUSION

Collaborative divorce is a win-win for all. It is a win for the parties, as they preserve resources, both financial and emotional. Divorcing couples conclude the process with an ability to communicate, and hopefully trust one another. They are better able to move forward in their lives and are better able to co-parent their children. It is a win for our judiciary system, which is one in which our judges are overworked and understaffed. The collaborative process allows them to process a completely resolved divorce at a simple uncontested hearing, without having to provide any other resources to the family involved. It is a win for the lawyers because at the end of the process they have satisfied clients who not only willingly pay their fees, but will likely refer other clients to them.

Lastly, and most importantly, the process benefits the children. Statistics show that how the parents conduct themselves during a divorce has a greater impact on the children then the actual fact that their parents get divorced.[9] ■

ENDNOTES

1. Stuart G. Webb, and Roland D. Ousky, *The Collaborative Way to Divorce.* (New York: Penguin Group 2007), xv.
2. Nancy Cameron, LLB, The Growing ADR Community: Adapting for Culture, Language and Families Around the Globe, *Collaborative Review* (Spring 2010): 1.

3. Gay G. Cox, JD, Using IACP Research Results to Obtain Client's Informed Consent to Participation in Collaborative Practice, *Collaborative Review* (Spring 2010): 24.
4. A. Rodney Nurse, PhD, ABPP and Peggy Thompson, PhD, Coaching to the 'End': Expanding the Goal, *Collaborative Review* (Spring 2010): 14.
5. Opinion 699, Advisory Committee on Professional Ethics, *Collaborative Divorce: An Essential Primer for All Family Law Practitioners* (New Jersey ICLE 2010): 47.
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who are not subject to conflicting interests between the parties providing payment and the individual receiving medical services. There should be complete disclosure to all participants of any such relationship.

19. Does the use of gestational carriers commodify and/or exploit women? Or does it fall within a woman's reproductive autonomy?
20. Does the expanded use of 'medical tourism,' such as the practice of paying women overseas to carry an ART child to term, amount to exploitation of women in less-developed countries? Or is it part of a woman's right to choose?
21. Who pays for the medical services involved? Should an insurance company pay the medical expenses of a gestational or traditional surrogate under her medical insurance policy? The Supreme Court of Wisconsin has recently held that an insurer can not exclude maternity coverage for an insured acting as a surrogate mother.[15]
22. And who is considered the mother of a child born under any of the various scenarios above? The United Nations Convention on the Rights of the Child places the biological connection at the heart of the parent-child relationship. However, California courts have ruled that the intention of the parties should control.[16] New Jersey cases and statutes offer a variety of answers depending on the facts in each matter and the county where the case is heard, as discussed above.

IN CONCLUSION

While the frequency of the use of ART continues to spiral, New Jersey lawyers are often left with many unanswered questions. As a result, when advising ART clients, New Jersey practitioners often face legal issues lacking clear answers and a potential ethical minefield. The author's best advice for a practitioner in New Jersey in this position is to go slow and document each step of the process. Moreover, practitioners counseling ART clients should make sure all parties have full knowledge of what is expected, and all parties are afforded the right to independent counsel and access to psychological counseling. ■

ENDNOTES

1. *In re Baby M*, 109 N.J. 396 (1988).
2. N.J.S.A. 9:17-38 *et seq.*
3. *Id.*
4. N.J.S.A. 9:3-41(c).
5. *A.H.W. v. G.H.B.*, 339 N.J. Super. 495 (Ch. Div. 2000).
6. *Id.* at 503 (emphasis added).
7. 383 N.J. Super. 165 (Ch. Div. 2005).
8. *Id.* at 171.
9. Docket # FD-09-1838-07 (N.J. Superior Ct., Hudson County, Dec. 23, 2009) (available at http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf) (last checked Sept. 16, 2010).
10. *A.G.R.* at p. 4 (*citing Baby M,* 109 N.J. at 433).
11. N.J.S.A. 9:17-41 (providing that proof of having given birth to a child establishes maternity).
12. *A.G.R.* at p. 4.
13. Camden County, (Chancery Division April 1, 2010).
14. 188 N.J. 415 (2006).
15. *Mercycare Ins. Co. HMO, Inc. v. Wisconsin Comm'r of Ins.*, 786 N.W.2d. 785 (Wis. 2010).
16. *See Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

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In Status and Out of Status

An Immigration Primer for the Family Law Practitioner

by Daniel L. Weiss and Michele Alcalde

This article is intended to provide family law practitioners with a basic overview of some of the most common family-related issues that arise in immigration law within the context of family relationships, including gay and lesbian relationships. In so doing, this article intends to sensitize family law practitioners to immigration law issues that may arise during the course of family law practice and to recommend how best to approach and resolve such issues.

