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HIGHLIGHTS

Need for Evidentiary Hearing Leads to Reversal of Hague Return Order

Recognizing that the Hague Convention on child abduction directs that proceedings be conducted expeditiously, the California Court of Appeal emphasizes that speedy resolution of a Hague petition must be balanced with the respondent parent's right to a fair trial. It thus sets aside the grant of a father's petition for his child's return to Denmark and remands for a full evidentiary hearing on the mother's claim that the child would face a grave risk of harm if returned because of prior domestic violence. **Page 1135**

Personal Injury Settlement Must Be Applied to Child Support Debt

A personal injury settlement received by a father who owes past-due child support is not exempt from a lien for payment of that arrearage, the Illinois Appellate Court says. The court acknowledges that state law exempts certain personal injury recoveries from attachment, but explains that the law's application here is negated by a provision of the Public Aid Code, which provides for an administrative lien on personal property for child support arrears regardless of any statute to the contrary. **Page 1136**

Indian Child May Stay in ICWA-Noncompliant Placement

The emotional distress an adjudicated dependent Indian child will suffer if removed from her non-Indian foster mother constitutes ''good cause'' to deviate from the placement preferences set out in the federal Indian Child Welfare Act, the Oklahoma Supreme Court decides. The court also addresses an issue of first impression, ruling that the proper standard for a good cause showing regarding an ICWA-noncompliant placement is clear and convincing evidence. Other states have split on this issue. **Page 1137**

Blood Quantum Requirement Foils Father's ICWA Claim

Although the father of adjudicated dependent siblings is an enrolled member of the Navajo Nation, the federal Indian Child Welfare Act does not apply to the state's action for the termination of his parental rights as to them, the New Mexico Court of Appeals holds. Finding that the father's tribal membership is based on having satisfied the tribe's minimum one-fourth degree blood quantum requirement, the court points to evidence that the children do not meet that standard and thus are not Indian children under the Act. **Page 1139**

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Court Decisions

Child Abduction

Lack of Evidentiary Hearing on Abuse Claims Results in Reversal of Hague Return Order

A judgment granting a father's Hague child abduction convention petition for his child's return to Denmark must be reversed and the matter remanded for a full evidentiary hearing on the mother's domestic violence claims, the California Court of Appeal, Fourth District, has ruled (*Noergaard v. Noergaard,* 2015 BL 451393, Cal. Ct. App., No. G049854, 12/16/15; published 1/15/16).

The court said that because the mother alleged that the child faced a ''grave risk'' of harm if returned to Denmark pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, the judge below erred by not fully considering her evidence on that issue.

Road Map. In a Jan. 25 e-mail to Bloomberg BNA, Sudha Shetty, Director of the Hague Domestic Violence Project and Assistant Dean for Global Programs at Goldman School of Public Policy, University of California, Berkeley, noted that the court did not originally certify this case for publication. However, she said that Hague DV joined amicus Family Violence Appellate Project in requesting publication, which ''is an essential step to establishing clear guidance for these cases—building a road map—for judges in California state courts'' who are not necessarily trained in Hague matters.

Turning to the court's decision, Shetty pointed out that Articles 2 and 11 of the Convention direct Contracting States to use ''expeditious procedures'' and instruct courts to ''act expeditiously.'' Thus, she said, the ''expedited nature of Hague Convention cases have a significant impact on the structure and management of these cases and case law suggests that courts do have discretion to limit discovery, limit witnesses, or limit witness testimony to affidavits in an effort to expedite these cases.''

''Expedited proceedings, however, should not come at the expense of a party's right to due process—and this is precisely what the *Noergaard* decision correctly addresses,'' Shetty stated, adding that ''[t]his is an important question in Hague Convention cases because [ ] courts often limit discovery or relax evidentiary standards to some degree due to the expedited nature of Hague proceedings, but there is sporadic guidance to courts as to how far they can go in limiting or expediting a hearing.''

''Importantly,'' she continued, the *Noergaard* court cites to *Danaipour v. McClarey*, which ''explains in its discussion of the grave risk analysis that '[t]he Convention assigns the duty of the grave risk determination to the country to which the child has been removed. . . . Generally speaking, where a party makes a substantial allegation that, if true, would justify application of the Article 13(b) exception, the court should make the necessary predicate findings'.'' 286 F.3d 1, 18, 28 FLR 1243 (1st Cir. 2002).

The *Noergaard* decision, Shetty concluded, provides ''important guidance to future courts handling Hague Convention cases involving allegations of domestic violence and the grave risk defense, where they must balance the expedited nature of these proceedings with a party's due process rights.''

Returned to Denmark. In January 2014, Orange County (Cal.) sheriff deputies removed 11-year-old Mia from her mother's care and turned her over to the county social services agency. The agency relinquished physical custody to the father, who was armed with two Danish custody orders.

According to the mother, the agency conducted only a cursory review of her claim that the father engaged in a pattern of domestic violence against the family after he lost in job in Germany and that he had unilaterally taken Mia from Germany to his native Denmark.

The mother claimed that the father's history of spousal and child abuse had caused Mia to run away from his care in Denmark and flee to Orange County with her maternal grandmother.

The state trial court in the father's Hague case likewise paid little due to the mother's abuse claims, which she raised as an affirmative defense under the Convention's Art. 13(b) ''grave risk'' provision. It conducted a ''summary trial,'' and admitted only two documents into evidence—the 2012 Danish court orders vesting custody of Mia in the father.

The court declined to resolve the mother's claim that the father had recently sent her an e-mail containing death threats, saying it lacked the technical expertise to determine the e-mail's authenticity. It also denied her requests to testify, to call witnesses (lay and expert) to support her abuse claims, and for a psychological evaluation of Mia.

Additionally, the court would not allow the mother to cross-examine the father, and would not consider her supporting documents and exhibits concerning the e-mail, her abuse allegations, the Danish custody proceedings, and a European Union investigation concerning the alleged failure of Danish courts to take allegations of domestic violence seriously when brought by a non-Danish parent.

After interviewing Mia in-camera, the court concluded she did not fear the father or flee from him. Saying that Denmark was a ''civilized country'' whose courts were capable of dealing with the mother's claims, it granted the father's Hague petition on Mar. 6, 2014, and he returned to Denmark with Mia.

The mother appealed, arguing that the court erred in granting the Hague petition without an evidentiary hearing on her domestic violence and abuse claims, including the death threats.

'Puzzling' Decision. Justice Richard M. Aronson cited *Chafin v. Chafin*, 133 S.Ct. 1017, 39 FLR 1190 (2013), in explaining that Mia's return to Denmark did not moot the appeal or further proceedings below. That being said, he agreed with the mother that a full evidentiary hearing was required and that the return order must be reversed.

