OPINION: REFLECTIONS ON FATHERS AND FAMILY

DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION
Volume 17 Number 2 $3.00 Summer 1999

THE EMBATTLED FAMILY

Nonprofit Organization
U.S. Postage
PAID
Wilmington, Delaware
PERMIT NO. 697

Our Work Is On Permanent Display At Morris, Nichols, Arsht & Tunnell

Since its inception in 1983, EDiS' Interior Construction Division has been focused on creating new tenant space and renovating existing space. Projects, both large and small, are completed quickly and without disruption to daily operations.

With nearly a century of experience,
EDiS is a regional leader in the construction industry.

Construction Managed by EDiS

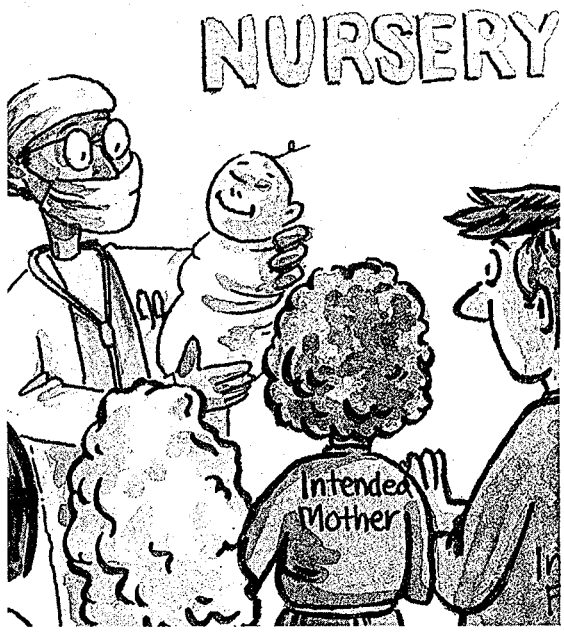
(302) 421-5700

EDiS Interior Construction Division

CONTENTS

FEATURES

Cover illustration by Michael Schweitzer
Top illustration by Michael Schweitzer



6
Uniform Parentage Act

DELAWARE LAWYER
A publication of Delaware Bar Foundation
Volume 17, Number 2
3301 Lancaster Pike, Suite 5-C
Wilmington, Delaware 19805

DELAWARE LAWYER
Attention: Chairman, Board of Editors
c/o Today Media, Inc.
Formerly Suburban Marketing Associates, Inc.
3301 Lancaster Pike
Suite 5-C
Wilmington, Delaware 19805

Address changes, subscription orders, requests for information about advertising should be directed to:

TODAY MEDIA, INC.

at the preceding address
Telephone inquiries to (302) 656-8440

Editorial inquiries should be directed to:
Margaret Gilmour, Associate Editor
(302) 656-8440

Delaware Lawyer is published by Delaware Bar Foundation as part of its commitment to publish and distribute addresses, reports, treatises, and other literary works on legal subjects of general interest to Delaware judges, lawyers, and the community at large. As it is one of the objectives of *Delaware Lawyer* to be a forum for the free expression and interchange of ideas, the opinions and positions stated in signed material are those of the authors and not, by the fact of publication, necessarily those of Delaware Bar Foundation or *Delaware Lawyer*. All manuscripts are carefully considered by the Board of Editors. Material accepted for publication becomes the property of Delaware Bar Foundation. Contributing authors are requested and expected to disclose any financial, economic, or professional interests or affiliations that may have influenced positions taken or advocated in the articles. That they have done so is an implied representation by each author.

CHAIRMAN'S NOTES

Collusive Endings

"Sibyl: Why did you really let *her* divorce you?
Elyot: She divorced me for cruelty, and flagrant infidelity. I spent a whole weekend at Brighton with a lady named Vera Williams. She had the nastiest looking hair brush I have ever seen."

Noel Coward, *Private Lives*

In the 1920's and 30's the seaside resort of Brighton, England seems to have been a hotbed of imaginary infidelities. The doomed hero of Evelyn Waugh's *Handful of Dust* spent a blameless night at Brighton so that his adulterous spouse might secure a divorce predicated on his non-existent misconduct. As you will see shortly, English law at that time so limited the availability of divorce that failed marriages often ended in the solemn reception of faked evidence.

A. P. Herbert, the author of *Pratt v. Pratt*, *Mugg Intercepting: a Swan Song*, which you are about to encounter, wrote a series of pieces demonstrating some of the absurdities of the law. They appeared in Punch, the English humor (oops!! humour) magazine, and were eventually collected in book form as *Misleading Cases in the Common Law. Pratt* is one of those comically misleading cases that make very serious points.

Herbert was trained as a lawyer but never practiced. He was a member of Parliament for Oxford University from 1935 to 1950. His campaign for divorce law reform (a subject he addressed in his nicely titled *Holy Deadlock*) led to the passage of the *Matrimonial Causes Act*, which did much to improve this vexing branch of the law. He also wrote novels and librettos for musical comedies and revues, which added to his considerable popularity and literary reputation. He was knighted in 1945.

I recommend that you now turn to page 20 and treat yourself to the pleasure of meeting a brilliant original.

WEW

EDITORS' NOTES

This issue offers an eclectic view of the emerging practice of family law. It travels from an hilarious expose of an upper-class English divorce decades before no-fault allowed for dissolution of marriage with minimum falsity and fuss–some would say too little–to a thoughtful examination of recommendations for a Family Court overwhelmed by litigation. They are supplemented by a report on the newly released proposal by Governor Carper to create a Domestic Violence Division in the Delaware court system.

Perhaps most challenging to those engaged in the practice of family law are the paired lead article on the Uniform Parentage Act and the closing opinion piece on fatherhood and fragile families. We have entered a world where the genetic identity of a child can be known, but we struggle with the legal role of such biological "truth." Dr. Mincy's opinion reminds us of the goal of this and all other family law struggles – two parents committed to the financial and emotional support of their children.

One new, generally unknown but valuable tool in litigation of parentage, child support, custody, visitation, and adoption in interstate cases is the Federal Parent Locator Service. The article on this expanded service is accompanied by a description of the federal and state protections for victims of family violence. Finally, there is an analysis of the legal consequences of adoption gone wrong.

I thank our authors for being so generous with time and expertise. In a world where science, covenant marriage, and the roles and responsibilities of parents make headlines every day, discussion of the topics in this issue will continue for years.

Susan F. Paikin

This issue of DELAWARE LAWYER considers the current state of the law of domestic relations. In the Spring of 1983 we published another issue on the same subject, taking that occasion to salute Family Court Judge Roxana Arsht, the first woman member of the Delaware judiciary.

On Tuesday, March 30, 1999, members of our bench and bar met to honor the memory of S. Samuel Arsht, the judge's late husband, and one of the stellar figures in the practice of corporation law in Delaware.

The memorial gathering was held, most fittingly, in Arsht Hall, the seat of the Academy of Lifelong Learning, to which both Mr. Arsht and his wife have contributed so much, not merely by enabling the University of Delaware to build Arsht Hall, but by their essential leadership of the Academy. It speaks well of our profession that these gifted professionals could in vigorous retirement excel in a wholly new undertaking. The community at large and especially those whose lives have been enriched by the Academy are indebted to these splendid lawyer citizens.

WEW

Janet Atkinson a Maryland attorney, is an Associate with the Center for Support of Families. She specializes in interstate and internationa family support, and has wirtten extensively on the FPLS.

Raina Hope Fishbane is Deputy Legal Counsel to Governor Carper. She was formerly the Executive Director of the Domestic Violence Council.

Charles E. Hayward is the Deputy Director of the Delaware Division of Child Support Enforcement (DCSE) in the Department of Health and Social Services. He served as the Secretary of the Department of Services For Children Youth and Their Families from 1985-93.

Ronald B. Mincy is the Senior Program Officer for Employment and Welfare in the Ford Foundation's Human Development and Reproductive Health program. He has published widely on the underclass, urban poverty, and income security policy. He has taught at the University of Delaware, Swarthmore College, Purdue University, Bentley College, and the Foundation for American Communications. His most recent book is *Nurturing Young Black Males: Challenges to Agencies, Programs and Social Policy.*

Susan F. Paikin has been a Senior Associate with the Center for the Support of Families since 1994. From 1980 to 1994 she served as a Master in the Family Court of Delaware. Ms. Paikin was President of the Eastern Regional Interstate Child Support Association and Secretary of the National Child Support Enforcement Association. She was an official observer to the UIFSA Drafting Committee for the National Conference of Commissioners on Uniform State Laws (NCCUSL) and currently serves in the same capacity for the Uniform Parentage Act Drafting Committee. She is a member of the Board of Editors of this magazine.

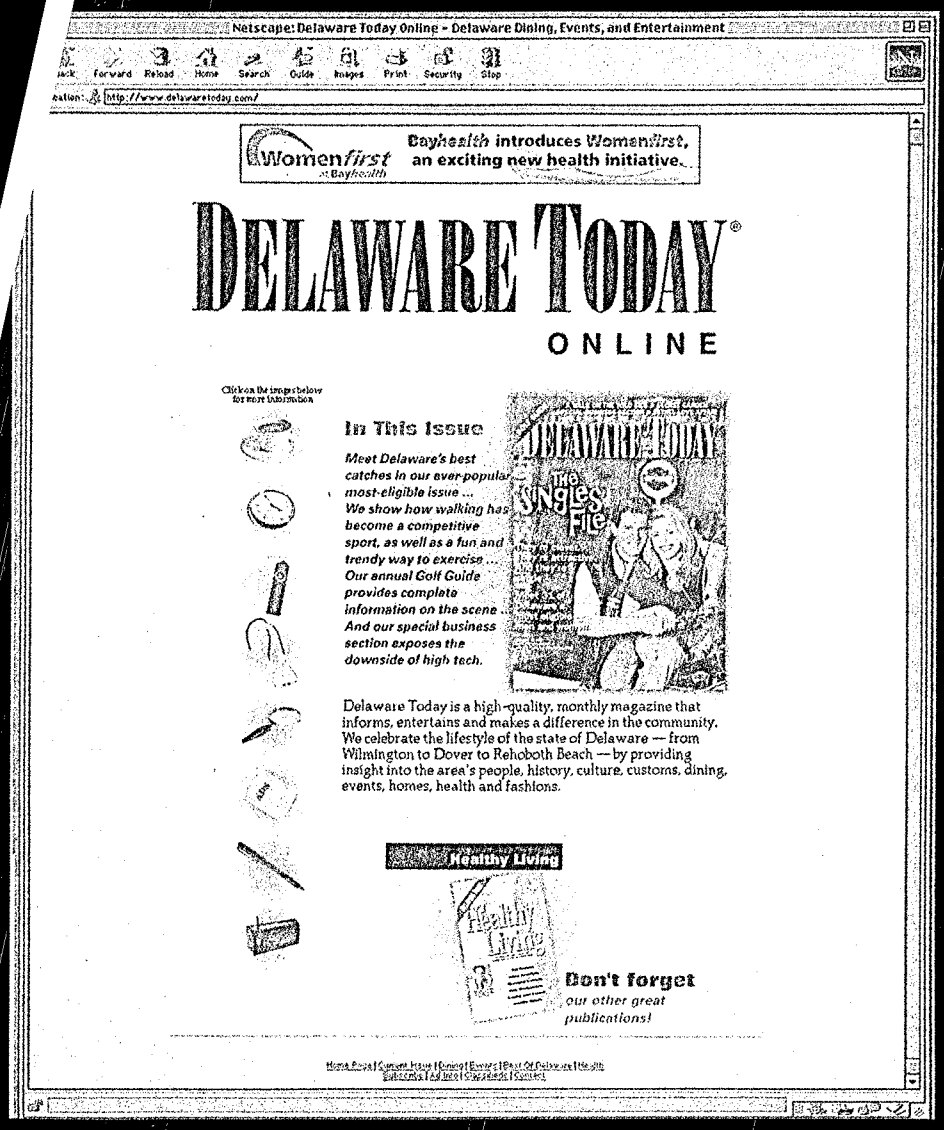
John J. Sampson, the William Benjamin Wynne Professor of Law at the University of Texas School of Law, has taught since 1970. He served as Co-Reporter for the Uniform Interstate Family Support Act, National Conference of Commissioners on Uniform State Laws, from 1990 to date, and is currently the reporter for the redraft of the Uniform Parentage Act.

Joel D. Tenenbaum is a member of the Board of Directors of the American Bar Association Family Law Section. A former chair of the Delaware State Bar Association Section on Family Law, he serves as liaison to the National Conference of Commissioners on Uniform State Laws, and as ABA liaison, U.S. State Department Hague Conference on Intercountry Adoptions. He practices family law in Delaware in the firm of Woloshin, Tenenbaum & Natalie, P.C.

Harlan S. Tenenbaum is an attorney at The Law Offices of Harlan S. Tenenbaum, P.A. and a director of Adoption House, Inc., a non-profit full service adoption agency specializing in both domestic and international adoptions. A member of the American Bar Association Family Law Section Adoption Committee, he served as a recording secretary for the Hague Conference on Private International Law.

Harry L. Tindall, a partner in Tindall and Foster, Houston, TX, is a Commissioner, National Conference of Commissioners on Uniform State Laws, and the Chairman of the Drafting Committee of the revision of the Uniform Parentage Act. He was Vice-Chair, U.S. Commission on Interstate Child Support from 1989-1992.

Read It. Live It. Hit It.



Visit Delaware Today Online at **www.delawaretoday.com** for the latest information on dining, events, and the Best of Delaware®.

Plus!

Find out what's in the current issue of Delaware Today magazine.

For information on subscribing to or advertising in Delaware Today magazine call **(800) 285-0400.**

www.delawaretoday.com

FEATURE

John J. Sampson
Harry L. Tindall

THE UNIFORM PARENTAGE ACT: A COMPLETE REVISION PROPOSED

The National Conference of Commissioners on Uniform State Laws (hereinafter, NCCUSL) promulgated the Uniform Parentage Act in 1973. As uniform acts go, the UPA has been moderately successful. As of 1998, 18 states have adopted the Act.[1] In fact, the Act has been even more successful than that statistic suggests, because some states have enacted significant portions of the Act.[2]

In 1997 the Executive Committee of NCCUSL decided that the UPA was more than a little long in the tooth, and needed to be reexamined for likely revision. A drafting committee was appointed,[3] which quickly concluded that that complete revision would be the appropriate response. Beginning with the first draft in November of 1997, and proceeding to date, four drafts have been produced.[4] Much work remains to be done on this extraordinarily complex subject before the revised UPA will be presented to NCCUSL for final adoption — scheduled for the Summer of 2000. Thereafter, it must be approved by the ABA at its Winter Meeting in 2001, and then move on to the states for consideration in the usual (irregular) pattern of acceptance or rejection state-by-state. Nonetheless, a preliminary progress report may be welcome in Delaware, given the fact that the state adopted the Uniform Parentage Act in 1983.

The proposed act is divided into nine substantive articles, plus a catch-all article containing standard provisions common to all uniform acts. Article 1, General Provisions, provides definitions for a wide variety of separate terms (21 in all) used in the proposed act, plus some standard general provisions.

Article 2, Parent-Child Relationship, deals with the establishment of the parent-child relationship by birth to a woman (except as otherwise provided, infra), and a determination of the father. A major change from the 1973 UPA is that the marital status of the parents has no effect on the child's rights towards them. On the other hand, presumptions of paternity continue to be important. The presumptions, which first saw light in the 1973 Act, have been slightly modified; only marriage, or attempted marriage, creates a presumption of paternity. Two presumptions in the current Act, which were based on fact-driven conduct rather than being tied to the marital status of the parents, have been eliminated.[5] As discussed *infra*, the ability of parents to regularize the father-child relationship is made very simple, thereby doing away with the necessity of having conduct create a presumption. Indeed, it can be said that the presumption of paternity itself may be more a convenience than a legally binding conclusion. That is, because science has reduced the identification of the male parent to a fine art, in many instances science can be readily employed to rebut the presumption of paternity.

Article 3, Voluntary Acknowledgement of Paternity, recognizes a new means of conclusively identifying the father. The genesis of Article 3 is found in a federal act,[6] which almost certainly will be in force in every state by October 1, 1999. Thus, the revision of the Uniform Parentage Act, if and when adopted in 2001 and thereafter, no doubt will arrive in a world where an existing system of acknowledgment of paternity is already in place. The revised UPA provisions, however, do not merely track the federal statute. That is because Congress, which knows as much about family law as a dog knows about chess, dealt with the subject in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA, commonly known as Welfare Reform Act). The congressional act mandates that in order not to jeopardize the receipt of the federal child support enforcement subsidy, all states must provide a procedure for a binding acknowledgment of paternity. Unfortunately, Congress was apparently clueless that a married woman might very well have a child by a man other than her husband, and that the genetic father might seek to acknowledge his paternity. Because the woman's husband is the presumed father of a child born to his wife, an acknowledgment of paternity by a third party male runs afoul of the presumption. Article 3 attempts to reconcile this "unforeseen" problem. Accordingly, one major requirement added to the draft UPA is that if the mother of the child has a husband, the acknowledgment of the paternity of another man must be based on the consent of all three parties. However, people are people. Undoubtedly mothers will continue to encourage

the man who they believe to be the father of the child to sign an acknowledgment, irrespective of the fact that somewhere in the wide, wide world the mother has a husband. In the present draft of Article 3, the solution is to make the acknowledgment voidable, and to permit a presumed father to collaterally attack such an acknowledgment act if he does so within two years of the child's birth.

Article 4, Putative Father Registry, accepts the fact that a majority of states have now enacted such registries, primarily to provide an easy method for terminating the rights of putative fathers for infant adoptions. The standard approach is followed, to wit, if a putative father fails to register with the official registry, his parental rights may be terminated without further notice to him. Generally, a search of the registry substitutes for personal service of notice of a parentage lawsuit. Although NCCUSL has previously rejected proposals to promulgate a uniform act containing provisions for a putative father registry, the new UPA will seek to do so.[7] However, the method of operation for the proposed paternity registry does not slavishly track the procedure described in *Lehr v. Robertson*,[8] in which the U.S. Supreme Court found a suspect New York procedure to be constitutional.[9] Rather, the registry advocated in the proposal revision of UPA is to be limited to infant adoptions. Because the mother will be giving up the child for adoption, the putative father is required to come forward and announce his interest to establish his paternity.