A basic knowledge of immigration law is critical for the family practitioner because a litigant's immigration status frequently impacts how a family matter may be resolved. Areas of family law that are particularly rife with immigration law issues include, but are not limited to, divorce, child support, child custody and domestic violence restraining orders.

Immigration law is a highly complex practice area that is in a near constant state of flux. As such, it can be difficult for a non-specialist who is unfamiliar with the nuances of the law to avoid potentially devastating immigration issues for his or her client. Consulting with an immigration specialist is, therefore, advisable when such issues arise for the family law practitioner's client. A word of caution: A practitioner should never suggest that a client go to the United States Citizenship and Immigration Services (USCIS) for assistance or information, as the client could be detained or placed in removal proceedings (also known as deportation proceedings).[1]

At a minimum, the family law practitioner should be familiar with the principal sources of immigration law. The United States Constitution allocates complete control over national immigration policy to the federal government.[2] Immigration is governed by the Immigration and Nationality Act (INA), codified at Title 8 of the U.S. Code.[3] Regulations for the USCIS and the Executive Office for Immigration Review (EOIR) are set forth in Title 8 of the Code of Federal Regulations.[4]

DETERMINING A CLIENT'S STATUS

The first step in assisting a client is to determine his or her status. A lawful permanent resident (LPR) has a green card, giving the LPR the right to live and work in the United States and to travel to and from the United States so long as he or she does not violate any laws.[5] The family law practitioner should be aware, however, that even an LPR with a lengthy residence in the United States will be removed if he or she is convicted of certain crimes, such as an "aggravated felony."[6] Additionally, an LPR with a criminal conviction may be denied admission to the United States under certain circumstances if he or she leaves and later attempts to re-enter.

Most LPRs are eligible to apply for naturalization (*i.e.*, United States citizenship) after maintaining five years of LPR status.[7] An LPR who obtained a green card through a *bona fide* marriage to a United States citizen, however, may file for naturalization after just three years of LPR status, which begins when "conditional" LPR status is granted by USCIS.[8]

In contrast, an undocumented person, often mistakenly referred to as an illegal alien, has no legal status in the United States. This is because the undocumented person has entered the country without inspection or overstayed the length of his or her nonimmigrant visa. In immigration law parlance, such persons are considered to be out of status or to have fallen out of status.

Determining an immigrant's status with precision can be a difficult task, requiring, among other things, a careful and thorough examination of the immigrant's status-related documentation. A family practitioner should consult an immigration attorney immediately when any ambiguity or questions arise concerning a client's status.

THE IMPACT OF DIVORCE

A judgment of divorce or the filing of a complaint for divorce or for separate maintenance can have a potentially devastating effect on an immigrant spouse's current or pending status.

In those cases where a United States citizen or LPR has initiated a status petition for an immigrant spouse, but have not yet attended an initial adjustment of status interview before USCIS, the immigrant spouse may be unable to obtain conditional or lawful permanent residency if the divorce proceeding has already been filed or a final judgment granted. If the couple has physically separated but remain legally married, they will bear the

awesome burden of proving to a USCIS officer, at the time of an adjustment of status interview, that they entered into the marriage in good faith. If the marriage was *bona fide* and can be proven as such, a bi-national couple can usually divorce without negatively impacting the immigrant's status.

Divorce can also cause immigration issues indirectly when its fallout creates child support conflicts. For example, if the custodial parent has no legal status, he or she may be unable to support the child at issue because he or she cannot work legally in the United States. Conversely, the parent from whom child support is sought may be unable to pay because he or she cannot legally work. Additionally, if the custodial parent is an undocumented person or has otherwise fallen out of status, he or she may be subject to arrest by Immigration and Customs Enforcement (ICE) and is at risk of being placed into removal proceedings.

If a parent is to be removed, it may raise catastrophic problems for both the parent and child. For example, a custodial parent who is deported may be unable to get permission to take the children with him or her. Further, the noncustodial parent could successfully argue that it is not in the child's best interests to travel to or live in the custodial parent's home country. Such a situation could even implicate criminal liability, as the resident/citizen-parent could file criminal charges under international kidnapping laws.[9]

The cause of action for divorce that is used by the plaintiff in his or her complaint for divorce and the cause of action utilized by the counter-claiming defendant party to the dissolution of a marriage may also greatly impact the current or pending immigration status of the immigrant spouse.[10] Similar status-related issues may be implicated during divorce settlement proceedings.

