

## About This Issue

This issue of the Journal is devoted to Constitutional Issues in Family Law. We have an excellent collection of articles with contributions by the most prominent family law professors in the country. They cover issues ranging from the second amendment as it pertains to cohabitants, the fifth amendment privilege against self-incrimination, and the constitutional rights of parents. There are also articles on the Indian Child Welfare Act and the Supreme Court's recent controversial abortion decision. First and fifth amendment issues are also discussed as are changes to the MMPI, a psychological tool often used in family courts. As usual, the issue concludes with an excellent bibliography of articles related to the topics mentioned.

Our Issue Editors are Laura Morgan and Anne Berger. Ms. Morgan is the owner/operator of Family Law Consulting in Amherst, Massachusetts, where she provides research and writing services to family law attorneys nationwide. Laura is the author of *CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION* (2nd ed. 2021-2022) and the co-author of *ATTACKING AND DEFENDING MARITAL AGREEMENTS* (2nd ed. 2010), as well as dozens of law review articles. She has also presented at over 100 CLEs, and serves on the Board of Editors of the Journal of the American Academy of Matrimonial Lawyers and The Family Law Journal, and previously served on the Board of The Family Advocate. Anne L. Berger has been practicing law in Massachusetts for over 50 years. She is a fellow of the American Academy of Matrimonial Lawyers and a fellow of the International Academy of Family Lawyers and has served in multiple positions on the governing board of both organizations. Ms. Berger is also a former Chair and a current Trustee of the International Commission on Couples and Family Relations and has served on the JAAML Editorial Board for a number of years. Her practice concentrates on complex matrimonial matters with international components.

Our first article is entitled, *Equality, Gestational Erasure, and the Constitutional Law of Parenthood* by Katharine K. Baker. Her article addresses the criticism that preferential treatment of gestational mothers discriminates against fathers or that the law's approach to gestational involvement unfairly excludes same sex partners from parental rights and that they both endorse a kind of gestational erasure, albeit for different reasons that relate to the foundations of parenthood as genetics or parental involvement. She argues, however that discounting the relevance of gestation will have serious consequences for the law of abortion, adoption, and custody, placing already vulnerable women at more risk of being controlled by men they want to escape. Further, that current constitutional doctrine, which recognizes the importance of ges-

tation is not inconsistent with LGBTQ equality in parenthood. Professor Baker is a University Distinguished Professor of Law at 11T Chicago-Kent college of Law. She is an expert in family law, particularly in the modern law of marriage and parenthood, and she has written extensively on sexual violence and misconduct, especially in the lives of young adults. Her work focuses on the intersection of women's intimate lives and the law. Prof. Baker's articles have been published in numerous journals, including the Harvard Law Review, Yale Law Journal, University of Chicago Law Review, Minnesota Law Review, and Boston University Law Review. She has been a visiting professor at Yale Law School, the University of Pennsylvania Law School, and Northwestern Law School. She is a graduate of Harvard-Radcliffe College and the University of Chicago Law School, where she served as a Comments Editor for the Law Review.

Joseph Blocher and Maisie Wilson authored *Living With Guns: Legal and Constitutional Considerations for Those Cohabiting with Temporarily Prohibited Possessors*. Professor Blocher is the Lanty L. Smith '67 Professor of Law at Duke Law School, where he also co-directs the Center for Firearms Law. He has published articles on the Second Amendment in leading law reviews—including Yale, Harvard, Stanford, NYU, Virginia, and Chicago—as well as popular outlets like the New York Times and Washington Post. With Darrell A.H. Miller, he is co-author of *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* (CAMBRIDGE 2008). Maisie Wilson is a first-year associate in the complex litigation and trials group at a large law firm in New York City. She is a 2021 graduate of Duke Law School, and she received a Bachelor of Arts in Music and History from Florida State University. Her work has previously been published in the Duke Law Journal. In their article they discuss whose decisions about gun possession in the home should be privileged when there is a conflict between or among cohabitants, an issue that has become more salient given the increased risk of gun-linked intimate partner violence in the Covid era. They suggest that analyzing this question demonstrates the ways in which the right to keep and bear arms is intertwined with other rights and interests, including within a single family or cohabiting unit. To illustrate the point, they focus specifically on the question of whether a legal gun owner may face legal liability while cohabiting with a temporarily prohibited possessor.

