



# REFEREES QUARTERLY

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## SAME-SEX MARRIAGE:

### The Past, The Present, The Future

*Contributed by Erin Blankenship & Shelley Spivack*

Despite significant setbacks, the institution of same-sex marriage has been steadily evolving over the past two decades. While several states have begun granting same-sex marriages, other states, such as Michigan, completely prohibit any legal recognition of a same-sex relationship. A growing number of other states provide some recognition of same-sex relationships to varying degrees by granting civil unions or establishing domestic partnerships.



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A public discussion regarding same-sex marriage essentially began in 1993 when the Hawaii Supreme Court ruled that the restriction of marriage to opposite-sex couples would be presumed unconstitutional absent a compelling state interest. *Baehr v Lewin*, 852 P 2d 44 (Haw 1993). In response to this decision Hawaii voters amended the state constitution in 1998 to state that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." Hawaii Constitution, art I, §23. A similar Alaska court decision in 1998 led to an even stronger constitutional amendment, providing that "a marriage may exist only between one man and one woman." Alaska Constitution, art I, § 25.

The reaction to the Hawaii Supreme Court decision in *Baehr v Lewin*, spread beyond the borders of the "Aloha"

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## SAME-SEX MARRIAGE: The Past, The Present, The Future

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By Erin Blankenship  
& Shelley Spivack

state. In 1996, the U.S. Congress passed, and President Clinton signed, the Defense of Marriage Act (DOMA) which provided that no state would be required to recognize a same-sex marriage from another state, and also defined marriage for federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 USC § 7.

In 1999, the Vermont Supreme Court held that the state must extend the benefits that married couples receive to same-sex couples and directed the Vermont General Assembly to decide how to provide such benefits, either by legalizing same-sex marriage or creating an alternate system. *Baker v. Vermont*, 744 A 2d 864 (Vt. 1999). In response, the Vermont legislature created a parallel status of "civil union" in 2000, and Vermont became the first U.S. state to legally recognize same-sex relationships.

The movement towards legal recognition of same-sex marriage was re-invigorated with the November 2003 Massachusetts Supreme Judicial Court decision holding that excluding same-sex couples from the benefits of civil marriage violated the state constitution. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003); and the February 2004 decision by the same court holding that unlike the earlier-established Vermont and Connecticut systems, a "civil union" law would be insufficient, as "segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or preserve" the government's goal of encouraging "stable adult relationships for the good of the individual and of the community, especially its children." Thus, on May 17, 2004 Massachusetts became the first state in the United States to issue marriage licenses to same-sex couples.

In response to the action of the Massachusetts Supreme Court, voters in states across the nation initiated efforts to ban same-sex marriage. Since 2000, voters in 20 states: Alabama, Arkansas, Arizona, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin, have ratified amendments, dubbed "Super-DOMAs," to state constitutions banning recognition of all forms of relationship benefits for same-sex couples. In these states, same-sex relationships receive no legal recognition whatsoever.

Following the lead of the Massachusetts court, the California Supreme Court ruled on May 15, 2008, that same-sex couples have the right to marry. In response, voters on November 4, 2008 narrowly passed Proposition 8, which amended

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the California Constitution to define marriage as between one man and one woman. On Aug. 4, 2010, in a detailed 100 + page decision, a federal district judge ruled that the same-sex marriage ban in Proposition 8 violated the equal protection and due process clauses of the U.S. Constitution. Enforcement of that decision has been stayed pending appeal. As both Governors Schwarzenegger and Brown have refused to defend Proposition 8, the issue of who has standing to defend the constitutional amendment is now before the California Supreme Court. Nonetheless, same-sex marriages performed before Proposition 8 was passed remain valid.

Currently, six states: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and New York, and the District of Columbia issue marriage licenses to same-sex couples. While Maryland does not issue same-sex marriage licenses, it does recognize same-sex marriages from other states where such marriages are legal. Five states currently grant civil unions to same-sex couples: Delaware, Hawaii, Illinois, New Jersey, and Rhode Island. Domestic partnership laws in California, along with Oregon, Nevada, and Washington grant unmarried couples nearly all state-level spousal rights; while laws grant unmarried couples in Hawaii, Maine, Wisconsin, and the District of Columbia some state-level spousal rights (the District of Columbia continues to recognize domestic partnerships for unmarried couples, whether they are same-sex or heterosexual).