As a result, in certain cases it may be prudent to delay the filing of a complaint for divorce until a client's immigration status is resolved. Finally, in order to avoid criminal or civil claims of fraud, it is critical that the parties refrain from representing to the USCIS that they are living together if they have, in fact, separated.

FAMILY-BASED IMMIGRATION

Family reunification has always been a primary goal of United States immigration policy. The majority of immigrants immigrate based on a family relationship with a person who already has status in the United States. The person with status is known as the petitioner. The petitioner may file a visa petition for his or her relative, who is known as the beneficiary.

The reunification system is divided into two principal categories based upon the age and familial relationship of the petitioner and beneficiary. These categories are further subdivided into a number of subcategories.[11] The speed with which a visa may be procured can vary significantly depending upon which category the petitioner-beneficiary relationship falls into.

United States citizens over the age of 21 may petition for an unlimited number of "immediate relatives," defined as parents, spouses, and unmarried children under the age of 21.[12] While spouses and children can often obtain derivative beneficiary status, they must have separate petitions filed for them by their citizen-petitioner.[13]

Currently, same-sex couples cannot file family-based petitions. A gay man or lesbian woman cannot petition their fiancé who resides outside of the United States, nor can they petition for their spouse, whether in the United States or abroad. The Defense of Marriage Act (DOMA) was signed into law by President Bill Clinton on Sept. 21, 1996.[14] It provides that no state shall be required to give effect to a law of any other state with respect to a same-sex "marriage." Additionally, it defines the words "marriage" and "spouse" for purposes of federal law as being only applicable to opposite-sex couples.

DOMA thus permits states to refuse to acknowledge same-sex marriage consummated abroad or at home[15] by making explicit under federal law that marriage is the legal union of a man and a woman as husband and wife, and a spouse is a husband or wife of the opposite sex.[16] DOMA has created a major obstacle for those United States citizens in same-sex relationships with foreign born individuals (*i.e.*, bi-national same-sex couples). As a practical matter, DOMA can only be overcome through immigration reform and advocacy. The proposed Uniting American Families Act (UAFA) is a promising example of such reform.[17]

CHILDREN: STEPCHILD, ADOPTED AND BORN OUT-OF-WEDLOCK

Prior to drafting a will or instituting an adoption proceeding involving immigrant-clients, the family law practitioner should take care to consult an immigration attorney to ensure that benefits, inheritance and the like will pass from parent to child.

The term "child" under the Immigration and Nationality Act means an unmarried person under 21 years of age, including a stepchild if the parents married before the child turned 18, and an adopted child who, before the age of 16, had a final order of adoption, had been in the legal custody of and resided with the adoptive parent for at least two years.[18] A child born out-of-wedlock qualifies as a child under the statute when legal status is sought by the child's natural mother or natural father.[19] Under the 14th Amendment, Section 1 to the United States Constitution, any child born on United States soil is a United States citizen, regardless of the status of the parents. This does not include the children of ambassadors and diplomats who are not considered subject to the jurisdiction of the United States government. In order for a United States

citizen child to petition for a parent, however, the child must be 21 or older.[20]

SPOUSAL RELATIONSHIP: *BONA-FIDE* MARRIAGES

The fact that a marriage is legal under the laws of the jurisdiction in which it was officiated is not sufficient for an immigrant to obtain benefits under current immigration law. Congress and the USCIS have put significant effort into discouraging 'sham marriages,' *i.e.* marriages entered into solely for immigration purposes. As a result, the USCIS or a reviewing U.S. Embassy abroad will scrutinize the relationship with the utmost care. Indeed, the USCIS operates under the *presumption* that a marriage was entered into for the sole purpose of obtaining immigration benefits. Put more bluntly, marriages under review are considered guilty until proven innocent. As such, the couple will likely be asked to produce substantial evidence that the marriage was entered into in good faith.

The Immigration Marriage Fraud Act of 1986 created a previously unknown status called "conditional permanent residence," intended to root out sham marriages and deter marriage fraud.[21] Knowingly entering into a marriage for the purpose of circumventing immigration laws is a federal crime, punishable by up to five years in prison and $250,000 in fines.[22] Knowing involvement in a fraudulent marriage also makes the immigrant spouse permanently ineligible to immigrate and makes an LPR spouse removable. An immigrant who obtains LPR status through marriage and then divorces, remarries, and seeks to petition for a new spouse within five years of immigrating will be highly scrutinized and will be required to prove by clear, convincing, and unequivocal evidence that the original marriage was entered into in good faith.[23]

In keeping with USCIS's strict policy concerning marriage, a person wishing to immigrate based on a spousal relationship must be married to the petitioner throughout the process until their green card is issued.[24] The only exceptions are for those who are victims of domestic violence. Typically, the petitioner has complete control over the petition process, deciding whether and when to file the petition. The petitioner can withdraw the petition at any time throughout the process.

