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A Retrospective

By Martin T. Johnson, Chair

We are pleased to distribute to all attendees today a compilation of articles which have appeared in the *Family Law Review* since 1975.

These articles have been selected by Elliot D. Samuelson, Editor, and Stanley A. Rosen, Editorial Assistant. Both Elliot and Stan have served in those roles for over twenty-two years, and we are extremely grateful to both of them for their efforts. As you know, the *Review* is published four times each year and contains Notes and Comments, a number of articles, Recent Decisions and Legislation, and Letters to the Editor. A great deal of work goes into each issue with drafting by Elliot of the Notes and Comments, the solicitation of articles, the editing of them by Stan, and the coordination with the State Bar to have the *Review* printed.

The *Family Law Review* has been cited by the courts, distributed to our judges and has been a credit to our organization. As you all know, our most visible contribution to practicing attorneys is the *Family Law Review* as well as the CLE programs we produce each year.

In reviewing the past twenty-five years of our journal, we find articles by Ben Kalman, Elliot Samuelson, Gene Moran, Mitchell Salem Fisher, Julia Perles, Steve Gassman, Saul Edelstein, Phil Brown, Jim Gitlitz, Stan Rosen, Paul Birzon, Mike Dikman, Surrogate Al Emanuelli, Judy Reichler, Tim Tippins, Nancy Peck, Dawn Capanna, Sandra Jacobson, Don Sukloff, Stu Gellman, Bill DaSilva, John Johnson, Robert Jones, Justice John DiBlasi, Barbara Handschu, Harvey Landau, Barbara Bel, Bob Dobrish and Lydia Milone.

The topics covered by these writers, who certainly represent some of the most well-known attorneys to have practiced in our field during the past three decades, span the breadth of our practice and include articles on dual divorce, merger or survival of agreements, drafting agreements, valuation of assets, reverse summary judgment (a concept which has since been legislatively prohibited in the CPLR), no-fault divorce, evidentiary problems, motion practice, valuation of licenses, child support guidelines, dependency exemptions, valuation dates, passive/active appreciation, enforcement, relocation, the innocent spouse rule and the use of a capital loss carryforward as an asset to be divided.

A re-reading of these articles will remind us of the issues we dealt with years ago and those that we continue to deal with on a daily basis. This compilation demonstrates just how significant the *Family Law Review* has been, and continues to be, as a statement of who we are and what we do. As I have indicated above, on behalf of myself, my predecessors as Chair and family law practitioners throughout the state, I want to express our gratitude and appreciation to the Editors and contributors for their efforts over the last quarter century. Thank you all.

Twenty-Five Years of Excellence

By Elliot D. Samuelson, Editor

When the Chair of our Section, Marty Johnson, called with the suggestion that we publish a twenty-five year retrospective of the *Family Law Review*, I couldn't have been more delighted . . . and for a variety of reasons.

A quarter of a century ago, when the first issue of the Family Law Review was envisioned, and the "Newsletter" of our Section was discarded, our goal was three-fold: to publish a professional law journal dedicated to the need of domestic relations lawyers in their day-to-day practice; to provide a forum for the expression of diverse views; and to create a vehicle to effect change. Not only were these goals achieved, but articles appearing in the *Family Law Review* have been cited by our appellate courts with increasing regularity and have been responsible for spearheading changes in the law, which has included enhanced earnings of non-degree holding business people, custody awards based upon intentional interference with visitation rights, and the elimination of triple-dipping when considering the enhanced earnings of professional wage earners.

With Equitable Distribution entering its twenty-first year, I find it remarkable that there are still parts of the statute which have not received attention by the courts. No definitive decision has been written which explains the circumstances when the loss of inheritance rights will be factored into an award of equitable distribution of marital property. And giving up one's career, in order to raise a family and aid the other spouse in his or her career goals, has similarly failed to receive much interest from the lower courts.

It appears most likely that, in the next few years, our high court will accept more cases in the field of domestic relations in an effort to clarify existing rules and, perhaps, forge new ones. For example, the bar still wrestles with the language of the *Grunfeld* decision, still not clear whether double-dipping will be an acceptable ladling device for the lower courts, or whether the equal protection clause of the State and Federal Constitutions will permit lower courts to ignore enhanced earnings of spouses without licenses or degrees who have enjoyed exceptional earnings based upon special skills acquired during a marriage. What may be less likely is a ruling by the high court that the legal fiction employed to write the *O'Brien* decision is no longer viable, resulting in New York's joining the majority view that refuses to value licenses.

Whatever new court rulings come along in the next twenty-five years, the *Family Law Review* stands ready to report, responsibly criticize and identify the emerging trends in the practice of family law. We urge our readers to continue to submit articles and cases of importance.

When the next retrospective is published, the hope is that our publication will receive even higher acclaim by the bench, bar and legal scholars, and exceed the expectation of its readers. Stan and I join Marty in thanking all of you for twenty-five years of excellence.

Dual Divorce

By Benjamin Kalman
November 1975

Commentary on the doctrine of dual divorce as it exists in New York State has been preempted to some degree by the recent decision of the Appellate Division, Second Department, in **Anonymous v. Anonymous**, A.D. 2d __, 367 NYS 2d 814 (motion for leave to appeal to the Court of Appeals denied), A.D. 2d __, __ NYS 2d N.Y.L.J., 7/25/75, p. 11, col. 4 [Second Department]). Familiarity with several earlier decisions on this subject appears to be a worthwhile prelude to a more complete understanding of this case and the relatively new concept developed by the court.

Consider initially the court's power to award such a decree. In **Gleason v. Gleason**, 26 N.Y. 2d 28, at page 35, 308 N.Y.S. 2d 347, 256 N.E. 2d 513, the Court of Appeals remarked (by way of dictum) that the Divorce Reform Law permitted termination of a marriage even where both parties were at fault—except in the case of adultery (DRL Section 171)—the theory being that if there was no longer a viable marriage, the question of fault become irrelevant. The opinion in **Mante v. Mante**, 34 A.D. 2d 134, 309 N.Y.S. 2d 944, also adopts this view.

There have been several Special Term decisions, published only in the *New York Law Journal*, where the court granted both parties a divorce against the other based on their mutual wrongdoing—more particularly, their respective cruelty to each other (**McLaughlin v. McLaughlin**, N.Y.L.J., 9/12/74, p. 20, col. 5, Supreme Court, Suffolk, DeLuca, J.; **Asendorf v. Asendorf, ibid**, 7/15/74, p. 13, col. 2, Supreme Court, Suffolk, Geiler, J.; **Merino v. Merino, ibid,** 4/25/74, p. 18, col. 8, Supreme Court, Suffolk, DeLuca, J.; **Staib v. Staib, ibid**, 4/4/74, p. 17, col. 7, Supreme Court, Nassau, DiPaola, J.; **Campisi v. Campisi, ibid,** 12/21/73, p. 14, col. 7, Supreme Court, Nassau, Velsor, J.; **Locascio v. Locascio, ibid**, 12/18/72, p. 14, col. 3, Supreme Court, Westchester, Walsh, J.). None of these decisions, however, discuss the power of the court to grant the dual divorce, and presumably just take it for granted that such authority exists.

The same is true when the mutual or dual divorce is reciprocally awarded to the parties on "conversion" [DRL § 170(5) and (6)] or no fault grounds (**Casper v. Casper**, N.Y.L.J., 5/2/74, p. 18, col. 6, Supreme Court, Suffolk, DeLuca, J.; **Chervin v. Chervin, ibid,** 2/16/73, p. 19, col. 6, Supreme Court, Nassau, Thom. J.; **Orlando v. Orlando**, **ibid**, 8/1/73, p. 14, col. 4, Supreme Court, Westchester, Walsh, J.). Not one of these cases suggests any objection to a dual divorce under such circumstances.

Prior to the decision in **Anonymous v. Anonymous, supra,** there were at least two reported cases that questioned the right of the court to issue a dual divorce—Special Term's decision in **Mellen v. Mellen**, 78 Misc. 2d 902, 358 N.Y.S. 2d 876, reversed on another issue, 46 A.D. 2d 790, 361 N.Y.S. 2d 28, where the court opined that a mutual divorce could not be granted on fault grounds; and **Gale v. Gale**, N.Y.L.J., 5/22/74, p. 19, col. 6, Supreme Court, New York, Fein, J.

In the latter case, both parties sought a divorce against the other on the ground of abandonment for a period of more than one year [D.R.L. § 170(2)]. After trial, the court found that neither party had established the other's abandonment, that their break-up was really a matter of mutual consent, and dismissed both actions. The court went on to say that if it were possible to grant a "bi-lateral divorce" (obviously what was meant was a mutual or dual divorce) on these grounds, it would be disposed to do so. But the court took the position that there was no authority to grant a dual divorce on the ground of mutual abandonment, there being "an obvious philosophic problem with the concept that each abandoned the other without consent and refused to return."

Probably the most troublesome aspect of dual divorces made on fault grounds is the incidental consideration of the court's authority to grant the wife alimony. While there is a strong line of cases which hold that a wife against whom a judgment of divorce is obtained because of her misconduct forfeits her right to support forever (**Hessen v. Hessen**, 33 N.Y. 2d 406, 410-411, 353 N.Y.S. 2d 421, 425-427, 308 N.E. 2d 891, 894-895; **Votta v. Votta,** 40 A.D. 2d 532, 334 N.Y.S. 2d 34; **Math v. Math**, 39 A.D. 2d 583, 331 N.Y.S. 2d 964, affd, 31 N.Y 2d 693, 337 N.Y.S. 2d 505, 289 N.E. 2d 549; **Smith v. Smith**, 60 Misc. 2d 692, 303 N.Y.S. 2d 193; **Mellen v. Mellen**, 46 A.D. 2d 790, 361 N.Y.S. 2d 28), there also is a very serious question whether a wife who is at least a partially successful party to a dual divorce based on fault grounds has actually been "refused" the "relief" she "requested"—as contemplated by Section 236 of the Domestic Relations Law (cf. **Woicik v. Woicik**, 66 Misc. 2d 357, 321 N.Y.S. 2d 5; **Garcea v. Garcea,** N.Y.L.J. 3/22/73, p. 17, col. 2, Supreme Court, New York, Silverman, J.). In fact, what can best be described as a **de facto** dual divorce was rendered in **Woicik v. Woicik**, **supra**, in order to enable that court to award alimony to a wife whose cruelty was adjudicated against her. (**Con-**

tra, Compitello v. Compitello, N.Y.L.J., 11/15/71, p. 21, col. 1, Supreme Court, Nassau, Velsor, J.).

Two decisions of Special Term, Nassau County, **Campisi v. Campisi**, N.Y.L.J., 12/21/73, p. 14, col. 7, Velsor, J., and **Wechsler v. Wechsler,** N.Y.L.J. 3/2/72, p. 18, col. 1, Suozzi, J., squarely confronted the question of a wife's right to alimony in these situations. In both cases the court awarded dual divorces on the basis of the parties' respective misconduct, and in both cases the court held that by reason of the proscription of Section 236 of the Domestic Relations Law, the wives were barred from obtaining support.

Similarly, in **Jay v. Jay**, 67 Misc. 2d 371, 323 N.Y.S. 2d 387, the court awarded both spouses a divorce against the other on the ground of their cruelty, but held that it was actually granting the divorce because of "conditions" that existed between the parties, rather than because either of them was particularly "at fault." Although no alimony was given to the wife, the court did not discuss whether it actually had the power to award her support were it so inclined.

For the most part, there were two basic issues disposed of by the **Anonymous** court: First, whether a dual divorce on the basis of both parties' cruelty can be awarded; and second, the propriety in such a situation of awarding the wife support.

The main argument made by the defendant wife (the only one who appealed) was that a dual divorce was not authorized because a finding of fault on the part of one spouse "contradicts" a finding of fault by the other. In rejecting this contention, the court stated that "the innocence of one party is not a concomitant of the fault of the other" (367 N.Y.S. 2d, at p. 817), and analogized the situation to tort law, where the negligence of the defendant does not preclude the contributory negligence of the plaintiff.

Although the court did not find any specific authority to grant a dual divorce, it found that there was nothing in our law which forbids or prohibits the rendition of that form of judgment, and concluded that in situations such as existed in the case before it, where both parties are equally responsible for their difficulties, it is virtually impossible to sort out precisely the causes for the ultimate breakdown of the marriage.

Deliberation by the court on the question of the wife's entitlement to alimony was next. It reviewed the conflict of authority in other jurisdictions, and then stated that Section 236 of the Domestic Relations Law does not directly reach the issue because the wife had not been refused the relief she requested based on her misconduct—indeed, she succeeded in her action, by way of the judgment awarded to her on her counterclaim.

Ultimately, the court held that although Section 236 does not clearly encompass a situation where a dual divorce based on mutual misconduct is granted, the intent of the statute was to deny alimony to a wife against whom a husband has been awarded a divorce because of her misconduct. Accordingly, Special Term's refusal to award the wife alimony was affirmed.

There are several somewhat exotic problems that our courts will be called upon to grapple with as the doctrine of dual divorce obtains more of a foothold in our state. While **Anonymous** clearly establishes the court's power to render a mutual decree based on both sides' cruelty, and it is equally evident that a dual divorce cannot be granted on mutual adultery—recrimination constituting an absolute bar to both parties (DRL 171[4]; **Recht v. Recht**, 36 A.D. 2d 939, 321 N.Y.S. 2d 395; **Garcea v. Garcea, supra**)—and most likely a divorce could not be granted on dual abandonment (**Gale v. Gale, supra**), this still leaves open and unresolved several "hybrid" situations—when dual divorces are sought on two different grounds.

Let us consider, for example, a situation where one spouse seeks a divorce on the ground of cruelty, and the other requests a decree based on adultery. In **Wechsler v. Wechsler, supra**, the court rendered such a reciprocal divorce—to the plaintiff wife predicated on the husband's cruelty, and to the husband on his adultery counterclaim. Beyond its actual rendition of this unique judgment, the court did not comment on its authority to issue it.

A different result—on virtually the same facts—was reached by the court in **Hughes v. Hughes**, N.Y.L.J., 6/19/68, p. 17, col. 1, Supreme Court, Kings, Sobel, J. The Plaintiff husband was awarded a divorce on the ground of adultery, and the wife was denied alimony. Her counterclaim for a divorce on the ground of the husband's cruelty was dismissed. However, the court remarked that the wife had established the allegations of her counterclaim by sufficient evidence, but under the law only the husband was entitled to judgment, citing Section 171 of the Domestic Relations Law.