The trial court's decision not to address the death threat issue ''is puzzling,'' Aronson said, pointing out that, ''[a]s Judge Posner has observed, 'the judge can't just throw up his hands [ ] because he can't figure out what is true and what is false'.'' (*Khan v. Fatima*, 680 F.3d 781, 785, 38 FLR 1321 (7th Cir. 2012) (reversing Hague return order for evidentiary hearing).

Patently Material. ''Death threats are patently material to the grave risk analysis, and therefore the trial court erred by leaving the matter undecided,'' Aronson said, citing *Van De Sande v. Van De Sande*, 431 F.3d 567, 32 FLR 1076 (7th Cir. 2005).

Noting that the Danish custody orders predate the 2013 e-mail, he ruled that due process required the court to decide the material issue of the alleged death threats and afford the mother the opportunity to offer evidence on that issue. (The father claims that she falsified the e-mail and is being criminally prosecuted in Denmark for doing so.)

There are also ''manifest flaws in simply leaving'' the issue for Danish authorities ''potentially to address,'' Aronson added, saying that a Hague court must consider such issues in deciding whether to impose undertakings in the return order and must itself ''ascertain and protect the child's safety.'' See *Khan*; *Danaipour*.

''As with the alleged death threat e-mail, mother is similarly entitled on remand to an evidentiary hearing on her other claims'' regarding the father's alleged domestic violence, he continued.

Alacrity Doesn't Always Control. Aronson recognized that both the Convention and its federal implementing legislation, the International Child Abduction Remedies Act, authorize courts to forego a plenary evidentiary hearing ''[w]here circumstances warrant'' (*West v. Dobrev*, 735 F.3d 921, 929, 40 FLR 1005 (10th Cir. 2013)), and that the Convention directs courts to resolve proceedings expeditiously.

''But alacrity in Hague proceedings is not an objective for its own sake. Rather, an overriding issue remains the child's safety,'' he asserted, saying that here, ''we have no confidence mother received a fair or adequate hearing.''

The ''trial court could not simply ignore to decline to hear mother's evidence or proposed testimony and deem the matter fully heard and fair resolved,'' Aronson said, observing that ''[i]t is no surprise the trial court reached the conclusions it did based on admitting only father's exhibits [the custody orders] and excluding all of mother's[.]''

'Unfortunate Irony.' After preventing the mother from calling witnesses or presenting evidence ''the court could not make an informed and fair decision,'' he stated, noting that the ''unfortunate irony in this case is that mother claimed the *Danish*courts failed to afford her a full and full hearing on her claims father abused her and the children.''

Further noting the mother's claim that the Danish courts ignored and never decided her Hague petition (alleging that the father abducted Mia from Germany) and custody petition, he found that the father contests the veracity of this allegation.

Thus, Aronson instructed, on remand the trial court must ''determine *what* was adjudicated in the Danish custody proceedings. [ ] More to the point, the trial court must determine *in this case* whether the Danish court that awarded the father custody actually heard and adjudicated mother's claim of abuse.''

Noting the father's claim that he was acquitted of one of the abuse charges and that Danish authorities declined to prosecute the others, Aronson tasked the trial court with also determining whether the Hague Convention required it to extend comity or a collateral estoppel effect to the alleged acquittal and decision not to prosecute.

Due Process. He gave two reasons why it must make such findings: ''[f]irst, clearly ascertaining what has been decided in Denmark will resolve what mother can litigate in her claim of grave risk,'' and will impact whether Denmark is Mia's place of habitual residence in light of the father's alleged abduction of her from Germany.

Secondly, Aronson said, the court must determine what occurred in the Danish proceedings so it can assess the mother's claim under Art. 20 of the Convention that her or Mia's fundamental rights will not be protected there.

Asserting that ''due process requires we reverse and remand the matter so mother may have her day in court,'' he acknowledged that post-return proceedings in Denmark or the EU may have now ''outstripped our discussion,'' and directed ''careful inquiry'' into what has occurred and its collateral estoppel or comity effect, if any.

Justices William F. Rylaarsdam and Eileen C. Moore concurred.

The mother was represented by Merritt McKeon, Laguna Hills, and the father by Stephen B. Ruben and Diana L. Leonida, of Ruben/Huggins, San Francisco.

BY JULIANNE TOBIN WOJAY

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Child Support

Personal Injury Settlement Isn't Exempt From State's Lien for Overdue Support

A personal injury settlement received by a delinquent obligor is not exempt from attachment for payment of his child support arrears, the Illinois Appellate Court, First District, held Jan. 15 (*Thomas v. Illinois Department of Healthcare and Family Services*, 2016 BL 13292, Ill. App. Ct., No. 1-14-3933, 1/15/16).

Rejecting the father's reliance on a statutory personal injury payment exemption, the court rested its ruling on a section of the state Public Aid Code that provides for

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an administrative lien on personal property for past-due child support regardless of any statute to the contrary.

This provision is the result of 2011 legislation that added similar language to the Illinois Marriage and Dissolution of Marriage Act, the Non-Support Punishment Act, and the Parentage Act.

Larry Thomas received $12,000 in settlement of a personal injury action he had filed against the city of Chicago. He deposited the money in his JP Morgan Chase Bank account.

The state social services agency notified Thomas and the bank that it was ''seeking to lien and levy'' the settlement funds and apply them to his $33,673 child support arrearage. Thomas requested an administrative hearing. He argued that the settlement proceeds were exempt under Ill. Code Civ. P. § 12-1001(h)(4), which provides:

> The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent: . . . (h) the debtor's right to receive, or property that is traceable to: . . . (4) a payment, not to exceed $15,000 in value, on account of personal bodily injury of the debtor[.]

Finding his reliance on the statute ''misguided,'' the administrative law judge ruled the lien was valid and enforceable. The circuit court affirmed, saying that § 12-1001(h)(4) had to be reconciled with § 10-25.5(a) of the Illinois Public Aid Code.

The latter statute, it pointed out, provides for an administrative lien on personal property for past-due child support ''[n]otwithstanding any other State or local law to the contrary.'' The court reasoned that if lawmakers had intended to exempt personal injury settlements from collection of past-due child support, it could have explicitly done so in § 12-1001.

Noting that the purpose of income exemptions ''is to ensure creditors cannot deprive debtors of the means of supporting themselves and their dependents,'' the court said nothing suggested that § 12-1001(h)(4) ''may shield debtors from their own internal family obligations.'' Thomas appealed.

Language Is Clear. Writing for the court, Justice Jesse G. Reyes said that ''[w]e view the language of section 10-25.5 as clear: despite any contrary statute, the State has a 'lien on all legal and equitable interests of responsible relatives in their personal property . . . in the amount of past-due child support'.''

Section 12-1001(h)(4), he said, ''constitutes a 'State or local law to the contrary','' as provided in § 10-25.5(a).