CONDITIONAL PERMANENT RESIDENT

An immigrant spouse of a United States citizen who successfully adjusts status obtains either permanent residency or conditional permanent residency (CPR). In most cases, however, an immigrant spouse is only granted CPR, which expires at the end of the two-year anniversary when it first became effective. Any derivative children of the CPR will also only obtain conditional status.[25] The CPR must file a petition to remove conditions on residence in order to remove the conditions.

Although the law theoretically applies equally to the spouses of United States citizens and LPRs, the wait for a visa is so long for the spouse of an LPR that those marriages are invariably more than two years old by the time the visa becomes available. Therefore, spouses of LPRs who eventually obtain residency usually acquire their status as LPRs, avoiding the necessity of having to renew the conditions on this status.

The petition for removal of conditional status must be filed jointly by the CPR and the United States citizen spouse within three months before the expiration date of the green card.[26] If the residency card is valid for 10 years, then the client has full LPR status and need do nothing further other than consider an affirmative petition to file for naturalization or review the residency card before its expiration.[27]

The central issue in the removal of a conditional status case is whether the marriage is *bona fide*. The couple submits a joint petition to remove the conditions along with voluminous supporting documentation demonstrating the *bona fides* of the marriage, such as birth certificates of children, evidence of shared finances and shared residence, affidavits of friends and family, photographs, etc. The petition will usually be adjudicated based on the papers submitted to USCIS. However, there are occasions when USCIS schedules a final interview before the immigrant spouse can be accorded full LPR status.

If USCIS should ultimately deny the petition to remove the conditional status, the immigrant spouse will be placed into removal proceedings. The immigrant spouse will have an opportunity to present his or her case to an immigration judge for remand back to USCIS. It is crucial that the petition to remove conditions be filed timely. If it is late, the immigrant spouse's CPR status will expire; he or she will fall out of status and become subject to potential removal proceedings.

CONDITIONAL PERMANENT RESIDENCY AND DIVORCE

Despite the recent emphasis on preventing marriage fraud, if an immigrant spouse enters into a good faith marriage with a United States citizen and the couple separates or divorces prior to the two-year anniversary date of the removal of conditions on the CPR status, the immigrant spouse can request a waiver of the joint petition.[28] The 'waiver' is discretionary and will only be granted once the *bona fide* nature of the marriage has been established. This is one of the rare exceptions in which an immigrant may self-petition.

There are three independently sufficient bases for obtaining a waiver. Firstly, waiver is obtainable where the CPR spouse demonstrates that: 1) he or she entered into the marriage in good faith *and* 2) that the marriage is now terminated. Secondly, waiver is obtainable where the CPR spouse provides evidence that he or she was subjected to battering or extreme

cruelty by the U.S. citizen spouse during the course of the marriage. Thirdly, the CPRs may obtain waiver where they demonstrate that deportation would result in extreme hardship for themselves and their children.

The CPR spouse can request one or all of these waivers. If a waiver of the joint petition is granted, the CPR spouse will become an LPR. If it is denied, or if the CPR spouse fails to file the request for a waiver, his or her CPR status will be terminated and he or she may be subject to removal proceedings.

If no domestic violence has occurred and the immigrant spouse is seeking waiver solely on the basis of termination of the marriage, the marriage must actually be terminated.[29] In these cases, the family law practitioner may wish to expedite the adjudication of a final divorce. Notably, USCIS may grant, upon formal request, an abeyance of its decision on the waiver petition until the judgment of divorce has issued. In such cases counsel's skills as a matrimonial attorney and family law negotiator may prove critical to preserving a client's status, as the U.S. citizen spouse's attempts to stall a judgment of divorce could derail the client's waiver proceedings.

In waiver proceedings based upon battery and domestic violence, proper documentation is crucial. The family law practitioner should assist the beneficiary in obtaining a final restraining order or lodging at a battered women's shelter and collect all police reports and medical records relevant to the case. Psychological reports and certifications from third parties should be gathered as well. Such third-party documentation can be critical in the absence of police or medical records.

