COURTROOM + Classroom
CURRENT LEGAL ISSUES FOR STUDENTS
May 2010

IN THIS ISSUE

Money's Motto "In God We Trust" is Constitutional

SUMMARY: The statutes requiring that "In God We Trust" be printed on U.S. paper money and stamped into U.S. coins do not violate the First Amendment because that motto is ceremonial or patriotic and not an affirmative effort by the government to advocate religious belief. The United States Court of Appeals for the Ninth Circuit decided *Newdow v. LeFevre* on March 11, 2010.

BACKGROUND: Michael Newdow is an ordained minister in and founder of the First Amendmist Church of True Science, a religion whose members believe that there is no god. Newdow has brought various lawsuits intended to end government practices that he and his church argue advance belief in a monotheistic god in violation of the First Amendment.

In this case, Newdow filed a lawsuit in federal district court claiming that the statute establishing "In God We Trust" as the national motto, and the statutes requiring that that motto appear on U.S. coins and currency, violate the Establishment Clause by encouraging belief in a Christian monotheistic god. Among the named defendants were Secretary of the Treasury Henry Paulson, Director of the United States Mint Henrietta Holsman Fore, and Director of the Bureau of Engraving and Printing Thomas Ferguson.

The district court granted the defendants' motion to dismiss and Newdow appealed.

ANALYSIS: Along with the free speech, association and press provisions, the First Amendment guarantees freedom of religion. This freedom has two complementary pieces as set forth in the Amendment. The Free Exercise Clause bars the government from interfering with the people's right to observe their own religious beliefs. Its counterpart, the Establishment Clause, prohibits government from establishing a national religion. The latter is the provision supporting the separation of church and state in the United States.

Because Newdow and his church believe there is no monotheistic higher power watching or guiding individuals or government, they are offended by the presence of a slogan, "In God We Trust," on all U.S. money. Newdow argues that the motto's presence on something that, practically speaking, he must acquire and possess, makes him an unwilling advocate of an idea with which he sincerely and strongly disagrees. More importantly, argues Newdow, the motto plainly conflicts with the First Amendment by adopting what is prohibited: an official government stance promoting religious belief.

Looking only at the motto Newdow opposes, and the wording of the Establishment Clause, his argument looks strong. Yet in 1970, the Ninth Circuit decided a case called *Aronow v. United States* making the same essential argument Newdow made here—that "In God We Trust" violates the First Amendment's Establishment Clause. In that case, the Ninth Circuit disagreed. Rather than a sincere statement or command of unified religious belief, the motto, ruled the court, was a more generalized and symbolic slogan with a ceremonial or patriotic purpose. Its function was rooted in tradition rather than religion and the motto's appearance on money did not impede people's ability to believe or disbelieve according to their own ideas and feelings.

Because Newdow was in the Ninth Circuit, and the *Aronow* case is still good law (having not been overruled by that court or the court above the circuit courts of appeal, the U.S. Supreme Court), the three-judge panel hearing Newdow's case felt compelled to abide by *Aronow* and to dismiss Newdow's appeal.

Newdow had argued that Supreme Court opinions in the intervening decades had changed the law on the Establishment Clause, limiting *Aronow* to its facts as of 1970, when it was decided. Two of the three Ninth Circuit judges disagreed. The third judge wrote separately, concurring in the judgment that he and his colleagues were bound by Ninth Circuit law, but expressing concern that the circuit needed to update its analysis of the Establishment Clause in light of Supreme Court decisions since *Aronow*.

EXCERPTS FROM THE MAJORITY OPINION (By Judge Bea): "The Establishment Clause of the First Amendment states: 'Congress shall make no law respecting an establishment of religion. The Establishment Clause prohibits the enactment of a law or official policy that establishes a religion or religious faith, or tends to do so. Newdow alleges the placement of 'In God We Trust' on coins and currency violates the Establishment Clause. According to Newdow, the motto unconstitutionally places the government's imprimatur on a belief in a monotheistic God. Newdow further alleges the national motto turns him and other Atheists into political outsiders by reinforcing the twin notions that belief in God is 'good,' and disbelief in God is 'bad.' Thus, Newdow asserts the statutes requiring the inscription of the motto on coins and currency run afoul of the Establishment Clause.

Newdow's Establishment Clause claim is foreclosed by our decision in *Aronow v. United States* (9th Cir. 1970). In *Aronow*, we held the national motto, 'In God We Trust,' and the statutes requiring its placement on coins and currency, do not violate the Establishment Clause.

We reasoned:

> 'It is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.
>
> * * *
>
> 'It is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted "In God We Trust" or the study of a government publication or document bearing that slogan. . . . While ceremonial' and 'patriotic' may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact. As stated by the Congressional report, it has 'spiritual and psychological value' and 'inspirational quality.'

"Newdow concedes his Establishment Clause challenge is essentially identical to the one raised in *Aronow*, but contends *Aronow* is not binding precedent. As a general rule, we, as a three-judge panel, are without authority to overrule a circuit precedent; that power is reserved to the circuit court sitting en banc. Nevertheless, where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.

