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# Slalom custody battle upends family law

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As the world watches the thrills and spills of the Sochi games, one well-known athlete is battling more than the slushy snow beneath his skis. Bode Miller captured bronze in the Alpine Men's Super-G earlier this week, bringing his total Olympic medal count to five and rightfully instilling pride in a nation. But off the slopes, Miller is embroiled in a custody dispute that hardly inspires pride in our judicial system. Rather, it reflects an astounding disregard for women's rights in a variety of troubling ways.

The story began in April 2012 when a tony matchmaking service paired the skier with Sara McKenna, a former Marine

and firefighter. The ill-fated relationship lasted only a few weeks but long enough for a child to be conceived. Disputes about the parenting of the unborn child surfaced almost immediately. When McKenna discovered she was pregnant and asked Miller to accompany her to an ultrasound appointment, he declined, texting her that she "made this choice against [his] wish." Shortly thereafter, Miller married a woman he began dating the same time his child was conceived. A few months later, about midway through the pregnancy, McKenna informed Miller she planned to pursue a degree at Columbia University in New York. In response, Miller took the somewhat unusual step of filing a suit for paternity in California, where both parents-to-be resided at the time. In December 2012, a seven months pregnant McKenna moved to New York to begin her studies. She gave birth to a baby boy in February 2013 and (perhaps in response to the pending California paternity suit) filed for custody of her newborn in New York.

In May 2013, a New York family court referee hearing the case judged McKenna with unusual harshness, rebuking her for "unjustifiable conduct" and "forum shopping" by moving across the country. While the referee conceded McKenna "did not 'abduct' the child," the court did say that "her appropriation of the child while in utero was irresponsible, reprehensible." Despite this strong language, the referee never reached the merits of the case, determining only that the New York court did not have jurisdiction over the matter because of the pending California action. This decision is wrong on the merits.

Under the terms of the Uniform Child Custody and Jurisdiction Enforcement Act, adopted by New York and virtually every other state, jurisdiction over custody disputes typically resides in the child's home state. "Home state" for a child less than six months old is defined as "the State in which the child lived from birth with [a parent]." Clearly, as the Miller-McKenna child was an infant, New York was the home state, as it was the place of the child's birth and the present residence of the child and his mother. Indeed, the child had no connection with any other state.

NEWS

RULINGS

VERDICTS

Friday, February 21, 2014

## U.S. Supreme Court High court to tackle EPA climate change regulations

The U.S. Supreme Court is stepping into the debate on tackling climate change Monday, scrutinizing the Obama administration's push to cut greenhouse gas emissions from power plants and other industrial operations.

## Personal Injury & Torts Guilty pleas could boost negligence claims against Dodgers

Two defendants charged with beating a San Francisco Giants fan outside Dodger Stadium nearly three years ago pleaded guilty Thursday, which attorneys say might affect the victim's lawsuit against the Dodgers.

## Employee Benefits Can we eliminate the 'California rule' for public-employee pensions?

The goal is to treat pension benefits just like other aspects of compensation: as something earned over time and not protected from changes that operate purely prospectively. By **Sasha Volokh**

## Litigation Plaintiffs have failed to prove their case, say defendants in major education suit

After three weeks of plaintiffs' testimony from nearly 20 witnesses, a Los Angeles County Superior Court judge must decide if a potentially landmark education lawsuit is fit to continue.

## California Supreme Court State Supreme Court lifts obstacle to retaliation lawsuits

The high court ruled unanimously Thursday that doctors can swiftly sue hospitals for retaliation in certain types of whistle-blower lawsuits, touching on issues of how best to maintain standards of care.

## Law Practice New firm draws from Downey Brand, Cota Cole

The two firms each lost a pair of partners to King Williams & Gleason LLP, a new Sacramento real estate and environmental law boutique that opened this week.

## Litigation Federal agencies get involved in Contra Costa Juvenile Hall case

Nonetheless, the referee declined to exercise jurisdiction over the matter, based on alleged "misconduct" by McKenna, specifically the claim that she "forum shopped." The referee's reliance on the "misconduct" provision represented a gross misinterpretation of the statute. Misconduct sufficient to trigger a denial of jurisdiction typically involves efforts to abscond with a child to gain advantage in a custody dispute. It is simply unprecedented for a court to deem a pregnant woman's decision to move to another state (for her education, no less) as "misconduct."

Fortunately, in November 2013 the referee's error was reversed on appeal by a five-judge panel that recognized McKenna's basic rights had been violated. In addition to ruling that jurisdiction belonged in New York, the appeals court made clear, "[p]utative fathers have neither the right nor the ability to restrict a pregnant woman from her constitutionally protected liberty." Unfortunately, the appellate ruling came after a California court asserted jurisdiction over the matter and for reasons only the sealed record would reveal, awarded primary custody of the 6-month-old boy to his west coast-based father. Miller and his wife retained custody of the child until this past November when the feuding parents reached a temporary custody agreement - with a special clause that permitted Miller to take the child along to Sochi to cheer his father on.

Any custody case plagued by error would cause regret for the possible harm done to the child, as well as the distress of the parent wrongfully deprived of custody. But the troubling ramifications of this case go well beyond concern for McKenna and her child. Both the New York and California judges' rulings reflect shades of sexism and gender stereotyping that view working or full-time student single women as less capable of caring for a child than an equally ambitious married man. A spate of custody cases across the nation display this favoritism for the married couple over the toiling single mother. The result is even more noteworthy in New York where the female referee - Fiordaliza Rodriguez - has endured charges of misogyny and paternalism for her ruling lambasting a woman for seeking to improve her lot by attending an Ivy League institution.