WIDOW AND WIDOWER PETITIONS

The spouse of a United States citizen is eligible to file a petition for him or herself, known as Form I-360, "Petition for Widow(er) or Special Immigrant," should the United States citizen spouse be deceased. (Prior to Oct. 28, 2009, the self-petitioner had to have been married to the deceased United States citizen for at least two years at the time of the deceased citizen's death, in order to immigrate as the widow(er) of a United States citizen. Congress removed this requirement, effective Oct. 28, 2009.[30]) Importantly, the self-petitioning alien spouse *cannot* remarry before receiving the green card. The self-petitioner will, as always, have to prove the *bona fides* of the marriage to the deceased.[31]

SELF-PETITIONING UNDER THE VIOLENCE AGAINST WOMEN ACT (VAWA)

Some immigrant women are married to United States citizen or LPR-petitioning spouses who are abusive. Consistent with such abuse, these petitioner spouses often refuse or fail to file a proper petition to obtain LPR benefits and status for their immigrant spouses. For an abuser, control over his or her immigrant spouse's legal status is a powerful weapon, used to keep the spouse dependent and in fear.

Fortunately, under the Violence Against Women Act (VAWA), immigrant women (or men) married to an abusive United States citizen or LPR can self-petition for LPR status so that he or she need not rely upon the abuser to file.[32] Family law practitioners who work with same-sex couple clients should note that VAWA has been interpreted to apply with equal force to same-sex domestic abuse.[33]

In order to self-petition, the man or woman must demonstrate the following: 1) that the abuser is or was a United States citizen or LPR (with some exceptions); 2) that he or she is (or was) the spouse of a United States citizen or an LPR, *or* the parent of a child who was abused by the self-petitioner's LPR or United States citizen spouse; 3) that the LPR or United States citizen abused the self-petitioner or subjected him or her to extreme cruelty during their marriage; 4) that he or she entered into the marriage in good faith; 5) that he or she is currently residing in the United States (with some exceptions); 6) that he or she resided with the abuser at some point, and 7) that he or she is a person of good moral character.[34]

The self-petition takes the place of only the first step in the visa petition process. It is designed to obviate the need for involvement by the petitioner-batterer. A self-petition is a complicated one, involving a lengthy affidavit from the self-petitioner and extensive documentation of the factors listed above. An approved self-petition comes with a priority date just like a regular family petition and, if the batterer is an LPR, the self-petitioner will still have to wait years for the actual visa. However, unlike a regular beneficiary, a second preference self-petitioner will be granted employment authorization so that he or she can support him or herself (and any children) while waiting for the visa.[35]

Once a self-petition is filed and a *prima facie* case established, the self-petitioner can file for a divorce. However, when the time comes for him or her to adjust status to an LPR, he or she will have the same burden as other immigrants in demonstrating admissibility.[36] Thus, the health, criminal, and other grounds of inadmissibility apply to the self-petitioner just as they do to any other immigrant.

There are, however, a number of exceptions made for battered self-petitioners not available to typical LPR applicants. The legally binding affidavit of support from the spouse is not required, for obvious reasons. Additionally, the issue of whether the immigrant will become a public charge will be evaluated in a way that takes into account the petitioner's past abuse. Public benefits he or she received because of his or her status as an abused immigrant, for example, cannot be used by USCIS to deem him or her a public charge.[37]

Other factors disregarded by the USCIS for battered self-petitioners

include Medicaid, food stamps, housing assistance, energy assistance, child care services, etc. Nevertheless, the public charge provision does apply as a general matter to battered self-petitioners. Thus, anything the family law practitioner can do to enable the self-petitioning immigrant to avoid government assistance or dependence on others to achieve financial independence will be helpful.

As a final cautionary note, if an undocumented client married to a United States citizen or LPR batterer is already in divorce proceedings, the matrimonial proceedings may need to be delayed, since the marriage must be intact when the VAWA petition is filed. However, the undocumented client can self-petition if he or she divorced within two years of filing his or her self petition and the divorce was precipitated by the abuse.[38]

CANCELLATION OF REMOVAL

Cancellation of removal is another form of relief available to battered immigrant men and women who are in removal proceedings in the immigration court. The requirements are similar to those for self-petitioners. An applicant for VAWA cancellation of removal must establish that he or she: 1) has been battered or subjected to extreme cruelty by a United States citizen or LPR spouse; 2) has been physically present in the United States for three years before applying; 3) would suffer extreme hardship, or that his or her child or parent would suffer extreme hardship if he or she were removed; 4) has been a person of good moral character during the period of physical presence; 5) is not inadmissible for crimes, security and terrorism grounds, or removable for marriage fraud, failure to register and falsification of documents, and 6) has not been convicted of an aggravated felony as defined under INA Section 101(a)(43).[39]

A grant of cancellation of removal by an immigration judge results in LPR status. The public-charge and other inadmissibility provisions do not apply in a cancellation matter. An eligible immigrant who is in removal proceedings should be referred to an immigration attorney, as these are complex cases to present before the immigration court.