It is virtually impossible to distinguish the **Wechsler** decision from **Hughes**. Simply put, in the former case the court was not adverse to granting a dual divorce. But the court in **Hughes** was either 1) engaging in the doctrine of comparative rectitude, determining that adultery is a worse offense than cruelty, and granting the divorce to the party least at fault; or 2) felt that the wife's request for divorce (by way of her counterclaim) had to be denied because she was guilty of adultery. That is to say, under Section 171 of the Domestic Relations Law, one of the instances when a divorce must be denied, is when the party seeking it is guilty of adultery.

In short, it could be argued that even though the Section 171 defenses have been held to apply only to divorces sought on the ground of adultery (**Gleason v. Gleason, supra; Mante v. Mante, supra; Woicik v. Woicik, supra; Bishop v. Bishop**, 62 Misc. 2d 652, 308 N.Y.S. 2d 998; **Ray v. Ray**, 62 Misc. 2d 652, 309 N.Y.S. 2d 53; **Hilford v. Hilford**, 70 Misc. 2d 30, 332 N.Y.S. 2d 216), the court would nevertheless consider the wife's adultery as a bar to her request for a divorce on the ground of cruelty (cf. **Cinquemani v. Cinquemani**, 42 A.D. 2d 851, 346 N.Y.S. 2d 875).

Consider next, the situation where one spouse is seeking to obtain a divorce on the ground of the other's cruelty or adultery, which is countered with a request from the other spouse for a divorce on the ground of abandonment. It would appear here that the very same "philosophic problem" referred to in **Gale, supra,** would exist, and a court would be hard put to find that a husband or wife who has been subjected to the other's adultery or cruelty would still be considered guilty of having unjustifiably abandoned him or her without consent.

Finally, we face the question of awarding one spouse a fault divorce when the other requests a conversion or no fault judgment. Our primary concern here is with conversion divorces rendered on an outstanding separation decree (DRL 170 [5]), as distinguished from a separation agreement (DRL 170 [6]), since the latter pertains to a divorce based on a formal contract between the spouses which cannot be altered or modified by the court, thereby rendering academic (in some measure) the financial and/or property impact of a subsequent divorce.

In this kind of a situation, that is, a request by the spouse against whom a fault divorce is sought to be awarded a conversion divorce on a prior separation decree—we can only hope that our courts will concern themselves with the dilemma of what a wife has at stake or stands to lose if she is the one against whom a fault judgment is rendered **(Hessen v. Hessen, supra;** cf. **Becker v. Becker**, 36 N.Y. 2d 787, 369 N.Y.S. 2d 697, at p. 698).

As the law now exists in New York State, a wife against whom a divorce is rendered because of her misconduct not only forfeits her right to support—regardless of how desperately she may actually need it—but there is a great likelihood that she has also forfeited her right to exclusive occupancy of the marital home, even though there is nothing in Section 234 of the Domestic Relations Law that mandates this, and there is at least some chance that she also forfeits her right to counsel fees, even though her husband might have taken her to court and it was necessary for her to defend herself (**Math v. Math, supra; Votta v. Votta, supra; Thompson v. Thompson**, 44 A.D. 2d 849, 355 N.Y.S. 2d 633). Unless it is permissible to urge the wife's misbehavior only as against the incidental relief she seeks in her conversion divorce action (cf. **Brown v. Brown,** 39 A.D.2d 540, 331 N.Y.S. 2d 456; **Hanscom v. Hanscom**, 57 Misc. 2d 218, 292 N.Y.S. 2d 495), there conceivably could be some obstacles hindering the issuance of a dual divorce.

On the other hand, if the wife is to be awarded the fault divorce, and the husband the conversion or no-fault decree, there does not appear to be any serious reasons why a mutual divorce could not be entered. Not to be overlooked here, however, is the situation where the underlying separation decree has been granted to the husband against the wife.

It has long been the settled law that a wife's right to support is terminated if she has been adjudicated a conjugal delinquent in a separation judgment (**Burton v. Burton**, 150 A.D. 790; **Byrnes v. Byrnes**, 126 A.D. 619), and she cannot thereafter revive or resurrect her right to support by a subsequent action for divorce, even if it is based on the husband's adultery or other misconduct, and certainly not if her divorce action is based on the prior outstanding judgment of separation.

Many now unforeseen problems regarding dual divorce will more than likely come up as matrimonial practitioners begin to implement this new doctrine. Future developments should prove most interesting.

Notes and Comments

By Elliot D. Samuelson
May 1976

In assuming the editorship of the Newsletter, I made a commitment to our section chairman to put out a meaningful and comprehensive periodic review of matrimonial law that could be utilized by our members in their day to day practice. It is hoped that this publication will not only achieve this goal but also will become a forum for the exchange of ideas and experiences of the matrimonial attorney.

To this end, it was necessary to enlarge this publication and, to some extent, change its format. Not only will cases of recent interest be noted but wherever possible, the trends and the philosophy of the court will be traced as well. Articles delving into complicated, esoteric and in many instances, unresolved areas, will be given prominent attention.

An expanded Recent Decisions and Trends column, authored by Mr. Brandes, is illustrative of the comprehensive studies that appear on these pages. Particular attention is called to **Kay v. Kay** and **Hickland v. Hickland**, infra, that are discussed in this column and are certainly landmark decisions from our highest court. In **Kay** the often nagging problem of whether a wife would be required to obtain employment when she had the ability to do so but where there were still children of tender years under her care, has at last been resolved.

The Court of Appeals, inter alia, found it inappropriate to consider the wife's ability to obtain such employment where the child care expenses and taxes would almost eliminate the economic benefit derived from her productivity. **Kay** also is important because it deals with the apparent duty of a husband to make his assets productive in order to provide sufficient sums for alimony and support and discusses under what circumstances an award to the family may exceed a husband's reported income.

Hickland is likewise significant because the court held that in a marriage of long duration, the mere fact that the wife has separate earnings or income will not deprive her of an award of alimony if the marital standard would require such supplement. In so holding the court distinguished **Kover v. Kover**, 29 N.Y. 2d 408, which reached a contrary decision in a childless marriage of short duration.

Another Court of Appeals case, **Ebert v. Ebert**, infra, dealt with the weight to be afforded a child's preference in a custody dispute and the abhorence of the court in separating siblings. Other cases contained in this column trace, inter alia, the current trend of the court in the area of disclosure, contempt, alimony awards, and the availability of DRL §248 as a defense to the payment of alimony. It is to be noted that the comments set out in italics are that of the editor and not of the author.

The article dealing with the availability of arbitration in a matrimonial matter, by Mr. Sladkus, is indeed stimulating and thought-provoking. It appears that the Court of Appeals will soon entertain this very question when it decides the appeal in **Swartz v. Swartz**, infra, and hopefully, will resolve the issue of whether arbitration proceedings will be continued or eliminated in matrimonial matters or whether, as suggested by the author as an alternative, the court will take a midground position so that limited questions pursuant to special rules will be considered in these proceedings.

Mr. DaSilva's article concerning constructive trusts should be helpful to the practitioner beset with the problem of re-acquiring property for a client whose spouse, after a marital break-up, has reneged on an expressed or implied promise to voluntarily do so at a later time.

No area in the past several months has caused more comment than §250 of the Domestic Relations Law. Does that section limit itself to merely the filing of a net worth statement or does an examination before trial and other pre-trial discovery devices at last become available to the matrimonial practitioner? Mr. Rothkopf's article sheds light on these problems and outlines the current available procedures in detail.

The **Grant, Hoppl, Brana, Ponard** and **Wegman** cases considering these questions are also reviewed in the Recent Decisions and Trends column.

To those interested in legislative changes, Mr. Wallman's column is of particular interest. Section 250 of the Domestic Relations Law was enacted dealing with disclosure, Section 246 was modified to obviate the need to utilize sequestration in a contempt proceeding, and Section 49B of the Personal Property Law was liberalized to permit a wage assignment to be made upon proof of delinquency of three or more payments.

Will a common law action for necessaries ever be preferred to a statutory application for alimony, support or counsel fees? To the attorney who may consider this

alternative, Mr. Millman's column will prove most helpful. It contrasts the standards that will be applied in both a statutory application and a common law proceeding for necessaries.

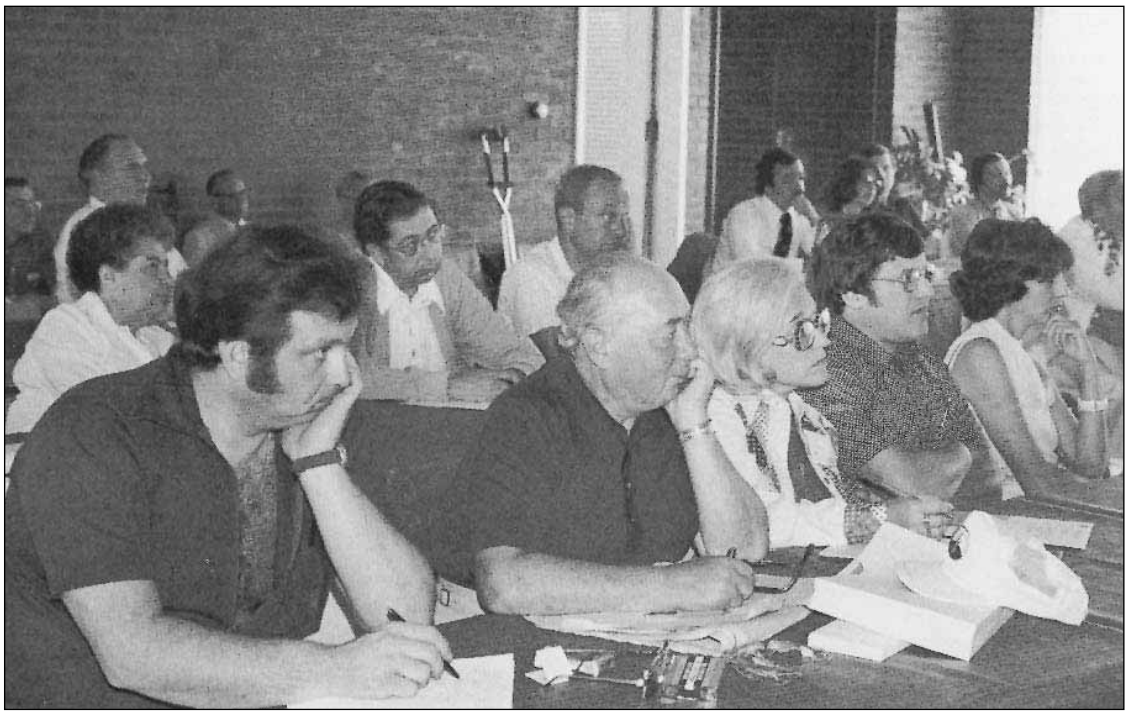
Mr. Moran's article surveys the existing custody law and the problems inherent in granting full faith and credit to custody judgments or orders. The proposed Uniform Child Custody Jurisdiction Act is discussed at length and certainly appears to be a method to avoid custodial ping-pong. The recent mellon case was illustrative of such abuses in extra-territorial custody disputes. The U.C.C.J.A. should certainly be given careful consideration by our Legislature.

Mr. Samuels' piece dealing with the U.S.D.L. completes this issue. If your practice includes appearances in the Family Court, the article will prove most helpful.

Hopefully, future editions will include contributions of topical interest from the academic as well as judicial sectors of the legal community. It is only with such cooperation and the continued aid of our members that this Newsletter can continue to maintain the standard of excellence that I hope this issue will exemplify.

To this end, I enlist your aid through the writing of articles, your comments regarding the contents of this issue, and any suggestions concerning particular topics of interest that should be the subject of coverage in forthcoming issues. If sufficient input is received, a Letters to the Editor column would also be utilized.

My special thanks to all those who have contributed their time and talents and have given me the encouragement to produce this publication.



Eighty persons attended the first Family Law Section Summer Meeting held in July 1975 in the Gideon Putnam Hotel in Saratoga Springs. Above, Section members listen during one of the morning programs.

The Merger or Survival of Settlement Agreements: A Trap for the Unwary

By Eugene J. Moran
March 1977

The subject of this article is one which is receiving increasing attention from our courts. Settlement agreements which had been executed and filed away after the obtaining of appropriate matrimonial relief are increasingly being called into question either as to their initial validity or as to their continuing effectiveness.

The conflict between the desire of our courts to encourage the voluntary settlement of matrimonial disputes on the one hand, and the recognition by the courts of the changing circumstances of life on the other, is largely responsible for the present state of flux in the case law. The purpose of this article is to review the development of that case law and to suggest practical guidelines for the matrimonial practitioner.

Definitions

For the purpose of this article, the generic term "settlement agreement," unless otherwise indicated, refers to and includes (a) written separation agreements duly executed before or after the commencement of a matrimonial action; (b) written stipulations of settlement prepared and executed after the commencement of a matrimonial action; and (c) oral stipulations of settlement dictated into the record in open court at the time of a pre-trial conference or a trial on the merits.

"Merger" is defined in Black's Law Dictionary, Revised Fourth Edition, as "the fusion or absorption of one thing or right into another." In matters of domestic relations the definition is further refined to mean a substitution of rights and duties under a judgment or decree for those under a settlement agreement.

"Survival," according to Black's, is defined as the continuation of the life or existence of some person or thing. As applied to settlement agreements, survival means the continuation in existence of that agreement as an agreement, separate and apart from any judgment or decree into which all or any part of the agreement has been incorporated.

The New York Case Law

If the settlement agreement merges into the matrimonial judgment (of either divorce or separation) little problem is presented to the court upon the subsequent application of either party to vary or modify support provisions contained in the decree since, by statutory authority, New York courts have broad powers and continuing jurisdiction to modify their own decrees. DRL, §236; DRL §240; **Kyff v. Kyff**, 286 N.Y. 71, 35 N.E. 2d 655 (1941); **Karlin v. Karlin**, 280 N.Y. 32, 19 N.E. 2d 669 (1939); **Fox v. Fox**, 263 N.Y. 68, 188 N.E. 160 (1933); **Smutny v. Smutny**, 43 A.D. 2d 590, 349 N.Y.S. 2d 765 (2nd Dept. 1973).

It is only when the settlement agreement, by its terms, is to survive incorporation of its terms into the matrimonial judgment and not merge therein that subsequent applications to vary or modify the support provisions of the judgment may give rise to a dichotomy of rights and obligations.