Article 5, Genetic Testing, deals with a subject that has been scientifically revolutionized since its relative infancy when the original Act was promulgated in 1973. Those were the days of simple blood tests that measured such elements as ABO and Rh-positive and Rh-negative. Science has come a long way in the interim. The proposed revision of UPA recognizes the accuracy of genetic testing through DNA analysis, and places evidence of paternity acquired by this method on the highest level. Although there may be dispute over the exact level of proof to be required, the proposed act states that a 99% probably of paternity establishes a presumption of paternity. Thereafter, it is incumbent on the alleged putative father to rebut that presumption. This may be done only by additional testing, demonstrating either that another man may be the father, or by proof that the putative father is excluded from the possibility of being the father by virtue of additional testing.

Article 6, Proceeding to Determine Parentage, sets forth the procedural standards for determining parentage in a court of law.[10] This article does not introduce significant new procedures to the child of such a suit, but rather continues the procedures of the UPA with some elaboration.

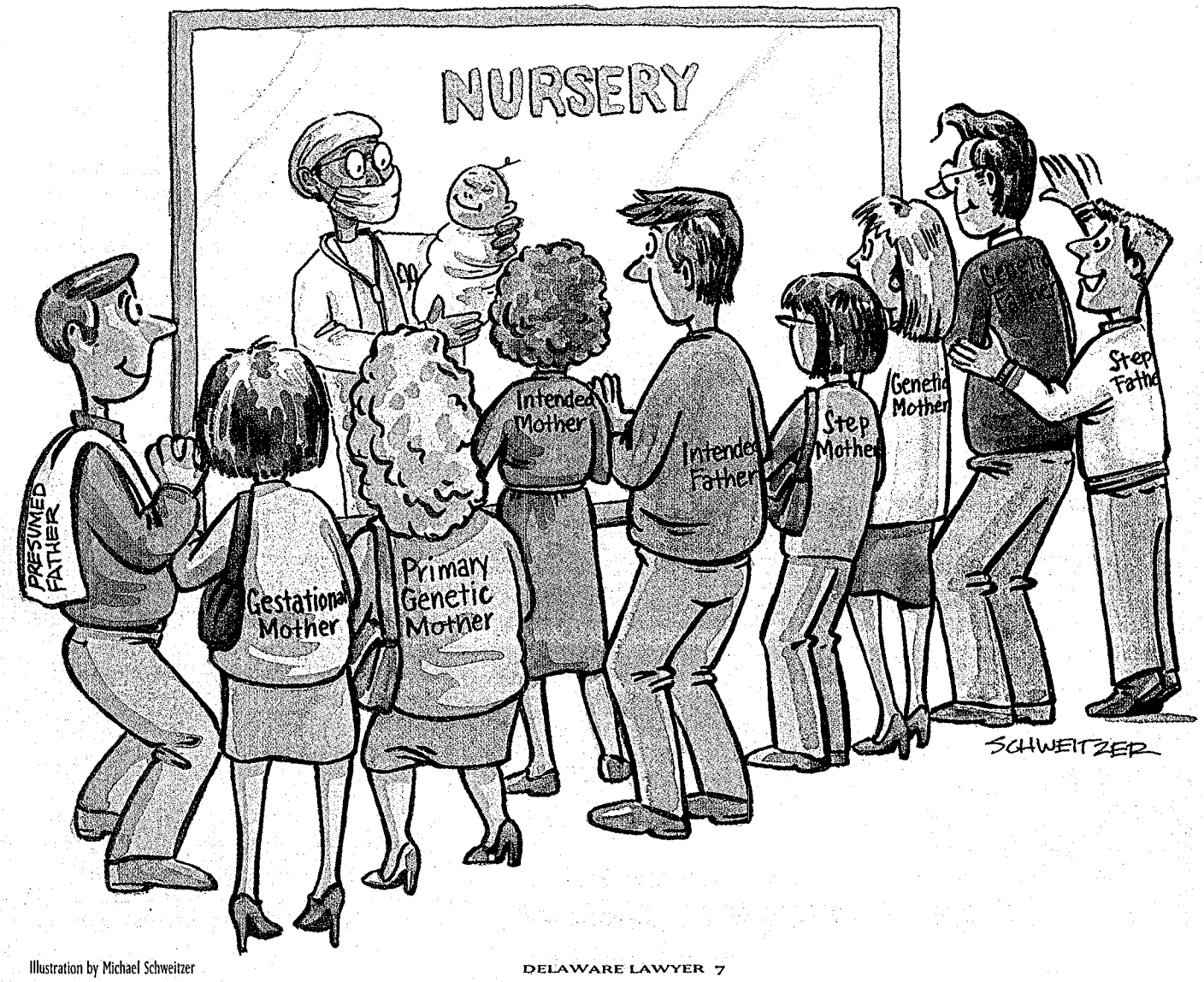


Illustration by Michael Schweitzer

Article 7, Parentage Based on Equitable Estoppel, new to the UPA, creates the possibility that parentage may be based on behavior, not biology. That is, a man who serves in the paternal role for a significant period of time may be able to establish that a person seeking to demonstrate that the man is not the father of the child will be stopped from doing so. This possibility of estoppel extends to both a third party male seeking to establish his paternity and to the mother of the child attempting to disestablish the paternity of "the father."

Article 8, Child of Assisted Reproduction, confronts the status of a child who is born as a result of assisted reproduction, tracking another uniform act. However, the Uniform Status of Children of Assisted Conception (USCACA) has been a relatively unsuccessful act. Only two states, North Dakota and Virginia, have adopted it, and the states took opposite positions regarding the most crucial and controversial position in the Act, gestational agreements, a.k.a. surrogacy. Virginia adopted one alternative provision validating such an agreement provided by USCACA, and North Dakota adopted the other alternative, which flatly banned surrogacy. Apparently promulgation of USCACA in 1988 was a bit too early for the states to face the issues raised by the range of possibilities of children being born through assisted reproduction.

The Drafting Committee determined that a real service would be provided by including comprehensive provisions dealing with this vital and highly publicized issue. This is consistent with the purpose of uniform acts, to provide guidance and promote uniformity among the states regarding laws dealing with commonly faced problems.

A wide variety of assisted reproduction technologies, a.k.a. ART, are now available, including in vitro fertilization, artificial insemination, intracytoplasmic sperm injection, and the donation of embryos for implantation in the woman serving as the gestational mother. Note that one subject is missing from this list; at present it is not scientifically possible to clone a human being. Moreover, the committee chose to not touch this sensitive subject with the longest possible pole. Indeed, it is theoretically possible that ART will evolve to the following possible fact situation. Sometime, perhaps in the near future, there may be four (or more) mothers of a single child, that is four women who can assert a

legitimate claim to have contributed to the genetic heritage of a single child. These are: the gestational mother, the woman who gives birth to the child; the primary genetic mother, the woman who donates the egg from which the child develops; secondary genetic mother(s), who contributes some of the genetic heritage of a child through a yet to be achieved assisted reproduction technology;[11] and, the intended mother. Note that at present all but the secondary genetic mother are reality, not hypothesis. Similarly, there is a possibility that three males (or even more) may lay claim to be the father of a particular child. There is the sperm donor, or genetic father; the intended father; and, in some instances, a presumed father, e.g., if the gestational mother is married (perhaps to more than one man). Of course not every child born through assisted reproduction will have that many parents. For example, the in vitro fertilization of a wife's eggs by her husband's sperm and the implantation of the resulting embryos into the wife yields but one mother and one father. But, as seen above, science has the possibility of creating far more complex fact situations.

The final substantive article, Article 9, Gestational Agreement, deals with the agreement by a woman to carry another womanís child, more commonly called surrogacy agreements. This too has been a delicate subject leading to famous litigation, *e.g., In re Baby M.*[12] The brave new world is here. The Drafting committee determined it is time to face this issue squarely and deal with it through recommended legislation. ◆

FOOTNOTES

1. 9B U.L.A. 17 (1998 Supp.).

2. For example, Texas has adopted the presumption of paternity found in §4 virtually word-for-word, although it has not adopted many of the other provisions of the Act.

3. The current drafting committee is composed of eight commissioners and a reporter, all of who have prior experience in drafting uniform family law legislation. In addition, and even more crucial to the utility of the ultimate product, the Drafting Committee has recruited eleven extraordinarily well-qualified advisors and observers to provide advice on the legal and scientific issues involved.

4. These may be located on the NCCUSL web page at www.law.upenn.edu/library/ulc/ulc.htm.

5. The UPA creates two fact-driven presumptions of paternity absent a marriage. Section 4(a)(4) presumes paternity if a man receives a child into his home and openly hold out that he is the father, and (a)(5) deals with acknowledgment of paternity. The revised UPA will eliminate the former, and greatly expand the effect of the latter, see Article of the revision.

6. 42 U.S.C. §†666(a)(5)(C), reads as follows:

This provision is not substantive law, but rather is tied to a states eligibility to receive the federal

subsidy for child support under the IV-D program.

7. In promulgating the Uniform Putative and Unknown Fathers Act (UPUFA) in 1988, the commissioners rejected the paternity registry approach based on disagreement with the procedure approved in Lehr v. Robertson, infra. Section 3 of UPUFA mandates notice to the putative father if his identity is known.

8. 463 U.S. 248 (1983).

9. The State of New York did not allow the claim of a biological father to assert his paternal rights because he failed to register his intent to make such a claim in a state-operated paternity registry. The facts of the case were more than a little outrageous; a man asserting himself to be the father was actually litigating the issue in one court, while a termination and adoption for the child was being sought in another court. The adoption court and the litigants had full knowledge of the man's assertion of paternity down the road. Notwithstanding the fact that his identity and whereabouts were known, the adoption court proceeded to terminate his rights based on the fact that he had failed to register as a putative father. According to the Supreme Court, this procedure did not deny the man's due process rights.

10. In many states child support is determined by administrative process, which often includes determination of paternity in uncontested fact situation. Although the Drafting Committee has not finally decided the issue, there is strong sentiment that contested parentage can only be resolved through a judicial process.

11. It is theoretically possible to extract nuclear DNA (from the nucleus of a fertilized egg) and insert it in an enucleated egg (containing only mitochondrial DNA); or to perform this cytoplasmic transfer in the other direction, i.e., make the transfer of mitochondrial DNA to a fertilized egg. In either event, the two DNAs could cooperate to form a child without mixing, but yielding a child with two genetic heritages. This process does not qualify as cloning because the nuclear DNA consists of the genetic contributions from both of the female egg donors and the genetic father. Although this process does not presently exist, the genetic contributions of the ìtwo mothersî is estimated to be between a 90-10% and an 80-20% ratio. Similarly, a process may involve an unfertilized egg from which the nuclear DNA is withdrawn and a cytoplasmic transfer is made to another egg for subsequent fertilization. Again this is not considered to be cloning because the child has multiple parents.

12. 537 A.2d 1227 (N.J. 1988). If you want to read about that case, you will not be disappointed; Westlaw lists 532 cites in "Texts and Periodicals." Have fun.

13. The last word on this topic will probably not be written in the lifetime of anyone reading this note. Regularly new decisions arrive to challenge the mind. For example, in In re Marriage of Buzzanca, 72 Cal. Rptr.2d 280 (1998), the husband sought dissolution of marriage and wife filed a separate petition to establish herself as mother of a child. She and husband agreed to have an embryo, genetically unrelated to either of them, implanted in a surrogate who, under a surrogacy contract, gave birth to child. The Court of Appeal held that:

(1) artificial insemination statute applied to both intended parents, who are to be treated, in law, as to natural parents of the child;

(2) the husband became lawful father by causing conception of child, even though the wife allegedly promised to assume all responsibility for child's care, and thus, he was obligated to support child; and

(3) fact that written surrogacy contract had not been signed at time of conception and implantation did not abrogate the husband's obligation to provide support to child.

FEATURE

Joel D. Tenenbaum
Harlan S. Tenenbaum

WRONGFUL ADOPTION

Imagine a young married couple, very much in love and wanting to start a family. After repeated failed attempts to conceive, the couple decided to consider adoption. They informed the Welfare Department of their desire to adopt a healthy baby. They waited for what seemed to be forever, and finally received a phone call from the Welfare Department. After meeting with a caseworker who informed them that a normal, healthy baby was available, they decided to adopt.

As the child grew, she suffered from many physical and mental problems. She was admitted to several hospitals for treatment, and after numerous tests and examinations, was finally diagnosed as suffering from a genetically inherited disease. The couple had relied upon the agency's representations in deciding to adopt and, after years of emotional and financial expense, they learned that the agency had lied. What rights do they have to redress these damages?

Increasingly adoptive parents turn to the courts when the duty to disclose necessary information regarding a child is violated. Brought under a variety of legal theories, these suits have been denominated actions for "wrongful adoption."

Wrongful adoption is "a tort action, based on fraud or negligence, which allows adoptive parents to recover for intentional or negligent misrepresentations made by an adoption agency or other intermediary regarding their adopted child's health history or genetic background."[1] It was virtually unknown before 1980, when California became the first state to consider the interests of the adoptive child in the context of tort theory.[2] Although the Court of Appeals denied recovery, it framed the two major issues that have been addressed in all subsequent wrongful adoption actions: (I) fraudulent misrepresentation and (II) negligent misrepresentation.

Fraudulent Misrepresentation

In *Burr v. Board of County Commissioners of Stark County.*[3] the Supreme Court of Ohio extended the common law tort of fraud to include "material" misrepresentations covering an infant's "background and condition." The court concluded that by deliberately misinforming adoptive parents of their adopted son's medical background, the agency deprived them of their right to make an informed parenting decision.

The Burrs had expressed their desire to adopt a male infant six months old or younger. Shortly thereafter, they were notified by the agency that seventeen month-old Patrick was available for adoption. A county caseworker told them that the child was a "nice big healthy baby boy," and that the biological mother, an unwed eighteen-year old living with her parents, was going out-of-state to search for better employment and had chosen an adoption plan. The only remotely negative piece of information shared with the Burrs regarding Patrick was that his grandparents were "at times mean to him." The Burrs decided to adopt Patrick.

In the ensuing years, Patrick suffered numerous physical and mental problems, including speech impairments, severe learning disabilities and mental retardation, and was finally diagnosed with Huntington's disease, a genetically inherited condition that destroys the central nervous system. While Patrick was undergoing treatment, the Burrs sought and obtained a court order to unseal his adoption records. Much to their surprise, the Burrs discovered that Patrick's birth mother was a thirty-one-year old patient in a psychiatric hospital and the child's father, whose identity was unknown, was presumed to be a psychiatric patient as well. The Burrs also learned the agency possessed actual knowledge of Patrick's health disorders before the adoption, because it had conducted a series of tests suggesting that Patrick was of lower than normal intellectual level for his age, and that his physical development was also

slower than normal. It was established at trial that Patrick's family background and medical history made him a prime candidate for Huntington's disease. None of this information had been shared with the Burrs and they testified that had they known Patrick was the child of two mental patients, they would not have agreed to adopt him.

Consequently, the Burrs won their suit. On appeal the Ohio Supreme Court, basing its decision on the elements of fraud, found the adoption agency liable for the intentional misrepresentation and affirmed an award of money damages for fraudulent inducement of adoption by a deliberate misrepresentation of the child's health.[4] The statute of limitations did not bar the Burrs' cause of action, since it did not accrue until the fraud was discovered, and the court rejected the adoption agency's argument that sovereign immunity protected the policy decision precluding the disclosure of personal background information. However, the court did limit the scope of its decision by establishing adoption agencies are not "guarantors" of a child's health, and that adoptive parents are no different from natural parents with regard to confronting the risks regarding their children's futurehealth.

In *Michael J. v. Los Angeles County Department of Adoptions*,[5] the California Court of Appeals also recognized a cause of action for intentional misrepresentation or fraudulent concealment made in the course of adoption. In *Michael J.*, an adoptive parent sued for emotional distress and medical expenses when her adopted son developed seizures and was diagnosed with a congenital degenerative nerve disorder known as Sturge-Weber Syndrome ten years after the adoption.

The attending physician at Michael's birth declined to "make a definite statement as to the prognosis for this child," noting on the hospital form that Michael had a large port wine stain on his face and chest. The agency did not know whether Michael had Sturge-Weber syndrome, but it did represent to the potential adoptive parents that, with the exception of the port wine stain, Michael was in good health.

The complaint in *Michael J.* alleged that the County knew, or should have known that the port wine stain was a manifestation of Sturge-Weber syndrome. The court found a triable issue of fact "regarding the failure to disclose a material fact (the physician's refusal to make a prognosis) within the agencyís possession," and concluded that a "good faith full disclosure of material facts concerning existing or past conditions of the child's health" is required. The court held a cause of action against an adoption agency for intentional misrepresentation or fraudulent concealment does not invalidate public policy, but actually supports it. However, the court did limit recovery available for adoptive parents to those cases of intentional misrepresentation or fraudulent concealment. Liability for "mere negligence in providing information regarding the health of a prospective adoptee" was specifically excluded, and the court refused to impose on agencies a "duty to predict the future health of a prospective adoptee."

Increasingly adoptive parents turn to the courts when the duty to disclose necessary information regarding a child is violated.

In *Gibbs v. Ernst*[6] Pennsylvania also recognized a cause of action for wrongful adoption based on fraudulent misrepresentation or concealment. An adoption agency provided prospective adoptive parents with the medical records of a child and his birth parents. Soon after the adoption was final, the child began to manifest violent and aggressive behavior. He was then hospitalized at four different facilities, and was finally diagnosed as schizophrenic. The Gibbs' subsequently learned the child had a history of such behavior, and upon further examination, the Gibbs discovered that the child had been neglected, suffered extensive physical and sexual abuse by his birth parents, and was repeatedly placed in foster care before his being adopted.