U-VISAS: FOR VICTIMS WHO ARE UNMARRIED OR WHOSE SPOUSE IS NOT A UNITED STATES CITIZEN OR A LAWFUL PERMANENT RESIDENT

There are many immigrant victims of domestic violence who are married to an abuser who is not a United States citizen or an LPR. In addition, many who are not married to their abuser, so that even if the abuser has status, he or she could not petition for him or her. These individuals do not qualify to self-petition but they may qualify for the U-Visa.

The U-Visa was created by Congress in 2000 for the purpose of protecting victims of a serious crime who report the crime and assist in its investigation and prosecution.[40] In fact, the U-Visa is not limited to victims of domestic violence. A family law practitioner should keep this in mind when counseling out-of-status clients.

The USCIS has promulgated regulations for persons who receive a U-Visa to later adjust their status to an LPR after three years in U-Visa status. However, to first qualify for a U-Visa, the applicant must: 1) have suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity; 2) possess information concerning the criminal activity and has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the criminal activity; and 3) have a certification from a federal, state, or local law enforcement official, prosecutor, judge, or other authority investigating criminal activity, to verify his or her helpfulness in the investigation or prosecution of the criminal activity.[41]

The criminal activity must be one of a series of crimes set forth within the regulation. These include rape, incest, domestic violence, sexual assault, abusive sexual contact, hostage-taking, kidnapping, and unlawful criminal restraint, among numerous other crimes. Additionally, the criminal activity must have occurred in the United States or its territories or have violated the laws of the United States.[42]

A U-Visa nonimmigrant may adjust his or her status to LPR if he or she meets the following requirements: 1) he or she has been present physically in the United States for a continuous period of at least three years since the date of admission as a U-Visa nonimmigrant; 2) he or she did not unreasonably refuse to provide assistance in a criminal investigation or prosecution, and 3) his or her continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. The USCIS may also adjust the status of the principal applicant's spouse or child if the adjustment is necessary to avoid extreme hardship.[43]

REMOVAL OF ABUSIVE SPOUSES OR INTIMATE PARTNERS

LPRs and all other immigrants in the United States are subject to removal from the United States on a number of grounds listed in Immigration and Nationality Act Section 237. An immigrant who is in the United States with no lawful status can be removed solely on the ground of having no legal status. The act also provides for removal due to marriage fraud or failure to remove the conditions on a CPR status.[44]

The criminal provisions are most likely to have an impact in cases involving domestic violence. These include the following: 1) conviction of one crime of moral turpitude within five years of immigration (or 10 years in some cases) if a sentence of one year or longer may be imposed; 2) conviction of two crimes of moral turpitude at any

time after admission; 3) conviction of an aggravated felony;[45] 4) conviction of any controlled-substances violation except a single offense of simple possession of 30 grams or less of marijuana; 5) being a drug abuser or addict, regardless of whether ever convicted of a crime; 6) conviction of almost any firearms offense; 7) conviction of a crime of domestic violence, stalking, violation of a restraining order, or child abuse, neglect, or abandonment; 8) being found to have violated a restraining order; and 9) miscellaneous crimes such as sabotage, espionage, etc.

Immigration law tends to define criminal law terms, such as "conviction" and "aggravated felony," more broadly than state law. For example, a "PTI with a guilty plea," which is not a conviction in New Jersey, is a conviction for immigration purposes. The liberal interpretation of criminal law terminology has had the unfortunate result of placing even long-term resident LPRs into removal proceedings for relatively minor criminal infractions.

The domestic violence and restraining order provisions were added by the Illegal Immigration Reform and Immigrant Responsibility Act[46] and are generally well known and sometimes misconstrued in the immigrant community. Obtaining a restraining order against a party who is not in legal status does not, by itself, subject that party to removal. A conviction for a domestic violence crime does, however, subject a defendant to removal proceedings.