In 1889 the Court of Appeals decided in **Galusha v. Galusha**, 116 N.Y. 635, 22 N.E. 1114, that a court lacked the authority to award in a matrimonial decree an amount of alimony greater than that provided in a settlement agreement if to do so would impair the rights of either party under a valid, non-merged agreement. The court noted that the agreement was made after actual separation, was valid and binding when made and that the husband had fully performed thereunder.

Thus, the Court concluded, the husband was ". . . entitled to the protection which it was stipulated that full performance (of the agreement) should give to him." In conclusion, the Court stated in strict terms the general principles applicable to the facts:

> "The law looks favorably upon and encourages settlements made outside of courts between parties to a controversy. If, as in this case, the parties have legal capacity to contract, the subject of settlement is lawful and the contract without fraud or duress is properly and voluntarily executed, the court will not interfere. To hold otherwise would be not only to establish a rule in violation of well-settled principles, but in effect, it would enable the court to disregard entirely settlements of this character. For, if the court can decree that the husband must pay more than the parties have agreed upon, it is difficult to see any reason why it may not adjudge that the sum stipulated is in excess of the

> wife's requirements and decree that the husband contribute a smaller amount."

In **Goldman v. Goldman**, 282 N.Y. 296, 26, N.E. 2d 265 (1940), the parties entered into a separation agreement providing, among other things, for alimony and child support. Thereafter, the wife obtained against the husband a judgment of divorce which incorporated precisely the support provisions of the separation agreement.

Nine years later, and based on an allegation of reduced income made by the husband in an application to the Supreme Court to reduce the annual support payment, the Supreme Court granted the application and modified the judgment by reducing the support substantially. The Appellate Division, Second Department, unanimously affirmed. The Court of Appeals also unanimously affirmed upon a finding that the husband's income had been substantially reduced from the time when the agreement was executed.

In its decision the court reaffirmed the holding in **Galusha** but went on to distinguish between the fixed, contractual obligation of support voluntarily assumed as part of a separation agreement and the obligation statutorily imposed on the court to award support "as justice requires." The court reasoned that, once the agreement of the parties had been incorporated into the matrimonial decree, the court had the power to direct a downward modification of the decree itself, without disturbing the contractual rights and obligations of the parties.

Although the Court in **Goldman** did direct the defendant to pay less than the amounts specified in the separation agreement, it did not direct the plaintiff to accept less, and the plaintiff was still free to enforce the contract in a plenary action. Thus, the **Goldman** holding introduced the dichotomy of support rights and obligations from which springs the present confusion in this area in stating that it had not decided in **Galusha**, or in any other case, that

> ". . . the parties by voluntary contract could not only fix the amount which the husband shall pay but could also constrain the court to incorporate the terms of the voluntary agreement in a final judgment of divorce and thus make available for the enforcement of a contractual obligation voluntarily assumed the drastic remedies provided by law for the enforcement of a marital obligation created by law."

Then along came **McMains v. McMains**, 15 N.Y. 2d 283, 258 N.Y.S. 2d 93 (1965), which knocked into a cocked hat just about everything we had previously learned about the sanctity of contracts. There, the Court of Appeals, faced with a destitute ex-wife, further refined the holding in **Goldman** and expanded the power of the court to make modifications with the following language:

> "We hold that a separation agreement valid and adequate when made and which contains a non-merger agreement continues to bind the parties when its terms as to support have been written into a subsequent divorce judgment but that this does not prevent a later modification increasing the alimony when it appears not merely that the former wife wants or by some standards should have more money but that she is actually unable to support herself on the amount heretofore allowed and is in actual danger of becoming a public charge . . ."

In **McMains**, the separation agreement was executed in 1944, some 20 years prior to the application by the wife for an upward modification. The agreement provided alimony for the wife of $100 per month. The wife then obtained from the husband a judgment of divorce awarding the amount of alimony provided in the agreement. In deciding as it did the Court of Appeals noted in its opinion certain extraordinary circumstances, namely, that the wife is in poor health and unable to work; that her monthly expenses far exceed the alimony payment; and that the husband has prospered since the execution of the agreement. The court then noted:

> "If we were to deny modification power when pressing need therefor later appears, we would be construing this separation agreement as meaning that so long as he paid $100 every month defendant could not be made to carry the unescapable duty which is his, not consensually but by common law and statute, to provide support for the wife. That continuing duty cannot be escaped by reliance on any contract and any agreement so written, construed or applied is invalid . . ."

Thus, in an effort to reach an equitable result, the Court of Appeals diluted the holding in **Galusha** and clearly impaired the protection afforded to the husband under the separation agreement.

The holding in **Galusha** still governs those situations in which the wife seeks an increase in alimony but is not in danger of becoming a public charge. Additionally, recent decisions have confirmed the wife's right to sue for the difference between a reduced support award

and the support required by the settlement agreement. **King v. Schulz,** 29 N.Y. 2d 718, 325 N.Y.S. 2d 754 (1971).

However, in the most important case of **Jacqueline S. v. Gerald C.,** 70 Misc. 2d 19, 332 N.Y.S. 2d 773 (Fam. Ct., Richmond, 1972), Judge Gartenstein recognized the anomaly in permitting a wife to enforce the support terms of a settlement agreement in an action on the contract after a downward modification of the decree into which the support provision was incorporated but not merged. In that case the parties executed a separation agreement which was followed immediately by a Mexican divorce into which the agreement was incorporated by reference but not merged therein.

The court found that the husband had sustained an adverse change of circumstances following the divorce. The former wife filed several, successive law suits in the Civil Court on the agreement and had obtained a number of judgments against the former husband on which she caused garnishees to be issued. Judge Gartenstein noted the right of the former wife to sue on the agreement in the Civil Court, but also noted that the ex-wife had sought to enforce the decree in the Family Court under Section 466(c) of the Family Court Act at which a full hearing was held and the penury of the former husband clearly established. In disposing of the cross-petitions the court adopted a practical, equitable approach in the following language:

> "The net effect of this dichotomy of obligation is to create in a wife who is dissatisfied with the valid adjudication of a Family Court of competent jurisdiction the right, in effect, to overrule it by taking to the Civil Courts in proceedings based on the agreement; succeeding as she must; and reducing the husband to double liability when a court of competent jurisdiction has ruled him incapable of sustaining even the original single liability.
>
> "This practice of 'double liability' though certainly legal, is oppressive; creates multiplicity of lawsuits; and allows a party whose rights and liabilities have been set to completely disregard the adjudication of a court which has heard the relevant issues and rendered a decision based on the current realities of a situation.
>
> "The court therefore holds that when any civil judgment for the differential between Family Court payments and agreed payments, pursuant to agreement, is being enforced, this court's order shall be reduced by the amount of any garnishee, wage assignment or income execution then in effect.
>
> "Should the petitioner be disposed to levy execution on any judgment, that shall be her absolute right, but she must understand that if and when she does so, this court will entertain jurisdiction and grant a further downward modification in pursuance of its obligation to keep its order at a level conforming to the financial situation of the parties."

Oral stipulations of settlement entered into in open court containing non-merger language, have been accorded the same legal effect as a formally executed, written separation agreement. Such stipulations will contractually bind the parties. **Bond v. Bond**, 260 App. Div. 781, 24, N.Y.S. 2d 169 (2nd Dept. 1940). In this regard, it is appropriate to remember Rule 2104 CPLR, which provides that:

> "An agreement between parties or their attorneys relating to any matter in an action, **other than one made between counsel in open court,** is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered." (Emphasis added.)

The most dangerous problems for attorneys dealing with settlement agreements generally are found in this area of oral stipulations. At such a time, the parties are naturally excited. The attorneys are conferring and negotiating under considerable pressure and at the eleventh hour, with a great number of factors under consideration. It is at this time that a determination should be made by agreement between the parties as to whether the oral stipulation will survive the entry of the matrimonial judgment, as a contract would do, or whether the stipulation is to be merged into the judgment, thus losing its existence as a contract.

If the oral stipulation is silent on the point, according to **Nicoletti v. Nicoletti**, 43 A.D. 2d 699, 349 N.Y.S. 2d 794 (2nd Dept. 1973), the stipulation is deemed to be **merged** into the judgment. If that is not your intention or the intention of the parties and yet, for some reason, you have neglected to state for the record that the stipulation is to survive, the omission may be rectified by a written stipulation between the attorneys, if your opposing counsel is agreeable. Such a stipulation should read as follows:

> "It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, that the oral

> stipulation regarding alimony, child support, custody, visitation and division of property dictated into the record of this court before . . . was intended to, and shall, survive, and shall not merge into, the judgment of divorce about to be entered herein.
>
> Dated: Nunc Pro Tunc
> March 18, 1977."

The written stipulation should be dated as of the date that the oral stipulation was dictated into the record for the reason that the written stipulation will then relate back to that date even though the stipulation is executed by the attorneys some days or weeks thereafter.

The **Nicoletti** case, supra, is unnecessarily inflexible, misleading and inaccurate. It tends to give the impression that, simply because of an oversight on the party of the attorney dictating the stipulation into the record in failing to provide for the survival thereof, the oral stipulation merges absolutely and finally into the judgment. However, the Second Department's own rules, NYCR § 699.9(f)(4), provide that ". . . *where the stipulation or agreement provides,* **or the testimony establishes that such was the intent of the parties**, the judgment will state that the stipulation or agreement is not merged in but shall survive the judgment." (Emphasis added.)

It would seem, therefore, that when the stipulation is silent as to the question of merger or survival a hearing must be held to determine the intent of the parties. Such was the holding of Mr. Justices James Gibson, recently retired from the Court of Appeals, when he sat in the Supreme Court of Schenectady County, in **Skolnik v. Skolnik**, 75 Misc. 2d 805, 349 N.Y.S. 2d 273 (1973).

The effect of an unintentional merger of your stipulation into a matrimonial judgment is that, generally, provisions to be performed or to take effect in the future (escalator clauses) or which are beyond the power of the court to award (life insurance, annuity contracts) cannot be recited in the judgment. Consequently, if your stipulation has merged, thus ceasing to exist, the benefits of such provisions would seemingly be lost forever.

In view of the fact that an oral stipulation is a contract [**Vranick v. Vranick**, 41 A.D. 2d 663, 340 N.Y.S. 2d 566 (2nd Dept. 1973)], the court may not modify or alter it in any material detail without the consent of both parties, absent fraud, overreaching, mistake or the like. In **Rado v. Rado**, 51 A.D. 2d 811, 380 N.Y.S. 2d 273 (2nd Dept. 1976), the wife sought to set aside an oral stipulation on the ground that she was emotionally upset when she approved the stipulation. Special Term granted her motion and the Appellate Division reversed, stating:

> "It has long been held that relief from a stipulation of settlement will be granted only upon a showing of good cause, such as collusion, mistake, accident, or a similar ground . . . The record herein indicates that (the wife) was represented by counsel and that she freely entered into the stipulation in open court . . ."

A common mistake made by many attorneys is that they fail to realize that the merger or survival of a settlement agreement may relate only to **part** of the agreement. For example, if it is desired that the alimony provision be merged into the matrimonial judgment because it is dependent upon the wife's continued ability to work, and the wife would require additional support if she were disabled, then only the alimony provision should be merged into the judgment.

If it is a separation agreement with which you are dealing, then it is an easy matter to make provision in the agreement itself, either initially or by subsequent modification, for the merger of a particular paragraph or paragraphs of the agreement into the matrimonial judgment. If it is an oral stipulation with which you are dealing, then be sure to take the time to discuss with your opposing counsel what provisions should be merged and what provisions should survive the entry of judgment and be sure that your client understands the difference.

Apparent Direction of New York Law

The so-called "equitable distribution" bill, which is now pending in the New York legislature and which finds expression in a completely revised §236 of the Domestic Relations Law, provides in subdivision 9 thereof for modification of support provisions contained in a prior order or judgment. It also provides that where a separation agreement is incorporated but not merged in a judgment ". . . no modification of a prior order or judgment incorporating the terms of said agreement shall be made as to maintenance (support) without a showing of extreme hardship on either party, in which event the judgment or order as modified **shall supersede the terms of the prior separation agreement** and judgment or order for such period of time and under such circumstances as the court shall determine . . ." (emphasis added).

Unfortunately, the statute does not make it absolutely clear whether the party who is entitled to support under a settlement agreement may commence

an action for the difference between the contractual provision and any reduced amount determined by the court, or whether the word "supersede" precludes such an action.

The trend in sister states also seems to be in favor of superseding the terms of a settlement agreement where required by the circumstances of the case and/or the respective parties. For example, §61.14 of the Florida Statutes Annotated provides, in part, that when spouses have entered into a settlement agreement ". . . and the circumstances of the parties or the financial ability of the husband has changed since the execution of such agreement . . ." either party may apply to the appropriate court for a judgment decreasing or increasing the amount of support, and the court is given discretion to make such further orders as equity requires ". . . with due regard to the changed circumstances and the financial ability of the husband. . . . Thereafter the husband shall pay only the amount of support maintenance or alimony directed in the new order, and the **agreement** or earlier order is modified accordingly . . ." (Emphasis added.)

Conclusion

The seemingly inescapable conclusion to be drawn from all of the cases cited above is that New York should adopt a provision similar to that of Florida, that is, that if the provisions of a settlement agreement relating to alimony and child support are required to be modified by the circumstances of the case and/or the respective parties, whether upward or downward, the court should have that power. Once such a modification is decreed, after a full and fair hearing, neither party should thereafter be permitted to sue to enforce the support provisions of a surviving contract, thus avoiding a multiplicity of contract actions in a civil court and/or post-judgment applications in the Supreme or Family Courts.

Additionally, if the parties had **not** been divorced and the husband had suffered a reduction in income or loss of assets we would certainly expect a reduction in their standard of living. Why, then, should the fact of a separation agreement and divorce insulate the former wife and children from the realities of life.

Program Chairman Michael Atkins speaks at the first Family Law Section Summer Meeting held in July 1975 at the Gideon Putnam Hotel in Saratoga Springs.

Drafting the Separation Agreement—The New Horizon

By Mitchell Salem Fisher
March 1978

In a recent lecture at a joint program of the Ontario Bar Association, the Faculty of Law of Toronto University and the New York State Bar Association, I referred to the matrimonial and family law of separation agreements as a night sky in which the lights are dim and new stars suddenly appear. **Christian,**[1] **Boden,**[2] and **Carter**[3] were such stars. I pose the question: What can we as lawyers do in the drafting and redrafting of our separation agreements to meet their challenge to our skills?