"Newdow asserts the reasoning and theory of *Aronow* is clearly irreconcilable with intervening Supreme Court precedent. According to Newdow, the Supreme Court's Establishment Clause jurisprudence went through significant changes since *Aronow* was decided. Specifically, Newdow notes all of the Establishment Clause tests with which he asserts 'In God We Trust' is incompatible were developed by the Supreme Court after *Aronow* was decided. Therefore, Newdow contends *Aronow* is no longer binding precedent.

"We disagree. That the Supreme Court has developed new Establishment Clause tests does not render *Aronow* clearly irreconcilable with Supreme Court precedent. Newdow did not and cannot cite a single Supreme Court case that called into question the motto's constitutionality or otherwise invalidated *Aronow's* reasoning or theory. To the contrary, and consistent with Aronow, the Supreme Court has noted in dicta the national motto does not violate the Establishment Clause."

"

EXCERPTS FROM THE CONCURRENCE (By Judge Reinhardt): "[This court has failed] to comprehend the constitutional principles set forth in the relevant Establishment Clause cases that the Supreme Court has decided in the years following our decision in *Aronow v. United States* (9th Cir. 1970). Because I am ... required to follow [our] precedent, no matter how misguided, I am also ... required to conclude that Newdow's claims in this case are foreclosed by *Aronow*, and therefore to concur in the result."

COMMENTS & QUESTIONS

1. What is Michael Newdow's legal claim with respect to money in the United States?

2. To what group, relevant to this case, does Newdow belong?

3. Is Newdow religious?

A common defense when government officials are called to defend statutes is to argue that the plaintiff has no "standing." Standing restricts who may bring a particular lawsuit. It helps ensure that those who ask the courts to decide matters affecting legal rights and remedies have an adequate interest in the outcome to put up a good fight. Parties with a stake in the outcome will likely try harder to present evidence and make well-reasoned legal arguments advancing their position. Judges do not like to decide cases, and create precedent, when one or both parties puts up a lackluster effort. In that situation, judges fear that important facts or arguments may be missing and that their decision will not improve the legal system's clarity and fairness.

The United States Supreme Court has held that the bare minimum requirements for standing to challenge a federal law are 1) injury, 2) causation, and 3) redressability. The Ninth Circuit reasoned that Newdow met all three requirements. Because he sincerely believes that there is no god and that the U.S. Constitution protects that belief, Newdow's offense and outrage at having to possess and distribute money with a message contradicting his beliefs amounts to a legal "injury." That message appears on U.S. money by operation of the statutes he challenged—causation. And striking down those statutes as unconstitutional would force removal of this motto from our money, redressing his injury. Newdow thus had standing to bring his lawsuit.

The Ninth Circuit holds that the statement "In God We Trust" on U.S. money is not a formal adoption or establishment of monotheistic religion by government. Do you agree? If you saw posters that said, "In McCain We Trust" or "In Obama We Trust," would you think the groups that created the posters were advocating a particular belief? Would you feel they were trying to convince you to believe as they do?

U.S. history includes practices or customs we no longer respect. Would it be lawful for our coins to say "Women Should Not Vote" or "We Practice Slavery" or "Indian Land is Our Land?" Are these mottoes offensive? To whom? If a court declared that these sayings were merely traditional, would that remove the offensiveness? Would you believe the court?

Do slogans belong on our money? If our bills were stamped, "Save the Environment?," would that be lawful? Would anyone have standing to challenge it? What if our bills said, "In Money We Trust" or "Money Makes the World Go Around"—legal? Offensive? Sincere?

Sometimes people say things that another person hears and is hurt by. In defense, the speaker might say, "I didn't mean what I said." Is that the court's interpretation of the motto on our money? Is it persuasive? Why would the government utter a collection of words whose literal meaning it does not intend? If the true meaning of the Establishment Clause is that church and state are to be separate, then that sentiment has a long history in our country. Do you think a statute would ever pass our Congress requiring coins to say "We Do Not Trust God?" Who would take offense at that message? Why?

In the *Aronow* opinion excerpt, Congress is quoted as saying that the motto has "spiritual value" and an "inspirational quality"? Are those descriptions non-religious?

Court Voids Law on Animal Cruelty

SUMMARY: A federal law created to punish creators of "crush videos," which cater to persons aroused or entertained by depictions of animals being tortured and killed, violated the First Amendment. The United States Supreme Court decided *United States v. Stevens* on April 20, 2010.

BACKGROUND: All 50 states and the District of Columbia have laws prohibiting animal cruelty. Despite these laws, government prosecutors were stymied in their efforts to prevent a particular type of cruelty, flourishing through internet commerce, known as "crush videos."

Submitted as evidence in this case for the judge's information was a sample crush video. In it, a mewing kitten was secured to the ground. A woman in spiked heels approached the kitten and began stomping on it, uttering "dominatrix" messages asserting her power and mocking the creature's suffering. The helpless animal wailed, bled, sustained broken bones in its body and head, until it was a dead mass of blood, fur and flesh.

The creators of such videos, knowing they are aiding and abetting a crime, avoid displaying evidence that would facilitate prosecution, such as identifiable locations or actors. The films are typically undated to avoid a means of calculating whether the applicable statute of limitations has run.