''When 'read in a vacuum,' section 12-1001(h)(4) of the Code of Civil Procedure shields Thomas's personal injury settlement from attachment or judgment; however, it is clear that the legislature intended section 10-25.5(a) of the Public Aid Code to 'impact other provisions of the law' such as section 12-1001(h)(4) to permit the imposition of a lien for past-due child support,'' Reyes explained.

Rejecting Thomas's reliance on *Brinegar v. Reeves*, 681 N.E.2d 1080 (Ill. App. Ct. 1997), and *People ex rel. Director of Corrections v. Booth*, 830 N.E.2d 569 (Ill. 2005), Reyes looked instead to *Department of Healthcare & Family Services ex rel. Black v. Bartholomew*, 905 N.E.2d 339, 36 FLR 1080 (Ill. App. Ct. 2009).

Black, he said, is ''instructive'' and its reasoning regarding the state's Income Withholding for Support Act's exemption for the collection of child support as applied to the Illinois Workers' Compensation Act's anti-attachment provision, is ''persuasive.''

Prioritization. ''[W]e view the prioritization of child support obligations as consistent with the fundamental purpose of the section 12-1001 exemptions: allowing a debtor like Thomas to support himself *and his dependents*,'' Reyes explained.

He also noted that ''[d]iscussing the policy underlying the statutory predecessor to section 12-1001, the Illinois Supreme Court in 1871 cited 'the humane principle, that a creditor should not wholly deprive the husband and father of the means of supporting his family, usually helpless in themselves, and preventing them from becoming a public charge.' *Good v. Fogg*, 61 Ill. 449, 451 (1871).''

Asserting that ''[w]e agree with the circuit court's observation that 'there is nothing to suggest that Section 12-1001(h)(4) may shield debtors from their own internal family obligations','' Reyes affirmed its judgment upholding the agency's administrative lien.

Justices Bertina E. Lampkin and Stuart E. Palmer concurred.

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Full text at http://www.bloomberglaw.com/public/document/Thomas_v_Ill_Dept_of_Healthcare__Family_Servs_2016_IL_App_1st_143

Native Americans

Clear and Convincing Evidence Must Support Non-ICWA Compliant Placement

The proper standard for a party's ''good cause'' showing regarding the foster care placement of an adjudicated dependent Indian child that is not compliant with the federal Indian Child Welfare Act's preferences is clear and convincing evidence, the Oklahoma Supreme Court ruled Jan. 20 (*In re M.K.T. (State v. Pigg)*, 2016 BL 14826, Okla., No. 113110, 1/20/16).

The court also held that a tribe's failure to timely provide an ICWA-compliant placement must be considered in deciding the child's best interests with respect to its belated motion to transfer the child to such placement after he or she has established emotional bonds with an ICWA-noncompliant foster parent.

The Indian child in this case was two years old when she was removed from her non-Indian mother's care due to neglect. (The father, who has ties with the Cherokee Nation, was incarcerated at that time.) She was adjudicated dependent, and in May 2013 placed with a non-Indian foster mother.

The placement was not compliant with ICWA's directive that, in the absence of good cause to the contrary, preference in a foster or preadoptive placement should be given to: (1) a member of the child's extended family; (2) a tribe-approved foster home; (3) an Indian foster home, or (4) a tribe approved or operated institution. 25 U.S.C. § 1915.

For the next nine months, the state social services agency unsuccessfully sought placement with the

child's relatives. It also sought help from the Cherokee Nation, which did not provide an ICWA-compliant placement.

The child's plan was changed to permanent placement when the state decided to seek termination of her parents' rights. The tribe then presented an ICWA-compliant adoptive family, and in May 2014 moved to transfer her to an ICWA-compliant placement. The foster mother asked to adopt the child.

The state, foster mother, parents, and child's attorney (the appellants) opposed the tribe's transfer motion. They cited the child's emotional needs as exhibited by her aggressive behavior at daycare and separation anxiety when apart from the foster mother. An agency specialist and the child's therapist testified regarding her ''extreme'' behavior and related needs.

Finding that they failed to show good cause to deviate from the ICWA placement preferences, the court ruled that it was in the child's best interests to grant the motion. The court of civil appeals reversed, and the appellee tribe turned to the supreme court.

BIA Guidelines. Observing that the Bureau of Indian Affairs's nonbinding ICWA guidelines ''are the starting point for a best-interests-of-the-child analysis,'' Justice James E. Edmondson noted that they were updated in 2015. However, he applied the original version in effect when the placement was made, see 44 Fed. Reg. 67594 (1979).

The Guidelines provide that use of § 1915's good cause exception should be based on one or more of the following considerations: (1) the request of the biological parents or child; (2) the child's extraordinary physical or emotional needs as established by expert testimony; (3) the unavailability of a suitable ICWA-compliant family.

The Guidelines also provide that the burden of establishing good cause is on the party urging deviation from the placement preferences, Edmondson added, noting that it was properly placed below.

Standard of Evidence. Turning to the trial court's ruling, he found that all the parties urged that it be reviewed under an abuse of discretion standard.

Edmondson acknowledged that his court has used that standard in reviewing placement of an adjudicated dependent child, but said that he ''concludes that an order directing an ICWA-noncompliant placement must be supported by clear and convincing evidence.''

He looked to *In re M.S.*, 237 P.3d 161, 36 FLR 1375 (Okla. 2010), which held that the clear and convincing standard was appropriate in a case involving the ''good cause'' denial of an ICWA § 1911 transfer of a dependency proceeding from state to tribal court.

''A similar issue is before us today,'' with regard to the burden of showing good cause to deviate from ICWA's placement preferences, Edmondson said.

He noted a split on the issue, with Idaho applying an abuse of discretion standard (*In re Baby Boy Doe*, 902 P.2d 477, 21 FLR 1507 (Idaho 1995)), and California applying a clear and convincing standard (*In re Alexandria P.*, 176 Cal.Rptr.3d 468, 40 FLR 1500 (Cal. Ct. App. 2014)).

Risk of Error. Observing that the preponderance of evidence standard is commonly used in private disputes where the parties equally share the risk of error, Edmondson said that ''[w]e see a potential for harm to the relationship between an Indian child and the child's tribe if the standard of proof required for 'good cause' exceptions for an ICWA-compliant foster placement is inadequate.''

An inadequate standard, he explained, ''could allow a state to sever the relationship between child and tribe and determine the future course of Indian children's lives without consideration of the unique value of Indian culture being reflected in their placement of children.''

Edmondson said that using the clear and convincing standard for a decision to make an ICWA noncompliant placement ''serves the dual purpose of giving a state court flexibility while also allocating the risk of error in accordance with the language in the Act that was designed for protecting a child-tribe relationship.''

He applied that standard here in determining that the ''evidence presented by appellants was sufficient to satisfy a clear [and] convincing burden for *continued foster placement* with the foster mother.''