Looking at *Burr* and its progeny, the Court mandated that adoption agencies have an "uncompromising duty to maintain integrity in dealing with all prospective adoptees and adoptive parents" and, in cases where adoption agencies violate this duty, punitive damages awards to prevailing adoptive parents were specifically permitted. Though clearly acknowledging the tort of wrongful adoption, the court limited the scope of the action in concluding that "the only burden placed upon agencies arising from this tort is the obligation to refrain from fraudulent and deceitful tactics."[7]

In *Zernhelt v. Lehigh County Office of Children and Youth Services*, Pennsylvania recently readdressed the issue of fraud in the adoption context. In *Zernhelt*, prospective adoptive parents were provided with a one-page report stating that the child's biological parents were both in "good health." Sometime after the adoption, the child exhibited severe behavioral problems, including setting fire to his adoptive home. The adoptive parents later discovered the agency withheld information regarding the birth parents' extensive histories of mental illness. Suit was brought for fraud, and the Commonwealth Court of Pennsylvania determined such a claim was barred by the state's statute of immunity. Reasoning the statute declared imposition of liability on a local agency for negligent acts (defined as excluding conduct constituting a crime, actual fraud, actual malice, or willful misconduct) the Court concluded "absent a specific statement by our Supreme Court in *Gibbs v. Ernst* precluding a government adoption agency from invoking the immunity defense, we cannot from dicta, infer otherwise."

In *Roe v. Catholic Charities*,[9] the Illinois Court of Appeals recognized a cause of action based on the international misrepresentation of an adoptee's health and psychological background. In *Roe*, three separate families wanted to adopt children and sought the services of the same adoption agency. Each family sought a physically and mentally healthy child, and any background information that the agency could provide. The adoption agency assured the prospective adoptive parents the children to be adopted were healthy and that no extraordinary medical expenses would

need to be incurred. Relying upon these representations, the prospective parents decided to adopt. However, after the adoption, the children in each family became destructive and violent. They required professional counseling and the adoptive parents incurred extraordinary medical expenses. The parents obtained a court order to review the agency's files and discovered the agency was fully aware that each of the children was not sound at the time the agency represented them as such.

The Illinois Court of Appeals expanded the doctrine of common law fraud, rejected the agency's public policy and confidentiality arguments and concluded "although at the time of the adoption there was no statute requiring disclosure, the agency was prohibited from committing fraud."

A cause of action for intentional misrepresentation or fraudulent concealment in adoption was also recognized by the Supreme Court of New York in *Juman v. Louise Wise Services.*[11] In *Juman*, an agency represented that an adoptive child had been born to an intelligent, educated woman in her thirties who became pregnant by a boyfriend who died before they could marry. After the adoption the child manifested atypical behavior, was hospitalized repeatedly, and was ultimately treated for schizophrenia. The Jumans then discovered the birth mother had a long history of mental illness and had actually received a frontal lobotomy before the child's birth.

The Supreme Court explicitly recognized the tort of wrongful adoption as an extension of common law fraud and stated "New York's vital social interest in the welfare of its children is one of its strongest public policies,"[12] and that New York's trial courts should not hesitate to create a new tort if it serves to further that policy.

In *Wilson v. Stark County Department of Human Services,*[13] the Ohio Court of Appeals concluded state-operated adoption services are protected under the doctrine of sovereign immunity. In Wilson, an adoption agency had assured the Wilsons that it would comply with their desire to adopt "non-disruptive children of normal intelligence." Four children were then placed in the Wilson home. Two were removed from the home before adoption because of severe behavioral problems, the Wilsons adopted the other two. Subsequently one child assaulted Mrs. Wilson, and the other sexually abused the Wilson's biological children. The Wilsons later learned the children were a product of a home where the birth father was an alcoholic who was rarely home, and the biological mother was unemployed and unable to control the children.

In the court below, the Wilson's prevailed over the state sovereign immunity defense. Nevertheless, this decision was reversed on appeal.

In the Matter of Robert S.[14] Ohio again addressed the question of fraud in the adoption context. In this case, the parents agreed to adopt a child "with mild learning disabilities but not one with substantial special needs." After the adoption the child developed disturbed and violent behavior, which ultimately required placement in a mental institution. The parents brought a dependency action seeking to have Robert declared a dependent child, and requesting the Department of Human Services assume guardianship. The court granted the request, and DHS filed a motion to determine who was responsible for financing the child's treatment. The court held that because of the agency's misrepresentations concerning the child's health and the availability of state funds due to the child's special needs status, the adoption agency was responsible for "all costs of care and treatment for Robert." The court required the agency to reimburse the parents and the state for past expenses and to remain responsible for all future expenses.[15]

Adoption agencies have an "uncompromising duty to maintain integrity in dealing with all prospective adoptees and adoptive parents."

In *Mohr v. Commonwealth,*[16] Massachusetts recognized liability for wrongful adoption claims for fraudulent misrepresentations made to parents about a child's history. The Mohrs were open to adopting a child with a correctable medical or emotional problem. The Commonwealth's social worker told them a child available for adoption had been in foster care for years, that no information existed about the biological father, and that the biological mother was healthy, 5'1" tall, with blond hair and blue eyes, a passion for cooking and dogs and aspirations to become a nurse.[17] The social worker also told the Mohrs the child had been removed from foster care because of alleged abuse, had been hospitalized for malnutrition, and examined for dwarfism because she was small for her age. Despite these problems, the social worker assured the couple the child fit the description of a child in whom they would be interested for adoption. Based upon these representations the Mohrs adopted the girl.

Approximately nine years later, and after numerous incidents of behavioral problems, the Mohrs discovered that the girl had been born to a mental patient diagnosed with schizophrenia, and had been institutionalized on two separate occasions, after being diagnosed as mentally retarded, and suffering from moderate cerebral atrophy and a failure to thrive. In perpetuating what has become an antiquated social working philosophy of placement at all costs, the adoption agency was in possession of this information at the time of the child's placement, and intentionally did not disclose it. The Mohr court explicitly recognized an action for wrongful adoption in cases of intentional misrepresentation.

In *April v. Associated Catholic Charities of New Orleans,*[18] Louisiana came short of explicit recognition of wrongful adoption, but did allow for the possibility that such a cause of action could be recognized. In *April*, a child was adopted in 1984, and shortly thereafter began having seizures. The adoptive parents took the child to see a physician, and the doctor suggested that the child had fetal alcohol syndrome. The following August the physician wrote a letter explaining that the child had fetal alcohol syndrome as well as epilepsy, microcephalopathy, severe behavior disorder, and mild mental retardation. The Aprils

filed suit alleging that by failing to inform them of the risk of disability the agency breached its duty of care. The agency made a motion to dismiss claiming a lack of a cause of action and a violation of the statute of limitations, but both arguments were denied. The decision was reversed on appeal, and the appellate court concluded the period in which the adopted parents had to file suit began to run when they first discovered the child had fetal alcohol syndrome. That period began as soon as the child first displayed obvious symptoms of a permanent impairment, which did not require a formal diagnosis. In conclusion, the court observed that tolling the period when the cause of action was not known is an exceptional remedy directly opposing the civil code, and that its use should be strictly construed. Nevertheless, the court did not specifically overrule the trial court's recognition of wrongful adoption as a cause of action, and thus the question of whether such a claim would be recognized remains unanswered.

Negligent Misrepresentation

The scope of the tort of wrongful adoption was enlarged through the recognition of a cause of action for negligent misrepresentation by the Supreme Court of Wisconsin in *Meracle v. Children's Services.*[19] In *Meracle*, the adoptive couple told an adoption agency of their wish to adopt a "normal, healthy child," without any disabilities, terminal illnesses, deformities, or intellectual, emotional or physical impairments. The agency advised them that it had such a child and explained that, while the child's grandmother died of Huntington's disease, the child was not at risk for developing the disease because her biological father had tested negative for Huntington's. The couple, relying on the agency's representations, decided to adopt the child. Five years later the child began to develop Huntington's disease. The Meracles filed suit charging the agency with negligently misrepresenting to them that the child's father was free from Huntington's. Unlike other courts' decisions on accrual periods, the Supreme Court of Wisconsin determined the cause of action accrued upon the child's diagnosis, not when the Meracle's first learned of the negligent misrepresentation. The court opted not to address the question of "whether adoption agencies have a duty to discover and disclose health information about children they place for adoption," but did conclude that actions based on negligent misrepresentations were not barred by public policy, and such actions would not "expose adoption agencies to potentially unlimited liability nor [do they] make such agencies guarantors of the health of adopted children." The court however was also careful to limit liability to the agency's "affirmative misrepresentations about a child's health," and recovery to those extraordinary medical expenses directly resulting from the negligent misrepresentation.

In *M.H. v. Caritas Family Services,*[20] Minnesota also concluded claims of negligent misrepresentation against adoption agencies would not be barred by public policy considerations. In *M.H.*, an agency represented that a child was normal, healthy, and well adjusted, that the biological father was healthy and of normal intelligence, but that a possibility of incest existed in the child's family history. The couple failed to inquire further into the incest matter, and proceeded to adopt the child, relying on the agency's representations. Soon after the adoption was finalized, the child exhibited violent and disruptive behavior, and was later diagnosed as having attention deficit hyperactivity disorder. The parents investigated further into the background of the child and discovered the child was the product of incestuous rape where a 13 year old girl was molested by her older brother, a "borderline hyperactive" child of lower than average intelligence. Moreover, it was revealed the agency possessed this information before the adoption.

A cause of action for intentional misrepresentation or fraudulent concealment in adoption have been recognized by the Supreme Court of New York.

Citing *Meracle*, the Minnesota Court permitted a cause of action for negligent misrepresentation. The court held public policy favors such a cause of action because it would "promote accuracy when agencies attempt to communicate health information." The court reasoned "renouncing such liability may actually inhibit adoptions" because prospective adoptive parents would necessarily be suspicious of agencies with no incentive to avoid making false representations. The court limited recovery to extraordinary expenses incurred as the result of the misrepresentation.

In *Mallette v. Children's Friend and Service,*[21] Rhode Island joined the growing ranks of jurisdictions that recognize a cause of action for negligent misrepresentation. A prospective adoptive couple were assured a child whom they wished to adopt was healthy, but that the child's biological mother was learning disabled solely because of a head trauma. After the child was placed in the couple's home, the couple soon became aware of the child's abnormal physical and emotional problems. Upon investigation, they discovered the child's birthmother was actually diagnosed as possessing macrocephaly, pseudopicanthal folds, a high-arched palate, tachycardia, small clinodactyly of the fifth fingers, hand tremors, and poor coordination. In addition, she was mildly retarded, and no medical documentation existed to support the agency's claim that this resulted from a childhood head injury. All of this was known by the agency and none of it was shared with the prospective adoptive couple.

The adoptive parents sued, alleging negligent misrepresentation. The Supreme Court of Rhode Island deemed this claim cognizable. It reasoned "when CFS began allegedly volunteering information concerning Christopher's and his biological mother's medical and genetic background, the agency assumed a duty to refrain from making any negligent misrepresentations," and, "CFS breached such a duty by allegedly misinforming the Mallettes of the true state of Christopher's and his family's medical and genetic background." The court held "when the Mallettes alleged they would not have adopted Christopher if they had known of his medical and genetic background and their injuries resulted from justifiable reliance on

CFS's misrepresentations, a cause of action for negligent misrepresentation was sufficiently set forth."

In *Roe, supra*, Illinois also recognized a cause of action for negligent misrepresentation, concluding that the analysis of a duty under negligence theory must consider foreseeable injury, the likelihood of injury, the magnitude of the burden of guarding against that injury, and what the consequences would be if that burden were placed upon a respondent. The court determined the adoptive parents were owed the "duty of an honest and complete response [by the adoption agency] to [their] specific request concerning characteristics of the potentially adoptable child..."

In *Gibbs, supra*, Pennsylvania also allowed a wrongful adoption action based on negligence. The Pennsylvania Supreme Court held that an agency assumes the duty of telling the truth when it volunteers information to prospective parents. By requiring "that the adoption agency make reasonable efforts to determine whether its representations are true" the court acknowledged the greater responsibility placed on adoption agencies, but ruled that the foreseeability requirement would limit an agency's liability to only those conditions which are "reasonably predictable at the time of placement." Thus, according to the *Gibbs* court if adoption agencies refrain from making representations they are capable of avoiding these types of problems.

The appellate court did not specifically overrule the trial court's recognition of wrongful adoption as a cause of action.

In *Wallerstein v. Hospital Corp. of America*,[22] the Florida District Court of Appeals addressed a separate but related topic by allowing a claim of negligent misrepresentation against attending physicians who incorrectly assured adoptive parents of a child's health and suitability for adoption. The child was diagnosed as suffering from chronic encephalopathy, paralysis and cerebral palsy before the child's first birthday. In the suit against the physicians, it was alleged these conditions were or should have been obvious to trained medical personnel. The Court of Appeals accepted the negligent misrepresentation allegation, concluding "this often mentioned and rarely explained tort was viable." Since the doctors were employed to determine the child's suitability for adoption and to "examine, recognize, and diagnose Shawn's physical condition," and since the plaintiffs sought assurances from these physicians upon which they were to rely in making their decision to adopt, the doctors' negligent misrepresentation of the child's health constituted an actionable tort.

In *MacMath v. Maine Adoption Placement Services*,[23] the court did not

specifically preclude actions for negligent misrepresentation, but it did not find the requisite duty under the specific facts of the case. In MacMath, an adoptive couple expressed interest in adopting a child who was not exposed to drugs and did not have special needs. Shortly thereafter, a child was placed with the couple, and the child began to exhibit abnormal behavior. The MacMaths took the child to a physician and it was tentatively diagnosed as suffering either from statis encephalopathy or cerebral palsy. The MacMaths contacted the adoption agency, requesting information about the child's birthmother, and the agency provided the couple with all of the information in its possession. The information

> "no moral blame can be attributed to an adoption agency that makes a full disclosure of the child's medical history to prospective adoptive parents."

was deemed "sketchy and subject to differing interpretations," and the MacMaths proceeded to adopt the child. Soon after the adoption was finalized, the child was diagnosed with global neurodevelopmental dysfunction, an impairment that would deny the child the opportunity of leading a normal or independent life. The MacMaths brought suit against the adoption agency, alleging the agency was at fault for not advising them to postpone the adoption until the health information was more complete, and for failing to discuss the availability of public subsidies for special needs children.

The Supreme Court of Maine refused to recognize the legitimacy of the claim, characterizing it as a "mere failure to disclose information to adoptive parents." The court concluded the adoption agency had no knowledge of the child's medical problems, and that adoption agencies should not be burdened with a "duty to discover every bit of health information

regarding the children" placed for adoption. The court held no duty was breached where the MacMath's only claim was the agency was negligent in failing to advise them to postpone the adoption.

While some courts either explicitly or implicitly recognize the tort of wrongful adoption on a theory of negligent misrepresentation, others have not followed suit. In *Richard v. Vista Del Mar Child Care Services*,[24] the Court held public policy bars a negligence suit against an adoption agency. In this case, adoptive parents agreed to the placement of a child who was described by an adoption agency as healthy, but premature and with large earlobes. Upon placement, the child was taken to a pediatrician, who also concluded the child was healthy. Several years later the child was diagnosed as suffering from "severe neurological damage, hyperkinesia, and neurological immaturity." Suit was brought against the agency, and the court concluded, "to impose liability in a case such as this would in effect make the adoption agency a guarantor of the infant's future good health." The decision was based on the notion that "no moral blame can be attributed to an adoption agency which makes a full disclosure of the child's medical history to the prospective adoptive parents."

In *Allen v. Children's Services*,[25] the Ohio Court of Appeals held the only valid cause of action against an adoption agency where an adopted child proved unhealthy would be based on fraud. In Allen, an adoption agency told prospective adoptive parents a nine-month-old girl was healthy and normal, and the parents agreed to the placement of the child in their home. It was later discovered the child suffered from a "severe to profound hearing loss," and action was brought against the agency alleging negligence and breach of contract. The court eliminated the negligence claim, and tried the case solely on the theory of breach of contract, holding a promise on the part of an adoption agency to provide prospective parents with a healthy child did not give rise to an enforceable contract.

In *Engstrom v.State*,[26] prospective adoptive parents began adoption proceedings relying on an agency's representations that the biological parents' rights had been terminated. The birthmother's parental rights were terminated, and a social worker had represented during those proceedings that the birth father had died. The child was placed, the adoption process begun, and it was

then discovered the biological father was not only alive and well, but that he also wanted his biological child. Alleging the agency breached its duty of terminating the natural birth parents' rights and of properly investigating the child's medical history and heritage, the prospective adoptive family filed suit against the agency. The court determined the primary issue in the case was whether or not a social worker was bound to fully investigate the background of a child who was potentially to be adopted. The court was reluctant to imply such a legal duty of care, absent an express mandate from the legislature. As for public policy considerations, the court held an agency should incur no liability "absent fraud, willful intent to harm, or personal injury to the parties of the adoption."

In *Foster v. Bass*,[28] Mississippi held an adoption agency not liable for negligent failure to inform physicians that an infant placed for adoption had not been tested for phenylketonuria. In *Foster*, the adoptive couple was interested in adopting a newborn. At that time, PKU tests were not routinely administered and the attending physician did not order a PKU test for the infant. The adoption agency provided the prospective parents with a medical form containing the child's birth information with the results of the PKU test left blank. Ultimately, the child was diagnosed with PKU and the adoptive family was told the damage suffered by their child was permanent and irreversible. The adoptive parents sued the adoption agency, alleging the failure to test for PKU constituted negligent failure to provide proper medical information. The Supreme Court held the agency could not have reasonably foreseen the injury, and that the negligence of the medical staff and treating physicians superseded anything the agency did or failed to do.