Christian is obviously dangerous. Again and again the articles, provisions and terms of a separation agreement derive from a welter of negotiative or litigative conflict. Parts are good for the wife, parts are good for the husband. There have been compromises. Under present New York law, the court has no power to transfer property titles (absent fraud and trust circumstances),[4] to award lump sums[5] or to direct support changes to occur in the future,[6] to purchase an annuity to provide support after death or even to direct maintenance of existing life insurance policies.[7]

Separation agreements within the borders of public policy are more flexible. Separation agreement after separation agreement gives these "goodies" unobtainable freedom from litigation. The separation agreement is thus a solitary instrument created by a variety of considerations and pressures including gracious and moral concerns, anxieties falling short of duress, mutual planning for the years ahead, close attention to tax consequences and a myriad of other factors. It is designed as a concatenated treaty, hopefully a treaty bringing matrimonial peace. It is to serve as the constitution for a broken family.

Christian comes and plucks out from a separation agreement's paragraph "6" a subparagraph thereof, which subparagraph provided for an equal pooling of all assets which were held by the spouses in their joint and individual names. The Court of Appeals observed that the agreement expressly set forth that "if any provision of the separation agreement be held invalid or unenforceable all other [provisions] shall nevertheless continue in full force." Accordingly, the Court of Appeals ruled (42 NY 2d at 73):

> "Courts were therefore, by contract terms, free to adjudge the validity of the last paragraph of provision '6' of the separation agreement without consequential effect on the remainder of the writing."

The special severability clause has thus resulted in a somewhat unexpected danger. The severability clause frequently used reads:[8]

> "In the event that any term, provision, paragraph or Article of this agreement is or is declared illegal, void or unenforceable, same shall not affect or impair the other terms, provisions, paragraphs or Articles of this Agreement. The doctrine of severability shall be applied. The parties do not intend by this statement to imply the illegality, voidness or unenforceability of any term, provision, paragraph or Article of this Agreement."

Perhaps the challenge of **Christian** can be met by some prophylaxis by adding to the clause:

> "In the event, however, any one or more of the following paragraphs:
>
> Paragraph(s)—of Article III (Real Property)
>
> Paragraph(s)—of Article VI (Allowance for the Support, Maintenance and Education of the Children)
>
> Paragraph(s)—of Article XIII (Income Taxes) are declared illegal, void or unenforceable, the party against whom such declaration has been obtained shall have an effective option to be exercised in writing within thirty (30) days of such declaration either
>
> (a) to revoke the Agreement in its entirety except for paragraph(s) of Article(s) numbered
>
> **or**
>
> (b) to revoke any one or more of the following paragraph(s) of these numbered Article(s)____."

The above is a suggested guide. The basic concept is that the spouse who thus succeeds to excise a provision disadvantageous to such spouse will have to give up the correlative counter balancing advantage which was placed in the bargaining scales.

Some similar results may be achieved by placing in a single article or paragraph balancing components and

expressly reciting that the effectuation of one is dependent upon the effectuation of the other. Thus we can try to direct the **Christian** scissors as it slices into our agreements.

The challenge of **Boden** is easier to meet. In **Boden** the agreement obligated the father far in advance of the child's reaching college age to obtain and maintain a life insurance endowment policy for her college education. When the child reached college age, the mother applied to increase the $150 a month child support as provided in the separation agreement to $250 a month.

The father, who had remarried, now had an income of $43,000 per year and the mother was earning an annual salary of $45,000 a year. The Court of Appeals recognized that the agreement was not binding upon the child and that under Family Court Act, § 461 and § 413, the application for the increase was properly made. But the Court of appeals ruled (42 NY 2d at 212-213):

> "Where, as here, the parties have included child support provisions in their separation agreement, the court should consider these provisions as between the parties and the stipulated allocation of financial responsibility should not be freely disregarded.
>
> * * * *
>
> "Absent a showing of an unanticipated and unreasonable change in circumstances, the support provisions of the agreement should not be disturbed."

The doctrine and language of the decision lend suggestion as to what weights and counter-weights might be inserted in separation agreements.

Thus, to negate **Boden**, consider:

> "Anything in this Agreement to the contrary notwithstanding, the parties have fixed their obligations with respect to the support, maintenance and education of the children on the basis only of the present financial circumstances of the parties, the present needs of the children and the present cost thereof."

To buttress **Boden**, consider:

> "Anything in this agreement to the contrary notwithstanding, the parties have fixed their obligations with respect to the support, maintenance and education of the children not only on the basis of the present financial circumstances of the parties, the present needs of the children and the present costs thereof, but such future circumstances, needs and costs." Consider adding [if you can induce an adversary to accept same]:"even if such future circumstances, needs or costs be expected or unexpected."

Of course, escalation and declination within the fabric of an agreement are intermediate solutions[9].

In **Boden** the Court of Appeals emphasized the respect the courts should give to the child support provisions in the separation agreement of the parents and that such support provision in a separation agreement should not be disturbed, absent "unanticipated and unreasonable change in circumstances." In **Nehra v. Uhlar**, 43 NY 2d 242, on December 15, 1977 the Court of Appeals considered the impact of a Michigan award of custody and ruled:

> "Absent extraordinary changes in circumstance, the Michigan determination is entitled to great weight not only on grounds of comity but because of the great interest of the state of the children's residence and domicile."

Toward the end of Justice Breitel's opinion, an opinion in which all the Justices concurred, the opinion suddenly referred to custody as established by a separation agreement.

> "Priority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances be accorded to the first custody awarded in litigation **or by voluntary agreement**." (emphasis added).

The court thus emphasized that the custody provisions of a separation agreement would also be followed in absence of extraordinary circumstances, albeit not as an absolute but as a weighty factor. Such emphasis, such respect for the custody provisions in a separation agreement becomes an awesome consideration for drafters of separation agreements. What happens if we as drafters wish a different result? Consider having the agreement state:

> "The best interest of the child at all times, now and in the future, shall be the paramount consideration as to both custody and visitation and changes thereof. Accordingly, the occurrence of future 'extraordinary circumstances' shall not be required to justify or prevent such change."

No separation agreement was **per se** involved in the third star, **Carter**. **Carter**, however alerts members of the bar to the fact that mothers as well as fathers may be liable for support of children and that the support contributions to be required of mothers may be substantial and primary, and not supplemental or secondary. Many of us were alert to this long before **Carter.**[10]

Boden is the obvious key to the challenge of **Carter**. For in **Boden**, the court stated (42 NY 2d at 213):

> "It is to be assumed that the parties anticipated the future needs of the child and adequately provided for them."

The court then immediately added:

> "It is also to be presumed that in the negotiation of the terms of the agreement the parties arrived at what they felt was a fair and equitable division of the financial burden to be assumed in the rearing of the child."

Boden thus gives the key: Representing the wife, destroy the presumption as to her support allocation; representing the husband, make the presumption explicit.

To negate **Carter** consider (if you can induce the father to sign same):

> "The father accepts the full obligation for the support, maintenance and education of the children in all respects without expecting or requiring any contribution thereof by the mother, now or in the future."
>
> **or**
>
> ". . . without expecting or requiring any contribution thereof by the mother, now or in the future, in excess of $_____ in any calendar year."

Consider contrary alternatives:

> "To the extent that the children may reasonably require for their support, maintenance and education amounts in excess of the payments required to be made by the father under this agreement,
>
> [ ] the mother, provided her financial circumstances reasonably permit, shall pay for the first two thousand dollars of such excess and any further excess shall be borne by the parties in the proportion of their then respective income after income taxes."

There are a variety of permutations.

Long before either **Boden or Carter**, I represented a husband-father and drafted a separation agreement in which the husband transferred his wholly-owned and substantial marital residence to the wife-mother. The following were some of the relevant provisions of that agreement:

> "4. In consideration of the father's entering into this agreement in its entirety and in particular consideration of the transfer and conveyance by the father to the mother of his ownership of the dwelling as set forth in Article III of this agreement, the mother agrees as follows:
>
> (a) to the extent that the child allowance as hereinbefore in this article set forth is not sufficient for the support, maintenance and education of a child, the mother shall pay and provide such support, maintenance and education without any claim of reimbursement from the father;
>
> (b) to provide and pay for summer boarding camp, elementary school, high school and college expenses of each child without claim of reimbursement from the father;
>
> (c) to indemnify and hold the father harmless from any payment or expenditure required to be made for the support, maintenance and education of the children except as set forth in paragraph 1 of this article, said indemnity to include any reasonable counsel fees and disbursements incurred by the father in defense of any claim made against the father for payments for a child in excess of the payment required for said child pursuant to paragraph 1 of this article."

These draft suggestions are made with deference and without guarantees.

Endnotes

1. **Christian v. Christian**, 42 NY 2d 63, 396 NYS 2d 817 (June 9, 1977).
2. **Boden v. Boden**, 42 NY 2d 210, 397 NYS 2d 701 (July 7, 1977).
3. **Carter v. Carter**, 58 App. Div. 2d 438, 397 NYS 2d 88 (App. Div. July 25, 1977).
4. **Dolphus v. Dolphus,** 39 App. Div. 2d 829, 332 NYS 2d 974 (4th Dept. 1972); **Miralles v. Miralles**, 56 Misc. 2d 789, 290 NYS 2d 99 (Sup. Ct. Nass. Cty. 1968); see also, **Siegal, Practice Commentaries,** McKinney's Cons. Law of N.Y., Book 14, Domestic Relations Law § 234, p. 125; for cases permitting transfer in fraud and trust situations within the ambit of matrimonial actions, see, Domestic Relations Law § 234; **Sagnard v. Sagnard**, 80 Misc. 2d 984, 365 NYS 2d 692, aff'd, 49 App. Div. 2d 751, 374 NYS 2d 305 (Sup. Ct. Nass. Cty. 1975); **Laurence v. Laurence**, 47 Misc. 2d 10, 261 NYS 805 (Sup. Ct. West Cty. 1965).

5. **Wilson v. Hinman**, 182 NY 408, 413 (1905); **Doerle v. Doerle**, 96 Misc. 72, 159 NYS 637 (Sup. Ct. NY Cty. 1916). The public policy against alimony in gross has a long history. See **Burr v. Burr**, 10 Paige (1842); **Crain v. Cavana**, 36 Barb. 410 (1862); **Sleeper v. Sleeper**, 20 NYS 339 (1892). But cf. **Kay v. Kay**, 37 NY 2d 632, 376 NYS 2d 443 (1975). (The trial court awarded the wife the marital residence and $10,000 to repair same in addition to periodic alimony and child support which the wife successfully increased on her appeal. The husband did not cross-appeal the award of the residence or of the $10,000 fund. There were no trust title aspects of the residence presented or pleaded. The Trial Court stated:

   > "The court further, in the interests of justice and in light of circumstances of the parties, directs that the defendant transfer to the wife his interest in the marital residence at 22 Jefferson Road, Scarsdale, New York, and provide her further with a sum of $10,000 for repair of the premises and its accessories. This will place him in the same position with respect to the condition of the home as if he had maintained it properly during the last five years."

   Kay v. Kay, Rec. on Appeal, A. 37).

6. In **Golden v. Golden**, 37 App. Div. 2d 578, 323 NYS 2d 714 (App. Div. June 1971), the court accepted my contention as Appellant's attorney that while such adjustments might be made in separation agreements, the court could not so decree within the ambit of Domestic Relations Law §§ 236 and 240. Thus, **inter alia**, it could not direct college education for a child who was then only a young child:

   The court ruled:

   > "The decretal provisions for the college education of the infant, and those for the payment to defendant of greater support in the future if plaintiff receives an adjusted gross income of more than $45,000 in any one year, should be deleted because those matters can be determined in the future to meet changing conditions (Domestic Relations Law §§ 236, 240; **McMains v. McMains**, 15 NY 2d 283)."

7. **Wilson v. Hinman**, supra; **Metz v. Metz**, 57 App. Div. 2d 800, 394 NYS 2d 671 (1st Dept. 1977); **Winter v. Winter**, 39 App. Div. 2d 69, 331 NYS 2d 747; aff'd, 31 NY 2d 983, 341 NYS 2d 313 (1st Dept. 1972); **Johns v. Johns**, 44 App. Div. 533, 60 NYS 865, (1901), aff'd, 166 NY 613; **Ehrler v. Ehrler**, 69 Misc. 2d 234, 328 NYS 2d 728 (Sup. Ct. Nass. Cty. 1972).

8. **Fisher, Separation Agreements**, New York Matrimonial Law (Practising Law Institute, p. 82, 1972); **A Prototype Separation Agreement**, Matrimonial Matters (Practising Law Institute, p. 138, 1975).

9. These raise other difficulties. See **Fisher, A Partisan Guide to Separation Agreements**, New York Matrimonial Actions (Practising Law Institute, p. 153, 1970), and **A Partisan Guide to Modification of Alimony and Support,** Matrimonial Matters (Practising Law Institute, p. 199, 1974).

10. See, Mitchell Salem Fisher and David B. Saxe, **Family Support Obligations: The Equal Protection Problem**, 46 New York State Bar Journal, p. 441 (1974).

The article was taken from a brief in a case where Mr. Fisher represented a millionaire father and contended that it was preposterous not to expect equal child support to be paid by the millionaire mother. The brief led to a settlement.

No Payola for Triola

By Julia Perles
September 1979

At a time when Lee Marvin was still married to one Betty Marvin, he met Michelle Triola and shortly thereafter began a live-in relationship with her. At some point in the six years or so which followed she changed her name legally to Michelle Triola Marvin. Lee divorced Betty about three years after the tryst with Michelle started and they lived together for three years after that.

Michelle's complaint alleged that when she first met Lee she was a successful singer earning $1,000 per week. She said he promised her if she would stop working, take care of him as would a wife, provide him with companionship and incidental services, he would share his worldly goods with her. Her complaint demanded 50 percent of $6,000,000 which she claimed were Lee's total earnings in the period they lived together. The complaint was dismissed in the lower California courts. In a decision which has achieved wide notoriety—probably attributable more to the public relations of Michelle's lawyer than to its landmark nature—the California Supreme Court reversed and remanded the case for trial.[1]

The Appellate Court noted the changing mores of the time at great length and held that changing lifestyles required a hearing and reconsideration of California's public policy. The courts found that the meretricious nature of the relationship did not *ispo facto* deprive Michelle of any rights. The court held that it would enforce an express or implied contract to the extent that it was not explicitly based upon the sexual services Lee Marvin clearly expected Michelle to render. The court said that if Michelle could prove an express contract, that contract would be enforceable in California courts.

Further, it was held that a contract might be implied from the conduct of the parties to confer rights upon Michelle either on the theory of constructive trust which, under California law, would give her up to 50 percent interest in Lee's earnings during the relationship under California Community Property Law or in *quantum meruit* if the trial court could separate out Michelle's non-sexual services as homemaker and companion from the sexual services.