Prosecutors and supporters of stopping crush videos, which evidence suggested was a million-dollar-a-year business, asked Congress to pass a law punishing creation of the videos depicting the crimes. Comparing commerce in crush videos to that in child pornography, they argued that prosecutors needed this extra crime-fighting tool because the market for the videos was promoting the criminal conduct.

Congress responded, creating the law codified at 18 United States Code section 48, which criminalized the creation, sale, or possession of certain depictions of animal cruelty. Hunting videos, and other videos with educational, literary or artistic merit, were exempted. Shortly after the law went into effect, the internet sale of crush videos effectively ceased.

Robert J. Stevens ran an internet-based business called Dogs of Velvet and Steel, selling videos of dog fights and of animals attacking other animals. He was prosecuted under section 48. Stevens filed a motion to dismiss the charges, arguing that the law violated the First Amendment. The district court denied the motion and he appealed to the Third Circuit Court of Appeals. That court reversed, finding section 48 unconstitutional. The government then appealed to the U.S. Supreme Court, which granted review.

ANALYSIS: The First Amendment insulates the public from criminal prosecution for the expression of ideas. It is among the most powerful defenses the public enjoys from an overreaching government. Yet not all expression a criminal defendant seeks to characterize as protected speech enjoys protection. Acts whose threat to the public is too great for justice to sanction are excluded from the First Amendment's reach. The Supreme Court has determined that obscenity, defamation, fraud, incitement (to criminal action), and speech integral to criminal conduct are not protected.

Stevens argued that section 48 was an invalid law, intruding on lawful conduct. The government countered that crush videos were not entitled to First Amendment protection.

Although they agreed that crush videos were deeply offensive, the court declined to put animal cruelty on the same level as the behaviors excluded from First Amendment coverage. If not addressing behavior excluded by the First Amendment, section 48 was subject to the Court's established analytical approach for laws regulating expressive activity.

The Supreme Court can find a statute unconstitutional "on its face." This means that the words setting forth the law plainly conflict with established constitutional rights or that the statute lacks any "plainly legitimate sweep." An example of such a law might say, "any person who criticizes the governor of any state will be imprisoned for one year." The Court did not find this type of analysis applicable to section 48. Punishing persons filming violations of animal cruelty laws did not obviously run afoul of the constitution.

Another evaluative test the Court applies to laws subject to constitutional challenge is the "overbreadth doctrine." Under this approach, even a law with a strong beneficial purpose can be unconstitutional if, in addition to unlawful activity, the law could apply to a substantial number of lawful situations. A majority of the Court determined that section 48 ran afoul of the overbreadth doctrine. In addition to the acts Congress sought to punish, the Court reasoned that hunting videos, as well as educational and journalistic videos, could violate the law.

Justice Alito dissented. He felt that the Court should have remanded the case to the Third Circuit to decide whether section 48 was constitutional as applied to Stevens. Deciding whether a law was constitutionally applied to the conduct that was prosecuted is preferable, Alito reasoned, to a far-reaching search for contexts in which the law might affect lawful activity.

Even applying "overbreadth analysis," Alito opined that the law was constitutional because it was written not to apply to hunting. The few situations where section 48 might affect other lawful activity were minimal and unlikely to arise.

EXCERPTS FROM THE MAJORITY OPINION (By Chief Justice Roberts): "We read §48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a depiction of animal cruelty nowhere requires that the depicted conduct be cruel. That text applies to any . . . 'depiction in which a living animal is

intentionally maimed, mutilated, tortured, wounded, or killed. '[M]aimed, mutilated, [and] tortured' convey cruelty, but 'wounded' or 'killed' do not suggest any such limitation.

The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to 'kill' is 'to deprive of life.' We agree that 'wounded' and 'killed' should be read according to their ordinary meaning. Nothing about that meaning requires cruelty.

"While not requiring cruelty, §48 does require that the depicted conduct be illegal. But this requirement does not limit §48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the humane wound[ing] or kill[ing] of living animal[s]. Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of §48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.

"What is more, the application of §48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in the State in which the creation, sale, or possession takes place, regardless of whether the . . . wounding . . . or killing took place in [that] State. A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of §48, because although there may be a broad societal consensus against cruelty to animals, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.

"In the District of Columbia, for example, all hunting is unlawful. Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, and hunting television programs, videos, and Web sites are equally popular.

"The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, §48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation's Capital.
Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions.

"Not to worry, the Government says: The Executive Branch construes §48 to reach only extreme cruelty, Brief for United States 8, and it neither has brought nor will bring a prosecution for anything less. The Government hits this theme hard, invoking its prosecutorial discretion several times. But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."

EXCERPTS FROM THE DISSENT (By Justice Alito):
"As the Court notes, photographs and videos of hunters shooting game are common. But hunting is legal in all 50 States, and §48 applies only to a depiction of conduct that is illegal in the jurisdiction in which the depiction is created, sold, or possessed. Therefore, in all 50 States, the creation, sale, or possession for sale of the vast majority of hunting depictions indisputably falls outside §48's reach.

"Straining to find overbreadth, the Court suggests that§48 prohibits the sale or possession in the District of Columbia of any depiction of hunting because the District—undoubtedly because of its urban character—does not permit hunting within its boundaries. The Court also suggests that, because some States prohibit a particular type of hunting (*e.g.*, hunting with a crossbow or canned hunting) or the hunting of a particular animal (*e.g.*, the sharp-tailed grouse), §48 makes it illegal for persons in such States to sell or possess for sale a depiction of hunting that was perfectly legal in the State in which the hunting took place.