Conclusion

Just as there are risks and benefits inherent in becoming biological parents, so too are there risks and benefits present in adoption. While the aforementioned cases clearly illustrate the principle that adoption agencies are not "guarantors" of a child's health, courts in certain jurisdictions are recognizing that fairness and sound public policy dictate the award of monetary damages to adoptive parents for fraudulent or negligent material misrepresentations by adoption agencies concerning the adopted child's history prior to adoption.

Delaware has yet to be presented with

a case involving these issues, and it remains to be seen whether a cause of action for wrongful adoption would be recognized. Nevertheless, as the tort becomes more widely known, and as adoptions increase in Delaware, it appears to be only a matter of time before Delaware joins the growing list of states that have had to address the issue. ◆

FOOTNOTES

1. Pat McDonald-Nunemaker, *Wrongful Adoption: The Development of A Better Remedy in Tort*, 12 J. Am.Acad.Matrim.Law 391 (1994).

2. *Richard P. v. Vista Del Mar Child Services*, 106 Cal. App.3d 860, 165 Cal.Rptr. 370 (1980)

3. 491 N.E.2d 1101 (Ohio 1986).

4. 491 N.E.2d at 1108

5. 247 Cal.Rptr. 504 (Cal.Ct.App. 1988)

6. 615 A.2d 851 (Pa.Commw.Ct. 1992), modified, 647 A.2d 882 (Pa. 1994)

7. Hank Grezlak, *Adoptive Parents Can Sue Placement Agencies for Misrepresentation And Child Abuse History*, Pa. L. Weekly, Sept. 26, 1994 at 15

8. 659 A.2d 89 (1995)

9. 588 N.E.2d 354 (Ill.App.Ct. 1992) cert. Denied, 602 N.E.2d 475 (Ill. 1992)

10. One child had displayed violent and destructive behavior in foster care such as "stomping the family's dog to death," another had seen mental health professionals for violent behavior as well as social, intellectual and mental retardation, and the third had severe episodes of abnormal behavior, including smearing feces on the interior walls of foster homes. None of this information had been shared with the prospective adoptive parents.

11. 8 N.Y.S.2d 612 (N.Y. Sup. Ct. 1994), affid, 620 N.Y.S.d 371 (N.Y.App.Div. 1995)

12. Id. at 616, citing *Barry v. Ingraham*, 400 N.Y.s.2d 772 (N.Y. 1977)

13. 1993 WL 135276 (Ohio Ct. App, 1993) revid, 639 N.E.d 105 (Ohio 1994)

14. 647 N.E>2d 869 (Ohio Ct. App. 1994)

15. The adoption agency challenged appealed on the grounds that the court lacked subject matter jurisdiction to try an action in fraud. The Ohio Court of Appeals held it "entertain[ed] a motion to determine the support obligations of the parties to a dependency action," not an "action for fraudulent misrepresentation,"[15] and, since the juvenile court merely based its imposition of support obligations on its finding of fraud under the facts, no error occurred.

16. 421 Mass. 147, 653 N.E.2d 1104 (1995)

17. Id.

18. 629 So. 2d 1295 (La.Ct.App. 1993)

19. 437 N.W.2d 532 (Wis. 1989)

20. 475 N.W.2d 94, 96 (Minn.Xt.App. 1991), modified, 488 N.W.2d 282 (Minn. 1992)

21. 661 A.2d 67

22. 573 So. 2d 9 (Fla.Dist.Ct.App. 1990), reh'g denied (1991).

23. 635 A.2d 359 (Me. 1993)

24. 106 Cal.App. 3d 860, 165 Cal.Rptr. 370 (1980).

25. Id. at 374

26. 58 Ohio App.3d 41, 567 N.E.2d 1346 (1990)

27. 461 N.W.2d 309 (1990).

28. 575 So.2d 967 (Miss. 1990), reh'g denied (1991).

A. P. Herbert

PRATT v. PRATT, MUGG INTERCEPTING: A SWAN SONG

Much comment was caused in legal circles today by an unconventional speech by Sir Oliver Slick, K.C., in opening a case in the Probate and Divorce Division. Sir Oliver is retiring from practice in a few days' time, and it is thought that he may be suffering from overstrain.

Sir Oliver said: May it please your lordship, members of the jury, in this case I appear for the petitioner, Mrs. Gladys Eleanor Pratt, who is praying for a divorce from her husband on account of — well, I mean, she wants to get rid of the man and that's all about it, milord. Milord, this is probably the last case in which I shall ever appear, so, to tell you the truth, I take a pretty detached view of the whole proceedings. Well, I mean, look at old Twopenny here (*Mr. Albert Twopenny, of the firm of Twopenny and Truelove, solicitors for the Petitioner*)—he'll never give me a brief again after this, but I don't care! And that's what makes the whole thing so terribly *funny!*
(Sir Oliver here laughed heartily.)

The Judge: Sir Oliver, if this is your swan song, I am sure that you would wish it to be in tune with the traditions of the Bar and with your own fine record.

Sir Oliver: Certainly, milord; you're a good sort, milord, and I don't want to offend you though you've given me a packet of trouble from time to time. Well, milord, the facts are these. The parties were married only a year ago at Westminster, and lived happily together for about three weeks, milord. Temperamentally, perhaps, they were unsuited; the husband was fond of golf and the woman of lawn tennis. However, the wife remained and is to this day devoted to her husband, but last year, milord, on July 20th — no, 21st — Mrs. Pratt noticed that Mr. Pratt's affections were cooling, and on the 24th, milord, she found him telephoning to a strange woman, a Miss Elizabeth Mugg, milord, who has been cited in this case as a co-thingummy —

The Judge: Sir Oliver, I'm not sure that I follow you.

Sir Oliver: Co-respondent, milord, that's the word I wanted. (Sir Oliver then lowered his voice and continued in tones suggestive of profound moral indignation.) Milord, there seems to be no doubt that this woman, by a protracted course of duplicity and cunning, has deliberately stolen away this husband from his wife. It is difficult, milord, to frame language strong enough to describe a woman who, without any provocation, it appears, from her unfortunate partner in guilt, has wormed her way into the affections of an English husband, and invaded, corrupted, and finally broken up an English home. Picture, milord, the state of mind of my unfortunate client as, day by day and bit by bit, she sees that devotion which is her right transferred to the supplanter. On the 26th, milord, this poor woman had a nervous breakdown; on the 29th she had fits. Milord, do you think I've done enough of this?

The Judge: I beg your pardon, Sir Oliver?

Sir Oliver: I mean, need I give the jury any more of this gup?

**Pratt v. Pratt — Mugg Intercepting: A Swan Song* is reprinted with the kind permission of A. P. Watt Ltd. on behalf of Crystal Hale and Jocelyn Herbert. *Pratt* first appeared in *Punch* and later in *Misleading Cases In The Common Law*, published in 1927 by Methven & Co. Ltd., London.

ll in love with her. I can tell
en ourselves, gentlemen of
ve had a job to get him to
is divorce at all. Didn't like
t. But in the end we got him
oney. You see, he's terribly
ilord, and she's going to pay
decent alimony. Of course,
I know, milord, I shall a-
ke him pay Mrs. Pratt alimo-
at alimony, too; but that's all
esides, we made things easy
er Elizabeth Mugg, and that
turn the scale, because he
had to go to Brighton with
e hates Brighton. But when
ie needn't even see Elizabeth
didn't mind being divorced
her so much. In point of fact
as seen Elizabeth Mugg. I

very simple. This is just one of the ordinary trumped-up upper-class divorce cases, you know. The lady's just bored adores Mrs. Pratt. But it's his own fault, really. The trouble was, you see, milord, that he married the girl for her money mention that because I don't want any one here to take too seriously what I said about Elizabeth Mugg just now,

TRAGIC MOMENTS

Strong-minded Lady (on meeting the bride and groom): I trust you will be as happy as we have been.

PI MUGG INTERCEPTING: A SWAN SONG

Much comment was caused in legal circles today by an unconventional speech by Sir Oliver Slick, K.C., in opening a case in the Probate and Divorce Division. Sir Oliver is retiring from practice in a few days' time, and it is thought that he may be suffering from overstrain.

Sir Oliver said: May it please your lordship, members of the jury, in this case I appear for the petitioner, Mrs. Gladys Eleanor Pratt, who is praying for a divorce from her husband on account of — well, I mean, she wants to get rid of the man and that's all about it, milord. Milord, this is probably the last case in which I shall ever appear, so, to tell you the truth, I take a pretty detached view of the whole proceedings. Well, I mean, look at old Twopenny here (*Mr. Albert Twopenny, of the firm of Twopenny and Truelove, solicitors for the Petitioner*)—he'll never give me a brief again after this, but I don't care! And that's what makes the whole thing so terribly *funny!*
(Sir Oliver here laughed heartily.)

The Judge: Sir Oliver, if this is your swan song, I am sure that you would wish it to be in tune with the traditions of the Bar and with your own fine record.

Sir Oliver: Certainly, milord; you're a good sort, milord, and I don't want to offend you though you've given me a packet of trouble from time to time. Well, milord, the facts are these. The parties were married only a year ago at Westminster, and lived happily together for about three weeks, milord. Temperamentally, perhaps, they were unsuited; the husband was fond of golf and the woman of lawn tennis. However, the wife remained and is to this day devoted to her husband, but last year, milord, on July 20th — no, 21st — Mrs. Pratt noticed that Mr. Pratt's affections were cooling, and on the 24th, milord, she found him telephoning to a strange woman, a Miss Elizabeth Mugg, milord, who has been cited in this case as a co-thingummy —

The Judge: Sir Oliver, I'm not sure that I follow you.

Sir Oliver: Co-respondent, milord, that's the word I wanted. (Sir Oliver then lowered his voice and continued in tones suggestive of profound moral indignation.) Milord, there seems to be no doubt that this woman, by a protracted course of duplicity and cunning, has deliberately stolen away this husband from his wife. It is difficult, milord, to frame language strong enough to describe a woman who, without any provocation, it appears, from her unfortunate partner in guilt, has wormed her way into the affections of an English husband, and invaded, corrupted, and finally broken up an English home. Picture, milord, the state of mind of my unfortunate client as, day by day and bit by bit, she sees that devotion which is her right transferred to the supplanter. On the 26th, milord, this poor woman had a nervous breakdown; on the 29th she had fits. Milord, do you think I've done enough of this?

The Judge: I beg your pardon, Sir Oliver?

Sir Oliver: I mean, need I give the jury any more of this gup?

**Pratt v. Pratt — Mugg Intercepting: A Swan Song* is reprinted with the kind permission of A. P. Watt Ltd. on behalf of Crystal Hale and Jocelyn Herbert. *Pratt* first appeared in *Punch* and later in *Misleading Cases In The Common Law*, published in 1927 by Methven & Co. Ltd., London.

ell in love with her. I can tell
een ourselves, gentlemen of
ve had a job to get him to
his divorce at all. Didn't like
t. But in the end we got him
money. You see, he's terribly
lord, and she's going to pay
decent alimony. Of course,
, I know, milord, I shall a-
ke him pay Mrs. Pratt alimo-
at alimony, too; but that's all
esides, we made things easy
er Elizabeth Mugg, and that
turn the scale, because he
had to go to Brighton with
e hates Brighton. But when
e needn't even see Elizabeth
didn't mind being divorced
her so much. In point of fact
as seen Elizabeth Mugg. I
mention that because I don't want any one here to take too seriously what I said about Elizabeth Mugg just now,

very simple. This is just one of the ordinary trumped-up upper-class divorce cases, you know. The lady's just bored adores Mrs. Pratt. But it's his own fault, really. The trouble was, you see, milord, that he married the girl for her money

TRAGIC MOMENTS

Strong-minded Lady (on meeting the bride and groom): I trust you will be as happy as we have been.

MU[illegible]
A SWAN SONG

Much comment was caused in legal circles today by an unconventional speech by Sir Oliver Slick, K.C., in opening a case in the Probate and Divorce Division. Sir Oliver is retiring from practice in a few days' time, and it is thought that he may be suffering from overstrain.

Sir Oliver said: May it please your lordship, members of the jury, in this case I appear for the petitioner, Mrs. Gladys Eleanor Pratt, who is praying for a divorce from her husband on account of — well, I mean, she wants to get rid of the man and that's all about it, milord. Milord, this is probably the last case in which I shall ever appear, so, to tell you the truth, I take a pretty detached view of the whole proceedings. Well, I mean, look at old Twopenny here (*Mr. Albert Twopenny, of the firm of Twopenny and Truelove, solicitors for the Petitioner*)—he'll never give me a brief again after this, but I don't care! And that's what makes the whole thing so terribly *funny!*
(Sir Oliver here laughed heartily.)

The Judge: Sir Oliver, if this is your swan song, I am sure that you would wish it to be in tune with the traditions of the Bar and with your own fine record.

Sir Oliver: Certainly, milord; you're a good sort, milord, and I don't want to offend you though you've given me a packet of trouble from time to time. Well, milord, the facts are these. The parties were married only a year ago at Westminster, and lived happily together for about three weeks, milord. Temperamentally, perhaps, they were unsuited; the husband was fond of golf and the woman of lawn tennis. However, the wife remained and is to this day devoted to her husband, but last year, milord, on July 20th — no, 21st — Mrs. Pratt noticed that Mr. Pratt's affections were cooling, and on the 24th, milord, she found him telephoning to a strange woman, a Miss Elizabeth Mugg, milord, who has been cited in this case as a co-thingummy —

The Judge: Sir Oliver, I'm not sure that I follow you.

Sir Oliver: Co-respondent, milord, that's the word I wanted. (Sir Oliver then lowered his voice and continued in tones suggestive of profound moral indignation.) Milord, there seems to be no doubt that this woman, by a protracted course of duplicity and cunning, has deliberately stolen away this husband from his wife. It is difficult, milord, to frame language strong enough to describe a woman who, without any provocation, it appears, from her unfortunate partner in guilt, has wormed her way into the affections of an English husband, and invaded, corrupted, and finally broken up an English home. Picture, milord, the state of mind of my unfortunate client as, day by day and bit by bit, she sees that devotion which is her right transferred to the supplanter. On the 26th, milord, this poor woman had a nervous breakdown; on the 29th she had fits. Milord, do you think I've done enough of this?

The Judge: I beg your pardon, Sir Oliver?

Sir Oliver: I mean, need I give the jury any more of this gup?

---

* *Pratt v. Pratt — Mugg Intercepting: A Swan Song* is reprinted with the kind permission of A. P. Watt Ltd. on behalf of Crystal Hale and Jocelyn Herbert. *Pratt* first appeared in *Punch* and later in *Misleading Cases In The Common Law*, published in 1927 by Methven & Co. Ltd., London.

Because, of course, you know, the whole case is a put-up job —

The Judge: Sir Oliver, I think you are not very well. Perhaps it would be fairer to your client to adjourn.

Sir Oliver: Never was better, old boy. Fit as yourself, and fitter. Well, I wasn't playing bridge half the night, milord, as I happen to know you were!
(Sir Oliver here laughed again in a genial manner.)

The Judge: If you are in good health, Sir Oliver, we will continue the hearing, but you will please confine yourself to the facts of the case.

Sir Oliver: Well, milord, the facts are very simple. This is just one of the ordinary trumped-up upper-class divorce cases, you know. The lady's just bored with him, that's all. Well, I mean, in these days, living with the same husband, week after week, for a whole year — Society girls can't *stand* it. There's nothing unpleasant in the case, nobody's done anything wrong, but my client wants to marry a chap in the Guards — Jack Filter, *you* know, milord, fellow with the eyeglass you met at the club the other day, so we've pitched this yarn about Pratt and Elizabeth Mugg — Don't interrupt, Twopenny!
(Mr. Twopenny spoke earnestly to Sir Oliver at this point, and subsequently on several occasions, but Sir Oliver did not appear to hear what was said.)

Sir Oliver, continuing: I'm sorry for Pratt in a way — that's the respondent, milord — he's a very good fellow and adores Mrs. Pratt. But it's his own fault, really. The trouble was, you see, milord, that he married the girl for her money and then fell in love with her. I can tell you, between ourselves, gentlemen of the jury, we had a job to get him to agree to this divorce at all. Didn't like it, not a bit. But in the end we got him over the money. You see, he's terribly in debt, milord, and she's going to pay him a very decent alimony. Of course, technically, I know, milord, I shall ask you to make him pay Mrs. Pratt alimony, and a fat alimony, too; but that's all eyewash. Besides, we made things easy for him over Elizabeth Mugg, and that helped to turn the scale, because he thought he had to go to Brighton with her, and he hates Brighton. But when he found he needn't even see Elizabeth Mugg he didn't mind being divorced because of her so much. In point of fact he never has seen Elizabeth Mugg. I mention that because I don't want any one here to take too seriously what I said about Elizabeth Mugg just now,

TRAGIC MOMENTS

Strong-minded Lady (on meeting the bride and groom): I trust you will be as happy as we have been.

because Elizabeth Mugg is really a very nice woman and knows her job thoroughly. Elizabeth has been in eighty-nine divorce cases, she tells me, under various names, and has never met one of the parties yet. In this case, of course, she went down to Brighton and stayed a night at the 'Cosmopole'. Pratt's valet stayed there the same night, and put a pair of Pratt's boots outside Elizabeth's room, and the next day he met one of the chambermaids and identified the boots, and there you are. You'll have all the evidence, of course, Pratt's bill, and the cloakroom ticket and the menu and everything, but that's all there is to the case.

The Judge: Sir Oliver, I never like to interrupt Counsel when opening a case, but are you materially assisting your client?

Sir Oliver: I should be sorry if you thought I wasn't, milord, because Mrs. Pratt is really quite a decent little woman. In fact, everybody in the case is thoroughly decent, including your lordship, if I may say so, and it seems to me a great pity that all these decent people should be put to all this trouble and expense and publicity when the whole thing might easily be done in two minutes at a registry office or through one of the big stores. On the other hand, of course, I have to live, and you have to live, milord, and Elizabeth Mugg has to live, so we mustn't complain. Speaking for myself, I'm doing very well out of this case, because my client is not only decent but rich, and old Twopenny here knows how to make'em cough up — well, I mean I've got one thousand pounds on the brief and a pretty good refresher for a potty little divorce. I mention these points, milord, because it is so nice to get a touch of reality in a case like this. How you can sit up there, milord, day after day, swallowing all the bogus stuff served up to you by members of the Bar like me, who ought to know better —

The Judge: Sir Oliver, this is an occasion without precedent in all my long experience, and I find a difficulty in dealing with it. But if you are unable to conduct yourself in accordance with the traditions of your profession and the interests of your client I shall be compelled to ask you to withdraw from this court.