It is to be noted that the complaint which the highest court of California was considering did not ask for alimony. Apparently at some subsequent time the complaint was amended and alimony was requested.

After trial, which lasted for months and received full treatment in the national press, Judge Tobriner found that the Appellate Court, in dismissing the complaint, did not intend to equate unmarried cohabitation with marital rights or to create a new class of common law marriage. He said, however, that Michelle had

> "the same rights to enforce contracts and to assert equitable interests in property acquired through [her] efforts as does any other unmarried person.
>
> "Parties may well expect property to be divided in accordance with the parties tacit understanding . . . and reasonable expectations. Thus, express contracts between non-marital partners are enforceable unless sexual services are the exclusive consideration for the contract.
>
> "The best presumption is that non-marital partners intend to deal fairly with each other."

Judge Tobriner found there was no contract, express or implied. Michelle received $104,000 as rehabilitative alimony—but in California alimony is not purely statutory and the court used its inherent power to apply equitable rules. A New York Court could not have awarded Michelle any money.

I would sum up the contract theory as follows:

> Marvin, Marvin, if we tarry
> You will loiter, reconnoiter,
> Or will falter till the altar,
> Or I will trip or make a slip
> And there I'll be, left; bereft.
> Ergo, ergo we must seal
> Or twist our tryst into a deal.
> A deal, contractual, so problems factual
> Will be referable, as is preferable
> To a writing.
> When leave you must, I'll put my trust
> And shall resort
> To a Court.
> A Court which will not sneer at me
> And if it can't give alimony
> Will have discretion how to go
> And any way will give me dough.

Post *Marvin* Cases

Marvin has been followed in Connecticut, Illinois, Minnesota, Oregon and elsewhere. The pattern is very similar.

The complaints in those cases allege that for a shorter or longer time there was a relationship and marriage with all but ceremonial sanctions. In some cases there were children. There were findings of either an express or implied contract; some lip service was given to illicit consideration for services and there was some discussion of non-marital services as separate consideration or as they were related to unjust enrichment. The cases which went furthest were *Latham v. Hennessey*[2] and most recently *Kozlowski* in New Jersey.[3]

In *Latham*, the woman alleged the man's promise to divide all property accumulated during the relationship if the parties should separate in consideration of a promise that the woman would live with the man, care for him and provide him with all the amenities of married life. *Latham* rejected any doctrine which would require the court to separate the meretricious nature of the relationship from the services the man was expecting from the woman and flatly held that the agreement was enforceable.

Only a month or so ago, the Supreme Court of New Jersey, in a very similar case, held that a man's oral promise to support his live-in companion of 15 years was a binding contract and the court unanimously ruled that she was entitled to support for as long as she lives. The lower court had found that a contract existed and fixed $55,000 as the lump sum to which the woman was entitled, based on the number of years of her life expectancy multiplied by the amount the man had been giving her while she was living with him.

The high court remanded, with instructions for the lower court to compute a more exact amount and method of payment. The Supreme Court, New Jersey's Court of last resort, emphasized that its decision in *Kozlowski* should not be construed to sanction common law marriage, which is barred in New Jersey. (New Jersey also outlaws breach of promise suits.) It stated, in language reminiscent of *Marvin*,

> "We do no more than recognize that society's mores have changed and that an agreement between adult parties living together is enforceable to the extent it is not based on a relationship proscribed by law or on a promise to marry."

New York Cases

The *Kozlowski* decision is totally contrary to a New York case involving David Merrick. The Merricks were married and divorced within six weeks after the ceremony. The parties had signed a separation agreement, one provision of which entitled the woman to use the name Merrick. They flew together to Mexico where she became the plaintiff in a divorce action; he appeared personally and by counsel, and they returned to New York together. They lived apart for a time and eventually resumed their relationship, living together for some six or seven years and a child was born of the relationship. Ms. Merrick sued for alimony, child support and counsel fees. Judge Gomez said that, absent a valid marriage, an application for temporary alimony and counsel fees is "beyond all hope."

Summary judgment was granted on the ground that the divorce was valid and under the Domestic Relations Law only a wife is entitled to alimony and counsel fees. That case was unanimously affirmed without opinion by the Appellate Division and leave to appeal was denied by the Court of Appeals.[4]

New York's long tradition of chauvinism is firmly rooted in judicial precedent. It has never looked with favor upon non-marital sexual relationships. In considering the New York law, we must remember that adultery is still a misdemeanor under the Penal Law. The Statute of Frauds was used long before *Marvin* to defeat claims of women in *Marvin* situations.

If a plaintiff can overcome the difficulty of the dead man's statute in proving an oral agreement, there remain the formidable obstacles of § 13-2.1 of the Estates, Powers and Trusts Law, which requires a contract to bequeath an interest in an estate to be in writing, and § 5-701 of the General Obligations Law, which requires a contract to be in writing if, by its terms, it is not to be performed within one year from the making thereof or the performance cannot be completed before the end of a lifetime. *Marvin* situations were considered by the New York Courts long before *Marvin*.

In *Levin v. Levin*[5] (1937), the Appellate Division denied specific performance of an alleged oral agreement to make a woman the irrevocable beneficiary of a life insurance policy in return for her society and companionship. That contract was held void as against public policy.

In *Roth v. Patino*,[6] a 20-year-old married woman and an 80-year-old man allegedly entered into an oral agreement that the woman would receive $1,000 per month so long as she lived if she devoted all or substantially all of her time to Mr. Patino to be at his beck and call, to act toward him as if he were her father, to allow him to censor her friends, conduct, education and entertainment, to act as his companion and to accompany him on social occasions. The complaint specifically alleged that the agreement was that these services were to be provided so long as they were not inconsistent with the woman's relationship with her husband. The court, nevertheless, held that this agreement was so inconsistent with, and destructive of, the woman's marriage as to be void and that in any event the agreement was barred by the Statute of Frauds since it could not be completed before the end of a lifetime.

The same result was reached in a Federal Court case, *Rubinstein v. Kleven*,[7] which applied New York law to the same fact pattern, except that the woman was not married to anyone else. The Federal Court held the oral promise unenforceable under the Statute of Frauds.

In re *Gordon's Estate*,[8] the woman sued for work, labor and services rendered in a bar owned by the decedent. She claimed an oral promise to compensate her in his Will. The Court of Appeals held, in a 4-2 decision that no recovery could be had from an implied agreement to pay for work, labor and services.

The parties had lived together 18 years as husband and wife without benefit of clergy. She worked as a scullery maid and, indeed, as noted in the dissenting opinion, the trouble was that the parties had lived together as husband and wife, stating that if the woman "had been a mere employee, she would not have labored from 8 A.M. until after midnight without demanding pay." Or, as the dissenting justice in *Rehak*,[9] said "the difference is that illegal conduct is not part of, but incidental to the contract." In other words, the dissenting justice refused to hold that she furnished work and labor *in consideration of a promise* to seduce her.

If there had been a writing in *Gordon*, the court, even in 1960, might not have been so harsh as to deprive the woman of payment for her work in the bar. Long before *Gordon,* and long before our current Statute of Frauds, our Court of Appeals in 1892 had a similar case. In *Rhodes v. Stone*,[10] a married man, not divorced from his wife, induced Rhodes to live with him as husband and wife, which she did for 32 years. He was a farmer and she worked on the farm. She sued for compensation for those services. This case was in fact cited in the majority opinion in *Gordon*. The Court of Appeals held that Rhodes could not rely on the implied contract if any part of the consideration was the illicit commerce, but that Rhodes, in the pre-Statute of Frauds days, was entitled to compensation for her labor on the farm since:

> "The relations of the parties did not necessarily forbid an express contract between them, that the intestate would pay for her labor. Notwithstanding the improper manner of her life with the intestate she was at liberty to make an agreement with the intestate to perform labor for him to pay."

Thus, the law of New York has long been that if there is an express contract—which is now required to be in writing—recovery may be had for services rendered, even if some of the indicated services are sexual. In this connection a recent bill was introduced in the current New York Assembly session which would have required

> "an agreement by persons not married to each other, the consideration of which is based upon cohabitation with a sexual relationship [must be in writing]."

The bill never was reported out of Committee. It was disapproved by The New York State Bar Association but approved by the New York County Lawyers' Association which felt that non-marital partners would at least be on notice of the legal boundaries of their relationship and that a *caveat emptor* approach was more desirable than the endless litigation which has been pouring into the courts.

New York applied a most harsh rule in a recent decision by Judge Gagliardi in Westchester County, *McCall v. Frampton*.[11] Penelope McCall was already married when she met Peter Frampton. She was skilled in the music business and working as a talent manager. Frampton asked her to leave her husband and her job to become associated with and work for him, and to live with him. She alleged an oral agreement that if she did so they would be equal partners in every respect.

She claimed that she used all her financial resources to support herself and Frampton through the time when he was not earning very much money, and that she performed various services for him, including public relations work, costuming for his group, managing his finances and credit. They shared his receipts and his bank accounts. She claimed they functioned as equal partners from 1973 through July 1978 when the relationship terminated.

Her first cause of action sought an accounting of Frampton's earnings from 1973 to date—the case came before the court in 1979—and a judgment dividing the earnings equally.

Her third cause of action alleged Frampton breached the partnership agreement. She sought an accounting and a direction that Frampton pay her one half of all earnings to date and thereafter a portion of his earnings in an amount to be fixed by the court, asking the court to hold, in effect, that the partnership was a continuing one.

In her second cause of action she alleged a constructive trust. She claimed that she had found a house which was intended for the joint use of both parties. Frampton took title to the house in his own name, although he had promised that the title would be joint, and he told her that he had bought it for both of them. When she asked him about this, he told her he had taken title in his own name for business reasons. The complaint alleged that she permitted him to hold the title in his individual name, relying upon his representations and her trust and confidence in him.

The defendant pleaded the Statute of Frauds and the illegality of the alleged agreements as against public policy. McCall's layers cited the *Marvin* case and other cases which have already been discussed.[12] The court, discussing the countervailing principles of public policy as against unjust enrichment, stated that to declare agreements void against public policy

> "is not based on a desire to benefit the party who breaches an illegal contract, but on a desire to protect the common weal, the general welfare of society being damaged by the very making of such a contract. By refusing to enforce such a contract and leaving the parties without a legal remedy for breach, society is protected by discouraging the making of contracts contrary to the common good."

Judge Gagliardi specifically referred to and rejected *Marvin* and the other cases above discussed. He distinguished the *McCall* case from other precedents by the fact that Penelope McCall was married to someone else during the entire time she and Frampton lived together. He said, in so many words, that the contract was illegal and that it was

> "Contrary to the public policy of this State which recognizes the state of marriage and the protection thereof as essential to the welfare of our society. It requires in its performance the commission of adultery, which remains a crime in this state."

He found that the contract as alleged

> "is clearly opposed to sound morality as is based on the illicit association of the parties."

As to the demand in the complaint that there was a legal partnership between McCall and Frampton, Judge Gagliardi had another arrow in his quiver. Apart from any question of illegality, this agreement was barred by the Statute of Frauds.

An oral contract of partnership is considered a partnership terminable at will and while partners acting under an oral agreement are accountable to each other until the partnership is terminated, McCall asked for much more than that. She wanted an accounting, not only for the pre-termination period, which would not have been barred by the Statute of Frauds, but for earnings and profits thereafter and for a continuation of those earnings and profits as if there had been a valid written partnership agreement. This, the court said, she could not have without a writing.

In effect, she was asking the court to compel a partner to continue the partnership which the courts are powerless to direct and it was held she was not entitled to a continuation of further earnings because there was no written contract.

Judge Gagliardi held, as to the constructive trust cause of action on the real property, that McCall had not proven the elements necessary to establish a constructive trust, i.e., a promise arising out of a confidential relationship, reliance, breach of promise and unjust enrichment. The court found that there were no grounds for a constructive trust, even if McCall and Frampton had been married to each other because Frampton was not unjustly enriched.

Thus, McCall was out of court completely, with no rights whatever. Judge Gagliardi even denied her leave to replead a complaint to allege any claims she might have for an accounting of earnings prior to July, 1978 while the parties were still partners.

The harsh result of this case is rather different from the approach taken by Erie County Judge Mattina in *McCullon v. McCullon*[13] on a motion for temporary alimony. The McCullons had lived together for 28 years. Susan McCullon did not obtain a divorce from her previous husband until five years after she went to live with Mr. McCullon.

She lived with McCullon for 28 years as husband and wife. Every year for 28 years they went to Pennsylvania to visit his family. She was introduced as his wife and slept in the same room. She wore a wedding ring and bore him three children. They filed joint tax returns, owned realty as tenants by the entirety and had joint bank accounts. The Erie County Court noted the widespread incidence of non-marital unions and stated that those relationships should be recognized to the extent necessary to prevent injustice. The court discussed the *Marvin*[14] case at length, noted the tremendous increase in the incidence of live-in relationships, "recognized the sanctity of marriage"—but could not "ignore the untold physical and mental anguish which may be visited—if no relief is afforded."

The court found two grounds for relief, holding there was a valid common-law marriage under Pennsylvania law and implied contract in New York State. Temporary alimony was set at $50 per week and child support was set at $50 per week.

The results in the *Roth*[15] case or the *Marvin* case do not offend my personal sense of justice, but Ms. Rhodes[16] the farm labor woman, Ms. Rehak[17] the scullery maid, Ms. Gordon[18] the bar maid were subject to a harsh rule of law by the accident of geography. Had they been in Oregon, as was Ms. Latham[19] or in New Jersey as was Ms. Kozlowski[20], they would have been invested with the dignity of wives, as indeed they were treated during the period of the long relationships involved in those cases.

As to the Penelope McCalls[21] of this world, one cannot fault Judge Gagliardi in face of our existing adul-

tery statutes, but it does seem unfair that through her efforts and money Peter Frampton reached the heights of success, while she was left without remedy. Contrast Penelope McCall's plight with that of Ms. McCullon[22] who found a sympathetic judge determined to do equity. He managed to eke out a theory based on the somewhat questionable application of Pennsylvania common-law marriage principles,[23] but he could not get around the Statute of Frauds so he ignored it. This is yet another example of a hard case making bad law.

The inconsistency and unfairness of the New York law becomes all the more obvious when one considers Section 248 of the Domestic Relations Law.[24] Thus, if, for example, Ms. Gordon or Ms. Rehak had been receiving alimony under a divorce judgment, their respective husbands would have been able to annul the support provisions. Yet they could not even recover for services rendered, not only as sexual partners, but as a bar maid and scullery maid. If Justice Mattina's decision in *McCullon* is reversed on Appeal, she will be remediless.