"Congress, in enacting §48, had no intention of restricting the creation, sale, or possession of depictions of hunting. Proponents of the law made this point clearly. Indeed, even *opponents* acknowledged that §48 was not intended to reach ordinary hunting depictions.

"For these reasons . . . §48 has no application to depictions of hunting. But even if §48 did impermissibly reach the sale or possession of depictions of hunting in a few unusual situations (for example, the sale in Oregon of a depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho), those isolated applications would hardly show that §48 bans a substantial amount of protected speech.

"[T]he conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess them with the intent to make a profit may be similarly culpable. (For example, in some cases, crush videos were commissioned by purchasers who specified the details of the acts that they wanted to see performed.) To the extent that §48 reaches such persons, it surely does not violate the First Amendment.

"Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct

prohibited by §48—the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record. Faced with this evidence, Congress reasonably chose to target the lucrative crush video market.

"Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And, §48(b) provides an exception for depictions having any serious religious, political, scientific, educational, journalistic, historical, or artistic value."

COMMENTS & QUESTIONS

1. What is a "crush video"?

2. Why are they produced?

3. Is a crush video protected by the First Amendment? Does this decision legalize animal cruelty?

The majority ruled that section 48 failed the First Amendment "overbreadth" test. "Breadth" in this context refers to the amount of protected expression affected by a particular law as it is worded. Free expression lies at the heart of our democratic system and therefore enjoys the greatest protection the courts afford to constitutional rights. A law affecting First Amendment freedoms must withstand "strict scrutiny." Under this test, a challenged law must serve a compelling government interest and it must be "narrowly tailored."

As this case demonstrates, the justices do not always agree on what laws pass or fail this test. The majority felt the law was not narrowly tailored because it could lead to prosecutions for hunting videos. The dissent viewed the law as constitutional, not reasonably applying to hunting videos and therefore affecting very few legitimate areas of expression.

Does filming the torture and killing of small animals qualify as entertainment? Does it express valuable ideas? Is it protected by the First Amendment? Do hunting videos express valuable ideas? What ideas does it express that a crush video doesn't? Are the differences meaningful enough to ban one and protect the other? The freedoms expressed in the Constitution are enforced against the government to prevent it from overstepping its authority and oppressing the people. Do you think the Founders of our country meant for the First Amendment to protect depictions of animal cruelty?

Much of the world's human population consumes animals, for which purpose they must be killed. Is a person eating a roast beef sandwich with one hand and turning through this court's opinion criticizing it with the other a hypocrite? Is a cow entitled to less protection under the law than a dog or a cat? Is it cruel to throw a fish on the shore after you catch it? What if you eat it later?

If the vast majority of the population finds crush videos disgusting and the people who make and watch them to be deeply depraved, do we need a law, and prosecutors and tax dollars devoted to the problem? If a particular act is rare, but highly offensive (though not dangerous to humans), is that a good reason to make it illegal?

Child pornography is not protected by the First Amendment. Congress sought to add animal cruelty to the class of speech so vile and harmful as to stand outside First Amendment protection. Do you think it should be classified the same as child pornography? In this case, the government also argued that Congress could proscribe new categories of speech when it found their “societal costs” exceeded their “value”. The Court rejected this argument stating that such “a free-floating test for First Amendment coverage is startling and dangerous.” Do you agree? Should there be such a balancing test? If so, who does the balancing?

Spousal Support Contract Enforceable Against Husband

SUMMARY: A spousal support contract, including the scenario where one spouse supports the other during schooling on the promise that the supporting spouse will benefit from the other's increased income as a result of the education, is enforceable in Utah. The Utah Supreme Court decided *Ashby v. Ashby* on February 9, 2010.

BACKGROUND: Gloria and Dallen Ashby were married in December 1997. While Dallen finished his undergraduate studies, Gloria worked to support the couple. According to Gloria, this arrangement was more than incidental: they had an agreement, whereby Gloria promised to support Dallen during his undergraduate studies so that he could focus on preparing for medical school, after which Dallen promised to use his medical training to raise their standard of living.

Dallen entered medical school, which he paid for with student loans, and then began a one-year medical internship in St. Louis. During this internship, in May 2005, Dallen and Gloria separated. Gloria filed for divorce in Utah in 2005. In her divorce case, Gloria made claims for breach of contract and "unjust enrichment."

Dallen filed a motion to dismiss both claims, which the district court granted. Gloria appealed and the appeals court reversed. Dallen then petitioned the Utah Supreme Court to review the appeals court's decision. The Utah Supreme Court granted his petition.

ANALYSIS: Dallen argued that Gloria's claims were precluded by Utah caselaw and statutes and that they violated public policy. Her claim for unjust enrichment, Dallen argued, was essentially the same as a claim for "equitable restitution," which the Utah Supreme Court had declared invalid in the 1991 case, *Martinez v. Martinez*. Her contract claim, he contended, was rendered unnecessary by the Utah alimony statute, which provided an adequate remedy for divorcing spouses and implicitly discouraged contract remedies within the marital relationship. Such a contract, Dallen contended, also violated public policy because enforcing it would encourage couples to speak less to one another for fear that "pillow talk" would turn into binding agreements on divorce.

