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Introduction to Developments in the Law 2014-15

Cover Page Footnote

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INTRODUCTION TO DEVELOPMENTS IN THE LAW 2014–15

*Jan Costello**

Conceiving and producing a Developments in the Law Issue presents two challenges for faculty advisors and student editors: First, identifying at the outset important legal issues, and, second, choosing the ones most likely to be of interest by the time the publication reaches its readers. This 2014–2015 Developments in the Law issue has certainly mastered both challenges.

How is a parent and child relationship formed? It can be based upon biological and genetic connection, formal legal commitment (as in adoption), or by functioning “like a parent.” California courts have ruled that a child’s parents can be a man and a woman, two women, or two men. But what if both legal parents are unavailable to care for the resulting child, and the sperm donor (known to child as a biological parent) steps forward? Should the benefit to the child of recognizing an individual as a parent trump an earlier agreement or operation of law that terminated any legal relationship?

Jason de Jesus¹ examines the California legislative response to *In re M.C.*, a case in which a child was placed in emergency foster care as a result of the biological mother’s arrest for alleged stabbing of the presumed mother. Since neither legal parent was available to provide care and custody for the child, he remained in foster care, although his biological father, with whom he had a relationship, sought custody. The court found that California’s law to establish parenthood, based on the Uniform Parentage Act, permitted the court to recognize only two legal parents. Thus, it failed to provide a remedy by which the biological father could be recognized as a legal parent. In response, the California Legislature enacted Senate Bill 274, the so-called “three-parent law,” granting courts the limited

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1. Jason de Jesus, *When It Comes to Parents, Three’s No Longer a Crowd: California’s Answer to In re M.C.*, 49 LOY. L.A. L. REV. 779 (2016).

discretion to find that a child has more than two legal parents, where this is necessary to prevent detriment to the child. De Jesus explains how the policy considerations underlying the California Supreme Court's recognition of same-sex parentage, that two parents are better than one, similarly apply to cases where more than two adults have formed parental relationships with a child. He explores the public's perceptions about the "three parent rule," and critically assesses recent cases applying the new law. Finally, De Jesus approves the child-centered policy underlying the new rule, concluding that in rare cases recognizing more than two parents will protect the child's emotional and psychological as well as financial and property rights.

The use of reproductive technology by prospective parents raises a different question: how much should individuals or couples be bound by an agreement regarding disposition of excess embryos, made before beginning treatment? For reasons ranging from infertility to genetic risk factors, individuals or couples may use reproductive technology, specifically in vitro fertilization (IVF), to become parents. Typically this process produces excess embryos, which will remain in cryogenic storage unless the IVF patients consent to their destruction, use in research, or donation to other individuals hoping to become parents. Noah Geldberg² considers the legal issues that arise when IVF patients donate their unused embryos. Because little legislation exists to regulate such donations, they are typically done by private contracts. The IVF patients enter into a contract with the reproductive technology services provider; besides consenting to evaluation and treatment, they must indicate in writing their chosen disposition of any excess embryos. Usually this decision is made before IVF treatment begins. But what if, for various circumstances including the birth of one or more children—or the termination of their relationship by divorce or death—one or both patients later wish to change their decision? Geldberg explains that in such cases enforcement of the initial agreement has proven problematic, due to lack of consistency among state laws. Some states treat embryos strictly as property; others give embryos a legal status somewhere in between property and living human beings.

To resolve this confusion, Geldberg recommends that embryos

2. Noah Geldberg, *Zygote Zeitgeist: Legal Complexities in the Expanding Practice of Embryo Donation*, 49 LOY. L.A. L. REV. 813 (2016).

should be defined as property for the purposes of contract law, reasoning that this will promote predictability in the enforcement of embryo donation contracts. Under his proposed rule, as a condition of being licensed to do business in a state, before treatment can be provided, IVF providers must obtain from patients written decisions as to how they will dispose of excess embryos. Patients must be told that their decisions will be binding and enforceable. In order to ensure that their decisions are fully informed and voluntary, IVF providers must offer the patient the opportunity to consult with independent legal counsel, at the providers' expense if necessary.