As the California decision moves towards the US Supreme Court and as state courts and legislatures move forward with various forms of legal recognition for same-sex couples, the Department of Justice on February 21, 2011 announced that it would no longer defend the DOMA in cases challenging its constitutionality. And, on March 16, 2011, the Respect for Marriage Act (RMA), which would repeal DOMA and restore the rights of all lawfully married couples to receive the benefits of marriage under federal law, was introduced in both the House and the Senate. House Resolution 1116 & Senate Bill 598. The bill would also provide married same-sex couples with all 1049 federal benefits and protections, even if

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a couple moves or travels to another state, thus restoring the principles of Full Faith and Credit to all marriages.



Despite progress in other parts of the country, in Michigan, where the Williams Institute recently reported that there are approximately 21,782 same-sex couples residing and approximately 21 percent of them raising children, a same-sex couple is provided no greater relationship benefits than a pair of complete strangers would be afforded. Currently, same-sex couples in Michigan are granted no relationship rights with respect to joint parenting, joint adoption, joint custody, visitation, social security, income tax filings, next-of-kin status for hospital visit and medical decisions, divorce protections, inheritance, spousal property tax exemptions, wrongful death benefits, bereavement and sick leave, and more. Because there is no legal relationship, a great number of challenges are created with the break-up of a long-term same-sex relationship or the death of one of the partners as they face virtually the same issues affecting a similarly-situated married heterosexual couple. As the issues facing these couples will increasingly come before family court judges and referees throughout the state, jurists in Michigan will increasingly face situations in which the best interest of the child is secondary to the politics surrounding same-sex relationships. It will be up to these same referees and judges to fashion remedies putting children, and not politics, first.



### ABOUT THE AUTHORS:

*Erin Blankenship is a partner in the Flint firm of Blankenship and Blankenship which specializes in all matters related to family law. Shelley Spivack is a referee in Genesee County and the Vice-President of RAM.*

# Fall 2011 Referee Legal Update

Contributed by Ed Messing

To access legal updates, both included and not included in this newsletter, visit the Michigan Court of Appeals— Court Opinions website at <http://coa.courts.mi.gov/resources/opinions.htm>.

## Juvenile Law

### In re VanDalen \_Mich App\_(2011) # 301126 6/16/11

The respondents' child was removed during a prior proceeding as the mother had tested positive for marijuana during pregnancy; and when the child was 2 months old there were lesions in his mouth and his leg was fractured in a manner consistent with child abuse. When the child was 16 months old, he was placed back with respondent-mother. The court dismissed jurisdiction 4 months later despite the father's non-compliance with the Parent-Agency agreement.

Five months after the dismissal, respondent mother had reunited with respondent-father; had become pregnant and again tested positive for marijuana. When respondents' new child was 5 months old, she would not use or put weight on her legs and had regressed developmentally. A month later the mother returned home from nursing school and found the youngest child, who had been left in father's care, whimpering and moaning but mother was persuaded by father not to take the child to the doctor. Over that weekend, father became angry and went into a rampage after the youngest child spit up on him. The next day maternal great-grandmother convinced mother to take the child to the doctor.

The youngest child went into seizures at the doctor's office. Testing showed damage to the child's brain cells, swelling, recent tissue injury and numerous fractures several weeks to several months old. The doctor ruled out disease, birth defects, or infections, concluding that the injuries were the result of shaken baby syndrome. A new petition was filed, the court assumed jurisdiction after a jury trial, and respondents' parental rights were terminated based on the history of child abuse occurring while in the respondents' care.

The Court of Appeals affirmed, determining that respondents' due process rights were not violated by the court's use of the standard jury instructions requiring a verdict of jurisdiction when 5 jurors agreed that 1 or more statutory grounds in the petition have been proven by a preponderance of evidence, as there is no requirement that 5 jurors agree on the same statutory ground for jurisdiction. In any regard, in this case all 6 jurors had agreed that jurisdiction existed based upon on all 3 statutory grounds alleged in the petition. Also, the respondents were not denied due process when the court, after the close of proofs, obtained a copy of the transcript of the prior proceedings and a court order showing that the parties agreed mother would supervise father's visits, as the court has authority to produce additional evidence to resolve a conflict in testimony.