The Utah Supreme Court agreed with Dallen on the unjust enrichment claim. Such a claim, the court reasoned, treats the marriage as a business arrangement and the advanced degree as marital property. Yet the practice in Utah is not to treat a degree as property that may be divided between the parting spouses. The court also concluded that unjust enrichment is a claim available in the absence of a contract. Thus, only one of Gloria's claims could stand--either there was a spousal support contract or there was not. The Martinez case precluded Gloria from recovering on an equitable or unjust enrichment theory, so the court moved to consideration of whether Gloria had a contract remedy.

Disagreeing with Dallen, the court held that Utah alimony law did not prohibit spousal support contracts. Although that law empowered judges to fashion appropriate remedies for divorcing spouses, those remedies were still subject to the judge's unique views of the facts. Contract law, by contrast, allowed parties to argue for damages amounting to the un-recouped benefits of their bargain. If Gloria could establish that she and Dallen had a spousal support contract, she was entitled to enforce it. The court specified that in such situations, lower courts were to evaluate the existence of the alleged spousal support contract first. If it found the existence of a valid contract it was then to fashion the rest of its divorce remedy (its alimony decision) in light of what the contract awarded between the parties.

The court also specified that because a spousal support contract was essential to a fair division of the marital estate, a spouse asserting such a contract had to do so in the divorce action. Failure to do so waived the action because the court needs to evaluate that claim before making an equitable property distribution.

Finding that Gloria had a right to proceed on her spousal support claim, which she brought in the divorce action, the Utah Supreme Court remanded the case to the lower courts for resolution in conformance with its opinion.

EXCERPTS FROM THE COURT'S OPINION (By Judge Durrant): "Gloria argues that Dallen has been unjustly enriched by her efforts to support him during medical school and that she is, therefore, entitled to be compensated for the value of the benefit she conferred on him. Gloria asserts that her case is distinguishable from *Martinez* because she, in contrast to the plaintiff in *Martinez*, alleges the existence of an actual contract. Although the presence of an actual contract casts Gloria's case in a somewhat different light from *Martinez*, Gloria's claim for unjust enrichment is nonetheless materially indistinguishable from the claim for equitable restitution we rejected in *Martinez*.

"*Martinez,* like the present case, arose out of a divorce that occurred shortly after one spouse graduated from medical school. The plaintiff in *Martinez* sought a share in the future increased earnings from her spouse's medical degree. While the court of appeals declined the plaintiff's invitation to treat the medical degree as property subject to division, it nevertheless allowed the plaintiff to recover under a theory of 'equitable restitution' based on contributions made to the family during the spouse's educational period.

"We reversed the court of appeals, declining to recognize the remedy of equitable restitution because (1) it treated marriage as a venture akin to a commercial partnership, (2) recovery under the remedy would be extraordinarily speculative, and (3) equitable restitution was essentially indistinguishable from treating an advanced degree as marital property. Although we recognized the equities involved in student support situations, we reasoned that the concept of alimony was broad enough to take the

equitable concerns presented in *Martinez* into account. We stated that if one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, it may be appropriate for the trial court to make a compensating adjustment in dividing the marital property and awarding alimony.

"Unjust enrichment is an action initiated by a plaintiff to recover payment for labor performed in a variety of circumstances in which that plaintiff, for some reason, would not be able to sue on an express contract. A claim for unjust enrichment is an action brought in restitution, and a prerequisite for recovery on an unjust enrichment theory is the absence of an enforceable contract governing the rights and obligations of the parties relating to the conduct at issue. If there were a contract, it, rather than the law of restitution, would govern the parties' rights and determine their recovery. Recovery under [unjust enrichment] presupposes that no enforceable written or oral contract exists.

"Accordingly, by the very nature of the cause of action, Gloria's claim for unjust enrichment is predicated on the assumption that there is no enforceable contract between her and Dallen. It is, then, essentially an alternative basis for recovery in the event her contract claim fails. And because Gloria's unjust enrichment claim is premised on the nonexistence of an enforceable contract between her and Dallen, it is, in reality, nothing more than a rewording of the equitable restitution claim we rejected in Martinez. Our rationale for rejecting the equitable restitution claim in Martinez did not hinge on the fact that the plaintiff had not alleged the existence of an express contract. Accordingly, our reasoning regarding the equitable restitution claim in Martinez is equally applicable to Gloria's claim for unjust enrichment in this case. We therefore reverse the court of appeals and uphold the district court's dismissal of Gloria's unjust enrichment claim.

"Dallen next argues that, even if [Utah Code] section 30-3-5 does not preempt Gloria's contract claim, it obviates the need for enforcing student support contracts by providing the adequate alternative remedy of alimony. And Dallen contends that the availability of this remedy, coupled with the potentially harmful effect that enforcing student support contracts would have on communication between spouses, justifies declining to enforce Gloria's contract claim.