JUVENILE SPECIAL IMMIGRANTS

An undocumented child who has lost his or her parents through death or abandonment, and who is in state custody or has had a legal guardian appointed by a court, can obtain permanent residence by filing a juvenile special immigrant petition. The petition must be accompanied by an order from the appropriate juvenile court stating the following: 1) that the child is dependent on the court or has been placed by the court into the custody of a state agency or an individual; 2) that the court has determined that the child is eligible for long-term foster care (*i.e.,* that the court has determined family reunification is not a viable option for the child); and 3) that the court has determined that it is not in the best interest of the child to be returned to his or her home country or the home country of his or her parents.[47]

CONCLUSION

The family law practitioner should not assume that clients who are completely out of status may have no rights to improve their immigration status. This is precisely why the expression, out of status is preferred over illegal. Each situation is unique. Conversely, the practitioner should not assume that someone in status has the right to stay in the United States. Any type of status other than that of citizen accords privileges only and not 'rights' to stay in the United States. Therefore, all family law practitioners should inquire into their client's status in order to avoid triggering immigration issues in divorce, domestic violence, adoption and juvenile court matters. ■

ENDNOTES

1. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) changed some important terms in immigration law. The traditional words "deportable" and "excludable" correspond more or less with the new terms "removable" and "inadmissible." The grounds for each are roughly the same despite the drastic changes.
2. Article 8, United States Constitution.
3. Title 8 of the United States Code outlines the role of aliens and nationality in the United States Code.
4. The Code of Federal Regulations (CFR) is the codification of the general and permanent rules and regulations (sometimes called administrative law) published in the *Federal Register* by the executive departments and agencies of the federal government. The CFR is published by the Office of the *Federal Register*, an agency of the National Archives and Records Administration (NARA). The CFR is divided into 50 titles that represent broad areas subject to federal regulation.
5. *See* Lawful Permanent Residence ("Green Card"), USCIS Website.
6. *See* Immigration and Nationality Act § 101(a)(43), 8 U.S.C. § 1101(a)(43).
7. Immigration and Nationality Act Section 316(a) of the Immigration and Nationality Act (INA) discusses the requirements for naturalization.
8. *See* 8 C.F.R. § 319.1(a)(3).
9. *See* Uniform Child Custody Jurisdiction Act (UCCJA), 9(1A) U.L.A. 271 (1999); Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), 9(1A) U.L.A. 657 (1999), *also* N.J.S. 2A:34-53, *et seq.*; and Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. 1738A.
10. New Jersey has, essentially, two no-fault grounds for divorce. The first is irreconcilable differences.

    Grounds (i) under Statute 2A:34-2, requires a litigant to attest that they are filing for divorce arising from "irreconcilable differences which have caused the breakdown of the marriage for a period of six months and which make it appear that the marriage should be dissolved and that there is no reasonable prospect of reconciliation." The other ground is Separation. To qualify, both the husband and wife must have lived separately, for a period of at least 18 consecu-

tive months. Moreover, there must not be a reasonable expectation of reconciliation. N.J.S.A. 2A:34-2A(d).

Fault Divorce Causes of Action

Extreme cruelty includes any physical or mental cruelty which makes it improper or unreasonable to expect that individual to cohabitate with their spouse. N.J.S.A. 2A:34-2(c). The courts are very liberal as to what type of conduct constitutes extreme cruelty.

Adultery

The courts have held that "adultery exists when one spouse rejects the other by entering into a personal intimate relationship with any other person, irrespective of the specific sexual acts performed; the rejection of the spouse coupled with out-of-marriage intimacy constitutes adultery." New Jersey Court Rule 5:4-2 requires that the plaintiff in an adultery divorce case, state the name of the person with whom the offending conduct was committed. This person is known as the co-respondent. If the name is not known, the person who files must give as much information as possible tending to describe the adulterer.

Desertion

The willful and continuous desertion by one party for a period of twelve or more months, and satisfactory proof that the parties have ceased to cohabit as man and wife constitutes desertion under N.J.S.A. 2A:34-2(b). It is important to note that the parties may live in the same house. The crucial element here is "as man and wife." Thus, desertion may be claimed after twelve or more months of lack of absent sexual relations.

Addiction

Under N.S.J.A 2A:34-2(e), addiction involves a dependence on a narcotic or other controlled, dangerous substance, or a habitual drunkenness for a period of twelve or more consecutive months immediately preceding the filing of the complaint. The evidence must show that the use of alcohol and drugs was persistent and substantial. This is not a common ground for divorce.

Institutionalization

When one spouse has been institutionalized for mental illness for a period of twelve or more consecutive months subsequent to the marriage and preceding the filing of the complaint, institutionalization is a ground for divorce under N.J.S.A. 2A:34-2(f). The primary issue in this ground for divorce is whether or not the spouse is able to function as a working partner in the marriage.