Predictability and consistency are strong policy reasons for enforcing contracts, even or perhaps especially when parties are jointly trying to become parents—or about to marry one another. Premarital agreements can provide both parties with a clear understanding of how their property, including their earnings, will be classified and managed during marriage, and how it will be divided in the event of divorce. However, as Jan Marfori explains³, although California family law has become fairly straightforward with regard to premarital agreements seeking to alter community property rights, the enforceability of provisions seeking to waive or limit spousal support (alimony) upon divorce remains unsettled. Section 1612(c) of the California Family Code precludes enforcement of provisions in PMAs limiting or waiving spousal support that are found to be “unconscionable at the time of enforcement.” Marfori contends that without a clear standard for determining unconscionability at the time of enforcement, the statute gives courts significant (and too broad) discretion to evaluate the substantive fairness of an otherwise valid agreement between spouses. Assuming that procedural fairness requirements were satisfied when the PMA was made, Marfori suggests that unconscionability should be decided in light of the contract principles that apply at execution. He concludes by proposing a set of policy-based guidelines for evaluating the enforceability of spousal support provisions specifically.

Children who enter the United States without documentation may do so with their parents, as part of a larger family group, or alone. Like other states, California has laws and procedures to identify children who are abandoned, abused or neglected; such

3. Jan Nicholas Marfori, *For Richer, Not Poorer: Enforceability of Alimony Waivers in California Premarital Agreements*, 49 LOY. L.A. L. REV. 843 (2016).

“dependent” minors may be placed with extended family members, in foster care, and in many instances reunified with one or more parents. How can or should the federal government respond to “dependent” minors who are immigrants?

Justin Potesta⁴ explains that Special Immigrant Juvenile Status (SIJS) is a form of immigration relief available to those minors who enter the United States without authorization. SIJS affords an unaccompanied minor who has suffered “abuse, neglect or abandonment” the opportunity to obtain permanent citizenship status. The protection also provides a basis for access to vital programs such as educational, medical, and housing assistance. SIJS addresses a noticeable gap left between other forms of immigration relief for children such as asylum and trafficking victim protections. While the introduction of SIJS was an important step forward in shielding vulnerable immigrant children from further injury, those same children are often barred access to its protection because of procedural and jurisdictional hurdles. SIJS requires the alliance of federal and state entities in executing the law’s intent. This relationship, however, has become strained and often ineffective, undermining a key protection offered to a vulnerable subset of immigrants.

With a narrow focus on the relationship between state and federal entities, Potesta traces the development of SIJS law. He goes on to discuss some of the pervasive issues at the federal level, and to address the state actors’ perspective and role in the SIJS process. Finally, Potesta analyzes various attempts to remedy the fractured relationship between state and federal agencies and offers new proposals to advance the SIJS protections to abused, neglected or abandoned children. At the federal level, Potesta proposes increasing funding to federal immigration agencies to better train immigration agents and allowing nongovernment organizations to participate in screening children for SIJS eligibility. Potesta further proposes that SIJS procedure would be greatly improved by more cohesive and efficient coordination of federal and state entities.

I am confident that each of these Articles will be of continuing importance to readers now and in the future. A brief search of the Internet—or even a reading of today’s Los Angeles Times—supports

4. Justin Potesta, *Federal and State Cooperation in SIJS Determinations*, 49 LOY. L.A. L. REV. 873 (2016).

this conclusion. Topics in the headlines or “most researched” online include progress in reprotchnology and increased openness about its use; expanding definitions of parenthood and family; donation and adoption of embryos; enforceability of premarital agreements; governmental response to immigrant children and families. I am proud and honored to have participated in this Developments Issue.