Best Interests. Acknowledging that tribes have a valid governmental interest in Indian children and their continued cultural relationship with their tribe (*Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 15 FLR 2025 (1980); *In re Baby Boy L.*, 103 P.3d 1099, 31 FLR 1077 (Okla. 2004)), he noted the appellants' reliance on *Cherokee Nation v. Nomura*, 160 P.3d 967, 33 FLR 1327 (Okla. 2007) (citing *In re Adoption of B.G.J.*, 133 P.3d 1, 32 FLR 1304 (Kan. 2006)), in arguing that a birth-parent's preference may be sufficient to show good cause for an ICWA noncompliant placement.

ICWA § 1915(c) ''clearly states that a parent's preference for child placement should be 'considered','' Edmondson said, noting that the Guidelines also recognize a parental preference. However, he stressed, this preference does not control the foster care placement decision or have ''the legal effect of *necessarily* superseding the interests of the tribe.''

'Anglo' Standard. Additionally, Edmondson said, ''[w]hile the ICWA should not be construed to produce a result contrary to the best interests of the child under a state law analysis, neither should a state law analysis produce an 'Anglo' standard for best interests of the child that conflicts with the ICWA.'' See *In re K.S.*, 448 S.W.3d 521, 40 FLR 1514 (Tex. Ct. App. 2014); *In re W.D.H.*, 43 S.W.3d 30, 27 FLR 1185 (Tex. Ct. App. 2001).

That being said, he stated that ''[o]n the other hand, [ ] we view the tribe's conduct as not in the child's best interest'' where: (1) it failed to timely provide a foster care ICWA-compliant placement, and (2) sought to move the child to an ICWA-compliant adoptive family while her parents' rights were still intact.

However, recognizing that an ICWA-compliant placement is presumed to be in a child's best interests, Edmondson returned to the Guidelines, reiterating that they ''are the starting point for a best-interests-of-the child analysis.'' He focused on the provision regarding the child's ''extraordinary'' needs as justifying a noncompliant placement, finding that the appellants had satisfied their burden under that provision.

Tribe's Tardy Actions. Also noting that here, the father's rights have not been terminated and that (during the pendency of the appeal) the ICWA-compliant family lost interest in the child, Edmondson looked to two

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other federal statutes—the Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act—both of which provide that foster care should be only a temporary placement (with a permanency hearing within 12 months) in light of the emotional bonds the child may establish with a foster parent during a lengthy placement.

Here, he pointed out, there is ''*no current family for an ICWA-compliant placement at a time 2 and 1/2 years after the State assumed custody of the child*[.]'' The tribe's actions, he found, were ''inconsistent with the federal *policy* that Congress created with the ASFA that was designed to diminish the risk of [foster] children developing emotional attachments and subsequent behavior problems[.]''

''It has been noted that courts have struggled with accommodating the statutory goals of ICWA while simultaneously protecting children's interests in remaining in a stable and secure placement,'' Edmondson observed, citing *In re C.H.*, 997 P.2d 776 (Mont. 2000), *In re S.E.G.*, 521 N.W.2d 357, 20 FLR 1515 (Minn. 1994), and *In re Adoption of Sara J.*, 123 P.3d 1017, 32 FLR 1039 (Alaska 2005).

Denial Required. But, he found, here it was shown ''that the child's attachment to her foster mother was of such a nature that it precluded the possibility of a normal and timely emotional attachment to the proposed ICWA-compliant family who is apparently no longer being considered for placement.''

Concluding that the ''evidence was sufficient to show that the trial judge was *required* to deny the Cherokee Nation's motion for an ICWA-compliant placement based upon the emotional attachment of the child to her foster mother,'' Edmondson reversed the order granting that motion.

Chief Justice John F. Reif, Vice Chief Justice Douglas L. Combs and Justices Yvonne Kauger, Joseph M. Watt, Tom Colbert, and Noma D. Gurich concurred. Justices James Winchester and Steven W. Taylor concurred in result.

The foster mother was represented by Becki A. Murphy, of Murphy Francy PLLC, the mother by Delorus Crawford, and the father by Brian Wilkerson. All are from Tulsa. Kacie R. Cresswell, Owasso, Okla., appeared for the child. Cherokee Nation was represented by Robert Garcia, Assistant Attorney General of Cherokee Nation, and Chrissi Ross Nimmo, both from Tahlequah, Okla. The state was represented by Larisa Grecu-Radu, Assistant District Attorney, Tulsa County Juvenile Bureau.

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Full text at http://www.bloomberglaw.com/public/document/IN_THE_MATTER_OF_MKT_CDT_and_SAW_Deprived_Children_STATE_OF_OKLAH

Full text of 1979 BIA Guidelines at http://pub.bna.com/fl/ICWABIA.htm

Native Americans

ICWA Doesn't Apply in Termination Of Navajo Father's Parental Rights

A trial court properly found that the federal Indian Child Welfare Act's standards did not apply in the state's action to terminate the parental rights of a Native American father as to his adjudicated dependent children, the New Mexico Court of Appeals decided Jan. 6. (*State ex rel. Children, Youth and Families Department v. Nathan H.*, 2016 BL 7487, N.M. Ct. App., No. 34320, 1/6/16).

Citing blood quantum evidence, the appellate court explained that the father—who has one-fourth degree Navajo Nation blood—had failed to establish that the children were eligible for enrollment in his tribe. He also had not established their mother's alleged lineage in the Ute tribe, it said, holding that the children thus were not Indian children under ICWA.

The father is an enrolled member of the Navajo Nation. He was in prison when the Children, Youth and Families Department removed the neglected children from the mother's care and took them into protective custody.

The children were adjudicated dependent, and the district court ordered reunification as the permanency plan. (The Navajo Nation was notified of the dependency proceeding.)

However, because of the father's repeated incarcerations, the permanency plan was changed to adoption and CYFD petitioned for the involuntary termination of his parental rights. He contended that ICWA's substantive and procedural standards applied to the termination action.

After a hearing, the court concluded that ICWA was inapplicable because the children were neither enrolled nor eligible to be enrolled in an Indian tribe, and thus were not Indian children as defined by the Act (25 U.S.C. § 1903(4)).

In his appeal from the termination order, the father again argued that ICWA applied because the children have Indian blood and thus are eligible for enrollment in an Indian tribe.

Blood Quantum Requirement. Determining that to be eligible for membership in the Navajo Nation, the children must possess one-fourth degree Navajo blood, Chief Judge Michael E. Vigil noted that the parties did not dispute that the father has one-fourth degree Navajo blood. ''Mother's blood contribution to Children is therefore significant in determining whether Children are eligible for membership in the Navajo Nation,'' he said.

Vigil looked to statements from the children's permanency planning worker, who testified about her investigation of the mother's Native American blood. She reported that the mother opposed enrollment for the children and did not cooperate in the investigation, which did not yield any concrete information about the mother's biological family.