"Dallen's argument is predicated on two assumptions that we find either incorrect or unpersuasive. The first assumption is that Gloria can be made whole, through alimony, from Dallen's alleged breach of contract. This is incorrect. While alimony may provide a remedy for the type of injury Gloria alleges, it is not necessarily a perfect substitute for the remedies available under contract.

"For example, if Gloria were to prevail on her breach of contract claim, she would be entitled to the damages necessary to place her in the same position she would have been in had Dallen tendered performance according to the contract's terms. In other words, she would be entitled to damages based on the alleged contractual bargain--to be supported by Dallen at a standard of living commensurate with the income normally obtained by a holder of a medical degree. In contrast, any relief available through alimony is within the discretion of the district court--both as to the terms of an alimony award as well as the decision to award alimony at all. Thus, even if the court decides that Gloria is entitled to alimony, the amount of any award would be determined by the district court in light of the equities and principles set out in section 30-3-5 rather than the amount negotiated by contract. And the court's alimony award, unlike the legal relief available by contract, would be subject to modification by the district court under the continuing jurisdiction granted it by section 30-3-5(8)(g).

"Dallen's second assumption is that enforcing contracts similar to his alleged contract with Gloria would cause significant harm to the institution of marriage. Dallen's primary concern is that enforcing these contracts would chill communication within marriage for fear that all pillow talk and the general complaint of 'broken promises' . . . would be elevated to contract or commercial status with the attendant risk of liability.

"But agreements based solely on pillow talk or general complaint[s] of 'broken promises' would rarely, if ever, rise to the level of enforceable contracts. In the event one spouse brings a claim for breach of contract against another based solely on these grounds, it would likely be disposed of on summary judgment. Thus, normal contract requirements, not to mention the more stringent standards imposed on postnuptial agreements, are sufficient to substantially allay Dallen's concerns. The mere fact that a spouse might assert an unenforceable contract claim does not justify adopting a bright line rule that would eliminate a whole class of claims based on legitimate contracts, seriously and deliberately negotiated, simply because of their subject matter."

COMMENTS & QUESTIONS

1. What was Dallen Ashby doing when he and Gloria got married?

2. What promise did she make to him? Did she keep it?

3. Did Dallen promise Gloria something? Did he deliver on his promise?

We often picture contracts as long, boring multi-page documents with dates and signatures and maybe some official looking stamps on the last page. A mortgage for a house, a lease for an apartment, and a car rental agreement are common examples of written contracts. Yet a contract need not be written down to be enforceable. An oral agreement can be enforceable in court, too, if it meets the requirements of a valid contract.

The basic requirements of a contract include offer and acceptance--one party proposes a certain deal and the other agrees to it, "meeting of the minds" or "mutual consent"--the parties share an understanding of the agreement and wish to execute it, "consideration"--the exchange of something of value, and performance--at least one party undertakes his or her side of the bargain (which initiates the obligation for the other side to perform). There was no written contract in this case, but Gloria would attempt, on remand to the lower court, to prove that the essential elements of a binding contract existed in her oral agreement with Dallen to support him in return for an enhanced standard of living for both of them once he became a doctor. Note that some contracts, such as an agreement to sell real estate, must be in writing or a court will not enforce them.

Do you think Gloria deserves additional money from Dallen? What if she were cruel and spiteful to him? What if she cheated on him? Would it matter to your answer if Gloria were also a doctor?

If Gloria inherited $5 million during the course of this lawsuit, and you were a judge, would that affect your interpretation of whether she was entitled to anything under a spousal support contract? Should it matter? Would it matter to the court deciding how to divide the marital assets if there were no spousal support contract?

Which of the following oral exchanges do you think create enforceable contracts?
a) "If you give me a ride to school, I'll buy you lunch." "Ok."
b) "Hey, I lent you a pen last week, so buy me a soda." "I guess that's fair."
c) "Give me a kiss and I'll give you the moon." "Sure."
d) "Pay me $5 and I won't punch you in the face." "Whatever you say."
e) "I'll give you a thousand dollars for that lot next to your cabin." "You got a deal."

Should courts be looking inside of marriages to decide whether conversations couples supposedly had regarding expenses and future jobs are enforceable as contracts? If not, does the likelihood of fairness in the divorce increase or decrease?

Should a written contract be required to make spousal support agreements enforceable?

Defective Sperm Could not Be Basis for Suit

SUMMARY: The mother of a child with a genetic disorder could not sue the sperm bank that provided the child's father's genetic material because she waited too long to bring suit. The United States Court of Appeals for the Third Circuit decided *D.D. v. Idant Laboratories* on March 9, 2010.

BACKGROUND: D.D. wanted a child. For artificial insemination, she acquired semen from Idant Laboratories. Idant told her that the semen in its possession was screened for irregularities as required by New York law. The semen it sent to D.D.'s physician was identified as being from donor G738. It was used to artificially inseminate D.D. and she became pregnant. Daughter B.D. was born in January 1996.

Shortly after B.D.'s birth, D.D. noticed that the child had behavioral problems. Genetic tests performed by SmithKline Beecham Clinical Laboratories in February 1998 indicated that B.D. had a gene identified as "Fragile X." In May 1998, SmithKline informed D.D. that she was not a Fragile X carrier. Its tests indicated that donor G738 was a Fragile X carrier.