To sum up, there seems little doubt that under New York law, past cohabitation in itself is insufficient consideration for a promise, but a written agreement between parties to a meretricious relationship with respect to money or property will be enforced if the agreement is independent of the relationship. However, the agreement must be in writing and it will not be implied by virtue of the relationship as in *Marvin*. It is also clear under the *Merrick*[25] case that alimony will not be awarded to anyone who is not a wife.

Editor's Note: Would the results reached by the courts in the ***Marvin*** *situations have differed if the parties were, in fact, married to one another? It would seem that this question must be answered in the affirmative. If so, then it might well be possible for a cause of action sounding in either an implied contract theory or an action to impress a trust to succeed. Based upon the courts' increasing liberality in the area of husband and wife and the failure of the legislature to enact an equitable distribution statute, the time might well be upon us for such enlightened precedent.*

Endnotes

1. *Marvin v. Marvin*, 18 Cal. 3d 660, 134 Ca. Rptr. 815, 557, P.2d 106 (1976).
2. *Latham v. Hennessey*, 547 P.2d 144 (Or. 1976).
3. *Kozlowski,* N.J. Sup. Ct. (1979) citation not available;

   Other relevant citations of cases in point, other than New York cases are:

   Dosek, Conn. 10/4/78, 4 Family Law Report 282 (Court found—marriage in all but ceremony, changed name, child, held out as husband and wife.)

   Hewitt, 62 Ill. App. 3d 861 (Court found—marriage in all but ceremony, 15-year relationship and finding that defendant misled plaintiff into believing valid conventional marriage.)

   Carlson v. Olson, 256 NW 2d 249 Minnesota (1977) (Court partitioned real and personal property split assets, 21-year relationship, son raised to majority, held property jointly. Minnesota Court relied on *Marvin*—held principles of property law insufficient to render justice, irrevocable gift.)
4. *Merrick v. Merrick*, 59 AD 2d 689 (1st Dep't. 1977).
5. *Levin v. Levin*, 253 App. Div. 758 (2d Dep't. 1937).
6. *Roth v. Patino*, 185 Misc. 235, 56 NYS 2d 853 (N.Y. Co. 1945).
7. *Rubinstein v. Kleven*, 261 F. 2d 921 (1st Cir. 1958).
8. *In re Gordon's Estate*, 8 NY 2d 71, 202 NYS 2d 1 (1960).
9. *Rehak v. Mathis*, 239 Ga. 541, 238 SE 2d 81 (1977).
10. *Rhodes v. Stone*, 17 NYS 561 (5th Dep't. 1892).
11. *McCall v. Frampton*, 415 NYS 2d 752 (April 1979).
12. See footnote 3, supra.
13. *McCullon v. McCullon,* 410 NYS 2d 226 (Erie Co. 1978).
14. See footnote 1.
15. See footnote 6.
16. See footnote 10.
17. See footnote 9.
18. See footnote 8.
19. See footnote 2.
20. See footnote 3.
21. See footnote 11.
22. See footnote 13.
23. See Foster-Freed New York Law Journal Articles April 24 and 25, 1979.
24. § 248 of the Domestic Relations Law empowers a court "in its discretion upon application of the husband on notice, upon proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man" to modify or annul a final judgment or support order.
25. See footnote 4.

Author's Note: This article would not have been possible without the research and comments of Henry H. Foster Jr. and Doris Jonas Freed, Esq., New York Law Journal 4/24-25/79. Title courtesy of William G. Mulligan, Esq.

Notes and Comments

By Elliot D. Samuelson
September 1980

Before the ink on the equitable distribution law was dry, Special Term rendered at least five decisions in the New York metropolitan area dealing with questions of jurisdiction. Specifically, the issue of whether the legislature intended to include pending actions in its proscription that only actions commenced after July 19, 1980 would be subject to the new statute was the subject of much litigation. The earliest case came from the Nassau County Supreme Court. Justice Bernard F. McCaffrey, in a lengthy and well written opinion (N.Y.L.J. 7/28/80) in *Deschamps v. Deschamps*, concluded that Part B of the new law—on a motion brought by a wife to discontinue her cause of action for divorce so as to enable her to commence a new action to obtain the benefits of equitable distribution—would apply to all pending actions that had not been reached for trial, and that with respect to the issue of alimony and fault, Part A would apply. The jurist then concluded that it was unnecessary to grant the motion for discontinuance and directed that the matter proceed to trial, as provided in his decision.

It was barely a few weeks later that Justice Morrie Slifkin, in a Westchester County Supreme Court case, *Cooper v. Cooper*, (N.Y.L.J. 8/14/80) decided to the contrary. In effect, he held that the legislature did not intend to permit litigants of pending matrimonial actions to obtain the benefits of the new legislation. Justice Slifkin limited the application of Part B to only those actions commenced on or after July 19, 1980. However, in effect, the jurist granted relief to the wife who sought to discontinue the action by permitting her to do so and commence a new action.

We then learned that there have been several other decisions, yet unpublished, that have reached contrary results. In one case, a motion to discontinue was disallowed on the basis of "prejudice" and in yet another, granted provided that court costs were paid. The best that can be said of the current conflicts in the courts is that it has not as yet reached chaotic proportions. Until the Appellate Divisions have ruled or, perhaps, the Court of Appeals finally decides these questions, attorneys must be certain to protect their clients' interests by not thoroughly relying on any of the lower court decisions.

The following procedure is recommended concerning these pending actions: (1) if you represent a client in a pending action who has no claim for marital relief, commence a new action for such relief and move to consolidate the two proceedings; (2) if both parties seek marital relief in the pending action and you desire to obtain the benefits of equitable distribution, move to discontinue the action. If the relief is granted, a new action would then be commenced and a motion made to consolidate the pending action and the new action; (3) if the motion to discontinue is denied, a new summons and complaint alleging a new cause of action and demanding equitable distribution should be served and, thereafter, a motion made to consolidate both actions.

Of course, it may be that Special Term on a proper cross-motion by your adversary will deny the consolidation and dismiss the subsequent action upon the grounds that there is already a pending action for marital relief between the parties. Nonetheless, it is suggested that this procedure be followed in order to protect your client's rights in the appellate court. A notice of appeal should be promptly served and filed in all respects; (4) if your client is unable financially to perfect an appeal before the trial is had, a motion to prosecute the appeal as a poor person might be made. If such relief is denied in the Appellate Division, the objections should be made when the pending action reaches trial (in the event that the court trying the pending action refuses to apply the benefits of the new statute) to the failure of the court to apply the new statute. Counsel must then spread on the record the steps taken to discontinue and commence a new proceeding, and the further fact that the client was financially unable to prosecute an appeal. In this way, your right to appeal will be preserved, and, if the holding in *Deschamps* is adopted by the appellate courts, a new trial may be a distinct possibility.

If the proper procedure to follow seems confusing, you are well to be reminded that neither you nor, for that matter, the courts, stand alone in such confusion. The fact is that until appellate courts definitively decide this issue, there will be different results in different courts based upon the same factual pattern. When we predicted profuse litigation in interpreting the statute, we never anticipated these procedural skirmishes. It is certain that it will take many more years than first thought before there will be a clear direction and interpretation made by the appellate courts regarding the substantive provisions of the statute.

The attention of the matrimonial bar is called to § 236, Part B, Subdivision 3 of the statute regarding separation agreements. It must be remembered that all agreements executed after July 19, 1980 will be gov-

erned by the new law. Your client must be aware that separation agreements may be attacked in one of several ways. The statute provides that a separation agreement must be fair and reasonable when made and not unconscionable at the time a judgment of divorce is entered. The converse must also be true, that if the agreement was not fair and reasonable when made, or unconscionable at the time of the decree, the agreement may be set aside by the courts. Certainly, it would appear that withholding all financial information or willfully furnishing false, misleading or fraudulent financial information would form the basis for a proceeding to set aside the agreement as being unfair when made.

In order to preclude this result, it is suggested that a DRL § 250 financial disclosure affidavit be exchanged by the parties and appended to the separation agreement as an exhibit in order to obviate their respective claims that they "never made such statements or representations." What does the term "unconscionable" at the time of the entry of judgment mean? It would seem that there would have to be some intervening compelling factors since the execution of the separation agreement before the court would make a finding that the financial terms are unconscionable. Each case would have to be decided on its own facts.

However, it is suggested that this "unconscionability" may include an agreement where a spouse earned $10,000 a year and provided $75 weekly for an unemployed spouse and several children and then, at the time of trial, catapulted his earnings to say $50,000 yearly, or more. Under such circumstances the terms of support might well be considered as unconscionable by the court. I am convinced that many applications will be made to set aside agreements where there has been a demonstrated marital increase in the financial status of the party paying maintenance between the date of the agreement and the entry of judgment, unless a *Boden* rule evolves as to maintenance. And, speaking of *Boden*, will there be a change in its application under the new law? I think not, but . . .

A far more serious problem exists under the new law and that is the court's inherent right to modify a separation agreement at any time subsequent to the entry of the judgment of divorce when it has modified its own decree based upon "extreme hardship." This broad language will be subject to varied interpretations by the court but it is clear that once the judgment is modified, the court has the absolute right to modify the agreement so as to be consistent with the provisions of the decree. However, it should be noted that the effect upon the agreement is only during the period of time and under circumstances specified by the court.

The question then must be asked: Is there any benefit to enter into an agreement under the new statute if one represents a party who is the substantial wage earner? It may well be that an agreement will only be of limited value since the courts will be free to modify in the event of "extreme hardship." Only time and experience will furnish the answer. The thought also occurs as to whether the provisions of the statute are constitutional since they are, in effect, an impairment of the rights of parties to freely contract with one another. The next year will undoubtedly offer some insight to the questions we now pose.

Because of the nature and complexity of this sweeping legislative reform, we have devoted a special section to DRL § 236 and other statutory changes made in the previous legislative session which affects the matrimonial practitioner. They are contained in Mr. Brandes' column. An article dealing with cruelty by Abraham Hecht completes this issue. Another question to tussle with is whether, under the new law, the *Hessen* dual standard will be adhered to, even though the new statute does not preclude, per se, the awarding of maintenance to a spouse guilty of fault.

We invite your thoughts and comments!

Equitable Distribution & Valuation of Assets

By Stephen Gassman
March 1981

The advent of the equitable distribution statute has placed upon the matrimonial practitioner new and greater burdens. The former facility for cross-examining a detective who attempts to implant the "Scarlet A" upon our maligned client must now be matched and overtaken by a familiarity and understanding of accounting principles and jargon. Capitalization of earnings is now a more important multiple than the number of times a party engaged in a meretricious relationship. The wasteful dissipation of an asset perhaps achieves prominence over the wasteful dissipation of a marriage. The nuances and innuendos await the test of judicial scrutiny.

For many practitioners, the process of valuing the assets of the parties is a sojourn to virgin territory. Until now, valuation of assets was a primary concern of practitioners who dealt in the estate and gift tax field and, as concerns real property, tax certiorari and condemnation proceedings. Now, we must declare ourselves in these areas as to the valuation process. It is an unsatisfactory reprise that the matrimonial lawyer can only become tangentially involved in the question of valuation on the theory that, in the final analysis, experts—i.e., accountants and appraisers—will carry the ball. Just as the personal injury attorney must be fully familiar with the medical aspects of his case, the matrimonial practitioner will have to be fully familiar with all the financial aspects of his case.

For valuing property under equitable distribution, we first must take note that all of the parties' property must be valued. While only marital property will be distributed by the court[1] in determining an equitable distribution of marital property, the court must consider, *inter alia*, "the income and property of each party at the time of the marriage, and at the time of the commencement of the action."[2] Thus, the value of separate property has some effect upon the distribution of marital property.

Value Defined

The key term in valuation is fair market value which is the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the relevant facts."[3] While this definition appears rather facile on is face, it has been the subject of extensive litigation in the estate and gift tax area. Reg. § 20.2031-1 sets forth certain general guidelines:

(1) The fair market value of an item of property is not to be determined by a forced sale price.[4] However, if the trend of a particular business is sloping downward, a cogent argument can be advanced that a forced or distress sale price is relevant in valuing the business;

(2) The fair market value of an item is governed by the value in the market in which the item is generally sold. For example, if the retail market is where an item is generally sold, the fair market value is governed by the retail price. Thus, the fair market value of a used car is governed by the price at which it is sold to the public, not by the price at which it is sold to a used-car dealer;

(3) As value is a question of fact, not law,[5] the regulations clearly set forth the caveat that "All relevant facts and elements of value as of the applicable valuation date shall be considered in every case"[6];

(4) While not applicable to actively traded stocks or bonds, an actual sale or purchase of property, if made within a reasonable time of the valuation date and if representative of an arm's length transaction, will generally represent the value of the property.[7] Such a valuation method obviates the need for expert appraisals or other valuation methods.

Fair market value must, in certain instances, be differentiated from net value, i.e., the amount actually received by a seller after deductions for expenses and commissions. Thus, if marital property is being sold and the proceeds distributed, net value must guide the distribution.

The lawyer's task in convincing a court to adopt a value beneficial to his or her client is pathed by the latitude presented by the mandated consideration of all relevant facts and circumstances. Moreover, the New York equitable distribution statute further mandates that the court, in making a disposition of property, "shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel."[8] Presumably, this requirement is inclusive of the factors the court considered in valuing the property of the parties.

Valuation of Closely Held Corporations

A troublesome and litigious area is the valuation of closely held corporations. By such entities, we are referring to corporations where market quotations are unavailable and which are characterized by a relatively limited number of shareholders who are often related.

Revenue Ruling 59-60 sets forth the factors to be considered in determining the value of a closely held corporation, and similar criteria are often applicable in valuing partnerships, proprietorships and other business interests.[9]

While the ensuing discussion of the eight factors encompasses many aspects of a business, the regulations again caution that no formula can be devised that will be generally applicable to the multitude of different issues arising and that fair market value will depend upon the circumstances of each case.[10] The factors are:

1) The Nature of the Business and the History of the Enterprise from its Inception

The first factor encompasses such consideration as whether the business has a long history or if it is a relative newcomer; what is the past stability or instability of the company, and its growth or lack of growth; what is the capital structure, plant facilities; has management been contingent upon the efforts of one man (thus warranting a discount in the valuation).