He also considered testimony from the CYFD adoption consultant who collaborates with the ICWA unit of the Navajo Children and Family Services. She testified that the children's maternal grandmother must be enrolled in order for the mother to be eligible, to then

make the children eligible for membership in the Navajo Nation.

The consultant stated that the Navajo Nation of Vital Records did not have any record of the maternal grandmother, and that she had been unable to contact her. The Navajo Children and Family Services also sent CYFD a letter stating that based on its research, the children were not eligible for membership.

''Based on the difficulties CYFD experienced in receiving evidence on Mother's lineage and the Navajo Nation's determination that Children are ineligible, we hold that Children are not eligible for enrollment with the Navajo Nation,'' Vigil said.

After rejecting the father's claim that the children's status does not need to be certain to implement ICWA and that the district court must only examine whether the Act possibly applies, Vigil turned to his assertion that the Navajo Nation has a second method of enrollment, application to the Enrollment Screening Committee, which is based on criteria other than vital statistics. (According to CYFD, the children may be enrolled through this process, even if the biological parent is not an enrolled member.)

Finding, however, that ''this committee also follows the one-fourth blood quantum requirement,'' Vigil stated that ''[a]gain the evidence fails to satisfies this requirement.''

Mother's Lineage. Vigil also was not swayed by the father's claim that the children are eligible for membership in the Ute tribe through the mother. Observing that it is undisputed that the mother is not an enrolled member of the Ute tribe, he pointed out that under § 1903(4), ''an Indian child is a member of an Indian tribe or eligible for membership in an Indian tribe and [the] biological child of a member.'' See *State ex rel. CYFD v. Marsalee P.*, 302 P.3d 761, 39 FLR 1290 (N.M. Ct. App. 2013).

''Father does not make any arguments that Mother satisfies the requirements for being a member of the Ute tribe,'' he observed, also finding that evidence of her lineage to the Ute tribe is lacking where CYFD does not have any information on how she had any such lineage or the name of a family member enrolled in that tribe.

Also noted that CYFD had contacted the Southern Ute tribe with the information it possessed, ''and the tribe stated in response to this information that the children are not eligible'' for membership, Vigil found that the father ''only relies on his testimony that Mother possesses Ute blood and [CYFD's] belief that Mother might be one-eighth Ute.''

Thus finding no evidence to establish the children's lineage to the Ute tribe, Vigil concluded that the ICWA does not apply to the children, ''because they are not eligible for membership in either the Navajo Nation or the Ute tribe and therefore do not satisfy the definition of an Indian child as set forth in 25 U.S.C. Section 1903(4).''

Judges Michael D. Bustamante and M. Monica Zamora concurred.

CYFD was represented by Charles E. Neelley, Chief Children's Court Attorney, and Rebecca J. Liggett and Kelly P. O'Neill, Children's Court Attorneys, Santa Fe. Nancy L. Simmons, Albuquerque, appeared for the father.

BY JULIANNE TOBIN WOJAY

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Full text at http://www.bloomberglaw.com/public/document/State_ex_rel_Children_Youth__Families_Dept_v_Nathan_H_No_34320_20

Pensions & Retirement Benefits

2nd Cir. Denies Rehearing of QDRO Case; Judge's Dissent Invites Supreme Court Review

The U.S. Court of Appeals for the Second Circuit won't reconsider how to divide pension benefits between divorced spouses, but one Second Circuit judge thinks the issue deserves a closer look by the U.S. Supreme Court (*Yale New Haven Hospital v. Nicholls*, 2d Cir., No. 13-04725, *motion for panel rehearing denied* 1/22/16).

Last summer, the Second Circuit ruled that a court order can give pension benefits to a worker's former spouse after the worker's death, regardless of any competing claim by the worker's widow (see 41 FLR 1416). The court on Jan. 22 denied a widow's request for rehearing in that case over the objections of Judge Richard C. Wesley, whose written dissent suggests the justices should weigh in on the issue.

In particular, Wesley said that the Supreme Court recently denied review in a case presenting similar questions in the context of lump-sum retirement benefits (see 42 FLR 1044, this issue). Because the dispute heard by the Second Circuit involved annuity benefits payable over a series of years, Wesley hinted that this question may be more appropriate for resolution by the high court.

Posthumous QDROs. The case had its root in a dispute between two former wives of Harold Nicholls, who was a participant in four different retirement plans sponsored by Yale-New Haven Hospital.

Three months after Nicholls died, his first wife obtained two state court orders awarding her portions of Nicholls's pension benefits, despite a competing claim from Nicholls's widow. A Connecticut-based federal judge affirmed the first wife's right to benefits.

Last summer, the Second Circuit issued a split ruling in favor of the first wife. In that decision, the Second Circuit said that the state court orders received by the first wife constituted valid qualified domestic relations orders (QDROs) under the Employee Retirement Income Security Act, even though they were entered after Nicholls died.

Judge Wesley dissented from this ruling in a lengthy opinion. According to Wesley, the majority approach could wreak havoc on plan administration by allowing a divorced spouse to submit a posthumous order ''at the eleventh hour'' and without any prior notice to the plan administrator, who might have already distributed the benefits to a subsequent spouse.

Nicholls's widow asked the Second Court to reconsider its decision, and the same panel that heard the case in 2015 denied her request. Wesley again dissented, filing a short written opinion hinting that the matter might be ripe for Supreme Court review.

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The petition for rehearing was filed by Votre & Associates.

BY JACKLYN WILLE

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Text of the Second Circuit's order at http://www.bloomberglaw.com/public/document/Yale_New_Haven_Hospital_v_Nicholls_et_al_Docket_No_1304725_2d_Cir/3.

Text of Wesley's dissent at http://www.bloomberglaw.com/public/document/Yale_New_Haven_Hospital_v_Nicholls_et_al_Docket_No_1304725_2d_Cir/2.

In Brief

Child Support—College Expenses—Foreign Decree—UIFSA

An Illinois court erred in requiring a divorced father to pay a portion of his daughter's college expenses, where such was not required under his Georgia divorce decree, the Illinois Appellate Court, Third District, held Jan. 13. The mother and children had moved to Illinois after the 2003 divorce. In 2014, she petitioned to enroll the Georgia decree in Illinois and request a contribution from the father for their 18-year-old daughter's college expenses. He agreed that the decree should be enrolled but opposed the petition for college expenses. The decree incorporated the parties' marital settlement agreement, which made no mention of the children's college expenses and provided that it was to ''be governed exclusively by the laws'' of Georgia. The father appealed the order requiring him to pay 31% of the daughter's college costs.