In affirming the termination, the court found clear and convincing evidence of a reasonable likelihood of harm or abuse if the children were returned to respondents' home, and that there was no reasonable expectation that they would be able to provide proper care and custody of the children in a reasonable time. The unexplained, serious, non-accidental injuries to the children while in the respondent's care were consistent with intentional abuse of the children throughout their lives. That evidence and ongoing uncertainty about the circumstances surrounding the serious abuse of the children clearly supported finding that termination was in the children's best interests.

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### Juvenile Law Continued

#### **In re Ellis \_Mich App\_ (2011) # 301884 8/25/11**

The respondents' 2 month old child was brought to the hospital with 13 broken bones (including seven partially healed fractures), internal bleeding and swelling inside the skull and multiple skull fractures. A child abuse expert testified that none of the child's injuries were accidental or the result of childbirth or genetic problems, but were the result of "abuse head trauma and physical abuse." Respondents testified that they were the child's sole caregivers and could not provide a plausible explanation for the child's injuries.

The Court of Appeals held that termination of Respondents' parental rights was permissible under subsections 19b(3)(b) and (k), "even in the absence of definitive evidence regarding the identity of the perpetrator." The numerous non-accidental injuries which occurred on more than one occasion, coupled with the fact that the respondents lived together and were the child's sole caregivers constituted sufficient evidence that respondents must have either caused or failed to prevent the child's injuries.

### Domestic Relations

#### **Shann v Shann \_Mich App\_ (2011) #301113 7/12/11**

Defendant's step-daughter accused Defendant's new husband of sexual molestation; resulting in both criminal and child protective proceedings. Plaintiff's father then filed his motion for custody of his and defendant's son. The stepdaughter later recanted her accusation and both cases were dismissed, against CPS's wishes, because the prosecutor believed it lacked evidence to proceed. The trial court in the custody action, however, granted plaintiff custody after an evidentiary hearing including testimony from the parties, the CPS worker, 3 of Defendant's step-daughters, and the child's babysitter.

The Court of Appeals affirmed the change of custody. Although criminal and child protective cases against Defendant's husband had been dismissed, the fact that CPS had removed the child from Defendant's home constituted a sufficient change in circumstance to warrant consideration of the motion to change custody. The court properly changed custody after considering testimony supporting the allegations in the CPS complaint. There was also testimony that the child had poor hygiene habits and was subject to verbal abuse from Defendant's husband. The Court of Appeals affirmed the trial court's finding that the CPS worker and Plaintiff's witnesses were more credible than Defendant's witnesses.



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## Fall 2011 Referee Legal Update

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### Domestic Relations Continued

#### **Carlson v Carlson \_Mich App\_ (2011) # 292536 6/28/11**

Although Defendant's reduction in salary from his family owned business was voluntary, as he had voted to reduce his pay to \$250 per week, the court's imputation of the average of his prior two year's annual income of \$95,000 was inappropriate. The trial court failed to evaluate the imputation factors in the Michigan Child Support Formula. Also, evidence had shown that due to the economy, the company's gross receipts had been reduced from \$1,198,860 in 2006 to \$67,591 in 2007 and that the company had laid off 14 of its 20 employees. As the reduction in Defendant's income was a business decision to attempt to keep the company in business, and there was no evidence that Defendant would earn \$95,000 from his company or any other employer, the imputation was an abuse of discretion.

#### **Estate of Reed v Reed \_Mich App\_ (2011) # 297528 6/23/11**

The default divorce judgment included a provision extinguishing the right of each party to be a beneficiary in the other parties retirement plans but the ex-husband failed to change the beneficiary with his 401K administrator. When the ex-husband died, Defendant, his ex-wife, received \$150,000 as the beneficiary of the deceased ex-husband's 401K, and the ex-husband's estate sued the ex-wife. Defendant ex-wife argues that under ERISA she never waived her rights as a beneficiary of the 401K.

The Court of Appeals affirmed the trial court's order that Defendant relinquish the funds to her ex-husband's estate. The court found that Defendant's failure to appear, respond, file pleadings or challenge the default judgment of divorce, constituted a waiver by defendant in her rights to decedent's retirement benefits. The court properly enforced this provision by ordering defendant to turn over benefits she had received from decedent's retirement plan to decedent's estate.

