

UPDATE OF FAMILY LAW DECISIONS

May 2007 through May 2008

RICHARD B. JACOBS, ESQ.
HEATHER L. PITZ, ESQ.

THE LAFAYETTE BUILDING
40 W. CHESAPEAKE AVE., STE. 400
TOWSON, MARYLAND 21204
PHONE 410-821-8718
FAX: 410-821-1581
richard@lawhj.com
heather@lawhj.com

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PATERNITY: REQUIRES PATERNITY LAWS TO APPLY EQUALLY TO MOTHERS AND FATHERS

In Re. Roberto d. B., 399 Md. 267 (May 16, 2007).

In a decision five years in the making, the Court of Appeals decided that, in accordance with the Maryland Equal Rights Amendment, parentage statutes must be construed to permit women the same opportunity to deny parentage as men. Thus, since gender-based laws violate the ERA, paternity statutes must be construed to be gender-neutral as well. The law previously did not provide a woman who was “genetically unlinked” from a child, to deny paternity. The Court split 4-3, with the majority finding that since a father can have his name left off the birth certificate, so may a mother’s name be left off a birth certificate.

The case arose in Montgomery County, where a surrogate mother was contracted by the father of two fetuses to carry them to term. The father, using his sperm, had eggs fertilized from an unrelated third party donor. The father then hired an unrelated surrogate mother to carry the two viable eggs to term. Neither the father of the children, nor the unrelated surrogate wanted the unrelated surrogate to be named as the mother on the twin’s birth certificates, as she had no genetic connection to the twins and she did not want to have any parental rights or obligations. However, the hospital typically submits the birth mother as the “mother” of the child for birth certificate purposes, thus birth certificated were prepared with the surrogate’s name as “mother”. The father and surrogate both petitioned the Circuit Court for Montgomery County to have her name removed and the court refused the petition stating there was no law to remove the mother’s name from the birth certificate and that to do so would violate the “best interest of the child” standard. The Court of Appeals found both arguments to be erroneous. The Court cited Health General § 4-211 which allows a court to issue a birth certificate without listing a mother. The Court also construed the parentage statutes in Maryland to permit a woman the same opportunity as a man to deny parentage.

PATERNITY: TRIAL COURT ERRED IN REFUSING TO ALLOW THE PUTATIVE FATHER, 12 YEARS AFTER BIRTH OF THE CHILD, TO CHALLENGE PATERNITY.

Ashley v. Mattingly, 176 Md. App. 38 (Sept. 13, 2007).

The Court of Special Appeals reversed the Circuit Court for Wicomico County, finding that it erroneously dismissed a father’s motion to terminate his child support obligations after genetic testing excluded him as the child’s father

more than twelve years after the child's birth. The mother and presumed father in this matter were married for less than one year, during which time they had one son. Following the divorce, father was ordered to pay \$100 a week in child support. More than a decade later, father had the occasion to meet his ex-wife's former boyfriend, Steve Reid, and suspected that based on the resemblance between Reid and the child, the child may have been conceived just prior to his marriage, when his ex-wife was still involved with Reid. After genetic testing confirmed that Appellant was not the father of the child, Appellant petitioned to discontinue child support payments and mother filed a motion to dismiss. The Court of Special Appeals determined that the trial court erred in granting the mother's motion to dismiss, as Family Law §5-1006 provides that a paternity challenge may be made anytime before a child reaches 18 years of age. Maryland law further provides a paternity judgment to be set aside at anytime if testing reveals that the named father is not the biological father.

The Court utilized Estates and Trusts §1-206(a) in arriving at its decision since the child in this case was born during the marriage but may not have been conceived during the marriage. Under the statute, the Circuit Court can order genetic testing if it is first determined the testing to be in the best interests of the child. The case was remanded to determine the child's best interest with regard to paternity.

MARITAL PROPERTY: ERROR TO REFUND NON-MARITAL FUNDS

Gordon v. Gordon, 174 Md. App. 583 (May 18, 2007).

The Court of Special Appeals found that a party that contributes non-marital funds to the purchase of real property titled as tenants by the entirety, is not automatically entitled to a refund for that contribution. In this case, the parties proposed an equal split of marital property, with the exception that the Wife asked to be reimbursed for a \$30,000 non-marital contribution she made to purchase their family home in Columbia, Maryland, from proceeds she withdrew from her non-marital 401k retirement account. Wife said she could trace the source of her funds and the trial court judge agreed with the wife, ordering husband to pay her a marital award of \$32,829 upon sale of the house.