Reversing, Justice Tom M. Lytton observed that a provision for payment of college expenses ''is a form of child support.'' The Uniform Interstate Family Support Act provides that a registering court may not modify any aspect of a support order that may not be modified under the laws of the issuing state, including duration of support, he pointed out, noting that the law of the state that issued the initial support order thus governs whether a parent will be required to contribute to college expenses. See *In re Edelman*, 2015 BL 161003, 41 FLR 1353 (Ill. App. Ct. 2015). Unlike under Illinois law, Lytton continued, ''[i]n Georgia, a court may not require a parent to pay colleges expenses for a child who is 18 years old or older.'' See *Wood v. Wood* , 361 S.E.2d 819, 14 FLR 1107 (Ga. 1987). Emphasizing that the decree here was entered in Georgia without any provision for the payment of college expenses, he explained that under UIFSA, the lower court was required to apply Georgia law. Under Georgia law, the father has no obligation to pay the daughter's college expenses because she has reached the age of majority, Lytton said, also citing *Marshak v. Weser*, 915 A.2d 613, 33 FLR 1159 (N.J. Super. Ct. App. Div. 2007), and *In re Doetzl*, 65 P.3d 539, 29 FLR 1224 (Kan. Ct. App. 2003). Presiding Justice Mary Kay O'Brien and Justice Mary W. McDade, concurred. (*In re Jones,* 2016 BL 8942, Ill. App. Ct., No. 3-15-0237, 1/13/16)

Full text at http://www.bloomberglaw.com/public/document/In_re_Marriage_of_Jones_2016_IL_App_3d_150237_Court_Opinion

Common-Law Marriage—Evidence—Public Recognition

A trial court's determination in a woman's action for dissolution of her alleged common-law marriage that she had failed to establish that the parties' 25-year cohabitation was a marriage is supported by credible evidence, the Alabama Court of Civil Appeals said Jan. 15 in affirming its judgment that the man and woman were not married at common law. Applying the three common-law marriage factors set out in *Gray v. Bush*, 835 So.2d 192 (Ala. Civ. App. 2001), Judge Terry A. Moore, ''[a]ssuming, without deciding,'' said the woman had presented clear and convincing evidence of the parties' capacity and present, mutual agreement to permanently enter into an exclusive marriage relationship, thus satisfying the first two factors.

However, Moore found that her evidence on the third factor—public recognition of the relationship as a marriage and public assumption of marital duties—was ''disputed, at best.'' The evidence, he said, ''was conflicting'' and thus the court did not err in dismissing the case with prejudice. Judges Craig S. Pittman and Scott Donaldson concurred. Presiding Judge William C. Thompson dissented without writing. Judge Terri Willingham Thomas also dissented, arguing that the evidence does not support a conclusion that the parties had failed to comport themselves in such a manner as to achieve public recognition of their status as common-law husband and wife. This case, she asserted, ''vividly illustrates that the time has come to abrogate common-law marriage in Alabama.'' Recommending that any such statute have prospective application only, and acknowledging that full faith and credit must be given to valid common-law marriages from other jurisdictions, Thomas said that ''[i]n my view, no need for common-law marriage exists. It is antiquated, uniformly misunderstood, and promotes a lack of commitment that now serves to jeopardize the definition of marriage more than ever before in our state's history. [ ] Unlike in the past, ceremonial marriage is readily available to all. [ ] Judicial recognition of common-law marriage has led to unnecessary litigation, perjury, and fraud for too long. Common-law marriage should not be encouraged or tolerated when a bright-line standard for determining marital status is readily available. The legislature, by its silence, should not require the courts of this state to continue to struggle to separate fraudulent claims of marriage from valid ones when requiring parties who wish to enter into a marital relationship to obtain a marriage certificate would decisively solve the problem.'' (*McMullins v. McMullins,* 2016 BL 11305, Ala. Civ. App., No. 2140536, 1/15/16)

Full text at http://www.bloomberglaw.com/public/document/McMullins_v_McMullins_No_2140536_2016_BL_11305_Ala_Civ_App_Jan_15

Custody—Modification—Nonresident Parent

A trial court did not err when, after establishing paternity of a four-year-old child, it placed the child in the

physical custody of the father, who lives in Virginia, the Iowa Court of Appeals decided Jan. 13. Finding that the nonmarital child was the result of ''brief relationship'' between ''[t]wo young and immature people,'' Chief Judge David R. Danilson agreed with the trial court that the case was a ''close call.'' He adopted its findings, in which the court stated that the mother was ''still quite immature in her life choices,'' and that her actions in refusing to provide the father with information about the child ''were clearly selfish as to [her] needs and harmful to the child's needs. [S]he has consistently put her desires and needs above those of the child where [the father] is concerned. [ ] [The father] has, on the other hand, grown up, He has excelled in his military career. He has had a steady marriage for over two years. He has consistently paid his child support[.] He has a stable home[.]''

In affirming the court's determination that the father ''has the better ability to provide the environment most likely to bring the child to healthy physical, mental and social maturity and provide for the long-term needs of the child,'' Danilson acknowledged that the mother has been the primary physical caregiver since the child's birth ''and that ordinarily this factor is given great weight.'' However, he pointed out that the evidence established that she had ''stymied'' attempts by the father and his wife to have a relationship with the child, refused to provide the child's Social Security number so the father could designate the child as his beneficiary for insurance purpose and as his dependent for military benefit purposes, asked the father to give up his parental rights, refused to provide him with her address, defied court-ordered visitation, and taught the child to refer to the father by his first name and to distrust him by refusing to leave the child alone in his care. Saying that ''there are simply too many troubling facts'' to accept the mother's explanation for her actions, he recognized that moving the child's care to the nonresident father would require an adjustment for the child, but noted the court's determination that ''any resulting trauma is less than the long-term effects of keeping the child with a mother who does not support the child's relationship with his father and fosters disrespect and fear of the father in the child.'' Judges Michael R. Mullins and Christopher L. McDonald concurred. Judge Mary E. Tabor took no part.

The mother was represented by Adrienne C. Williamson, of Pillers & Richmond, Clinton, Iowa, and the father by Jennifer Olsen, of Olsen Law Firm, Davenport. (*In re Myers and Smith,* 2016 BL 11287, Iowa Ct. App., No. 15-0842, 1/13/16)

Full text at http://www.bloomberglaw.com/public/document/In_re_Myers_No_150842_2016_BL_11287_Iowa_Ct_App_Jan_13_2016_Court