Sir Oliver (bowing): Milord, I bow to your ruling. Milord, I have little to add at this stage of the case. My client will now go into that box and tell the tragic story of her married life. She will tell you of affection blighted, of a home made desolate and a heart destroyed. She will tell you that even at this late hour she is ready to hold out the hand of forgiveness and clasp to her bosom the rightful partner of her life, if he will but tear himself from the embraces of the supplanter, Mugg, a woman, milord, who, as you will shortly hear, has from first to last — from first to last, milord — played a part in the lives of these two people which is without precedent, milord, in my experience for treachery, deceit, ingratitude, and cunning. Call Gladys Pratt.

The Judge: We will now adjourn.

The Court adjourned. ◆

FEATURE

DELAWARE SUPREME COURT SPECIAL COMMITTEE ON FAMILY COURT INTERNAL OPERATING PROCEDURES Final Report March 30, 1999

The Family Court of Delaware is undergoing both internal and external review. Delaware Lawyer has excerpted major sections from the only report issued to date. As we went to press, neither internal Family Court committee - Courting Quality and the Committee to Establish Trial Court Performance Standards for Family Court had issued a final report, and the report being prepared for Senator Thomas Sharp was unavailable. It is expected that by the time the reader has this issue in hand, one or more of those documents will have been released. While the news media highlighted the Special Committee's recommendations for additional judges, there are far more important analyses and recommendations in this excellent document. Given available space, we have included those sections that should have the most significant impact on family matters. The article incorporates substantial portions of the Final Report language edited to a magazine format. Footnotes have been eliminated except where text of the Final Report has been reduced to footnote form to save space. Those who wish to examine this very able report in its entirety can secure copies from the Supreme Court.

The Special Committee on Family Court Internal Operating Procedures (the "Committee") was created by Chief Justice E. Norman Veasey in Administrative Directive Number 112, dated November 17, 1997. It was established to address the need recognized by both the Supreme Court and the Family Court of the State of Delaware (the "Family Court" or the "Court") "to ensure that all matters within the Courtís jurisdiction are resolved as expeditiously as possible commensurate with the obligation of the Courts of this state to provide its citizens with the highest quality of justice feasible."

The Committee began by conducting interviews of all judges, commissioners, and masters. It quickly became apparent that strict internal operating procedures should not be developed, but standards and guidelines to unify current practice should be established. The Committee developed standards for: (1) assignment of case types to judges and commissioners; (2) time from assignment to scheduling; (3) time from assignment to hearing date; and (4) time from hearing to decision. In consultation with the Family Court judges, the Committee also developed guidelines for length of hearings in each case type that could serve as a starting point for judges in deciding, in conjunction with standards and guidelines, that the Court will not be able to meet reasonable standards without additional judges. The Committee members believe that as many as four judges will be needed.

The Court deals with a caseload astonishing in both volume and breadth of jurisdiction. A list of jurisdictional matters takes up nearly five single-spaced pages. Close to 58,000 new filings were registered in the Court during fiscal 1997, exclusive of motions and applications for interim relief. Since 1992, the growth in new filings has increased the Court caseload by 30%. Family Court jurisdiction, which goes to the heart of family relationships, brings the timing and quality of each Court decision under close scrutiny from litigants, relatives, legislators, and the community at large. The resulting pace and the concomitant focus on efficient processing are perhaps greater than in any other of our trial courts. The Court regularly adjudicates matters that may not be best resolved by adversary proceedings. Preserving a family unit may be a task better suited for psychologists and social workers. It is not our function to examine such questions, but the Family Courtís goals and responsibilities differing from those of other trial courts must be considered in any review. As one member of the bench put it, referring to the possibility of the adoption of procedures requiring uniform treatment of all cases before the Family Court, "You cannot put children in boxes."

The Court consists of thirteen judges of equal judicial authority. The Chief Judge is the administrative head of the Court. There is a Judicial Council composed of two Associate Judges and the Chief Judge. There are also nine commissioners and six masters. Administrative and operational staff assist the many self-represented parties, attempting to resolve cases through alternative dispute resolution methods, and preparing unresolved cases for judicial scheduling.

Despite the 30% increase in filings over the last five years, the

Court has been successful in stabilizing the number of pending cases through creative judicial initiatives and operational modifications. Although the measures employed to keep pace with the increasing workload have been successful in moving cases through the system, the Court and the constituencies affected by its decisions have expressed the need to examine current Court processes and to determine (a) whether there are further possible efficiencies and (b) whether there is a need for operating procedures to assist the Court in administering justice.

RESULTS OF INTERVIEWS AND INFORMATION GATHERING

Current Judicial Case Processing System

Guiding Principles

The current system allows each judge to decide how cases will be handled once they reach the judgeís assignment list. One underlying principle of a unified family court is that one judge should handle all of the matters related to a particular family. This "one judge/one family" principle applied in the Family Court has served as a model for courts across the nation. Courts employing this model are perceived as providing "a more efficient, less costly and damaging, consistent and longer lasting resolution of the problems presented." This approach is applied in Delaware where a specialized knowledge of the family is useful in fashioning relief. Contested divorce, custody, visitation, support, property division, and related matters benefit greatly from this approach. On the other hand, cases requiring singular action on the part of the Court, such as criminal and delinquency trials, protection from abuse proceedings, stipulations, and consents do not require an historical perspective and can be processed more efficiently through random assignment. In between these two categories are cases of dependency and neglect resulting in foster care placement. These cases require swift processing. The Family Court assigns a foster care case to a specific judge who remains with the case, even though a different judge may handle other aspects of the family's file.

External Requirements

Criminal and delinquency cases are subject to Speedy Trial Guidelines. The PFA statute requires that all cases be heard within thirty days. Bail review hearings are required for detained defendants on the next Court day following detention. Similar requirements exist for issuing decisions in specified time periods.

Case Processing before Judicial Assignment

Although the scope of the Committee's work starts with judicial assignment, a generalized explanation of case processing before judicial assignment is helpful in understanding the judges' caseload. The following explanation is will not apply to every type of action in each county.

Every petition and motion is sent to case processing upon filing. Summons and service documents are prepared and sent to either the sheriff or a private company for service of process. Upon return of service of process, eligible cases are sent to the mediation unit. Cases ineligible or bypassing mediation are sent to the judge assigned the file. If no judge is assigned, FAMIS (the Courtís automated system) selects the judge to be assigned. Cases resolved in mediation are signed by a judge, commissioner, or master, depending upon the level of judicial officer needed for the type of case or action. In support cases, unsuccessful mediations are sent to case processing for scheduling before a commissioner or master. Cases ineligible or unresolved at the commissioner or master level are placed on a judge's assignment list. Motions and filings other than petitions are docketed and sent directly to assigned judges for action. Applications for expedited hearings are processed on the day of filing, and decisions on granting or denying them are made within twenty-four hours. Criminal cases are reviewed for eligibility for arbitration. A case is scheduled for arraignment upon receipt. A criminal case manager schedules each subsequent stage at the time of appearance. Judges assign dates for trial, sentencing, and amenability hearings.

The Committee cannot help but note that the "intake" process could be materially improved by assigning legally trained personnel (staff attorneys, paralegals, etc.) to review each filing when it is made. Defects in paperwork can be noted and corrected early in the process. Furthermore, initial routing to arbitration, mediation, etc. may be enhanced if legally trained personnel make the initial decisions.

Interview Results

Judicial officers described how their chambers process cases. However, none expressed a confident understanding of how his or her colleagues processed cases. There is no consistent system for handling a case once it is assigned. Not only do judges have their own system, there is very little sharing of system information among the judges. Likewise there is no system for tracking cases with precision. The systems now in place appears to be neither accurate nor helpful in identifying issues before they become problems.

The interviews also showed lack of understanding of processing from filing to judicial assignment. Concerns emerged from each level of decision making about the distinction between judges, commissioners, and masters. Those interviewed consistently recommended clearer definition of duties, clearer demarcation between levels of authority, and a clearer system for measuring productivity.

Some common needs and recognized deficiencies emerged from the interviews and observations by Committee members, including needs: **(a) to better understand processing throughout the Court; b) to share successful techniques among judges; c) for enhanced collegiality, mentoring, and training; d) for better definition of the distinction between judges and commissioners; e) for measures of productivity that consider the complexities of the cases; f) for recognition that an efficient pace must be accompanied by judicial quality and an opportunity for litigants to be heard; g) for better screening at the earliest points of processing and referral for dismissal, where appropriate; h) for staff attorneys to review and advise processing staff on deficient filings; and i) for better and more available information to reduce the inefficiencies resulting from uninformed filings by pro se litigants. The Committee also notes both that the general pace of the Court is detrimental to morale at all levels and that the skill and efficiency levels among judicial officers vary considerably.**

COMMITTEE RECOMMENDATIONS

The Committee process and deliberations made clear that the best means to achieve the goals of the Supreme Court set forth in Administrative Directive Number 112 is by developing standards for disposing of cases, guidelines on the length of hearings, and procedural changes. Established standards and guidelines, whether internally promulgated or externally published, will bring a degree of predictability to the processing functions while preserving the decision-making autonomy of judges.

The Committee determined that the diversity of Family Court jurisdiction precludes formal procedures for each matter before the Court. Family Court has juris-

diction over juvenile and certain adult crimes, custody of children, adoptions, divorces, enjoining spouses from injuring one another, etc. Relief ranges from incarceration to injunctions to money awards. All of this is to be accomplished within the confines of the overarching statutory directives to preserve the family structure if possible. To develop rigid and uniform internal operating procedures for the Court would require many sets of procedures for the many different matters — a cumbersome result at best. Instead, the Committee believes that the most important aspect of the Court's work from the litigants' perspective is rendering timely justice. To build public trust and confidence in the Court, the processes must be fair, efficient, swift, and so perceived. Timing the process lends itself to standards. The time to disposition and the various steps along the way are subject to objective measurement. Judges, lawyers, and litigants will be able to determine if justice is being dispensed promptly and fairly.

The establishment of standards for disposing of cases without mandating the methods for meeting them is consistent with the diverse jurisdiction of Family Court. Specialized methods and remedies can be applied where desirable. Judges will be free, and indeed encouraged, to experiment and develop novel approaches. At the same time, the Committee members thought it would be helpful to provide judges with nonbinding guidelines on the length of hearings.

Before turning to standards and guidelines, we should note several other recommendations. The Committee members are convinced that the standards and guidelines cannot be met without two, and possibly four, additional judges. The Committee recognize that increasing productivity within a given court system by the addition of judges is generally the last step taken. Before adding judges, we should see what can be done to increase the capacity of the system. We should consider such options as the increased use of alternative dispute resolution. In Family Court, however, many matters are resolved primarily through mediation before requiring decision by commissioners or judges. Thus, it is questionable whether additional capacity can be achieved by the increased use of alternative dispute resolution. The Committee, however, makes one recommendation, the use of nonbinding arbitration.

Adding more commissioners and masters probably will not increase the capacity of the system, since a large caseload does not appear to result in delay at that level. The caseload that requires a decision by a judge appears to be at the point where delay in disposition results far too often.

The Committee has considered other measures to increase the efficiency of Court process. Adding staff attorneys and law clerks might improve the efficiency of the judges, and a number of the procedural changes recommended here could have the same effect. However, the Committee has concluded that even with these efficiencies, the existing number of judges will be unable to meet the recommended standards. Accordingly we recommend that two judges be added to the Court in 1999. It is possible that two more judges will be needed in the year 2000. A definitive decision on the latter issue should not be made until two events occur and are evaluated. First, the recommendations of the Committee need to be put in place. Secondly, there are a number of other committees currently evaluating various aspects of the Court. Their work needs to be coordinated with ours. Until all of the resultant information is available, no final decision on more than two additional judges can be made.

Standards

Standards must be set at reasonable levels. Judges are human beings of varied experience and ability. Not all judges perform at the same level. Some arrive at decisions more quickly than the hypothetical "average" judge. However, quickness without depth of analysis is not a laudable goal. Some perform at the opposite end of the spectrum — more slowly and deliberately. Skill levels also vary significantly. In addition, we expect more from experienced judges than from new judges. Thus the standards have been set with the knowledge that some judges will easily meet them, and some will have difficulty in doing so. The function of the standards is to provide workable goals for all judges and to measure their success in reaching them.

1. Scope of Standards

The four areas for the proposed standards are: (a)Class of cases appropriately handled by judges, commissioners, and masters; (b)Time from judicial assignment to scheduling; (c) Time from judicial assignment to hearing date; and (d) Time from hearing to issuance of final disposition.

In developing standards in these areas, the factors are reasonableness, aggressiveness, and visibility. Reasonableness of time standards can be approached from several points: what is reasonable (1) in the eyes of litigants and attorneys; (2) in light of the number of cases and available resources; and (3) in the interests of expedient justice. It is likely that many of the failed attempts in other jurisdictions to develop workable standards suffered under the difficulties of this analysis. Administrative Directive 112 suggests a balancing of these factors. What may seem a reasonable time to a litigant for bringing a case to resolution may be impractical in view of the number of pending cases. What may seem reasonable in view of the high volume of cases may not accord with a child's best interests.

Aggressiveness of standards is a policy decision to be made at the highest level. Standards must consider the broad range of Family Court subject matter. Setting standards that merely portray the current state of affairs reduces their value in improving the Court's performance and public respect for the Court. On the other hand, too aggressive standards without sufficient resources will have a negative effect, decreasing the quality and efficiency of justice and reducing confidence in the system. **Unreasonable standards are guaranteed failures.** The Committee intends the standards to reflect the complexity of case types, and to inspire a higher quality of expedient justice.

2. Standard for Cases Assigned to Judges, Commissioners, and Masters

Determining the types of cases that should be heard by judges, commissioners, and masters is a difficult task. The use of other judicial officers is an effective tool for resolving cases, particularly in a jurisdiction with large numbers of filings. Despite the highly effective use of alternative dispute resolution in custody, visitation, and support matters, and arbitration in delinquency cases, the Family Court is still left with approximately 3,400 cases for each judge. Clearly, if not for the referral of cases to commissioners and masters, the Family Court would drown in filings. At the same time that commissioners and masters have made the caseload more manageable, the use of these other judicial officers raised some concern about the distinctions between the levels of hearing officers. The Court has used commissioners and masters increasingly over the last six years to keep the pending caseload from rising, but the benefit achieved by deploying other judicial officers has probably been maximized, and has reached the point of diminishing returns. In light of the increasing caseload and the stated

desire of the Court for better distinction between judges, commissioners, and masters, the Committee requested an analysis of the types of cases that should be assigned to each level of judicial officer.

Commissioners and masters are highly effective in those cases requiring one-time contact with the Court to resolve matters of average complexity. In child support cases, based primarily on the Delaware Child Support Calculation (Melson) Formula, commissioners and masters have been able to handle the vast majority of filings. Commissioners and masters can also be effective in handling interim matters that will be decided finally by judges. They also effectively handle interim visitation orders and procedural motions. Finally, commissioners can be used effectively in the criminal and delinquency process to handle most misdemeanor cases resulting in pleas or trials.

Judges are responsible for the entire caseload of the Court, but in light of the overwhelming number of filings, their time should be devoted to cases requiring the highest level of decision making because of complex of subject matter, significant effect on the parties, and the seriousness of criminal/delinquent conduct. Litigants, legislators, and the community at large expect that felony offenses will be decided and sentences determined by judges according to the importance of an offense. By the same token, judges should not be assigned to hear routine misdemeanors, more appropriately heard by commissioners. Similarly, parents expect that the best interests of their childrenís lives will be decided at the highest level. Abused, neglected, and dependent children placed in foster care deserve permanent homes and rely on judges to exercise their authority to that end. The Committee's recommendation on the standard for cases assigned to judges, commissioners, and masters reflects the seriousness of an offense, complexity of subject matter, likelihood of appeal, and expectation of the public.[3]

3. Standard for Time from Assignment to Scheduling

Domestic relations disputes are inherently stressful. Unable to agree on critical issues in their lives, the parties go to court. (They have often tried to reach a compromise for months or years before doing so. Once filed, a case is subject to delays before it reaches a judge. It may have been sent to mediation and perhaps an interim hearing.) The parties' anxiety concerning time for judicial action is understandable. One common external complaint about the Family Court is the amount of time it takes to schedule a case and complaints are often heard about the length of time necessary for final disposition. The Committee considered the three main temporal events in a lawsuit: (a) the time necessary to schedule a hearing; (b) the length of time before the hearing; and (c) the length of time a matter is under submission.

Standards are proposed for each of these timelines.[5]

Most civil cases proceed as planned and standards can be reasonably stated and applied on average. Therefore, the Committee considered the progress of civil cases. Judges have complete control over the progress of civil cases before them. Commissioners do not. The clerkís office schedules their matters, and lengthy times for disposition are generally not required.

4. Standard for Time from Assignment to Hearing Date

This is a function of a number of variables, including case complexity, number of parties, status of representation, availability of attorneys, number of cases scheduled for trial, need for immediate action, and priority relative to other cases. This standard area, more than any other, is resource dependent and will result either in greater success if resources are available or intense frustration if they are not. The assigned times balance the need for immediate action, complexity of the subject matter, and any intricacies related to processing case. For example, termination of parental rights is one of the most serious matters before the Court, meriting the most expeditious hearing. However, the processing of a petition requires notice, often by publication, that can take up to 60 days. Termination cases are placed in the Civil III category, suggesting that most actions be heard within 90 days to cover the inherent problems of due process.