Based on this information, D.D. got a lawyer, who sent Idant a draft civil complaint in 1998. The draft complaint asserted that B.D.'s Fragile X Syndrome was caused by donor G738 and passed on to B.D. As a direct result of being born with the syndrome, the complaint continued, B.D. has permanently impaired developmental communication, play, motor planning, sensory and cognitive skills and a 50-percent chance of passing Fragile X on to her own children.

Idant responded with two letters. The first was from Dr. Fred Gilbert of Cornell Medical School. Dr. Gilbert stated that B.D.'s retardation must be due to something other than Fragile X, as that status is associated with normal appearance and development. Gilbert did state that as a Fragile X carrier, B.D.'s offspring would be at risk for retardation. The second letter came from Dr. Paul McDonough of Medical College of Georgia. He likewise asserted that B.D.'s retardation must be due to a cause other than the Fragile X mutation. McDonough advised D.D. that it was important to perform cytogenetic studies and other evaluations of B.D. based on clinical findings specific to her.

D.D.'s lawyer did not serve a final complaint upon Idant or file it with the court.

In August 2006, a California professor told D.D. that there was a connection between B.D.'s condition and the genetic material she obtained from Idant. In 2008, The American Journal of Medical Genetics published an article called, "A Girl With Fragile X Permutation From Sperm Donation," which D.D. read. The paper recommended Fragile X DNA screening of male and female gamete donors because the mutation is common in the general population and can cause medical problems.

On July 16, 2008, D.D. sued Idant for negligence, breach of contract, breach of product warranties, product liability and negligent infliction of emotional distress. All of these injuries were caused by Idant's failure to identify donor G738 as a "Fragile X" carrier. D.D. claimed Idant's wrongs caused monetary damages involving need for medical treatment throughout B.D.'s life.

Idant moved to dismiss the claims as untimely and the district court granted the motion. D.D. appealed. Idant did not focus its defense on the substantive claim—the essential legal wrong that D.D. argued was demonstrated by the facts of her artificial insemination. Instead, Idant argued that D.D. had no right to bring the claim at all, because she had waited too long to file suit.

Except for extraordinary situations like murder, most legal claims must be brought within a certain prescribed time period for the particular type of claim asserted. The laws establishing the timeframes within which claims must be raised are called "statutes of limitations." Periods such as two, four and six years are common. Some must be asserted more quickly.

Evidence is a primary reason for limiting the time within which a suit must be brought. Over time, witnesses move, die, forget the specifics of what they have seen. Locations and devices involved in accidents change or disappear. Written records get lost. Statutes of limitations promote fairness by requiring parties to bring their claims while the evidence to prove or disprove them is still available.

Idant argued that D.D.'s claims were barred by the applicable statutes of limitations. B.D.'s medical or behavioral problems forming the basis of D.D.'s complaints manifested themselves by 1998. The scientific tests by SmithKline Beecham establishing that B.D. had the Fragile X condition and that D.D. was not a carrier of that gene were likewise available in 1998. Thus, Idant argued, D.D. had the information she based her complaint on ten years before she sued. That period exceeded the relevant statutes of limitations for all of her claims.

D.D. argued that 1998 was not the correct time from which to commence counting for statute of limitations purposes. "Tolling" is the legal concept describing suspension of a statute of limitations. Tolling applies when a party, even though injured, does not realize that the injury has occurred. For example, if a chemical spill in 1990 was proven to have caused cancer in area residents 14 years afterward, they would not be barred by a statute of limitations running from the time of the spill. Because the nature of the damage—the cancer—was not known or knowable until the first link to cancer and the spill was made, the court would suspend running of the statute of limitations. Justice is not served when people are denied opportunity to bring claims within a certain period when they had no knowledge that they had a basis to sue during that time.

D.D. argued that because of the letters Idant's medical experts had sent to her, she did not know that Idant and donor G738 were the cause of B.D.'s Fragile X until 2006, when a California doctor made the connection, or 2008, when a medical journal linked donated sperm and Fragile X. Because D.D. did not know that information, she argued, the limitations period should be tolled until that evidence surfaced.

The Third Circuit disagreed. D.D. had gotten genetic tests ruling out D.D. as the Fragile X carrier and had sent Idant a draft complaint in 1998. Whether D.D. believed or wanted to believe that Idant was to blame for her bearing a child with a genetic problem was not the issue before the court. Rather, the court's job was to determine whether D.D. had what she needed, and what a reasonable person in her shoes would need, to bring a timely lawsuit for the harm sustained. The Third Circuit ruled that D.D. did have the evidence to support her claims ten years before suing and therefore the limitations periods governing her claims would not be tolled. Her claims were time-barred, and properly dismissed.

EXCERPTS FROM THE COURT'S OPINION (By Judge Barry): "D.D. argues that the statute of limitations was tolled because she relied on the letters of Drs. Gilbert and McDonough and because she was unable to know that B.D.'s Fragile X, developmental, and other problems were caused by the sperm sold by Idant until the 2008 publication of 'A Girl With Fragile X . . . .' Stated generally, she bases her argument for tolling on Pennsylvania's discovery rule and fraudulent concealment doctrine.