Domestic Violence—Civil Protection Order—Statute—Evidence

A divorcing woman should not have been granted a domestic violence civil protection order against her husband, who has bipolar disorder, the Ohio Court of Appeals, Sixth District, held Jan. 15. The husband's 20-year bout with chronic fatigue syndrome had been diagnosed as bipolar disorder within the last two years. The incident giving rise to the domestic violence petition occurred in June 2014. The parties' married daughter resides with them, along with her spouse and two children. Her spouse confronted the husband for waking up the children by playing his guitar at 2:30 a.m. The husband became agitated, a result he later explained was caused by his failure to take his medication. After the incident, the wife arranged for him to visit his family in Utah. While he was gone, she filed for a divorce and for a civil protection order. (She also canceled his return flight and shipped him all of his belongings.) At the hearing on the protection petition, the daughter testified as to the husband's ''angry, violent outbursts,'' and said she feared for her children's safety because he had discharged loaded guns in the house. She stated that he was ''just not mentally all there.'' The husband admitted to shooting a BB gun at an interior wall and to having pushed the wife 20 years earlier. The wife testified that she was afraid of the husband because he was not diligent in taking his medication, and was worried that his bipolar disorder would worsen. She also said he ''gets angry,'' and had pushed her to floor within the past six or seven years. The wife stated she was concerned for her safety due to the husband's disregard for firearm safety, and recounted two instances where he had accidentally dropped a loaded gun onto the floor. In granting a six-month protection order, the trial court noted that husband admitted that he: does not always take his medication, ''may overreact to certain things,'' had shot holes in a wall of the home, and has angry outbursts directed at the wife. It found that he ''is 6'2, 250 [pounds] and bigger than his family members. He has 6 long guns and 5 pistols at the home. It is clear that [he] has engaged in a pattern of behavior that has caused mental distress to the family members and the family members need protection.''

Reversing the protection order, Judge Mark L. Pietrykowski said there was ''insufficient evidence to establish that appellant knowing engaged in a 'pattern of conduct' 'closely related in time' that caused appellee or the daughter to be in fear of mental distress or physical harm'' as required by the domestic violence statute. See Ohio Rev. Code 2903.211. He explained that the testimony at the hearing ''describes only one incident [in June 2014] in the past several years that involved a confrontation with another person, and in that situation the appellant did not threaten or exert physical force. Furthermore, general allegations that appellant would get angry and yell without providing the context or contents of the outbursts provides no basis for us to determine that appellee or daughter feared mental distress or imminent physical harm.'' Judges Arlene Singer and Thomas J. Osowik concurred.

The husband was represented by Tonya M. Robinson, Toledo. The wife did not file a brief. (*Olson v. Olson*, 2016 BL 11182, Ohio Ct. App., No. WD-15-002, 1/15/16)

Full text at http://www.bloomberglaw.com/public/document/Olson_v_Olson_2016Ohio149_App_6th_Dist_2016_Court_Opinion

Domestic Violence—Protection Order—Extension—Good Cause

A wife's motion to extend a family court two-year order of protection against her husband should have been granted, the New York Appellate Division, Second Department, ruled Jan. 20. Justice Cheryl E. Chambers noted that Fam. Ct. Act § 842 provides that a court may extend an order ''for a reasonable period of time upon a showing of good cause[.]'' This case, she said, pre-

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sented the opportunity to consider the meaning of ''good cause.''

Saying that while § 842 does not define good cause, the legislature has declared that the fact that abuse has not occurred during the pendency of an order ''shall not, in itself, constitute sufficient ground for denying or failing to extend the order,'' Chambers observed that good cause is a common legal term that ''generally signified a sound basis or legitimate need to take judicial action.'' The term should also be interpreted in accordance with legislative intent, ''which in this case aims to prevent reoccurrences of domestic violence,'' she said, directing that in determining whether good cause has been established, ''courts should consider, but are not limited by, the following factors: the nature of the relationship between the parties, taking into account their former relationship, the circumstances leading up to the entry of the initial order of protection, and the state of the relationship at the time of the request for an extension; the frequency of interaction between the parties; any subsequent instances of domestic violence or violation of the existing order of protection; and whether the current circumstances are such that concern for the safety and well-being of the petitioner is reasonable.'' See *MacPherson v. Weiner*, 959 A.2d 206 (N.H. 2008). Finding that here, the parties have a child in common and thus continue to interact, she noted they come into contact during custody/visitation litigation and custody exchanges. The husband also has a history of assaulting the wife, and their on-going discord continues, she added. Also noting that the criminal court has issued a two-year protection order, Chambers said it is clear that the wife's fears that the husband might stalk, harass or attack her ''is well-founded.'' (She said the existence of the criminal court order ''does not negate or other otherwise render superfluous'' the wife's request for an extension of the civil order.) As to the length of the extension, Chambers reiterated that § 842 allows an order to be extended for a ''reasonable period of time.'' Based on the circumstances, she concluded that five years was a reasonable period of time to extend the order here. Justices William F. Mastro, Ruth C. Balkin, and Joseph J. Maltese concurred.

The wife was represented by Stephanie Taylor, Jamaica, N.Y. (Brian Dworkin of counsel). (*Molloy v. Molloy*, 2016 BL 14750, N.Y. App. Div., No. 2014-07966, 1/20/16)

*Full text at http://www.bloomberglaw.com/public/document/Matter_of_Molloy_v_Molloy_No_201407966_Docket_No_O302310_2016_BL_*

Grandparents' Rights—Visitation Statute—Alabama—Constitutionality—Certiorari Petition

Alabama Attorney General Luther Strange's petition for writ of certiorari seeking review of the Court of Civil Appeals' decision declaring the state Grandparent Visitation Act—as amended in 2011—unconstitutional was denied without opinion by the state Supreme Court Jan. 22. Chief Justice Roy S. Moore and Justices Tom Parker and Glenn Murdock concurred in Justice Tommy Bryan's denial of the writ for review of *Weldon v. Ballow*, 2015 BL 357999, 42 FLR 1017 (Ala. Civ. App. 10/30/15).

Justice Greg Shaw concurred specially. Noting that he authored the supreme court's decision holding the pre-amended version of the statute unconstitutional in *Ex parte E.R.G.*, 73 So.3d 634, 37 FLR 1399 (Ala. 2011), Shaw observed that the certiorari petition here contended that *E.R.G.* indicated that a presumption in favor of the parent's decision was required for the GVA to be constitutional, and argued that the 2011 amendments provide such a presumption, making the GVA ''now constitutionally sufficient.'' While the 2011 amendments do create a presumption that parents ''know what is in the best interests of the child,'' the amended GVA ''does not mandate any other criteria for a court to use when determining whether the statutory presumption has been rebutted,'' he explained, quoting language from the intermediate court's opinion below. Noting its finding that the presumption was insufficient under *Troxel v. Granville*, 530 U.S. 57, 26 FLR 1379 (2000), Shaw pointed out that the ''attorney general, in his certiorari petition, does not challenge the Court of Civil Appeals' conclusion that the presumption created by the 2011 amendments is insufficient. I do not believe that, without an argument tending to show that the Court of Civil Appeals erred in holding that the presumption does not meet constitutional muster, the petition shows the 'probability of merit' necessary for issuance of a writ of certiorari,'' he said. Justices Jacquelyn L. Stuart, Michael F. Bolin and James Allen Main dissented. Justice Alisa Kelli Wise recused herself. (*Ex parte Strange (Weldon v. Ballow)*, 2016 BL 17449, Ala., No. 1150152, 1/22/16) (*on further proceedings in 42 FLR 1017*)

Full text at http://www.bloomberglaw.com/public/document/Strange_v_Ballow_No_1150152_2016_BL_17449_Ala_Jan_22_2016_Court_O

Parental Rights Termination—Voluntary Surrender—Prepaid Support—Private Action

The New York County Family Court found Jan. 8 that it had ''no authority [ ] in this type of private litigation'' to grant a petition brought by two unmarried (and now estranged) parents for the voluntary surrender and termination of the father's rights as to their one-year-old child. Observing that they had presented an ''unusual application'' to extinguish the out-of-state father's parental rights to the son he has never met, and for whom he proposed to prepay ''a lifetime'' of child support in a $150,000 lump sum, Judge Carol Goldstein did grant their joint request that the mother be awarded sole legal and physical custody.