#### **Smith v Smith \_Mich App\_ (2011) #295243 5/26/11**

After extensive discovery, the parties entered into a property settlement agreement in August 2009 calculating the value of defendant's IRA using a February 2009 IRA statement. However, the IRA had increased by nearly \$1.4 million by August 2009, and at the time of judgment plaintiff unsuccessfully attempted to increase her share in the IRA based upon the increase in value since the property settlement agreement.

The Court of Appeals affirmed the trial court's denial of Plaintiff's request. Because the property settlement agreement established a fixed value for retirement accounts, without providing for adjustment due to market valuation, Defendant was not required to disclose changes in the value of the IRA, and Plaintiff was not entitled to share in the \$ 1.4 million increase in the IRA's value.



# PENDING LEGISLATION

## Paternity

### **SB 557 - "Revocation of Paternity Act"**

A substitute for the original version of this bill was introduced in the Senate Judiciary Committee and referred to the Committee of the Whole on 9/8/11. The current version would substantially revise the procedures for setting aside an acknowledgement of parentage and create a procedure for setting aside an order of filiation. The bill creates several categories of fatherhood including an "affiliated father" (a man who has been determined in court to be the child's father), an "alleged father" (a man who by his actions could have fathered the child), and a "presumed father" (a man who is married to the child's mother at conception or birth) and generally allows actions for revocation to be filed within 3 years after the child's birth. A complete version of the bill can be found at: <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/Senate/pdf/2011-SIB-0557.pdf>.



Photo: Michigan Supreme Court Building

### **HB 4883 - Amendment of Paternity Act**

This bill would amend the Paternity Act by providing that if a father were to obtain sole custody of the child, his obligation to pay confinement expenses would be abated. The bill was referred to the House Judiciary Committee on 8/24/11. A complete version of the bill can be found at: <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-4883.pdf>.

## Juvenile Law

### **SB 246 & HB 4555 - Juvenile Competency and Criminal Responsibility Standards**

Bills were introduced in the Senate and House Judiciary Committees setting forth procedures regarding juvenile competency and criminal responsibility determinations. No further action on either of the bills has been reported. A complete version of the bills can be found at: <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/Senate/pdf/2011-SIB-0246.pdf>; and [http://www.legislature.mi.gov/\(S\(jhq2o255xv3pwi3r5mpytf45\)\)/mileg.aspx?page=getobject&objectname=2011-HB-4555&query=on](http://www.legislature.mi.gov/(S(jhq2o255xv3pwi3r5mpytf45))/mileg.aspx?page=getobject&objectname=2011-HB-4555&query=on).

Additional information about these and other bills can be found at: [Michigan Legislature](http://www.legislature.mi.gov/), or <http://legislature.mi.gov/>.

# PENDING LEGISLATION

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## Child Abuse and Neglect

### SB 320 - Emergency Removal and Placement of Children

This bill would amend the standards and procedures for the emergency after-hours removal and placement of children by the Department of Human Services and would specifically authorize referees to issue interim orders of placement. Under the original version of the bill, a judge or referee would be required to "immediately" communicate "in writing, electronically or otherwise, to the appropriate county department office" an order for placement. (Both the Michigan Probate Judges Association and RAM opposed the requirement for immediate written communication of an order). A draft substitute for the bill has now been submitted that would require a DHS worker to submit, electronically or otherwise, a petition or affidavit of facts to the judge or referee prior to the issuance of an order for placement. Upon receipt of the petition or affidavit, the judge or referee "may order placement if the placement order is communicated in writing, electronically or otherwise, to the appropriate county department office and filed with the court the next business day."



## UPCOMING EVENTS

- **Tuesday. October 18, 2011.**  
 MJI Referee Training  
 Topic: Domestic Relations  
 Hall of Justice  
 Lansing, Michigan
- **Tuesday. October 18, 2011. Noon.**  
 RAM Board Meeting  
 Hall of Justice  
 Lansing, Michigan
- **Wednesday. October 19, 2011.**  
 MJI Referee Training  
 Topic: Juvenile & Neglect  
 Hall of Justice  
 Lansing, Michigan
- **Thursday. November 17, 2011. 10 a.m.**  
 RAM Board Meeting  
 State Bar Headquarters  
 Lansing, Michigan