Following the rationale of *Hart v. Hart*, 169 Md. App. 151, the Court ruled that a trial court does not have the authority to distribute the proceeds from the sale of a marital home unequally. The Court also found that under Family Law §8-201(3), this home was entirely marital property and thus the source of funds argument does not apply when the interest is in property held as tenants by the entirety. The Court found that the underlying purpose of the statute was not served in this case, which is to balance inequities that results from the distribution of marital property by title. Here the parties agreed to divide all of their marital property by title with the Husband taking 44% and the Wife taking 56%.

MARITAL PROPERTY: PENSIONS: COURT DID NOT ERR IN GRANTING THE APPELLEE WIFE 50% OF HUSBAND'S WORLD BANK PENSION

Aleem v. Aleem, 175 Md. App. 663 (Sept. 10, 2007).

The Court of Special Appeals found that a couple married in Pakistan under a marriage contract, do come within the purview of Maryland law with regard to divorce related issues. Husband claimed that since he was a party to an arranged marriage in Pakistan with a marriage contract, the terms of the marriage contract should control the divorce, thereby denying the wife of any claim to his marital property. The Court disagreed stating that the marriage contract violated Maryland public policy and that the trial court properly awarded the wife one half of husband's World Bank retirement benefit. Husband cited New Jersey law in which the court there accepted the Pakistani divorce and denied wife's claim for equitable distribution holding that there was an insufficient nexus between the marriage and New Jersey, and that Pakistani law should prevail. Maryland distinguished the facts of that case, stating that here there is sufficient nexus since the wife here lived with her husband in Maryland for twenty years and was a permanent resident. The wife in the New Jersey case lived in Pakistan with her children, while her husband lived in New Jersey.

MARITAL PROPERTY: PENSIONS AND CONTEMPT

Marquis v. Marquis, 175 Md. App. 734 (Sept. 12, 2007).

The Court of Special Appeals upheld the ruling of a Master who held that a service member cannot reduce the amount of potential retirement benefits payable to his spouse by utilizing exclusions. Here, the parties agreed at their divorce in 2004 that the wife would receive 50% of the marital share of the husband's military retirement benefits. Members of the military utilize a Constituted Pension Order, or CPO, for such agreements, and, upon reviewing the draft CPO sent by wife to husband, husband refused to sign the CPO. Wife filed for contempt of the divorce agreement for failure of her husband to sign the CPO as agreed and a Master's hearing followed.

Husband argued that the wife's share should be determined based on his "Disposable Retired Pay" which is the amount the retiree receives less deductions. He argued that 10 USC 1408(e)(5) does not allow a CPO that exceeds the amount of the retiree's disposable retired pay. However the Court of Special Appeals disagreed stating that while the military won't pay in excess of 50% of the disposable retired pay to the retiree's divorced spouse, there is no provision in the law that keeps the retiree from making payments in excess of 50% to his divorced spouse directly.

MARITAL PROPERTY: PENSIONS

Allen v. Allen, 178 Md. App. 145 (Feb. 6, 2008).

The Court of Special Appeals denied a husband's attempt to block his military retirement benefits from going to his former wife, and awarded her a share of his retirement benefit. The husband chose to waive his retirement benefits rather than be forced to share them with his former wife even though he signed a separation agreement promising her a portion of those benefits. The husband served in the U.S. Army starting in 1973, however he was placed on leave in 2003 for his anxiety disorder, and was finally discharged in 2005, at which point he received a disability severance of \$140,192. His wife was denied any of the money by the military stating that the entire amount was based on her husband's disability, not his retirement. The wife filed a motion to enforce her pension order and was awarded \$75,810 by the Circuit Court for Harford County. On appeal, husband also argued that the payment was based on his disability and not retirement and that the circuit court lacked authority to divide disability benefits. The Court of Special Appeals agreed with the wife and found that the Army paid him disability benefits in lieu of retirement or pension benefits and thus she was entitled to her share of the disability payment.

MARITAL PROPERTY: PENSIONS

Hearn v. Hearn, 177 Md. App. 525 (Nov. 30, 2007).