In *The Constitution, Paternity, Rape, and Coerced Intercourse: No Protection Required*, Karen Syma Czapanskiy addresses the question of whether a man who has engaged in coerced intercourse must nevertheless be given legal parenthood status. She argues that the Constitution does not require such a result because sourcing paternity in genetics is not a constitutional requirement, and due process is not denied when the man's claim to fatherhood is protected by minimal procedures. Furthermore, she contends that women who are victims of rape or coerced intercourse are denied equal protection when more than minimal due

process is provided to protect a claim of fatherhood when the pregnancy resulted from coerced intercourse. Professor Czapanskiy is Professor Emerita, University of Maryland Carey School of Law. She has taught and written extensively about family relationships, gender, disability, special education and poverty. In retirement, she anticipates continuing to contribute to legal and policy debates, participating in electoral politics, riding horses, baking bread, and mentoring younger professionals.

Our next article was contributed by Professor Maxine Eichner and is entitled *When the Helping Hand Hurts: How Medical Child Abuse Charges Are Undermining Parents' Decision-Making Rights over Children's Medical Care*. She reports that “medical child abuse” (MCA) charges are now increasingly being leveled against parents by doctors. Proponents of this new “diagnosis”—mainly pediatricians who specialize in child abuse—argue that parents who seek medical care that a doctor deems unnecessary have committed abuse, and doctors should “diagnose” this abuse and report it to child protection authorities. Her primary thesis is that these MCA charges as conceptualized and weaponized against parents, constitute a gross and devastating infringement on parents’ constitutional right to determine their children’s medical care. She describes the recent origin of MCA charges and demonstrates that the broad definition of MCA adopted by physicians constitutes an unprecedented and unconstitutional expansion of the state’s power to supervene and supervise parents’ medical decision-making. She criticizes the process through which physicians identify cases of MCA which particularly targets parents of children with rare or complex health conditions. She suggests that through these cases courts are expanding physicians’ authority beyond their proper bounds in medical neglect cases and finally she proposes legislative reforms and litigation strategies to protect parents’ constitutional rights. Professor Maxine Eichner is the Graham Kenan Distinguished Professor of Law at the University of North Carolina School of Law. In addition to her work on medical child abuse, she writes on issues at the intersection of law and political theory, focusing particularly on how U.S. social welfare law and market forces affect families, as well as on issues of feminist theory. Professor Eichner is the author of *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (OUP, 2020), as well as *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* (OUP, 2010). In addition, she has written numerous articles and chapters for law reviews, peer-reviewed journals, and edited volumes on law and political theory, and was an editor of a family law casebook.

The Indian Child Welfare Act is the subject of our next article written by Professor Ann Laquer Estin. It is entitled, *Equal Protection and the Indian Child Welfare Act: States, Tribal Nations, and Family Law* and offers family law practitioners an introduction to the unique balance of federal, tribal, and state authority with respect to Native Ameri-

can communities and tribal members, and the Supreme Court's distinctive equal protection jurisprudence in this context. It considers the challenges posed by cross-border family litigation from this perspective, arguing that states have an important role to play in recognizing and supporting the ties between tribes and their members. It discusses the interaction of state and tribal courts in family law matters and describes the Supreme Court's approach to equal protection in federal Indian law cases including in the *Brakeen* case which is currently pending before the Court. She concludes by suggesting that the experience gained with ICWA can be used to expand state and tribal comity and collaboration in child welfare and other family law matters, including domestic violence, child support, custody, and divorce. Professor Estin is Aliber Family Chair at the University of Iowa College of Law. She teaches courses including Family Law, Federal Indian Law, and has written several books, including the *INTERNATIONAL FAMILY LAW DESK BOOK* (2nd ed. 2016) and *DOMESTIC RELATIONSHIPS: A CONTEMPORARY APPROACH* (2nd ed. 2018). Before her academic career, she practiced family law in Denver, Colorado.

Our next article focuses on the recent Supreme Court abortion decision and is entitled *Dobbs V. Jackson Women's Health and The Post-Roe Landscape* by Professor Yvonne Lindgren. The article examines some of the important takeaways of the decision itself and the likely reverberations it will have on other areas of law and reproductive healthcare more broadly. It closely examines the Court's various opinions to consider what they reveal about the new standard of review for abortion, the shift in power among the members of the Court itself, as well as what the opinion signals might come next. It further explores the future of abortion in a post-*Roe* landscape as the abortion rights movement moves from the defensive to the offensive posture and discusses emerging constitutional theories for sourcing the abortion right, as well as federal and state executive and legislative actions to protect abortion access. Finally, she assesses the potential impact of the end of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* on criminalization of abortion and self-managed care, the surveillance of pregnant people, and adjacent issues, including reproductive health and assisted reproductive technology. Yvonne ("Yvette") Lindgren is an Associate Professor of Law at University of Missouri-Kansas City School of Law. She earned her LL.M. and J.S.D. from U.C. Berkeley School of Law and her J.D. from Hastings College of the Law. She was a post-doctoral fellow at the Center on Reproductive Rights and Justice at Berkeley Law. She is the author of numerous articles related to her research interests which are reproductive rights and justice, constitutional law, and health law policy.