Explaining that nothing in the state's Family Court Act, Domestic Relations Law, or Social Services Law permits the termination of the rights of one parent ''under the circumstances presented in this case,'' Goldstein said that there were only three specific statutory provisions for the surrender of a child or termination of rights (where the child is in foster care or under an agency's guardianship/custody, or is destitute or dependent) and ''none of them are applicable'' here.'' She also noted that there were no reported New York cases that would allow termination in this situation. The parents' claim that a termination order is in their child's bests interests did not sway Goldstein, who said that a best interests analysis is ''irrelevant'' because the Family Court cannot grant such an order in this case. Adding that she ''strongly disputes'' the best interest claim, she pointed out that the proffered prepaid child support may not actually satisfy the father's future obligation or the child's needs. Observing that ''this Ivy League educated parent is just at the start of his career,'' she noted

that the father's income is expected to increase, thereby warranting an upward modification of support. Also the prepaid support does not take into account mandatory additional items (such as day care) or discretionary expenses (college tuition), or the fact that New York law requires support to be paid until the child turns 21, Goldstein said. Noting that the parents ''are two young people, right out of college,'' she added that ''[o]nce the father matures, he may [ ] wish to form a relationship with his son.'' Also pointing out that if the father's rights were terminated, the child ''would be orphaned if the mother should pass away,'' she said the situation ''would be vastly different'' if in the future the mother's spouse or partner sought to become the child's legal parent though adoption, at which time ''the father might accomplish his goal of ending his parental relationship [ ] by consenting to such adoption.''

Jeffrey A. Kaplan, of Schwartz, Levine & Kaplan, PLLC, appeared for the mother, and Ari Gourvitz, of Gourvitz & Gourvitz, LLC, for the father. Both are from New York, N.Y. (*Hope B. v. Avery G.*, 2016 BL 14706, N.Y. Fam. Ct., No. V-38616/15, 1/8/16)

Full text at http://www.bloomberglaw.com/public/document/Matter_of_Hope_B_v_Avery_G_No_V3861615_2016_BL_14706_NY_Fam_Ct_Ja

Taxation—Innocent Spouse Relief—Garnishment—Criminal Judgment

A divorced woman may not use the federal Tax Code's ''innocent spouse'' affirmative defense in contesting a garnishment order on her pre-divorce earnings obtained by the government after her husband pled guilty and agreed to pay restitution for failing to file a tax return during their marriage, the U.S. Court of Appeals for the Fifth Circuit held Jan. 19. The couple married in 1981. In 2012, the husband pled guilty to not filing a tax return in 2006 and was sentenced to 12 months in prison, supervised release, and restitution in the amount of $453,547. Following the filing of that judgment, the U.S. Attorney's Office obtained a writ of garnishment targeting the spouses' property and wages. They divorced in January 2014, and two months later the district court directed the woman's employer to withhold the portion of her earnings that accrued prior to the date of the divorce, including paid time off and contributions to her retirement plans. The woman appealed after the court denied her motion to quash those writs of garnishment.

Judge Patrick E. Higginbotham, joined by Judges Jennifer Walker Elrod and Leslie H. Southwick, affirmed the denial of her motion. Noting that the district court had rejected her claim of innocent spouse relief under Internal Revenue Code § 66(c), he found it did so on the ground that such relief is only available as an affirmative defense to the government's efforts to assess a tax deficiency, not when the government is enforcing a criminal judgment. Rejecting the woman's claim that because the innocent spouse defense protects a nonliable spouse from the payment of a tax deficiency, she should be protected from an order of criminal restitution, Higginbotham explained that ''§ 66(c) provides tax liability relief for innocent spouses. Criminal restitution. even as a penalty for a failure to pay taxes, is not a tax.'' Noting that the husband had agreed to pay restitution under 18 U.S.C. § 3663, Higginbotham pointed out that this ''is a provision in the criminal code authorizing restitution for any number of crimes, most having nothing to do with taxes.'' He also noted that the woman ''has not offered any statutory footing for a wider application of § 66(c), nor any cases applying the provision to criminal restitution orders.''

The government was represented by Mattie Nell Peterson Compton, U.S. Attorney's Office, Dallas, and the woman by David B. Coffin, Southlake, Tex. (*U.S. v. Tilford*, 2016 BL 13533, 5th Cir., No. 15-10352, 1/19/16)

Full text at http://www.bloomberglaw.com/public/document/United_States_v_Tilford_No_1510352_Summary_Calendar_2016_BL_13533

Supreme Court

Pensions & Retirement Benefits

Justices Decline to Review Posthumous QDRO Case

A retirement plan participant's surviving spouse lost her attempt to have the U.S. Supreme Court review whether the Employee Retirement Income Security Act permits a state court to issue a posthumous order retroactively changing a participant's beneficiary designation (*Cowser-Griffin v. Griffin*, U.S., No. 14-1531, *cert. denied* 1/11/16).

The high court's Jan. 11 denial of review leaves standing a Virginia Supreme Court decision holding that state law authorized the issuance of a posthumous qualified domestic relation order that retroactively divested the surviving spouse of her pension benefits to designate as beneficiaries the participant's children from a previous marriage.

The state Supreme Court's ruling affirmed a lower court's conclusion that the plan benefits hadn't vested in the surviving spouse when the participant died because the plan documents permitted assignment of benefits through QDROs and no such order was entered or sought until after the participant died.

The appeals court opinion further held that the divorce decree had vested beneficiary rights in the participant's children because plan benefits were alienable under state law.

The surviving spouse asked the high court whether ERISA permits a state court to retroactively reassign plan benefits after the plan participant's death when the participant directed that the benefits would go to his spouse and when the plan documents directed that the benefits would go to the spouse absent the spouse's consent to reassignment.

The petition was filed by Heath, Overbey, Verser & Old, PLC, Vinson & Elkins LLP and the University of Virginia School of Law Supreme Court Litigation Clinic.

BY CARMEN CASTRO-PAGAN

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