2) The Economic Outlook in General and the Condition and Outlook of the Specific Industry

Consideration is given to such factors as the corporations success relative to its competition in the same industry, the outlook for the industry in general, and the likelihood of prospective competition. The effect on the value of stock as a result of the loss of the manager of a "one man" business can depress the valuation. In *Lavene v. Lavene*,[11] for example, a New Jersey court, in determining the value of a corporation, considered the existing general decline in the electronics industry.

3) The Book Value of the Stock and the Financial Condition of the Business

"Book value" refers to the company's net assets as per its financial statements, i.e., the excess of assets over liabilities. To determine book value per share, the total book value is divided by the number of shares outstanding and issued.

Rarely is book value indicative of the fair market value. The company's assets as reflected on its books will generally be at cost. When real estate appears on a balance sheet, its acquisition cost is generally shown, less accumulated depreciation based upon an estimated life. The sum is thus a constantly reducing one and bears no relation to the true market value or replacement cost.

Non-operating assets of a company, i.e., assets not essential to the operation of the business of the company but held as investments such as real estate and securities, generally realize a lower rate of return than do the operating assets of the company. Accordingly, the regulations provide that in valuing such assets, those of the investment type should be revalued on the basis of their market price and the book value adjusted accordingly.[12]

In general, where the business of the corporation is wholly or primarily that of an investment or holding type of company, the underlying assets will truly reflect the value of the company. This is not the case when valuing stocks of companies which sell products to the public.[13]

A New Jersey court amply stated the inconclusiveness of book value as follows:[14]

> ". . . There are probably few assets whose valuation imposes as difficult, intricate and sophisticated a task as interests in close corporations. They cannot be realistically evaluated by a simplistic approach which is based solely on book value, which fails to deal with the realities of the goodwill concept, which does not consider investment value of a business in terms of actual profit, and which does not deal with the question of discounting the value of a minority interest."

4) The Earning Capacity of the Company

Rev. Rul. 59-60 states that "In general, the appraiser will accord primary consideration to earnings when valuing stocks of companies which sell products or services to the public." By earning capacity, consideration is given to the income available for future consumption. Thus, if the company is selling assets, this will not contribute to future income.

Detailed profit and loss statements should be obtained for a representative period preceding the valuation date, and preferably not less than five years.[15] The earnings capacity is not determined simply by averaging the earnings of the representative period. Analysis of the earnings must be made to determine earning trends, adjustments for abnormal economic periods, and adjustments for non-recurring factors. Examples of the latter are unusual capital gains and losses, abandonment of loss lines of business, changes in accounting methods and abnormal retirement plan payments.[16]

Additionally, salaries paid to officers should be scrutinized as to reasonableness. Obviously, if a shareholder-officer is being overpaid, there is a concomitant depressing effect upon earnings. A corporation, moreover, may deduct as salary only "reasonable compensation."[17]

Items of cost and expense must be similarly examined to ascertain effect upon future earnings. Such items include the consumption of raw materials and supplies in the case of manufacturers, processors and fabricators; the cost of purchased merchandise in the case of mer-

chants; utility services; insurance; taxes; depletion or depreciation; and interest.[18]

Having made the necessary adjustments, reliance can now be had upon the Revenue Ruling statement that "Prior earnings records usually are the most reliable guide as to the future expectancy."[19]

5) Dividend-Paying Capacity

Rev. Rul. 59-60 cautions that "dividends paid are a less reliable criterion of market value than other applicable factors." This is because in a close corporation, dividends actually paid may be measured and controlled by the income needs of the stockholders or by their desire to avoid taxes on dividend receipts, instead of the ability of the company to pay dividends. Accordingly, it is the dividend-paying capacity, and not dividends actually paid in the past, that is taken into account.

Where a controlling interest in a close corporation is being valued, the dividend paying capacity is not given much weight due to the controlling shareholders' ability to substitute salaries, bonuses and other emoluments for dividends.

6) Goodwill or other Intangible Value

Goodwill refers to the going-concern value of the business. Included in the concept of goodwill is the prestige and renown of the business; the ownership of a trade or brand name; the firm's reputation and the prospect for repeat business.[20] Where a business is not unique, and has no patents, trademarks, long-term contracts with key employees or diverse or widespread clientele, no goodwill may exist even though the business has enjoyed large earnings.[21]

In the final analysis, however, goodwill is generally based upon earning capacity.[22] Several methods of valuation are predicated upon the determination of a fair return on the invested capital, and a consideration of the profits in excess of that amount as attributable to goodwill. Thus, the test becomes one of "excess earnings." In determining the tangible or goodwill value of a business, a "formula approach," i.e., the capitalization of earnings in excess of a fair rate of return on net tangible assets, is utilized and is comprehensively set forth in Rev. Rul. 68-609.

In utilizing the formula approach, tangible assets are valued and a percentage return on the average annual value of the tangible assets used in the business is determined, using a period of years—preferably not less than five—immediately prior to the valuation date. This amount is deducted from the average earnings of the business for such period, and the remainder is the average earnings of the intangible assets. This amount, capitalized at a proper rate, is the value of the intangible assets of the business. In general, where a business has a small risk factor with stable and regular earnings, an eight percent rate of return and a 15 percent rate of capitalization are applied to tangibles and intangibles, respectively. In a hazardous business, a 10 percent rate of return and a 20 percent rate of capitalization are applied.

To use an example, assume ABC corporation, a low-risk business, has average earnings of $100,000 per year and the value of its tangible assets is $1,000,000. Applying an eight percent rate of return on the tangible assets, a fair return on the tangible assets would be $80,000. Thus, the excess earnings ($100,000 less $80,000) are $20,000. Applying a 15 percent capitalization rate (multiplier of 6 2/3), the value of the intangible assets of the business would be $133,320 which, when added to the value of the tangible assets, shows a total asset value of ABC corporation of $1,133,320.

Controversy has been engendered over whether a professional practice has goodwill in fact and, if so, how it is measured. In a footnote to the case of *Stern v. Stern*,[23] the court commented that:

> "The goodwill of a law firm, for ethical reasons may not be sold or transferred for a valuable consideration. N.J. Advisory Committee on Professional Ethics, Opinion 48, 87 NJLJ 459 (1964); Opinion 80. 88 NJLJ 460 (1965). It may however, in a given case, be possible to prove that it does exist and is a real element of economic worth. Concededly, determining its value presents difficulties. Rev. Rul. 609, 1968-2. Cum. Bull, 327."

Yet, the court in *Stern* enumerated goodwill "should there in fact be any" as a factor in determining the worth of a prestigious law partnership.

In *Levy v. Levy*,[24] the question posed involved the valuation of the husband's law practice which he conducted as a single practitioner. The court faced the issue of whether or not a goodwill factor should be included in determining the value. Using the "excess earnings" test and finding that the husband's practice was only "fair"—net income for six years averaged $41,500 per year—the court found that such facts negate any concept of excess earnings and thus there was no goodwill factor. The court stated:

> ". . . For goodwill to be found in a case of this sort, competent, informed and expert testimony should be offered to establish that *the value of the professional services is less than the net income of the practice.* The difference would then be what the Revenue Ruling refers to as the earnings of the "intangible" asset of goodwill. I believe that it is impossible to get such testimony in the present

case. Certainly there was none." (emphasis supplied)

Suppose, however, such testimony was proffered. Imagine the problems encountered in attempting to prove that "the value of the professional services is less than the net income of the practice," which phrase might be a euphemism for the unearned or "rip-off" factor of legal fees charged. It should be noted that the court in *Levy* alluded to cases of sister states that found goodwill value in professional practices.[25] A Texas court, on the other hand, has ruled that goodwill in a professional practice is a quality personal to the professional and thus is not a marital asset subject to distribution.[26]

In this regard, while not dealing with goodwill, it should be noted that in *Mahoney v. Mahoney*,[27] where the assets acquired during the marriage were negligible, the New Jersey court held that the husband's education and MBA degree, obtained during the marriage while his wife worked and maintained the household, constituted a property right for which the wife was reimbursed for her contribution in the nature of a distributive award.

7) Sales of the Stock and the Size of the Block to be Valued

The elements of control of the corporation and the marketability of the stock are important factors in utilizing sales of the stock as a measure of value. Moreover, rarely are sales of stock in a close corporation *bona fide* expressions of fair market value, as sales of shares are often between family members at prices not even resembling the price in the open market.

There is a lack of marketability discount often ascribed to shares in a close corporation. As the Court of Claims stated in *Central Trust Co. v. U.S.*[28]:

> "It seems clear, . . . that an unlisted closely held stock . . . in which trading is infrequent and which therefore lacks marketability, is less attractive than a similar stock which is listed on an exchange and has ready access to the investing public."

The concept of blockage—the lowering of stock values concomitant with the placing of a large block of stock on the market—is inapplicable to shares of closely held corporations where no active market exists.[29] In such situations, a minority stockholder can't compel the majority to liquidate the stock so he can receive his proportionate share of the assets.

Aside from lack of marketability, shares of close corporations may be discounted because they represent a minority interest in the corporation.[30] Conversely, if the block of stock to be valued represents a controlling interest, either actual or effective, in a going business, a higher value may be justified.[31]

8) The Market Price of Stocks of Corporations Engaged in the same or a Similar line of Business having their Stocks Actively Traded in a Free and Open Market, either on an Exchange or Over-The-Counter

In using the market price of a comparable company to base the value of a close corporation, the problems and controversy surround the finding of a truly comparable company.[32] While the Regulations merely state that the lines of business be the same or similar,[33] consideration must be given to other facets of the business for comparison purposes as, e.g., labor relations, buying arrangements, labor costs, credit, financial structure, etc.

Relative Weight of Factors

Where all of the above intrinsic factors have been examined, the question remains of the relative weight of the factors. No set formula giving a percentage weight to each factor is applicable.[34] Nevertheless, certain guidelines are posited:[35]

(1) In valuing operating companies engaged in sale of products or services to the public, earnings should receive primary consideration. In the case of the investment or holding type of company, the greatest weight is assigned to the assets underlying the security to be valued. The operation expenses and the cost of liquidation, if any, of such a company and its underlying asset value. Thus, adjusted net worth is given primary consideration;

(2) Where a corporation operates a business and holds substantial investments not needed in operating the business, separate valuations should be made of each segment.[36]

Methods of Valuation

There are three principal methods utilized for valuation purposes with a closely held corporation once the above information has been obtained. All of the methods have been highlighted as part of the discussion of the eight factors. The methods are capitalization of earnings, the asset method—appraisal of all assets with adjustment for existing liabilities—and a comparison with price earnings ratios of similar publicly traded companies.

With respect to capitalization of earnings, a vexing problem is the rate of capitalization to be applied. The reciprocal of the capitalization rate is the earnings multiplier (a capitalization rate of 12½ percent is juxtaposed to an earnings multiplier of 8). Among the more important factors to be considered in determining a capitalization rate are: (1) the nature of the business; (2) the risk involved, with a risky business accorded a lower price-earnings multiple—and thus higher capitalization

rate—than a stable business; and (3) the stability or irregularity of earnings.[37]

Appraisals and Expert Testimony

New Jersey courts have enjoined parties to utilize appropriate experts to appraise business interests and property rights,[38] and have sanctioned the appointment by the trial court of its own expert where the proofs adduced by the parties do not provide sufficient information.[39]

In Rev. Proc. 69-49, the IRS promulgated the information which should be included in a competent appraisal report:

1. A summary of the appraiser's qualifications;
2. A statement of the value and the appraiser's definition of the value he has obtained;
3. The bases upon which the appraisal was made, including any restrictions, understandings, or covenants limiting the use or disposition of the property;
4. The date the property was valued;
5. The signature of the appraiser and the date as of which the appraisal was made.

For a proper appraisal to be done of a closely held corporation, the accountant must consider numerous factors and examine a plethora of documents. Included in such an effort, but not all-inclusive, would be examination of all fixed assets and a determination as to whether the assets are stated at their net book value or depreciated costs, and thereby an appraisal increment (excess of the appraised value of an asset over the net book value) may be obtained; review of buy-sell agreements,[40] officer loans, bank loan data, credit reports and the value of writedowns of inventory.

Especially for a cash basis taxpayer, a schedule of current accounts receivable should be obtained. Excess compensation or non-working relatives on the payroll should be noted. Of course, journals, ledgers, bank statements, and all prepared financial statements should be scrutinized. It may be that appraisals for insurance purposes have already been done and could be utilized.

To facilitate the use of experts, the Proposed Code of Evidence for the State of New York authorizes the court on its own motion to appoint experts, fix the expert's compensation and tax the compensation against the parties in such proportions as the court deems proper.[41]

It should be remembered that where an expert is called upon to give an opinion as to value of property, it is not fatal to the receipt of the testimony that the witness has no personal knowledge of the property. The opinion may be based upon facts proven by other witnesses or upon facts assumed or embraced within the case.[42] A lay witness may testify as to the value of personal property,[43] if it is shown that the lay witness is familiar with the market price.[44]

As to real property, the qualification of an expert has been stated as follows:[45]

> "We would, however, point out that the qualification of a witness who is giving opinion testimony as to property values need not be very great (see 21 N.Y. Jur., Evidence §453). He clearly need not be a professional broker. Even his failure to possess experience as to actual sales in the vicinity does not disqualify him as an expert, but merely bears on the weight to be given his testimony, as long as he has some knowledge of the value of property in the general area (see *King v. Daru*, 252 App. Div. 767, 298 NYS 982; 21 NY Jur., Evidence, § 453)."

The expert may state his opinion and reasons without specifying inprimus the data upon which it is based. The basis of the testimony may be left for development on cross-examination.[46]

The proposed code of evidence even provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of the fact."[47]

Discovery

Without question, equitable distribution and all its facets necessarily involves liberal financial disclosure.[48] Demonstrative of such a policy is the holding of the court in New Jersey in *Gerson v. Gerson*,[49] where the wife moved for an order permitting her accountant to inspect the financial books and records of a New York corporation of which her husband was a director and a 50 percent shareholder. The corporation resisted on the ground, *inter alia*, that it was currently under investigation by the IRS and the disclosure sought would be violative of the privilege against self-incrimination. The court directed the disclosure, commenting as follows:

> "To determine valuation of the stock and its income-producing qualities requires sophisticated discovery by an accountant. This means more than a review by counsel of the furnished corporate tax returns and the naked answers to interrogatories or depositions. Of necessity it requires an examination and evaluation of corporate assets, good will, capital accounts, cash flow, tax-sheltered income, travel and

> entertainment expenses, tax status of the corporation, etc. This court finds that where such a complex estate exists there is good cause shown for additional discovery to establish valuation and the income producing quality of a party's stock."