The Minnesota Multiphasic Personality Inventory (MMPI), a psychological tool frequently used in family law cases has been again revised and our next article offers reader an overview. Dr. Chris Mulchay is the author of *The Revised MMPI-3 and Forensic Child Custody Eval-*

*uations: A Primer for Family Lawyers* which is designed to provide family court attorneys with information concerning the newest version of the MMPI, abbreviated as the MMPI-3. It is a 335-item self-report inventory and although has a very similar inventory to the previous version its updates include its normative data, as well as improved items, and improved scales. Attorneys should understand the strengths and limitations of the MMPI-3 in the context of forensic parenting evaluations and how the new version may apply to clients and courts. In addition to describing the new features the article addresses *Daubert* and addresses the controversy surrounding the use of psychological testing in family court evaluations. The article concludes with challenges to the MMPI-3. Chris Mulchay is a licensed psychologist practicing in Asheville, North Carolina. He is the co-author with Benjamin Garber, PhD, and Dana Prescott, JD, PhD, LMSW of *THE FAMILY LAW PROFESSIONAL'S FIELD GUIDE TO HIGH-CONFLICT LITIGATION: DYNAMICS, NOT DIAGNOSES* (ABA, 2021).

Changes in the formation of families have led to increased conflicts regarding custodial rights. Professor Tom Oldham focuses specifically on disputes between parents and non-parents in his article entitled *Changing Norms in the United States for Resolving Custody Disputes Between a Parent and a Non-Parent*. His article discusses the rationale for the strong parental presumption and how it can be rebutted. It further describes the compromise position where there is a parental preference unless compelling circumstances exist and then highlights jurisdictions where no parental presumption is applied in custody disputes between a parent and a defacto parent or psychological parent. He evaluates the strengths and weaknesses of the various approaches and the extent to which parents' constitutional rights are impacted by these various approaches. J. Thomas Oldham is the John Freeman Professor of Law at the University of Houston Law School where he has taught Family Law and Community Property for 41 years. He is a member of the Board of Editors for the Family Law Quarterly and has written extensively about premarital agreements, equitable distribution, conflicts of law in divorce, community property and child support. He played center field for the 1970 Dennison University Big Red baseball squad.

Professor Mark Strasser is the author of our next piece entitled, *Day of Reckoning: On Non-Custodial Parents' Rights to Teach Their Children Religion*. In it he suggests that while the U.S. Supreme Court has long recognized that the Constitution protects the right of parents to impart religious values to their children, it has never addressed the Constitution's limitations on the states with respect to how those states resolve divorced parents' disputes about their children's religious training. He points out that state courts have adopted various approaches when seeking to balance the parent's respective rights and their children's interests, but he argues that many state approaches do not take adequate account of existing Religion Clause guarantees and are un-

likely to pass muster under the current Court's increasingly robust view of free exercise protections. He concludes that many states will likely have to modify their approaches with respect to the conditions under which noncustodial parents may be prohibited from instructing their children on religious matters, best interests of the children notwithstanding. Professor Strasser is the Trustees Professor of Law at Capital University Law School in Columbus, Ohio. His teaching and research are primarily in Constitutional Law and Family Law broadly construed. He has written numerous articles and several books including *FREE EXERCISE OF RELIGION AND THE UNITED STATES CONSTITUTION: THE SUPREME COURT'S CHALLENGE* (ROUTLEDGE, 2018). His current focus tends to be on First Amendment and Family and Reproductive issues.

Our final article was written by Brett R. Turner and is entitled, *Fifth Amendment Privilege in Family Law Litigation*. Mr. Turner begins by examining the basic parameters of the privilege and when and how the privilege can be waived which is essential to determining the practice scope of the privilege. He then illustrates how the privilege applies to documents and other forms of nontestimonial evidence and finally, he highlights the adverse consequences of asserting the privilege. He cautions attorneys that while there are similar privileges under state law that generally track the protection given by the federal provision, it is best to confirm that approach since there is no requirement that the federal and state privileges exactly mirror one another. Mr. Turner is Senior Attorney at the National Legal Research Group. He is the author of *EQUITABLE DISTRIBUTION OF PROPERTY* (4th ed. 2021) and the co-author (with Laura W. Morgan) of *ATTACKING AND DEFENDING MARITAL AGREEMENTS* (2ND ED. 2012). He also was the former Editor of *Divorce Litigation*.

We conclude the issue with another excellent bibliography of articles on the topic of constitutional issues in family law by Professor Allen Rostron, William R. Jacques Constitutional Law Scholar and Professor of Law at the University of Missouri – Kansas City School of Law.

Mary Kay Kisthardt  
Executive Editor  
Kansas City, Missouri  
Emerita Professor of Law,  
University of Missouri – Kansas  
City School of Law