5.Standard for Time from Hearing Date to Issuance of Final Disposition

The final standard we recommend addresses the time from hearing to disposition. Although the proposal recommends a decision within a certain number of days of submission, we expect that submission will ordinarily occur with the completion of the hearing. Statutes and administrative directives set the time for disposition of certain cases. At present, only termination of parental rights cases are required by statute to be decided no later than 30 days after the final submission. Supreme Court Administrative Directive Number 94 does not require a decision by a certain date but does require judges of the constitutional courts and the Family Court to submit lists of cases under advisement 90 days or more along with explanatory comments. The proposed standard is necessarily shorter than the reporting time under Directive No. 94 as the Directive anticipates that only exceptional cases should extend 90 days or more.

From the litigant's perspective, awaiting the Court's decision is one of the most stressful aspects of litigation. To the extent possible, judges should rule on matters as soon as practical. If the case requires a reserved decision, judges should consider advising the parties when the final decision may be expected, as well as any interim orders or instructions to cover the period between trial and final decision.

GUIDELINES FOR APPLICATION OF STANDARDS

For the proposed standards to succeed it will be necessary to consider: (1) publication of the standards; (2) impact on the current system; (3) required resources; and (4) ability to monitor performance. The decision to publish will affect the expectations of litigants and attorneys as well as the final format of the document. The standards will affect the current system through a reassignment of case types and imposition of unified times for case processing. The Committee members believe that the timing envisioned by the standards will ensure prompt justice. At the same time, we recognize that these standards cannot be imposed on the system as it presently exists with the expectation of success. In short, the Court does not currently have the resources necessary to meet these standards. Identifying the necessary resources thus becomes an important function. Finally, the ability of automated systems to track cases and compliance under the standards will be key.

Length of Hearings

Such a guideline could be useful both to litigants and the Court. Knowing the length of a typical hearing allows the parties, especially pro se parties, and the Court to plan presentations and schedules. The guideline assists the Court in determining the amount of courtroom time required by the number of filings in a given period. As with the standard for

hearing date, variation from the guideline, in either direction, likely will depend on such factors such as case complexity, need for expert witnesses, status of representation, volume of evidence, cooperation of the parties during discovery, and the need to interview children.

Guideline for Length of Hearings

Publication of Standards

The Committee members believe that the standards should be published. If standards are disseminated beyond the Court, expectations will be raised particularly among self-represented litigants. But publication should increase public trust and confidence by letting litigants know that the Court is working towards specific goals. Equality, fairness, and integrity should be enhanced as some additional consistency in the process is made known to the litigants and attorneys.

Impact on the Current System

Standards for case type assignment, time from judicial assignment to scheduling, and time from submission to decision may be imposed upon the current system with favorable results. Standards for time from assignment to hearing date and guidelines for hearing times are not feasible without additional judges and staff.

The aggressive standard for issuing decisions is a reflection of the current process in most judicial chambers. The standards for masters' orders have been in place since October 1992. Since their initiation in January 1994, statutory requirements for protection from abuse cases have been met by commissioners without exception. In general, judges comply with the statutory requirements for termination of parental rights cases as well as the Chief Justice's reporting requirement. Enforcing the standard for final dispositions will benefit the public more than it will inconvenience the Court.

The remaining standard for time from assignment to hearing date and the guideline on length of hearing are not feasible because of the current case backlog. As a result of the shortage of judges, the hearing dates are far beyond the standard we propose. The volume of cases at present is so great that it will never be met with current staffing at all levels. Likewise, the length of hearings is dependent upon the time available and the increasing complexity resulting from the inherent delays in bringing the case to court. Reasonable standards will require resources not presently available to the Court.

Impact on the Current SystemThe standards developed in each area individually impact on the current system. Standards for case type assignment, time from judicial assignment to scheduling, and time from submission to decision may be imposed upon the current system with positive results. Standards for time from assignment to hearing date and guidelines for hearing times are not feasible prior to an infusion of additional judicial resources and staff related to the judicial unit. Clarification of the case types assigned to judges, commissioners, and masters will involve some shifting of workload among the levels of judicial officers. At present, the assignment of case types varies from county to county, in part due to differences in judicial staffing and types of filings. Kent County and Sussex County have fewer judges available for cases but have greater flexibility in use of the commissioners as all of the prior masters have been appointed as commissioners. New Castle County has a greater number of judicial officers but is limited in their use until all of the masters have been confirmed as commissioners. Applying the standard immediately will shift all felonies, dependency, neglect, guardianship, and foster care cases to judges. In exchange, the commissioners would have to handle all misdemeanor crimes and delinquencies, as well as hearing the first leg of all petitions for a rule to show cause.The standard for time from assignment to scheduling could be implemented with some minor modifications to the present procedure. In fact, the amount of time currently spent scheduling is consistent with the standard. The difference between the current practice and the implemented standard would be the point at which the scheduling process starts. For instance, some judges identify a date for a case within a day of assignment even though the trial date is months in advance. Other judges do not send notice of a date until approximately 60 days prior to the hearing. Proponents of the former approach believe that the litigant should know the date as soon as possible. Advocates of the latter procedure believe the notice closer to the hearing date will reduce the chances of losing the notice and failing to appear. The proposed standard suggests that earlier notice of an assigned date assists both the litigants and the Family Court.The aggressive standard for issuing decisions is a reflection of the current process in most judicial chambers. The standards for masters' orders have been in place since October 1992. Statutory requirements for protection from abuse cases have been met without exception by commissioners since their initiation in January 1994. Judges, in general, comply with the statutory requirements for termination of parental rights cases as well as the Chief Justice's reporting requirement. Implementing the standard for final dispositions will have more external positive impact than internal detrimental impact.The remaining standard for time from assignment to hearing date and the guideline on length of hearing are not feasible in the current system due to the current backlog of cases. As a result of the shortage of judges to handle the 58,000 annual cases, the hearing dates are far beyond the reasonable standard proposed by the Committee. The volume of cases reaching a judge at present is so great that the standards will never be met with the current staffing at all levels of the Family Court. Likewise, the length of hearings is dependent upon the time available and the increasing complexity resulting from the inherent delays in bringing the case into Family Court. Reasonable standards will require reasonable resources that are not presently available to the Family Court.

Resources Required to Meet Standards

After the proposed standards criteria were circulated for comments, the Committee requested and received statistical information from the Family Court Administration and the Family Court and Court of Common Pleas Study Committee chaired by Henry N. Herndon, Jr., Esq. The Committee's analysis suggests that reasonable standards and guidelines can not be met with the current complement of judges. Using the statistics generated by the weighted caseload study, there is an estimated need for between four or five additional judges to enforce the proposed standards. The need is greatest in Kent and Sussex Counties where courtroom time per judge is approximately 165% of capacity. New Castle County has a less severe overload of 132% in a realigned civil division. The monthly shortage totals 437.13 hours, or 4.5 judges. To achieve the increased efficiencies of the recommendations by the Committee, four additional judges will be needed. However, this estimate cannot be regarded as conclusive. There are several other concurrent studies of various aspects of the Family Court underway. They have the common goal of speeding the process without impairing the quality of justice. A final assessment of the need for additional judges cannot be made until all of the reports are collated and the

cumulative results known. However, the Committee are convinced that at least two additional judges are needed and will assume, until it is shown otherwise, that ultimately four will be needed.

Inventory of Pending Cases

The Committee was unable to determine the exact number of pending cases before Family Court judges (as opposed to those pending before all judicial officers). The reports maintained by the State do not separate the cases into groups listed by the responsible judicial officer. Certain assumptions, however, may be applied to generate estimates of the number of cases pending before judges or commissioners. Although this is less precise, this methodology was the only one available to the Committee.

Ability to Monitor Performance

Standards without evaluation are of little use. Their effectiveness depends on accurate reporting systems. The current ability of the Court to monitor performance under the standards is severely hampered by the lack of sophisticated automation. Systems must be created or updated to provide reliable information of progress under the standards. Automated reporting is essential to the success of the standards. Manual reporting would require additional administrative duties of judges already working beyond capacity.

Subcommittee Recommendations

The Committee appointed four subcommittees to study these specialized areas: (1) motion practice; (2) pretrial and diversion techniques; (3) emergency applications and FAMIS modifications; and (4) orders, publication, and reporting. The Committee adopts their recommendations as follows:

Motion Practice

The subcommittee studied the routine motion day, emergency motions, and motion processing. The subcommittee believed there was no problem with the way the Court handles interim motions. The subcommittee were unable to conclude that a motion day would be beneficial. The Committee recommends, however, that the Court consider the possibility from time to time.

Pretrial and Diversion Techniques

This second subcommittee studied pretrial hearings, alternative dispute resolution, and other procedures that could be streamlined. Pretrial hearings conducted in many cases, most frequently in property division cases, narrow issues, identify areas of agreement, set hearing schedules, and resolve discovery issues. The subcommittee found a significant problem with the 16c disclosure form. The information requested is not well organized and is not calculated to lead to settlement or trial. The subcommittee recommends that top priority be given to reorganizing the form and that a copy of the form be given to each pro se litigant at the divorce hearing or sent with the divorce decree.

The subcommittee found that discovery is not being completed before pretrial conferences, which therefore are not as useful as they could be and not as likely to lead to settlement. The subcommittee recommends that discovery be completed before pretrial conferences, barring good cause for noncompletion. Severe sanctions should follow failure to provide discovery.

The subcommittee recommends that judges require four way meetings of litigants and their attorneys. The scheduling should occur at pretrial conference, which is usually held a few months before trial. If there is a good reason why such a meeting should not be held, this should be resolved at pretrial conference.

Pretrial conferences are used exclusively in property division matters. Judges use widely varying procedures in their pretrial conferences. Most lawyers practicing in the Family Court feel very strongly that there should be consistency in pretrial conferences, which would go a long way toward making attorneys aware of what is expected of them at the conference and enforcing the open, full disclosure of all matters necessary to property division. The subcommittee recommend that the judges develop one procedure to be followed for a pretrial conference, making clear what is expected in discovery, attempts at settlement, and any written stipulations and other documents expected from attorneys. The subcommittee recommend that the Court appoint a committee of judges and lawyers to make pretrial procedure consistent.

A document called "the 52d filing" to be filed by each party no later than seven days before trial, states the positions litigants will take at trial and authority therefor. Some lawyers believe that there should be a form for these filings to make them consistent. Since many cases are litigated *pro se*, a form would give litigants a form to bring their issues before the Court before trial and perhaps help in settling cases without full-blown trial. The subcommittee recommends that such a form be created and given out at the pretrial conference. A brief explanation of how to complete the form should be available for *pro se* litigants.

Another way to lighten the caseload of the Family Court would be to eliminate the uncontested divorce hearings. Bills have been introduced in the General Assembly but have never passed. Legislators seem to think that eliminating the hearing will just make divorce easier but this has no bearing on the ease of divorce. The hearing typically lasts three minutes, and one of the parties — the only party that must attend ñ simply parrots the petition. Since there is no contest, there is nothing to decide. There is already precedent for no hearing in uncontested TPR and in adoption cases. Eliminating the hearing will free one half-day a week of a master's court schedule. The subcommittee recommend that a bill be introduced to eliminate hearings in an uncontested divorces. The Delaware State Bar Association should support such a bill, use its lobbyist to fight for passage, and solicit support from the Family Law Commission.

The subcommittee recommends that a child support modification request be in the form of a motion, not a petition. The motion would be scheduled for motion day if one is established by the Court. Each attorney should be required to present a version of the Melson Formula (Delaware's child support formula). Often one attorney proposes a support figure not far from that calculated by the other. If the attorneys cannot agree and a judge's decision is required, the motion judge could review the calculations, hear argument, and decide at once.

Qualified domestic relations orders ("QDROs") compel the division of the marital portion of a pension between the ex-spouses when the pensioned ex-spouse retires. Since QDROs are almost uniformly divided 50/50 as to the marital portion, all judges should require that proposed QDROs be filed early in the pretrial process. Lawyers would like this requirement because, after all ancillary matters have been resolved they are often still trying to get the attorney representing the other party to respond to the QDRO draft. This can keep cases open for years, with the result that motions have to be filed for court intervention long after a case has been decided. The subcommittee recommends that all QDRO drafts be presented at the pretrial conference, absent good cause. Failure to present the QDROs without good cause should result in sanctions *against the attorney.*

In termination of parental rights cases, a social report giving background infor-

mation on the birth parents must always be filed with the Court. If it appears that litigants will not be able to pay court fees, *in forma pauperis* forms should be attached to the hearing notices. Currently, this determination is made at the first hearing, thus necessitating a second hearing. Only one hearing should be necessary. The subcommittee recommend that whenever it is possible to know a litigant's likely ability to pay court costs *in forma pauperis* forms be attached to the hearing notices to expedite adjudication.

There is no consistent process in Family Court arraignments and case reviews. Adopting consistent methods would make the process more efficient. There could also be a better screening process to preclude unnecessary arraignments. If the proper form were sent and a plea of "not guilty" entered, there would be no need for an arraignment. Only a guilty plea would require a defendant to appear for the arraignment.

Under Family Court rules arbitration is voluntary and arbitration decisions binding. The subcommittee makes specific recommendations on civil arbitration. Lawyers are reluctant to arbitrate because of the uncertainty of decisions and the lack of ways to correct poor decisions. Several family law attorneys feel that at the pretrial conference, *when all discovery has been completed*, a judge should have the option of mandating nonbinding arbitration. As in Superior Court, it is likely that many cases would be resolved at arbitration. Another suggestion is that there be a special master for the most complex, high asset cases. This is done in Pennsylvania. These cases take three or four or five days and overwhelm a judge's calendar. A private attorney could be appointed as special master, chosen from a list of highly qualified family law practitioners with accounting and business expertise, as well as vast experience litigating in Family Court. In Pennsylvania a large hourly fee is paid to the special master. This could be done in Delaware as well. The fee would be paid by one or both of the litigants, depending on the financial circumstances, and would be assessed as part of the special master's findings. Exception to the report of the special master could be taken (as is done in Chancery), and then the matter would be assigned to a judge. The subcommittee recommend that the arbitration rules be changed as soon as possible to make arbitration nonbinding. Thereafter, the subcommittee would recommend that at pretrial conference, judges order non-complex, low asset cases to arbitration to be concluded within a fixed time before a trial, if any, is scheduled. The use of special masters should also be considered.

Further Committee Recommendations

Felonies Handled Exclusively by Judges

The highest level of authority is required to decide both the adjudication and disposition of juveniles charged with felonies. Adult defendants charged with felonies are indicted and tried by jury. Although juveniles do not have a constitutional right to a jury trial and are not indicted, felonies committed by juveniles are no less serious than those committed by adults. Juveniles face serious sanctions, and the consequences of their acts potentially subject them to a substantial deprivation of liberty. From the perspective of the victim and community, it is important that the Court treat these offenses with due seriousness.

Clear Delineation between Judges and Other Judicial Officers

The valuable role played by commissioners and masters in the disposition of the staggering Family Court caseload cannot be overstated. Use of these judicial officers has enabled the Court to keep the pending caseload relatively constant when filings have increased 30%. The heightened processing standards for these judicial officers and the broad powers granted by statute make the Family Court commissioners a reliable and flexible resource. The low rate of appeals and quality of decision making support the continued extensive use of commissioners and masters. These successes notwithstanding, interviews with judges, commissioners, and masters, and the input provided by Committee members, show a need for clear delineation between judges and the other judicial officers. This can be accomplished by differentiating assignments of case types to each level of judicial officer. In making distinctions between the types of cases assigned to judges and commissioners and making clear the appellate role of the judge in relation to commissioners and masters, the public will recognize that the commissioners and masters hear cases *for* judges, and not in place of them.

Judicial Collaboration in Administrative Functions

The judges should and must drive the philosophy, policy, and processes of the Court. They should speak with one voice on behalf of the Court. There is a need for collaboration among the judges to reach consensus whenever possible and to provide the administrative judge the necessary information to choose a course of action consistent therewith.

Second, and perhaps more important, independence means that each judge is responsible for continual monitoring of the administrative functions of the Court. Each judge should feel that it is part of his or her "job description" to review the functions of the Court and to bring to the attention of the Chief Judge and the judges collectively suggestions for improvement. It is also worth noting that while this report encourages autonomy and individual actions by the judge to meet the standards, the report does not ignore the fact that Delaware is a state of three counties with different wants and needs. What works in New Castle County may not in Kent or Sussex and vice versa. Certainly it helps practitioners and statewide agencies to have uniform procedures statewide where possible. At the same time, novel approaches may be best tried at the county level. The key to success is to make sure that different procedures are adopted for sound reasons and are well publicized. Absent a unified approach from the judges, the Family Court will lack singularity of purpose resulting in confusion among Court staff, inconsistency for the bar, and decreased public trust and confidence from the litigants.

Statewide Judges Meetings and Self-Education

The interview process revealed a variety of innovative techniques used by judges in handling cases but a lack of knowledge among the judges of the successful techniques employed by their colleagues. This report emphasizes the need for innovation but the question remains: Of what benefit is innovation if the results are not shared? Family Court judges have statewide meetings ten times a year. We recommend that the judges devote every other meeting to self-education. Judges could present their ibest practicei in a particular area of case management. Formal educational programs on substantive areas of the law, as well as child and family matters, should be presented two to three times per year.

Law Clerks

The effective use of law clerks, particularly in the cases with pro se litigants, could screen pending matters to identify issues, procedural defects, and other nondispositive matters presently consum-

ing an inordinate amount of judicial time better spent in the courtroom. Moreover, domestic relations law requires time-consuming research on infrequently raised legal issues. Two Family Court judges currently share one law clerk, leaving one judge without assistance half the time. The Committee recommend that each judge be assigned a full-time law clerk.

Further Study on the Non-Judicial Functions of Family Court Judges

One of the stated tasks for the Committee was to "include in its report recommendations with respect to the retention of nonjudicial functions within the Family Court or the transfer of such functions to other entities." As noted, there is an inherent conflict in the construct of family courts between the traditional court functions and the social service functions generally assumed to fall within the responsibility of the Court. The Family Court statutory mission, "to provide for each person coming under its jurisdiction, such control, care, and treatment as will best serve the interests of the public, the family, and the offender," reflects this conflicting philosophy.