The Court of Special Appeals held that a mutual mistake in a settlement agreement between a couple may be enough to reform an enrolled consent judgment. When the couple divorced in 1999, they agreed that the husband would pay a portion of his pension benefits to his wife via a QDRO (known as a Civil Service Retirement & Survivor Annuity Benefit Order or CSRS since the husband worked for the federal government). While the Government informed the parties that the benefits would be calculated based on gross monthly benefits, the husband filed a motion contending that the division of benefits should be calculated based on his net monthly annuity. The Circuit Court denied the motion concluding that the agreement the parties entered into was not ambiguous because the federal regulations state that, unless specified, the federal government would disburse pension benefits based on gross amounts. The husband then offered two letters exchanged by counsel for the parties showing that the couple intentionally eliminated the term "gross" from the calculation of the formula. The separation agreement was held to not be ambiguous by the Appeal's court, but an unambiguous contract can be reformed if mutual mistake can be shown. *Hoffman v. Chapman*, 182 Md. 208. The dicta in *Hoffman* said that a mistake of law "in making an agreement is not a ground for reformation" and while the wife made that argument, the appellate court found

that “the correct rule of law is that even if the mutual mistake is one of law, a court of equity can act” to reform the contract to give an equitable remedy.

SAME SEX MARRIAGE: COURT RULES AGAINST SAME SEX MARRIAGE

Conway v. Deane, 401 Md. 219 (Sept. 18, 2007).

In a 4-3 decision, the Court of Appeals has determined that the law in Maryland which limits marriage to being between one man and one woman does not violate the Equal Rights Amendment of the Maryland Constitution, reversing a decision in Baltimore City in favor of same sex plaintiffs who claimed that their right to marry had been denied unconstitutionally. The majority stated that the state has a legitimate interest in fostering procreation and a stable family environment, and since same sex marriage was not deeply rooted in our traditions, there was no burden to any fundamental rights. The Majority also held that same sex marriage does not violate the Maryland ERA because it does not discriminate on the basis of gender and that sexual orientation is not a suspect class, thus they refused to analyze the case under anything but a rational basis standard. The Majority also found that there is no fundamental right to marry someone of the same sex.

VISITATION WITH EX-PARTNER:

Janice M. v. Margaret K., CA No. 122, Filed May 19, 2008.

The Court of Appeals dealt a setback to gay rights activists and groups in its just filed decision regarding visitation rights for gay and lesbian ex-partners. In a 6-1 decision, the court struck down the concept of “de-facto parenthood”, which was first recognized by the Court of Special Appeals in 2000 in another same-sex child access case. A de-facto parent is permitted access to a child for visitation over the legal parent’s objection upon a showing that the visits are in the best interest of the child. To satisfy the de-facto parent standard that court previously laid out, an ex-partner would have to show that 1)the third party lived with the child 2) they performed parental functions to a significant degree, 3) that a child-parent bond was forged and 4) that the legal parent fostered the relationship. The Court of Appeals reversed stating that it had to do so based on a Supreme Court decision since the 2000 Court of Special Appeals decision, and two decisions involving grandparent visitation that it has addressed.

The case involves a long-term lesbian couple, Margaret and Janice, who moved in together in 1988. In 1999, Janice adopted a baby from India named Maya. When the couple split up in 2004, Janice retained custody of the child and Margaret had regular visitation with her. Margaret wanted to secure her visitation rights, and the Circuit Court for Baltimore County agreed, finding Margaret to be a de-factor parent and that visitation was in Maya’s best interests. The Court of

Special Appeals affirmed prior to the Court of Appeal's reversing and remanding of the case for a determination by the trial judge as to whether there are exceptional circumstances that Margaret can show in favor of her visiting with Maya. Chief Judge Bell said that finding exceptional circumstances requires analyzing any and all relevant factors, and that even if a person passes the de-facto parent test, does not mean they meet the exceptional circumstances threshold.

CHILD SUPPORT: RETROACTIVE APPLICATION OF EXTENSION TO AGE 19

Bornemann v. Bornemann, 175 Md. App. 716 (Sept. 12, 2007).

The Court of Special Appeals held that the trial court did not err in extending a father's child support obligations until child reached age 19, even though the parties had previously signed an agreement that the child support would terminate when the child reached 18. Father argued that his contractual rights were impeded by the new law in violation of the Contract Clause of the United States Constitution, and that retroactive application of the law would impose on his rights under the agreement between he and his former spouse.

The Court held that the 2002 law extending child support obligations until age 19 is retrospective as the legislative intent to make it retroactive is clear in the preamble to the bill. The preamble states that the act would apply to modifications to orders "issued before the effective date of this act". This legislative intent is clear and retrospective application of the statute is appropriate. The Court also rejected the Appellant's Contract Clause argument stating that child support obligations can not be waived by contract and that the duty exists regardless of the agreement of the parties.