"The discovery rule . . . tolls the running of the applicable statute of limitations when an injury or its cause was not known or reasonably knowable. Tolling is applied where despite the exercise of reasonable diligence, the plaintiff could identify neither her injury nor its source within the limitations period. Reasonable diligence is an objective test, but it is also sufficiently flexible . . . to take into account the difference[s] between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question.

"Demonstrating reasonable diligence requires a plaintiff to establish that she displayed those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others. With regard to identifying the injury or its cause, plaintiffs need not know that they have a cause of action, or that the injury was caused by another party[] . . . , for once a plaintiff possesses the salient facts concerning the occurrence of his injury and *who* or *what* caused it, he has the ability to investigate and pursue his claim.

"As far back as 1997, D.D. knew that B.D. was a Fragile X carrier. By early 1998, she knew that she was not a carrier, and in May of that year, she knew that Donor G738 was and that males who possess the Fragile X syndrome pass it to all of their daughters. It was based on this knowledge that her counsel was able to send Idant a draft complaint alleging that B.D.'s numerous deficiencies were the result of her 'Fragile X syndrome' . . . caused by Donor G738. D.D. alleges that the letters of Drs. Gilbert and McDonough undermined any suspicion she might have had that B.D.'s disabilities were related to Donor G738 and Fragile X. If that is so, she clearly failed to demonstrate those qualities of attention, knowledge, intelligence and judgment which society requires of its members . . . . A reasonable person would have questioned some of what was in those letters coming, as they did, from the defendant's doctors, or at least have done what Dr. McDonough said it was important to do: perform cytogenetic studies, and other evaluations. In any event, we note that although the letters say that B.D.'s mental retardation was not caused by her Fragile X carrier state, they are consistent in important respects with the SmithKline reports on Donor G738 and B.D. – they agree, for example, that she is a Fragile X carrier whose children will be at increased risk of developing the full Fragile X syndrome including retardation. Having possess[ed] the salient facts concerning the occurrence of the injury alleged here and what caused it at the time the draft complaint was prepared, the discovery rule did not toll D.D.'s cause of action beyond 1998.

"[I]n order for fraudulent concealment to toll the statute of limitations, the defendant must have committed some affirmative independent act of concealment upon which the plaintiff[] justifiably relied. The plaintiff bears the burden of proving fraudulent concealment, and must show that he exercised reasonable diligence in attempting to uncover the relevant facts. As is the case with the discovery rule, the fraudulent concealment doctrine does not toll the statute of limitations where the plaintiff knew or should have known of his claim despite the defendant's misrepresentation or omission.

"Again, reasonable minds cannot disagree. D.D. does not identify the affirmative independent act of concealment on which she relied, or what it was in those letters that was fraudulent. Moreover, the medical malpractice cases that D.D. cites are easily distinguishable involving, as they do, plaintiffs who relied on the assurances of their own physicians, and who therefore were justified in relaxing their vigilance. And, as noted above, the substance of the Idant letters is consistent in important respects with the SmithKline reports. Because D.D. was aware of both an injury and its source in 1998, her claims were untimely and were properly dismissed."

COMMENTS & QUESTIONS

1. What product did Idant Laboratories provide to D.D.?"

2. Why did she want it?

3. Did it work as she had hoped? What did she do about it? When did she do it?

Cases involving children born with genetic defects raise allegations that the child—and parent—suffers because of the condition. A parent may argue that had he or she known the child would be born with serious problems, the parent may have elected not to go through with the pregnancy. Courts use the term "wrongful life" to describe claims arguing that the child's birth itself is an injury (resulting from the defendant doctor's or hospital's or laboratory's misconduct). Regardless of the nature and extent of the child's medical or developmental problems, many jurisdictions reject wrongful life claims. The reasons are both philosophical and social. We cannot know what it is like to be dead or not to exist. Therefore, courts are not well suited to compare life against the alternative. Courts dislike such claims for social reasons too because they involve an argument that a "defective" child is an undue burden, one the parent would have avoided had the problems that developed been suspected on pregnancy or birth.

What is a statute of limitations? Why do we have them?

Is justice served when valid claims cannot be brought just because a certain amount of time has passed? Do you agree that D.D. knew what she needed to know too long before suing?

Once D.D. has the evidence that Idant gave her genetically defective semen, establishing her claim, does it matter how many years pass? What if D.D. had a videotape of Idant executives discussing their problem with Fragile X in their product pool—should a statute of limitations still protect them?

In addition to being untimely, the court ruled that the daughter in this case had "no cognizable injury". From the damages point of view, wrongful life cases pose particularly thorny problems. A cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence. Are the courts equipped to make such a comparison?

COURTROOM +Classroom
CURRENT LEGAL ISSUES FOR STUDENTS
1555 Edgcumbe Road
St. Paul, MN 55116-2304

Courtroom & Classroom is published monthly September through May (9 times each school year). Annual subscription cost – $55.
To order, write *Courtroom & Classroom*, 1555 Edgcumbe Road, St. Paul, MN 55116-2304. Phone 651-690-5155. FAX 651-698-8394. Or, visit our web site, *www.courtroomclassroom.com.*

Please direct your e-mail inquiries to Publisher, John C. Smith. E-mail address: *smith@courtroomclassroom.com.*