Since 1992, the judges of the Family Court have made a concerted effort to shift the role as a dual court and social service agency to a primary role as a court while maintaining a "social conscience" as a gatekeeper of ordered services. The Family Court has established collaborative relationships with State agencies and private providers to ensure that the orders of the Court are clear and to provide feedback to the judges on the effectiveness of the treatment programs. Aside from court-ordered treatment, statutes, such as the Protection from Abuse Act, contain statutory mandates to provide assistance to litigants not provided in other courts. An extraordinarily high number of the parties who appear in the Court are not represented by counsel and therefore require assistance, which is often provided by the Court personnel.

We believe that serious consideration needs to be given to determining whether family matters, custody, visitation, etc., are best decided in a court system or by social agencies. Trying to continue the two and calling the result a court may not be the best way to provide assistance to those who need it. Perhaps the time has come for society to evaluate the proper functions of courts and social agencies in the family setting — a task beyond the reach of this Committee.

Implementation Planning

Putting in place the standards and recommendations of this report will require the joint efforts of all three branches of government. Additional judges and related staff will require courtroom and office space, equipment, training, and case processing support. Many of the standards are interdependent, such as the standard for time from assignment to hearing date and the recommendation for additional judges. The Committee recommend that the Family Court develop a proposed schedule that would apply the standards no sooner than July 1, 2000. In the interim, the Committee recommends that the Family Court: coordinate the results of the various studies of the Court that are underway; develop promptly a master plan for Court improvement that adopts and integrates the best features of the various studies; and develop, in conjunction with the Supreme Court, a master plan to establish promptly the changes that do not need the assistance of the Executive and Legislative branches of government.

The Committee envisions its recommendations (without reference to the results of other studies) be in place in the year 2000. As noted, the Committee believes four additional judges will be necessary by 2000 in order to ensure the timely dispensation of justice. However, four judges in 2000 would not make the standards effective unless the existing scheduling problems are dealt with.

The Committee therefore recommends the immediate addition of two judges to assure adequate preparation for implementing the standards. These judges should be available as early in 1999 as is possible to reduce the current backlog before applying the proposed standards, followed by two additional judges in 2000, or such number as continuing statistical analysis requires to make the standards work.

The specific tasks enumerated in the Administrative Directive include:

Reviewing and recommending changes to the policies, practices, and standards used by judicial officers in the management and disposition of matters assigned to them;

Preparing a set of Internal Operating Procedures designed to promote and improve the delivery by the Family Court of the highest quality of justice to the citizens of the State of Delaware in as expeditious and uniform a manner as feasible;

Recommending the retention of nonjudicial functions within the Family Court or the transfer of such functions to other entities;

Filing preliminary and final reports with the Chief Justice of the Supreme Court and the Chief Judge of the Family Court.

Additionally, the Administrative Directive notes that the experience gained in the process of developing internal operating procedures for the Family Court may be considered in evaluating the benefits of proceeding with similar efforts in other trial courts.

Masters, selected by the Chief Judge, serve at his pleasure. Cases decided by masters may be tried de novo before a Judge. Masters are not permitted to incarcerate adults or detain juveniles. Nevertheless, masters finally resolve approximately 95% of cases referred by judges. Commissioners, unlike judges, although appointed by the Governor and confirmed by the Senate, are not recommended by the Judicial Nominating Committee. The nomination and confirmation process by the executive and legislative branches give commissioners the authority to incarcerate and detain defendants, thereby increasing the flexibility of their use. Commissioners' decisions are subject to a review on the record by a Family Court Judge. Commissioners have a higher final resolution rate than masters as because of the requirement that objections be stated with particularity. Litigants benefit from the use of commissioners and masters, as cases are brought to trial in significantly less time, and appealing decisions is less costly in most cases.

The above recommendation does not represent a major change, as most cases are handed presently by the appropriate judicial officer. One recommended innovation involves petitions for rules to show cause. These generally institute proceedings and thus have a wide range of complexity requiring different levels of authority for resolution. Significant progress has been noted in other jurisdictions by employing a two-level approach: all rules to show cause are heard in the first instance by a commissioner or master shortly after filing, who resolves technical violations and undisputed allegations, ordering minor remedial relief; cases with substantial factual disputes and those requiring substantial sanctions are sent to the assigned judge. Reducing the number of actions reaching the judge will allow for more expeditious and effective enforcement of court orders.

Another committee is reviewing these procedures.

Standards for scheduling in criminal and delinquency cases have not been a problem for any court in Delaware. Generally, a defendant knows of the next court date at each appearance. Criminal cases are heard by either a judge or a commissioner and are scheduled by the clerk's office on the valid assumption that most will result in plea agreements. Therefore, only a small percentage require lengthy trials. For this reason, as many as 20 or 30 criminal cases can be scheduled for the same morning or afternoon. In the event an assigned judge or commissioner is in trial, other hearing officers in the at-risk division are asked to take pleas.

The guideline as applied to any individual case must be flexible. As applied to the entire caseload, the guideline should reflect the average of cases that require more or less time than the stated goal.

The guidelines were developed by asking Family Court judges to estimate the amount of in-court time required to hear each type of case. The results were calculated to determine the mean, median, and mode for each category. The calculated result was adjusted to include various preliminary stages that regularly occur in a particular type of case. A final word about the guidelines for the length of a hearing — the guidelines are nothing more and nothing less than that. Many hearings are unique, and flexibility is desirable. Judges will be expected to meet the standards for deciding cases. So as not to destroy individuality and to encourage experimentation, the Committee have left it to each Judge to devise the means to meet the standards. ◆

FOOTNOTES

1. The specific tasks enumerated in the Administrative Directive include:

• Reviewing and recommending changes tothe policies, practices, and standards used by judicial officers in the management and disposition of matters assigned to them;

• Preparing a set of Internal Operating Procedures designed to promote and improve the delivery by the Family Court of the highest quality of justice to the citizens of the State of Delaware in as espeditious and uniform a manner as feasible;

• Recommending the retention of nonjudicial functions within the Family Court or the transfer of such fnctions to other entities;

• Filing preliminary and final reports with the Chief Justice of the Supreme Court and the Chief Judge of the Family Court.

Additionally, the Administrative Directive notes

that the experience gained in teh process of developing internal operating procedures for the Family Court may be considered in evaluating the benefits of proceeding with similar efforts in other trial courts.

2. Masters, selected by the Chief Judge, serve at his pleasure. Cases decided y masters may be tried de novo before a Judge. Masters are not permitted to incarcerated adults or detain juveniles. Nevertheless, masters finally resolve approximately 95% of cases referred by judges. Commissioners, unlike judges, although appointed by the Governor and confirmed by the Senate, are not recommended by the Judicial Nominating Committee. The nomination and confirmation process by the executive and legislative branches give commissioners the authority to incarcerate and detain defendants, thereby increasing the flexibility of the use. Commissioners' decisions are subject to a review on the record by a Familly Court Judge. Commissioners have a higher final resolution rate than masters as because of the requirement that objections be stated with particularity. Litigants benefit from the use of commissioners and masters, as cases are brought to trial in significantly less time, and appealing decisions is less costly in most cases.

3. The above recommendation does not represent a major change, as most cases are handled presently by the appropriate judicial officer. One recommended innovation involves petitions for rules to show cause. These generally institute proceedings and thus have a wide range of complexity requiring different levels of authority for resolution. Significant progress has been noted in other jurisdictions by employing a two-level aproach: all rules to show cause are heard in the first instance by a commissioner or master shortly after filing, who resolves technical violations and undisputed allegations, ordering minor remedial relief; cases with substantial factural disputes and those requiring substantial sanctions are sent to the assigned judge. Reducing the number of actions reaching the judge will allow for more expeditious and effective enforcement of court orders.

4. Another committee is reviewing these procedures.

5. Standards for scheduling in criminal and delinquency cases have not been a problem for any court in Delaware. Generally, a defendant knows of the nex court date at each appearance. Criminal cases are heard by either a judge or a commissioner and are scheduled by the clerk's office on the valid assumption that most will result in plea agreements. Therefore, only a small percentage require lengthy trials. For this reason, as many as 20 or 30 criminal cases can be scheduled for the same morning or afternoon. In the event an assigned judge or commissioner is in trial, other hearing officers in the at-risk division are asked to take pleas.

6. The guideline as applied to any individual case must be flexible. As applied to the entire caseload, the guideline should reflect the average of cases that require more or less time than the stated goal.

The guidelines were developed by asking Family Court judges to estimate the amountof in-court time required to hear each type of case. The results were calculated to determine the mean, median, and mode for each category. The calculated result was adjusted to include various preliminary stages that regularly occur in aparticular type of case. A final word about the guidelines for the length of a hearing — the guidelines are nothing more and nothing less than that. Many hearings are unique, and flexibility is desirable. Judges will be expected to meet the standards for deciding cases. So as not to destry individuality and to encourage experimentation, the Committee have left it to each Judge to devise the means to meet the standards.

A GUBERNATORIAL PROPOSAL: A DOMESTIC ABUSE DIVISION OF THE COURTS

by Raina Fishbane

As part of his 1999 legislative agenda, Governor Thomas R. Carper has proposed two initiatives aimed at enhancing the State's response to cases of domestic abuse.[1] First, the Governor, along with Chief Justice Veasey, has proposed creating a specialized Domestic Abuse Division of the courts that would hear domestic violence and child abuse cases. Second, the Governor is calling for enhanced supervision by Probation and Parole officers of certain domestic violence and child abuse offenders.

Under the current statutory scheme, domestic abuse cases often get bifurcated among the courts.[2] For example, an unmarried man and woman with a child in common may have misdemeanor criminal charges filed in the Court of Common Pleas. At the same time, the victim of the offense may file a petition for a Protection from Abuse order in the Family Court, or the Division of Family Services may be pursuing a dependency and neglect action against one of the parents in that Court.

This system results in limiting to each decision-maker information about the circumstances of litigants. It also results in litigants, who are often *pro se*, being forced to navigate not one, but multiple court processes.

To address these concerns Governor Carper and Chief Justice Veasey, along with Justice Holland and the presiding judges and administrators of each of the relevant courts, have proposed consolidating all domestic abuse cases into a newly-created division of one of the courts.[3] This new division would hear criminal adult domestic violence cases and some related civil proceedings (such as Protection from Abuse cases).[4] Most critically, in light of the growing evidence of a relationship between adult domestic violence and child abuse,[5] the Division also would hear child abuse cases.

Creating a Domestic Abuse Division should result in:

- Consolidation of all relevant court information concerning a family;
- Enhanced expertise for those decisionmakers rotating through the division; and
- Greater litigant satisfaction in both

process and result.

Judges would rotate through the Division. During their rotations, participating judges would have the opportunity to enhance their expertise about these complex issues. One specific Division judge would be assigned to each family or litigant, to ensure that the decisionmaker for a particular case has necessary information about the parties and a more complete understanding of the range of dynamics present.

The Division also could address better supervision of the offenders before it. For example, the Division may decide to require that offenders reappear to ensure compliance with court orders, such as no contact orders or treatment requirements. In support of this initiative, the Governor is also proposing an enhanced supervision project within the State's Probation and Parole system. Probation officers would work with the new Division in helping to ensure compliance with probation terms and in an effort to reduce recidivism.

Other jurisdictions have created, or are moving towards, similar specialized and consolidated domestic violence courts or court divisions.[6] Delaware has been at the forefront in addressing domestic violence issues in recent years. We now have the opportunity to take the next steps to better address these difficult and dangerous cases. ◆

FOOTNOTES

1. For purposes of this article, I am using the term domestic abuse to include both adult domestic violence cases and cases of child abuse.

2. Family Court's criminal domestic violence jurisdiction is limited to misdemeanors committed by one member of a family against another. *See* 10 *Del. C.* § 922. The Court of Common Pleas and the Justices of the Peace Courts have jurisdiction over other domestic violence misdemeanor cases, such as those involving dating relationships or same sex couples. 11 *Del. C.* § 2701(b) (Court of Common Pleas and Justice of the Peace Courts); 11 *Del. C.* § 2702 (Justice of the Peace Courts). Family Court, however, does have exclusive jurisdiction over Protection from Abuse Act cases. 10 *Del. C.* § 1048. This jurisdiction is broader than Family Court's criminal jurisdiction and includes ex-spouses, a man and a woman living together regardless of whether they have a child in common, and a man and a woman with a child in common, regardless of whether they have ever lived together. 10 *Del. C.* § 1041(2).

3. The details of this proposal were still preliminary at the time that this article was written.

4. If felony cases are included in the Division's jurisdiction, judges from Superior Court may need to be assigned to the Division to hear the felony-level cases.

5. *See* Domestic Violence Coordinating Council 1996 Annual Report at A-28 (describing impact of domestic violence on children in the home).

6. Other jurisdictions that have established specialized domestic violence courts include Miami, Denver, and the District of Columbia.

FEATURE

Janet Atkinson
Susan F. Paikin[1]

THE FEDERAL PARENT LOCATOR SERVICE: A POWERFUL DISCOVERY TOOL

Introduction

The Child Support Enforcement Program is a federal, state, and local partnership established by Congress under Title IV-D of the Social Security Act in 1975 to collect child support payments on behalf of children in single-parent families. Hence, the short-hand denomination "IV-D" program.[2] State and federal legislation establishes the basic framework while courts, state, and federal offices of child support enforcement and other public agencies work to fulfill legislative mandates and serve the needs of America's children.

Some federal requirements and resources pertain specifically to cases where the Delaware Division of Child Support Enforcement (DCSE) is providing services to an individual. Others, such as presumptive child support guidelines, universal income withholding, and the State Case Registry requirements, apply to all child support orders. Members of the Delaware Bar should be familiar with the scope and operation of DCSE's paternity and support enforcement authority and responsibility. What is less well understood is the Division's locating resources — as well as when and how the private bar can get this information.

What is the Federal Parent Locator Service?

The federal Office of Child Support Enforcement (OCSE) is dedicated to ensuring that America's children receive financial and emotional support from both parents. Absence of a parent is the leading cause of poverty among children,[3] and is increasingly correlated to the likelihood that children will have emotional and behavioral problems, drop out of school, and be in trouble with the law.[4] In a majority of divorces, custodial parents face a serious financial crisis, while the noncustodial parent's lifestyle improves markedly.[5] Many noncustodial parents eventually lose contact with their children.

Collecting support or enforcing a custody order can be difficult when parents and children live in the same state. The difficulty increases exponentially when the noncustodial parent and the child live in different states. Approximately 34% of child support cases involve a parent who lives outside the child's home state, but account for only 8% of collections.[6] Establishing and enforcing child support, custody, and visitation orders across state lines is often challenging, time consuming, and prohibitively expensive.

As every lawyer knows, locating the noncustodial parent is essential to child support enforcement. The Federal Parent Locator Service (FPLS) was envisioned from the beginning of the IV-D program as a critical tool in this task. An original component of the IV-D program, the FPLS was established to provide address and Social Security Number (SSN) information to state and local child support enforcement agencies to locate noncustodial parents. state IV-D agency. OCSE then accessed its external locating sources to search for the requested information.

While an important resource from the outset, the information was slow to be received and frequently outdated. As part of Congress' strategy to reduce poverty for children in single parent families through better child support enforcement, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [7] (PRWORA, generally referred

to as "Welfare Reform") dramatically expanded the scope and utility of the FPLS, and extended access to courts, private litigants, and private attorneys.[8]

> The expanded Federal Parent Locator Service (FPLS), is a computerized, national location network operated by the federal Office of Child Support Enforcement (OCSE), which now includes the National Directory of New Hires (NDNH) and the Federal Case Registry (FCR). The NDNH is a central repository of wage and employment data from the State Directories of New Hires, State Employment Security Agencies (SESA), and Federal Agencies. It has operated since October 1, 1997. The FCR is a national database that contains every Stateís IV-D cases. The FCR also contains each State's non-IV-D orders that are established or modified on or after October 1, 1998.

The FPLS is also linked to databases, maintained by State Parent Locator Services (SPLS) and federal agencies, such as the Social Security Administration, the Internal Revenue Service, the Department of Defense, and the Department of Veterans Affairs.[9]

This powerful new tool improves child support enforcement, increasing financial support to children and supporting the self-sufficiency of the custodial parent.

Attorneys can use FPLS data to help locate non-custodial parents, their employers and their assets, to uncover information on the non-custodial parent's wages and employment benefits, and to identify other cases involving the same participants, including duplicate child support orders. The FPLS can also help in finding parents and children, who are involved in custody and visitation cases, in recovering missing children in cases of parental kidnapping,[10] and in tracking down those, who may have parental rights to children of foster care and adoption proceedings.[11]

The National Directory of New Hires and Federal Case Registry

The National Directory of New Hires (NDNH) and the Federal Case Registry (FCR) are key to PRWORA's child support enforcement provisions. The NDNH, a national employment information database, receives up-to-date information on newly hired employees from all the states and federal agencies, along with other state and federal employment information. The FPLS matches this data against the FCR and "locate requests" submitted by the states. When there is a match, the FPLS provides information to the requesting state, if release is not precluded by the Family Violence Indicator (FVI). The New Hire report contains, at a minimum, the following information: the employee's name, address, and social security number, and the employer's name, address, and Federal Employment Identification Number (FEIN). Federal agencies report directly to the NDNH. More complete case information can be obtained from the appropriate State Case Registry (SCR) or court.

Attorneys can use FPLS data to help locate non-custodial parents, their employers and their assets.

Since October 1997, with information submitted by the states, the National Directory of New Hires has found over 1.1 million delinquent parents.[12]

The Federal Case Registry (FCR), inaugurated on October 1, 1998, is the second major component of the FPLS. Established and maintained by OCSE, the FCR is a federal database, which contains identifying information on all parties to publicly enforced (IV-D) child support cases, and privately enforced (non IV-D) child support orders, entered or modified after October 1, 1998. The FCR consists of abstracts of data for persons, cases, and orders transmitted from the State Case Registries. It includes the following data: case identification number, case type (IV-D or non IV-D), an indication of whether or not there is an existing order in the case, first and last names of each participant, participant type (custodial party, non-custodial parent, putative father, or child), date of birth and Social Security number of each participant.