Photo: RAM Board Meeting

## The President's Corner

*Contributed by Paul H. Jacokes*

Monday mornings in Macomb mean motions. From simple child support reviews to complicated property issues, Macomb County referees hear the whole range of domestic relations issues. Custody, parenting time, medical expenses, status quo, debts, real estate, QDROs, and spousal support motions have all been before me. I'm not bragging. I'm sure there are referees elsewhere in the State dealing with all these issues and many more. For example, while I do not do enforcement actions, Oakland County domestic relations referees do this and much more. Add in those referees who are cross trained in both domestic and juvenile cases and you cover the gamut of issues relating to families and children. This wide range of expertise is mirrored in the membership of RAM. With a membership consisting of domestic, juvenile and domestic/juvenile referees, we have quite a body of expertise.



Photo: Paul H. Jacokes.

This is why SCAO, the Supreme Court, the State Senate, the State Bar and others call on us to advise them. We have standing appointments on the Ethics Board: Lorie Savin, and the Family Division Forms Committee: Shelley Spivack. Domestic relations referees Ken Randall and Ron Foon have ably served as our representatives on the Child Support Guidelines Committee; while juvenile referee Dave Bilson ably served as our representative on a committee formed by the Supreme Court to look into possible legislation regarding the juvenile consent calendar. Shelley Spivack served on the SCAO Indian Child Welfare Act Resource Guide and Court Rules committees. Traci Rink serves as our voice on the Family Law Council. Forgive me if I have left anyone out, as the list goes on.

We are called on to review and express our opinion on many issues. We submitted responses to the Supreme Court regarding proposed changes to the Juvenile consent calendar and proposed changes to MCR 3.915 and 3.911. Most recently, Senate Bills 320 and 557 were sent to us for our input.

Our board supported the proposed amendments to MCR 3.915 which would call for appointment of counsel at all hearings including the preliminary hearing; while we tabled a vote on the proposed amendment to MCR 3.911 which concerned time limitations on jury requests in juvenile trials. SCAO

## The President's Corner

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By Paul H. Jacokes

subsequently tabled the issue as well. Our board approved proposed legislation creating a statutory consent calendar and submitted a letter indicating our support.

Proposed Senate Bill 320, among other things, would require written removal orders to be delivered immediately to the local DHS office. The Board disagreed with this provision; believing that this would in some instances place some children in harm's way. While we agreed with many of the provisions of the bill, this section caused enough consternation to make us oppose the bill as written. We expressed our concerns to the leaders of the Senate and are now working with the Probate Judges Association to remove this requirement.

Proposed Senate Bill 557 concerns paternity. It is a wide ranging piece of legislation that attempts to cover all situations. This includes the default paternity case, the case of a child born during a marriage that is not the husband's natural child and acknowledgement of paternity cases. In each instance, there are different players involved. The proposed Bill defines four different types of fathers and allows for three different actions: To set aside an acknowledgment of parentage; to set aside an order of filiation and to determine a presumed father is not a child's father (see Pending legislation and the link to the bill).

Referees have been discussing the bill on the Listserve and it is anticipated that a vote will be taken regarding support of the bill at our next meeting. Take a look at the bill and post your comment on the Listserve!

As you see, our Referees are not only involved in assisting courts in resolving cases, we are involved in all aspects of family and juvenile law in Michigan.

Keep up the good work!

Just a note, the RAM Board will be meeting at lunch time during the MJI Seminar on October 18<sup>th</sup>. Among other items, we will be discussing and deciding the location of the May 2012 Conference. Our next regular meeting will be November 17<sup>th</sup> at the State Bar Offices.





[www.referees-association.org](http://www.referees-association.org)

Since 1984

"Compassionate justice  
helping children."

#### WHO WE ARE

The Referees Association of Michigan (RAM) is recognized by the State Bar of Michigan as a special purpose organization. The Association consists of both Juvenile Court and Friend of the Court (collectively referred to as "Family Court") referees throughout the State of Michigan. RAM's primary function is to educate its members by providing a forum for communication, by holding an annual training conference, and by providing a quarterly publication, called *Referees' Quarterly*. RAM also offers guidance to both the State Legislature and Michigan Supreme Court regarding proposed amendments to statutes and court rules. Collectively, the referees who comprise RAM's membership preside over 100,000 family law hearings every year.

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