ATTORNEY'S FEES: APPOINT GUARDIAN AD LITEM, NO ACQUIESCENCE BY GRANDPARENT

Taylor v. Mandel, 402 Md. 109 (Nov. 9, 2007).

The Court of Appeals overturned both the trial court and the Court of Special Appeals, and held that grandparents may not be required to pay fees for the services of a guardian *ad litem*, when the grandparent is seeking custody of a minor grandchild. The majority held that even though the grandmother requested the services of the guardian *ad litem* and paid the \$1000 fee which was then held in the attorney's escrow account, the current fee statutes apply only to parents, and that the grandmother did not consent to the fees by requesting a guardian *ad litem* and paying the fee. While the Court of Special Appeals said her consent to receiving and paying for those services was implicit, the grandmother argued that she was not required to pay the guardian *ad litem* fee of \$9,041 because she

was not the “parent” under Family Law §1-202 and that only counsel fees could be assessed, not guardian *ad litem* fees. The majority held that since the order failed to specify any liability for the grandmother or that she would be required to pay any fees, and since she was not the parent under Family Law §1-202, there is no authority to assess guardian *ad litem* fees against her.

DOMESTIC VIOLENCE: AFTER CONSENT TO FINAL PROTECTIVE ORDER, NO APPEAL MAY BE FILED.

Suter v. Stuckey, 402 Md. 211 (Nov. 14, 2007).

The Court of Appeals unanimously held that parties who consent to a domestic violence protective order in the district court forego their common law rights to appeal that judgment, reversing a Circuit Court for Prince George’s County decision. Suter argued that consent domestic violence orders may not be appealed based on jurisprudence from the 1800s and the high court agreed. The court stated that “the right to appeal and the mode of appeal are delineated in Family Law §4-507”, which provides protection to domestic violence victims and provides de novo appeal of district court protective orders in the circuit court. However, the court added that the ability to appeal can be lost if a party acquiesces or consents to a final judgment.

ESTATES AND TRUSTS: PROPERTY TRANSFER ON DEATH ACCOUNTS

Sexton Schoukroun v. Karsenty & Schoukroun, 177 Md. App. 615 (Dec. 11, 2007).

The Court of Special Appeals reversed the trial courts decision in a unanimous ruling holding that Transfer on Death accounts, which are part of a revocable trust that the decedent, Gillis H. Schoukroun, retained control over until his death, must be included as part of the decedent’s estate for purposes of calculating the surviving spouse’s elective share.

The appellant was the decedent’s wife at the time of his death and the appellee was married to the decedent from 1987 to 1995 and had one child with him during that time. Mr. Schoukroun’s wife at the time of his death, filed for her elective share in accordance with Estates and Trusts §3-203(b), claiming fraud on her marital rights and requesting a constructive trust be established in her favor. Mr. Schoukroun’s former wife also filed suit requesting a constructive trust, claiming that her former husband agreed to maintain a life insurance policy for their minor child as beneficiary, but instead that policy was paid out to his surviving spouse.

The Circuit Court for Anne Arundel County denied both claims, applying *Knell v. Price*, 318 Md. 501, and stating that no bright line rule exists making a revocable trust a fraud per se. The point was argued on appeal by the current

wife, asserting that when her husband put his assets in a revocable trust via Transfer of Death and direct transfers, he effectively defrauded her out of her one third statutory elective share.

The Court of Special Appeal used the *Knell* analysis with regard to the assets in the instant case. In *Knell*, the Court of Appeals held that the husband committed a fraud on his wife's marital share by conveying his property to his mistress through a strawman, as it was not a complete and unconditional transfer. The Court found the same lack of "complete, absolute, and unconditional" transfer here, this time in the form of a revocable trust, and held it to be fraudulent since it was transferred by a spouse during the marriage. The intent of the deceased spouse does not matter because the law pronounced transfer on death transfers to be a fraud on the surviving spouse.

At the end of their opinion, the court stated that they "reluctantly" were affirming the lower court's dismissal of the former wife's claim, under the abuse of discretion standard and said they would have decided the insurance claim by the former spouse differently.

TERMINATION OF PARENTAL RIGHTS:

In Re. Adoption/Guardianship of Rashawn Kevon H. and Tyrese H., 402 Md. 477 (Dec. 11, 2007).