Imprisonment

Imprisonment as a ground for divorce occurs when a spouse has been imprisoned for eighteen or more months after the marriage. N.J.S.A. 2A:34-2(g). Moreover, the parties must not have resumed cohabitation after the imprisonment.

Deviant Sexual Conduct

Deviant Sexual Conduct occurs if the defendant engages in deviant sexual conduct without the consent of the plaintiff spouse. N.J.S.A. 2A:34-2(h).

11. *See* Immigration and Nationality Act §§ 201 and 203.
12. *See* Immigration and Nationality Act §§ 101(b)(1) and 201(b)(2)(A)(i), 8 U.S.C. §§ 1101(b)(1) and 1151(b)(2)(A) (i).
13. *See* Form I-130, Alien Relative Petition, Department of Homeland Security, United States Citizenship and Immigration Service.
14. *See* 1 U.S.C. § 7 and 28 U.S.C. § 1738C.
15. Currently, same-sex marriage is recognized in Vermont, Connecticut, Iowa, Massachusetts, New Hampshire and Washington, DC.
16. www.lectlaw.com/files/leg23.htm.
17. The Uniting American Families Act (UAFA, H.R. 1024, S. 424) is a U.S. bill to amend the Immigration and Nationality Act to eliminate discrimination in the immigration laws by permitting permanent partners of United States citizens and lawful permanent residents to obtain lawful permanent resident status in the same manner as spouses of citizens and lawful permanent residents and to penalize immigration fraud in connection with permanent partnerships. UAFA was introduced during the 111th Congress, to the United States House of Representatives on Feb. 12, 2009, by New York Congressman Jerrold Nadler (D-NY).
18. *See* Immigration and Nationality Act §§ 101(b)(1)(B), (101)(b)(1)(E).
19. *See* Immigration and Nationality Act § 101(b)(1)(D).
20. *See* Immigration and Nationality Act § 201(b)(2)(A)(i).
21. Immigration Marriage Fraud Amendments Act of 1986 (PL 99-639); *See* Immigration and Nationality Act § 216 and 8 C.F.R. 216.
22. 8 U.S.C. § 1325(C) and 18 U.S.C. § 1546.
23. *See* Immigration and Nationality Act § 204(a)(2)(A).
24. *See* 8 C.F.R.§§ 235.11(b), 1235.11(b).
25. *See* Immigration and Nationality Act § 216.
26. *See* Immigration and Nationality Act § 216(c)(1); 8 C.F.R. § 216.4(a)(1), 1216.4(a)(1).
27. *See* Endnote 6. Immigration and

Nationality Act Section 316(a) of the Immigration and Nationality Act (INA) discusses the requirements for naturalization.
28. *See* Immigration and Nationality Act § 216; 8 C.F.R. § 216.5, 1216.5.
29. *See* Form I-751, Petition to Remove Conditions on Residence; 8 C.F.R. § 216.5.
30. *See* Green Card for a Widow(er) of a U.S. Citizen, USCIS Website.
31. *See* Immigration and Nationality Act § 201(b)(2)(A)(i).
32. Violence Against Women and DOJ Reauthorization Act of 2005 – [PL 109-162, title VIII; 119 Stat. 2960, 3053-77 (Jan. 5, 2006); HR Rep. 109-233]; *see also* Violence Against Women Act 42 U.S.C. § 13925(b)(8) (2006) (stating that "[n]othing in this subchapter shall be construed to prohibit male victims of domestic violence…")
33. *See* Whether the Criminal Provisions of the Violence Against Women Act Apply to Otherwise Covered Conduct When the Offender and Victim are the Same Sex, DOJ Memorandum Op., (April 27, 2010).
34. *See* Immigration and Nationality Act § 204.
35. *See* Form I-360, Petition for American Widow(er), or Special Immigrant.
36. *See* Immigration and Nationality Act § 212(a) generally.
37. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999).
38. *See* INA § 204(a)(1)(A)(iii).
39. *See* Immigration and Nationality Act § 240A.
40. Victims of Trafficking and Violence Protection Act of 2000; 8 C.F.R. § 214.14(a)(2).
41. *See* 8 C.F.R. § 214.14.
42. *See* 8 C.F.R. § 214.14.
43. *See* 8 C.F.R. Parts 103, 212, 214, 245 and 299.
44. *See* Immigration and Nationality Act § 237(a)(1)(G).
45. The term "aggravated felony" is defined in Section 101(a)(43) of the INA. The list of crimes considered aggravated felonies has been greatly expanded in recent years and now includes almost all felonies.
46. Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996).
47. *See* Immigration and Nationality Act § 101(a)(27)(J).

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