Rodriguez's characterization of travel by a pregnant woman as "misconduct" substantially burdens the pregnant woman's rights and likely constitutes an unconstitutional infringement of due process and the right to travel. Moreover, by equating a fetus with a child for purposes of the jurisdiction statute, the ruling stokes the burgeoning movement for increased fetal rights. While Rodriguez might have seen herself as displaying gender evenhandedness in adjudicating the matter, she failed to acknowledge the biological imbalance at the heart of any pre-birth dispute: Prior to delivery, men and women are not similarly situated regarding the location of the fetus. The fetus resides in the woman's body. Indeed, that crucial fact forms the basis for a woman's right to terminate the pregnancy protected by the Constitution - a right that the woman can exercise without even notifying the father.

A pregnant woman's exclusive control over her bodily integrity and whereabouts is easily understood and constitutionally justified when the mother-to-be is also the child's intended parent. Such was the case with Sara McKenna. Imagine that instead of their brief romance, Miller and McKenna signed an agreement in which she agreed to serve as a gestational carrier for an embryo that he would supply. In that case, many of McKenna's rights over the fetus would be governed by the terms of the contract rather than by her status as a pregnant woman. If the contract forbade McKenna from traveling across the country while pregnant, her trip could be considered a breach entitling Miller to possible legal relief.

California law is particularly attuned to the distinctions between status and contract pregnancies, given our long embrace of commercial surrogacy arrangements. Since the state Supreme Court's decision in *Johnson v. Calvert*, 5 Cal. 4th 84 (1993), declaring that gestational surrogacy "does not offend the state or federal Constitution or public policy," we have served as the national hub for such arrangements. Further proof of our keen understanding of parental versus professional pregnancy is embodied in Family Code Section 7960. Enacted in 2012, this provision allows intended parents to a surrogacy arrangement to petition a court for a pre-birth judgment establishing that they - and not the surrogate - are the lawful parents of the in-utero child.

Judicial intervention into the lives of pregnant woman treads on hard-fought sacred ground that should evoke a high degree of scrutiny. In the case of Baby Miller-McKenna, the New York court's maltreatment of the pregnant petitioner displayed a worrying lack of understanding of the liberty that women enjoy, even while temporarily tethered to another life. Gestational surrogates voluntarily relinquish certain aspects of their liberty in support of another's reproductive dream. Recognizing

Taking an unusual step, the U.S. government waded into an ongoing federal lawsuit that challenges the placement of youth with disabilities at Contra Costa County Juvenile Hall in solitary confinement without educational services.

**Media organizations want Google privacy litigation documents unsealed**  
A large group of media organizations is seeking to intervene in litigation alleging Google Inc. illegally intercepts and scans emails.

**Intellectual Property**  
**Obama administration calls on Senate for patent litigation reform**  
Top Obama Administration officials emphasized its support Thursday for legislation pending in Congress intended to make litigation more difficult for patent holding companies.

**Alternative Dispute Resolution**  
**Louise A. LaMothe**  
A longtime neutral and a former business litigator, LaMothe is about to begin an unusual arrangement as a part-time U.S. magistrate judge while also preserving her private practice as a mediator and arbitrator.

**Criminal**  
**Judge questions lawyers about leak in gang murder case**  
A federal judge is investigating how a San Francisco defense attorney filing a habeas appeal got his hands on a police report turned over by the government that was under a protective order.

**Mergers & Acquisitions**  
**Dealmakers**  
A roundup of recent merger and acquisition and financing activity and the lawyers involved.

**Judges and Judiciary**  
**Chief justice optimistic about LAO report**  
Chief Justice Tani G. Cantil-Sakauye said Thursday that a recent report from the Legislative Analyst's Office could buoy efforts by the branch to increase courts' financial flexibility.

**Solo and Small Firms**  
**Entertainment boutique emphasizes quick, creative thinking**  
Long before the black-and-white art house film "The Artist" took home the 2012 Academy Award for best picture, quick maneuvering by Pierce Law Group prevented labor issues from sinking the project just days into production.

**Family**  
**Slalom custody battle upends family law**  
Off the slopes, Olympic bronze medalist Bode Miller is embroiled in a custody dispute that hardly inspires pride in our judicial system. By

the boundaries of reproductive liberty that accompany each pregnancy is essential in a society that strives to fulfill every person's quest for parenthood. While Bode Miller may have easily traversed the Russian slopes to certain victory, navigating the legal landscape of parental and reproductive rights has proved far more challenging.

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**New justice should confront barriers to simple fairness**  
As one noted British jurist has said, "The most important thing for a judge is - curiously enough - judgment." By **John M. Feder**

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**Alternative Dispute Resolution**  
**From attorney-warrior to mediator-peacemaker**  
How do you climb off your high horse as the powerful attorney fighting the "good fight" to take on the role of a "lowly" mediator? By **Arnold Levinson**

**Securities**  
**VIDEO: Securities class actions back on the rise... for now**  
In 2013 the number of federal securities class actions was up by 10 percent over 2012, with filings in the 9th U.S. Circuit Court of Appeals back to historical levels. By **Todd Scott and Alex Talarides**