The Court of Appeals reaffirmed its ruling that a finding of either parental unfitness or exceptional circumstances must be made in order to terminate a parent's rights to their child. The Court reversed a trial court's decision terminating the appellant-mother's right to her two children. The Court stated that the trial courts must relate the findings it made with respect to the statutory factors to the presumption favoring continuation of the parental rights or to another exceptional circumstances that would rebut the presumption. "On remand, the court will have to make clean and specific findings with respect to each of the relevant statutory factors and, to the extent that any amalgam of those findings lead to a conclusion that exceptional circumstances exist sufficient to rebut the presumption favoring the parental relationship". Here, the trial court found that the children's health and safety needs would be better served by a guardian, but it failed to identify those needs or explain why the children's health and safety required termination of parental rights. The Court of Appeals remanded the case to the trial court directing it to make clear and specific finding to each of the statutory factors.

MONEY JUDGMENTS UNDER RULE 2-648(b):

De Arris et. al. v. Klinger-deArriz, No. 480 September Term., filed May 1, 2008.

In this matter, the circuit court issued an order in the Judgment for Absolute Divorce indicating that wife be awarded a monetary award against husband in the amount of \$110,000, payable upon settlement of the couple's home, however the monetary award was not reduced to a judgment. The couple entered into a contract for \$1,075,000 for the sale of their home, however prior to settlement, wife learned that husband had encumbered the house with two deeds of trust to the law firm of Brodsky, Greenblatt, Renehan & Pearlstein worth in excess of \$245,000, as payment for a portion of his legal fees due to the protracted domestic case. Husband further encumbered the house to pay child support arrearages for another \$22,993.98. Husband effectively encumbered his title to the marital home, whereby eliminating his interest in the marital home. Wife objected to Brodsky's lien taking priority over her monetary award since her husband was due no proceeds from the marital home.

The house did not settle as planned due to issues revolving around the trust, so husband filed for emergency relief to sell the marital home and for Brodsky to be paid for all moneys owed to them under the liens. Wife filed for emergency relief also, and requested that trial court to revise the Judgment of Absolute Divorce *nunc pro tunc*, awarding wife's monetary award priority over monies owed to Brodsky. At a hearing on the matter, Brodsky agreed to withdraw their liens in the amount of \$110,000 with the understanding that Brodsky would keep its filing date so that priority could be established at a later hearing. The court made no ruling at the hearing. Settlement of the house went forward in February 2007 and the settlement company deposited \$110,000 into the court registry pending a later court determination. A second hearing followed where the court considered if the Brodsky firm had priority to the escrowed funds. Again, the court took the matter under advisement and scheduled another hearing for May 2007, prior to which the trial judge asked the attorneys to consider Rules 9-210(b) and 2-648 and how they applied to this matter. In late June, the court ordered that a money judgment be entered for the wife and against Brodsky firm in the amount of \$110,000 in accordance with rule 2-648.

The Court of Special Appeals reversed the trial court stating that by granting wife's emergency motion, they granted her entitlement to the \$110,000 help in escrow. Pursuant to 2-648, the trial court enforced the Judgment for Absolute Divorce and entered the judgment for wife, thus the Court of Special Appeals was left to determine if husband was a non-complying obligor and whether Brodsky was a transferee with knowledge. The court found husband to be a non-complying obligor as he did not pay the monetary award at the settlement of the couple's home. Then the court had to consider how it would seize husband's property in order to compel compliance with the Judgment for Absolute Divorce. The court found that each lien placed by the Brodsky firm was

perfected when each deed of trust was filed, and thus took priority over third party creditors, and since the Judgment of Absolute Divorce did not reduce wife's monetary award to a judgment, and therefore the Brodsky firm's deeds of trust took priority and thus it was entitled to the \$110,000 held in the escrow account. Once the Brodsky firm held title to the funds in escrow, the trial court used Rule 2-648(b) to enter a money judgment against the firm. Under this rule, the property must have been transferred in violation of a judgment prohibiting or mandating action, and a Judgment for Absolute Divorce was found to be a judgment for purposes of this rule. Thus husband's actual knowledge of the Judgment at the time of the transfer would make him subject to sanctions including seizing of property and entry of a money judgment. The Court of Special Appeals said that where the trial court erred was in interpreting the Judgment for Absolute Divorce, in which the agreement stated that the monetary award shall be payable "upon settlement of the house", not from the settlement proceeds from the house. The distinction is significant as husband was not ordered to pay the monetary award from the proceeds of the house sale. Thus the Court of Special Appeals held that the trial court's mandate on how husband was to use the proceeds from the marital home was in error.