Family Violence Indicator

Domestic Violence is a reality for many families. Victims often cross state lines or go into seclusion, in order to avoid injury or death. Victims frequently become financially destitute after separating from their abusers. The receipt of child support may enable them to care for their children, yet violent incidents can be prompted by a party's attempts to establish paternity or secure support for a child. Disclosing the victim's location might endanger the parent or child.

PRWORA contains measures, intended to balance the victim's need for safety with the need for support. States must place a Family Violence Indicator on a participant if: there is a protective order or if the state determines it has reasonable evidence of domestic violence or child abuse against a party or child, and (2) disclosure of information could be harmful to that parent or child. The FPLS will not release information on that parent or child except to a court or an agent of a court of competent jurisdiction.[14] The Family Violence Indicator will remain in place, until the state that originally placed it requests removal.[15]

Security and Privacy

Congress and the OCSE recognize that the security of FPLS data is vital to the success of child support enforcement programs and for the protection of privacy. Access to FPLS data is strictly limited. Federal law requires all state and federal agencies to establish safeguards for confidential information handled by state and federal agencies.[16] FPLS information is transmitted over secure and dedicated lines. The public does not have access to these telephone lines. Information is not available over the Internet. FPLS databases are housed in the Social Security Administration's world class computer center, where they are protected from destruction, modification, disclosure and misuse. OCSE continually monitors and enhances its state-of-the-art security systems.

Use of the FPLS in Custody and Visitation Cases

Title IV, Part D of the Social Security Act recognizes the import of emotional as well as financial support from parents to their children. Non-custodial parents often complain that federal and state government fails to support the efforts to secure and enforce visitation and shared parenting orders. While these issues remain within the purview of State courts, FPLS resources are available to determine the whereabouts of a parent or a child, to locate the parent or child in order to make or enforce a custody or visitation determination.

According to Federal statute, a *"custody or visitation determination"* means a judgment, decree, or other order of a court providing for the custody or visitation of a child. The term includes permanent and temporary orders, and initial orders and modifications. [18]

However, Federal law permits only an authorized person to directly submit such a request.[19] For custody and visitation purposes, the term **"authorized person"** means: (1) any agent or attorney of any State having an agreement under 42U.S.C. §663, who has the duty or authority under the law of that State to enforce a child custody or visitation determination; and (2) any court having jurisdiction to make or enforce a child custody or visitation determination, or any agent of such court. (42 U.S.C. ß663(d)(2(A) and (B))

Getting the Information

Only the State Parent Locator System may submit requests for information to the FPLS.[21] Such requests must contain information about the individual whose location is sought, including name and SSN. If the SSN is unknown, the IV-D agency must make every reasonable effort to ascertain it before submitting the request to FPLS.[22]

When location information is sought for the purpose of custody or visitation enforcement, the requesting party will receive information on the participants' most recent address and place of employment. When the request is made for child support purposes, the FPLS will provide additional information. This includes participants' addresses, the SSN, name, address and FEIN of the obligor's employer, information on the obligor's wages and other income from employment, including health care coverage. The FPLS may also provide information on the type, status, location and amount of any assets of, or debts owed by or to the obligor, for child support purposes.

DCSE charges a one-time application fee of $15.00 for FPLS locate services. Authorized persons are not required to register for IV-D enforcement services, or assign their support rights to the state, in order to obtain locate information.

Child Support

A court with authority to issue or enforce a custody, visitation or child support order, or the parent, legal guardian, attorney or agent of a child, who is not receiving public assistance, can access the FPLS in order to: (1) locate the support obligor, obligee or child to whom an obligation is owed, (2) identify and locate the obligor's employer, (3) obtain information on the obligor's wages, other income from and benefits of employment (including health care coverage), (4) obtain information on the type, status, location and amount of any assets of or debts owed by or to the obligor. Federal law limits disclosure to specified information, which will be released to authorized persons for authorized purposes.

An authorized person can obtain FPLS information, by placing a "locate request" through the State Parent Locator Service (SPLS), pursuant to 45 CFR 303.7. When the FPLS receives the locate request, it searches its automated internal databases and external sources, to search for information requested by state IV-D agencies, and provides the SPLS with information appropriate to the purpose of the request.

Custody, Visitation, and Parental Kidnapping

Private attorneys, seeking "locate" information in connection with child custody, visitation or parental kidnapping cases, should request the information through Family Court. The Court then submits the request through the SPLS. All such requests must be accompanied by a statement, signed by the DCSE Director or her designee, attesting that the request is being made solely for the allowable purpose regarding custody and visitation and that any information obtained through the FPLS shall be treated as confidential and subject to safeguards.[27]

After searching its databases, the FPLS will transmit the appropriate information to the SPLS, which will forward it to Family Court. The Court then can make the information available to the requesting parent or attorney.[28]

Conclusion

The expanded Federal Parent Locator Service is key to PRWORA's goal of ensuring that all children receive emotional and financial support from both parents. The FPLS is a powerful, low-cost discovery tool, which can be used in cases involving child support, custody, or visitation. The FPLS can help in determining income, identifing assets, locating missing children, and finding parents and their current employers. If you have any questions regarding the FPLS, or if you would like to request additional information, you may reach Jeff Johnson, FPLS Judicial Outreach Coordinator, at (202) 401-5567, or jjohnson@acf.dhhs.gov. ◆

FOOTNOTES

1. Written under contract with the Federal Office of Child Support Enforcement
2. Title IV-D of the Social Security Act, Pub. L. No. 93-647, 88 Stat. 2337 (1974) (codified as amended at 42 U.S.C.§§651 et seq (1998).
3. U.S. Bureau of the Census, Current Population Reports, P60-200, Money Income in the United States: 1997, U.S. Gov't Printing Off. (1998).
4. See e.g. Eugene Flango & H. Ted Rubin, How is Court Coordination of Family Cases Working? Judges J. Fall 1994 at 10,11,15, citing a 1994 study by the National Center for State Courts. Althea C. Huston, Policies for Children: Social Obligation, Not Handout, in Children of Poverty; Research, Health and Policy Issues (1995).
5. Janelle T. Calhoun, Comment: Interstate Child Support Enforcement System: Juggernaut of Bureaucracy, 46 Mercer L. Rev. 921, 922 (1995), citing Lenore J. Weitzman, The Divorce Revolution: The Unexpected Consequences for Women and Children in America, 323 (1985).
6. OCSE Ann. Rep. to Congress, at 30, 31 (1996).
7. Pub. L. No. 104-193, 110 Stat. 2105, encoded at 42 U.S.C. §653
8. 42 U.S.C.S. § 653(a).
9. 42 U.S.C.S. § 653(e).
10. 42 U.S.C. § 663 (1998)
11. U.S.C. § 653(c)(4)(1998).
12. See, Bienia, N., "Security and the Federal Parent Locator Service" Child Support Quarterly Volume XXXI, No.2 (Spring 1999 Edition).
13. See, Goelman, D., Hoff, P., Horowitz, R., Inada, S. and Mickens, J., **Interstate Family Practice Guide: A Primer for Judges** (American Bar Association: Center on Children and the Law, 1997) citing Klein, Catherine F. & Orloff, Leslye E., "Providing legal Protection for Battered Women: An Analysis of State Statutes and Case Law," 21(4) HOFSTRA.
14. 42 U.S.C.S. § 653(b)(2).

15. 42 U.S.C.S. § 653(b)(2). See, **Use of Family Violence Indicator in Child Support Cases** by Charles Hayward elsewhere in this issue for details on DCSE's implementation of the Family Violence Indicator.

16. 42 U.S.C.S.§§ 453, 454, 454a; 5 U.S.C.S. 552a; 26 U.S.C.S. §§ 6103, 7213, 7431

17. 42 U.S.C. §§653(a)(3) and 663(a)(2).

18. 42 U.S.C. §663(d)(1)

19. Federal regulations preclude the SPLS from accepted requests from other than such a person. 45 C.F.R. 302.33(c).

20. Examples of such agents are officers employed by the State, such as social workers and law enforcement officials, including an Attorney General empowered to act on behalf of the State to prosecute a parental kidnapping or child custody case. **See, Preamble to Final Rule, 48 Fed. Reg. 38,645, August 25, 1983,** attachment to OCSE-AT-83-17 and OCSE-PIQ-8308 for additional guidance on this issue.

21. 45 C.F.R. 303.70(a).

22. 45 C.F.R. 303.70.

23. 45 C.F.R. 302.33 (c).

24 U.S.C.S. §§ 653(a)(c). 42 U.S.C.S. §§ 653(a)(c). 42 U.S.C.S. §§ 653(a)(c).

25. 42 U.S.C.S. § 653(e).

26. 42 U.S.C.S. § 653(a).

27. 45 C.F.R. 303.70 (d). See also, 45 C.F.R. 27.21 and 42 U.S.C. §§ 653(b)(3) and 654(26).

28. 45 C.F.R. 302.33 (c). States are required to have in place policies and procedures to safeguard the confidentiality of this material and to ensure its use only for the stated purpose. Accordingly, the IV-D agency must send the information directly to the court or other authorized person who requested it and make no other use of the information. After it is sent, the IV-D agency must destroy any confidential records and information related to the request. 45 C.F.R. 303.15(c) (8)(v)and (vi).

USE OF THE FAMILY VIOLENCE INDICATOR IN CHILD SUPPORT CASES

by Charles Hayward

The Division of Child Support Enforcement (DCSE) is presently working to apply the new family violence provisions passed by Congress. One of the provisions of P.L. 104-193, The Personal Responsibility and Work Opportunity Act of 1996(Act), required the placement of a Family Violence Indicator (FVI) on certain child support cases. The intent of this legislative change was to provide a measure of protection for families by addressing the issue of disclosure of information in matters of domestic violence and child abuse. Domestic violence and child abuse victims who need child support should be able to get it safely.

This new requirement can have a profound effect on the lives of families who receive services from the child support system across the country. As violence has increased in dysfunctional families, especially in families finding it difficult to function and who are then breaking up, many children and parents rightly fear for their safety and well being. Recent cases in nearby Media and Philadelphia attest to the devastating consequences of family violence. It is recognized that through automation, there is an abundance of information available on both custodial and non-custodial parents that could potentially be used to locate and harm a custodial parent and child. The act envisions providing ways to safeguard families and children at risk of domestic violence and abuse by limiting the disclosure of information. The Act explicitly requires the state to provide notification of domestic violence or child abuse using the FVI in the Federal Parent Locator Service (FPLS).

The first step in Delaware was to determine what constitutes "reasonable evidence of domestic violence or child abuse." The federal interpretation states that, at a minimum, a state has reasonable evidence of domestic violence or child abuse when a protective order has been entered or the state has reason to believe that the release of information about an adult or child may result in the physical harm to such adult or child. The most obvious source of this information is a Protection from Abuse Order (PFA) issued by the Family Court. The majority of cases identified in Delaware for inclusion under the Act will be those in which a PFA has been established. DCSE recognizes that there are other possible sources of information that would provide proof of domestic violence and will, therefore, take a liberal approach when reviewing documentation claiming abuse. Other sources of documentation may include statements from a therapist, a battered women's shelter, police reports, or other professionals. The purpose is to protect the well-being of the parent and child or anyone residing with such a person. The Division is also moving toward gaining access to the Delaware Criminal Justice Information System, which will also be a valuable source of information.

The second step occurred in September of 1998, when the FVI began to be placed on cases sent through the State Parent Locate Service (SPLS) to the FPLS. This flag in the system essentially cuts off sharing information about specific cases. Because the FPLS is the recipient of various sources of information used to track custodial and non-custodial parents, children, information on new hires, and child support cases throughout the 50 states and territories, limiting access at this level effectively thwarts passing sensitive client information to other states. By attaching the FVI, the endangered parent or child is provided a measure of security, knowing that information as to their whereabouts will remain confidential.

Once a person is tagged with a FVI, the only way information can be released is through a manual process. The Federal Office of Child Support Enforcement has very specific procedures on how cases are to be handled if there is a request for information on a case that contains a FVI flag in the system. OCSE has developed a court override process that must be followed. A request for information on such a case must be addressed to the administrator of the SPLS. If it is a Delaware order and the request is from a Delaware source, the request must show a justification and how the information will be used. If the request is a deemed proper, it will then be forwarded to the Family Court determine what, if any, information may be released. If the request is for information on a case with an out of state order, the request must go to the SPLS in the state where the request originates. It will be manually forwarded to the FPLS for review. If approved, the request is forwarded to the SPLS in which the order was issued for forwarding to the appropriate court, where a determination on the request is made.

As is evident by this process, the safeguarding of information to protect the parent and child is the paramount concern of the child support agency. With the break-up of families and the many volatile issues involved, both the federal government and DCSE are taking a very cautious approach to handling the sensitive information that can be used to locate, harass, and ultimately harm our clients. ◆

For more information, please contact Delaware Division of Child Support Enforcement at (302) 577-4804.

REFLECTIONS ON FATHERS AND FAMILY

Ronald Mincy

In the mid-1980s my young family moved to Delaware where I had recently taken a junior faculty position at the University. This was a new beginning for us, because the mid-western state from which we had moved had not fully recovered from the recession. Although we were happy to be coming to a new job in Delaware, we were dismayed because we had lost money on the house that we left behind. We anticipated that after a year, or so, of saving we would be able to buy a home again. However, we got a rude awakening when we started our exploratory search of the housing market and realized how much higher housing prices were in the east, compared with the mid-west. Those exploratory searches convinced us that we would have to be renters for a little longer in order to save the money that we needed to buy the kind of house we really wanted. So we dug in, buckled down, cut back on all sorts of things and began to save every dime we could. Then, April of the second year of our move came. Without a home mortgage interest deduction, our taxes wiped out virtually all of that we had been saving. I still remember lying in bed with my wife on April 16th of that year, staring at the ceiling, both of us almost to the point of tears. After a year of real sacrifice we were no closer to realizing our goal of getting back to the American dream of home ownership. We eventually recovered from our dismay and resolved to get into the housing market in whatever way could, even if it meant purchasing a house well short of our dream. In other words, we had to focus on the feasible as a pathway to the ideal, otherwise the ideal would never be realized.

Our society faces a similar challenge, when we think about fathers, children and families. Many researchers have pointed out that, generally, children reared in families with both natural parents do better than children reared in any other family arrangement. The former are more likely to complete school, less likely to become teenage parents, and less likely to become involved in crime than the latter. These results suggest that marriage is the ideal family arrangement for child development. As a result, many legislators and leaders in the fatherhood movement conclude that public policies should aggressively promote marriage as the ideal context in which to promote responsible fatherhood.

Even if a well-functioning family is the ideal context for child development, many children are born to parents who want to act responsibly, even though they are poor and unmarried. For example, estimates by the Urban Institute from a new representative sample of American families, shows that 48 percent of all poor children under three years old live in households in which their unmarried parents cohabit or their unmarried fathers visit them at least once per week. These estimates are supported by preliminary data collected in Houston and Oakland, two of 21 cities from a path-breaking study by a research network led by senior scholars at Princeton University and Columbia University. This study focuses on young, disadvantaged, pregnant women and the fathers of their unborn children. Eighty-six percent of these women say that they are romantically involved with the fathers of their unborn children, more than 50 percent are cohabiting with these fathers and believe that the prospects of marriage to the father are good to excellent. Nevertheless, by the time the children are two years old, most of these fathers will be estranged from their children and their children's mothers.

These quantitative data support many smaller scale and ethnographic studies that challenge also our assumptions about young, poor and unwed mothers. Though we call their families' mother-only families, many of these young moms are engaged in a process of family formation that does not begin with marriage. Their relationship with the fathers of their children, who are also young, unskilled, and poor, are fragile, and without supports these relationships succumb to a variety of stresses over time.

While we should, of course, continue to remind our youth that marriage is the ideal context for childbearing and child rearing, and therefore, fatherhood, our focus on this ideal cannot obscure the opportunity that is staring us in the face. The rate of out of wedlock births, already high among minorities, is growing faster among whites. Most of this growth is not among teenagers, but among young adults. In other words, we can expect to confront a less than ideal context for child development and fatherhood for a growing number of America's children in the coming decade.

The good news, however, is that in the early years of the lives of half of the children born to poor young mothers, there is a father who is actively involved and a mother who wants his involvement. These children are not born into the ideal family situation. However, with supports for both the mother and the father, from extended family members, community based organizations, and government these fragile families can build the educational, employment, and relationship skills they need to work together as a team to meet their child's needs. With support from faith based institutions, some of these families can acquire the maturity they need to begin and sustain healthy marriages.

A decade after we first arrived in Delaware, my wife and I finally signed the contract for our ideal home. Our kids have graduated from college, moved out, begun their careers and are saving for their first homes. Oddly enough, however, they have strenuously resisted our efforts to sell the house where they grew up, that feasible house for which we settled in the mid-1980s. So, we remodeled the house and we escape to it often, especially during the holidays with the kids. Even though our ideal home will have all the things we've always dreamed of, that old house reminds us of how far we've come, since the days when all we had was our youth, our dreams, and our love. ◆

PLAN TO BE THERE

BEST OF DELAWARE® PARTY

THURSDAY, JULY 15TH

5-8:30 PM

AT THE NEW FIRST USA RIVERFRONT ARTS CENTER

DELAWARE TODAY®
1999 Best of Delaware®

PROCEEDS TO BENEFIT THE MARCH OF DIMES

GOLD SPONSORS
(AS OF 5/3/99)

FIRST USA. A BANK ONE COMPANY

FOXFIRE

DOVER DOWNS SLOTS

conectiv communications

Mercedes Benz

HOSTED BY THE FIRST USA RIVERFRONT ARTS CENTER

TO PURCHASE TICKETS OR FOR MORE INFORMATION
CALL THE MARCH OF DIMES AT 302.737.1310
OR DELAWARE TODAY AT 800.285.0400