To prepare your financial testimony, it would certainly be helpful to obtain in advance the appraisal reports obtained by your adversary. It would appear likely that in view of the liberal exchange of medical reports in personal injury actions, and particularly the exchange of appraisal reports in condemnation and tax certiorari proceedings,[50] that exchange of appraisal reports in equitable distribution cases will be mandated or granted upon motion.

Conclusion

The factors enumerated herein are the general concepts employed in the valuation process for estate and gift tax purposes. They will serve as the basis for valuation for equitable distribution purposes, with appropriate adjustments made for the differences inherent in the marital breakup situation.

It is clear that the valuation determinations will revolve around expert testimony. It is hoped that a basic appreciation of the valuation process will aid counsel in the preparation of the expert testimony which must be adduced to prove the valuation.

Endnotes

1. DRL § 236, Part B, § 5, subd. (c).
2. DRL § 236, Part B, § 5, subd. (d).
3. Reg. § 20.2031-1(b).
4. Chalmers, 299 T.M., **Valuation of Real Estate**.
5. *Anderson v. Commissioner*, 250 F. 2d 242 (5th Cir. 1957).
6. Reg. § 20.2031-(b).
7. Rev. Rul. 70-512, 1970 – 2 C.B. 192.
8. DRL § 236 (B)(5)(g).
9. Rev. Rul. 65-192; Regs. §§ 20.2031-3; 25.2512-3.
10. Rev. Rul. 59-60, 1959-1 C.B. 237.
11. 162 N.J. Super. 187, 392 A. 2d 621 (1978).
12. Rev. Rul. 59-60(4)(c).
13. *Lavene,* supra, note (11).
14. *Lavene*, 148 N.J. Super. 267, 372 A. 2d 629.
15. Rev. Rul. 59-60(4)(d).
16. See, *Central Trust Co., v. U.S.,* 305 F.2d 393 (Ct. Claims, 1962).
17. IRC § 162(a)(1).
18. Rev. Rul. 59-60(4)(d).
19. Rev. Rul. 59-60.
20. Rev. Rul. 59-60(4)(f).
21. *Estate of Maddoch*, 16 T.C. 324; *Donald A. Carty*, 38 T.C. 46.
22. Rev. Rul. 59-60(4)(f).
23. 66 N.J. 340, 331 A.2d 257 (1957).
24. 164 N.J. Super. 542, 397 A. 2d 374 (1978).
25. *Mueller v. Mueller*, 144 Cal. App. 2d 245, 301 P.2d 90 (D. Ct. App. 1956) (individual dental practice); *In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (D. Ct. App. 1974) (medical practice); *In re Marriage of R.M. Lukens*, 16 Wash. App. 481, 558 P.2d 279 (App. Ct. 1976) (osteopath); *In re Marriage of Lopez*, 38 Cal. App. 2d 93, 113 Cal. Rptr. 58 (D. Ct. App. 1964) (law practice).
26. *Nail v. Nail*, 486 S.W. 2d 761 (1972).
27. 419 A. 2d 1149 (Super. Ct., 7/22/80).
28. 305 F. 2d 393 (1962).
29. See, *Mott v. Commissioner*, 139 F. 2d 317 (6th Cir. 1943).
30. *Laird v. Commissioner*, 85 F. 2d 598 (3d Cir. 1935).
31. Regs. 20.2031-2(f); Regs. 20.2031-2(e); Rev. Rul. 59-60(4)(g).
32. See, *Levenson's Estate v. Commissioner*, 282 F. 2d 581 (3d Cir. 1960) where it was held that two companies were not in fact comparable where one company had issued preferred stock and the other had not.
33. Rev. Rul. 59-60(4)(h); IRC § 2031(b).
34. Rev. Rul. 59-60(7).
35. Rev. Rul. 59-60(5).
36. See, *Worthen v. U.S.,* 192 F. Supp. 727 (D.C. Mass., 1961).
37. Rev. Rul. 59-60(6).
38. *Rothman v. Rothman*, 65 N.J. 219, 320 A. 2d 496 (1974); *Borodinsky v. Borodinsky*, 162 NJ Super. 437, 393 A. 2d 583 (1978).
39. *Lavene v. Lavene*, 148 NJ Super. 267, 372 A. 2d 629 (1977).
40. See, IRC § 2031(8). Elements which bear upon whether a buy-sell agreement is a bona fide business arrangement so as to validly determine value, are as follows: (i) was the price as original determined the fair market value of the stock; (ii) was the agreement periodically reviewed and updated; (iii) did the parties actually abide by the agreement when making transfers or sales; (iv) if the parties were related, was there a valid business reason for the agreement.
41. NYCE § 706.
42. *Levy v. State*, 28 AD 2d 943, affd. 25 NY 2d 876.
43. *Cutler-Hammer Inc. v. Troy*, 283 AD 123.
44. *Klein's Auto Delivery Inc., v. Super Garage, Inc.,* 91 NYS 2d 425.
45. *Broward National Bank of Ft. Lauderdale v. Starzec*, 30 AD 2d 603 (3d Dept. 1965).
46. CPLR § 4515; *Schlansky v. Augustus v. Riegel*, 9 NY 2d 493, 497.
47. Proposed NYCS § 704.
48. DRL § 236(B)(4).
49. 148 NJ 194, 372 A. 2d 1139 (1977).
50. See, CPLR § 3140; Rules of 2d Dept., 22 NYCRR 678.1; IRC § 7517 gives a taxpayer the right to receive an explanation of how IRS arrived at a proposed valuation.

Editor's Note: In our last Notes and Comments column, we briefly outlined the importance of appraisals and expert testimony. Mr. Gassman's article draws heavily on the New Jersey experience. Whether New York will adopt these rules or, as they have done in the past on other issues, establish their own, remains to be seen.

Reverse Summary Judgment: Subterfuge or Salvation?

By Saul Edelstein and Phil Brown
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Whoever heard of moving for summary judgment against yourself? It sounds crazy, but that shouldn't dissuade most matrimonial practitioners. Actually, the procedure does not involve completely throwing in the towel and giving up (despite the appeal that may sometimes follow), and so is more aptly called partial summary judgment. All that is given up, in fact, is the client's right to claim total innocence in the break-up of the marriage, a right which few legitimately have anyway, as we all know.

Reverse summary judgment involves not responding to your adversary's matrimonial cause of action, be it complaint or counterclaim, and the moving for summary judgment pursuant to CPLR 3212 on the documentary evidence, the pleadings of your adversary containing the cause of action and your client's affidavit not disputing these claims. Naturally, care must be taken as to what fault your client is admitting to—adultery is still a crime in New York,[1] but rarely is adultery the sole claim for divorce, due to evidentiary restrictions.[2] Concomitantly, your client must forego causes of action for dissolution of the marriage he or she may possess. For this reason the strategem is not for everyone and should be used circumspectly and *only* after the informed consent of the client, preferably in writing. Parenthetically, for reasons unknown to this writer, it appears that more men are willing to accept "marital fault" in this context than women. Possible explanations include temperament, actual fault, peer pressure and economic realities.

If the requested relief is granted, a judgment of divorce may be signed right away with the remaining so-called "ancillary" issues severed for later determination. At this later hearing, evidence of marital fault need not be introduced but the findings of fact certainly may be raised should a party claim it to be a "factor which the court shall expressly find to be just and proper," the catch-all factor (10) for both maintenance and equitable distribution.[3] More will be said of the importance of marital fault later, but first let us explore the origins and theoretical basis of this anomalous procedure.

CPLR Rule 3212, entitled "Motion for Summary Judgment," as enacted in 1962, restricted the use of summary judgment motions in matrimonial actions to "documentary evidence or official records which establish a defense to the cause of action."[4] This continued the repealed and replaced Rules of Civil Procedure 113 and 114, and followed a universal reluctance to permit summary judgments of divorce,[5] logically, because of the immense difficulty of proving that no issues of fact exist in this type of case. In 1978, however, an amendment to Rule 3212 was enacted which repealed the old section (d), also amending CPLR 3212(a) and DRL 211, and which removed matrimonial actions as an exception to the summary judgment rule.[6] The history of this change is somewhat cloudy. Apparently, even prior to the 1978 amendments, the First Department adopted a rule authorizing the rendition of default judgments in matrimonial actions upon submission of papers, without insisting on courtroom appearances of the parties.[7] This rule was doubtless passed with the noblest intentions of alleviating the clogged court calendars, wrought by the Divorce Reform Act of 1966 which made a divorce obtainable by almost everyone, and which, to use a hackneyed phrase, "opened the floodgates of litigation." It may be argued that the First Department solution was too forward thinking, overstepping the bounds of its authority by permitting matrimonial judgments on default upon submission, whereas the Domestic Relations Law did not specifically so authorize. If so, it is a classic example of "the cart leading the horse" as the Legislature, largely on the recommendation of the Judicial Conference,[8] amended not only DRL 211, but also CPLR 3212.

Perhaps another reason for the amendment to CPLR 3212 also grew out of the Divorce Reform Act of 1966. Subdivisions (5) and (6) of DRL 170, for the first time in New York, permitted "no fault" divorce. Parties merely had to have lived separate and apart for a period of one or more years after the granting of a judgment of separation or the execution of a written agreement of separation, which the plaintiff has substantially complied with. Divorce actions based upon DRL 170(5) or (6) seem uniquely appropriate to be decided merely on papers as they themselves are based merely on papers. It is respectfully submitted that when the Legislature considered summary judgments in matrimonial actions it was primarily with these two actions in mind.[9]

As the amendments became effective on January 1, 1979, cases soon came thereunder. In *Hetler v. Hetler*, 98 Misc. 2d 529, 414 NYS2d 283 (Sup. Ct. Monroe Co., 1979) counsel failed to distinguish between a motion for summary judgment and a submission on default, and attempted the former where the latter was indicated.

A more expected situation was presented to the court in *Scheidt v. Scheidt*.[10] There, plaintiff/husband commenced a divorce action on the no-fault ground of living apart pursuant to a written separation agreement for a period of one or more years. Defendant/wife opposed the motion, inferentially alleging non-compliance. The court found these allegations to be vague, conclusory and, thus, insufficient to defeat the motion. However, even while granting summary judgment of divorce, the court decided that issues with respect to child custody arrangements dealt with in the separation agreement, though not raised by either party, existed. Standing on the time honored and oft cited *parens patriae* relationship first enunciated by Justice Cardozo in the *Finlay* case,[11] the court, in effect, granted partial summary judgment requiring the appearance of the proposed custodial parent to satisfy the self-imposed judicial obligation toward the child. Later that year, still in 1979, two cases came down which may be regarded as the theoretical parents of the procedure unashamedly endorsed herein.

Rera v. Rera[12] was a divorce action brought on the grounds of the husband's adultery. The wife's motion for summary judgment was supported by evidence establishing the husband's convictions for rape and sodomy committed during the marriage. Upon such strong supporting evidence, Justice Gowan had little trouble granting summary judgment to the wife even over opposing counsel's attempt to inject issues of fact to cloud the question. Clearly, the court's sympathies were with the plaintiff. As the defendant/husband was at that time incarcerated for his crimes, the court could not make the facile distinctions. Thus, Justice Gowan granted the judgment of divorce and referred the ancillary issues for later determination by the Family Court.

The rendition and entry of a judgment of divorce with a referral of the ancillary issues, now also including equitable distribution, for later determination is the second aspect of the reverse summary judgment motion. The first aspect of this motion is based in large part on the only appellate decision on the question, in the case of *Hickox v. Hickox.*[13]

In the latter part of 1978, Mrs. Hickox commenced an action for divorce against her husband claiming cruelty and adultery along with living apart pursuant to a written separation agreement for more than one year.[14] In his amended answer, filed just after the effective date of the amendments to CPLR 3212 and DRL 211, the defendant admitted the allegations with regard to the "no fault" divorce claim, denied the allegations of the other four causes of action and similarly counterclaimed for a conversion divorce. Simultaneously, the defendant/husband moved for summary judgment on the conversion causes of action set forth both in the complaint and in the answer. Note that in seeking summary judgment both on the conversion claim in the complaint and in the answer, the defendant at least half moved for judgment against himself. It was fortunate that he did it, as it was the half against him upon which he prevailed. On appeal from Special Term's denial of the motion, the Appellate Division, First Department, agreed that summary judgment could not be granted the defendant, for two reasons. First, the question was not properly before the court, defendant having moved for summary judgment before a reply to his counterclaim was served. Issue not having been joined as to the counterclaim that aspect of the motion was ruled premature. Secondly, defendant's right to a conversion divorce at all was cast into doubt by plaintiff/wife's affidavit alleging his breach of the agreement negating the essential element of substantial compliance.

Having given the plaintiff the opening rounds, the Appellate Division then turned around and knocked her out of the box by granting judgment in her favor. CPLR 3212(b) states:

> "If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."[15]

While the defendant's right to summary judgment was negated, the right to a judgment of divorce in favor of the plaintiff was unquestioned, even if on the defendant's motion. "But," said the plaintiff, "I don't want summary judgment on my conversion divorce claim. I want a divorce by reason of cruelty and adultery so that I can show the court what a rotten guy the defendant is, which incidentally, won't hurt my chances in the custody proceeding or in getting money."[16] The very forward thinking First Department arrived at the right answer, ruling that a divorce is a divorce and the courts have better things to do than allow people a forum to vent their spleens. Strictly speaking, the plaintiff would gain no more rights or benefits through a divorce on the grounds of adultery than on the no fault conversion grounds. In the name of expediency and the saving of the court's time, it didn't make sense to beat a dead horse. Neither is the plaintiff denied the right to prove any improprieties of the defendant as relate to his fitness for custody or as relate to any other issue properly before the court. Only the "res," the status issue of the marriage, was decided by the Appellate Division's entry of partial summary judgment; all other issues were severed for later determination.

As can be seen, *Hickox* was the true father of the reverse summary judgment procedure as it was the first case to incorporate all of its elements. The potential utility of the procedure increased with the enactment of the 1980 equitable distribution law.

In deciding *Hickox* as it did, the Appellate Division struck a strong blow against the importance of the fault concept in divorce. Relying on legislative mandate in enacting DRL 170(5) and (6) and on that portion of the decision of the Court of Appeals in *Christian v. Christian*,[17] which granted a divorce on the grounds of living apart for more than one year pursuant to a written agreement of separation, even while striking down the agreement as unconscionable, the appellate court dissolved the marriage in what it termed the "least painful means."[18] As the plaintiff would gain no more rights or benefits under a divorce on fault grounds, other than the intangible sense of revenge, no fault is quicker and easier, hence better.

In enacting the package of laws collectively entitled the 1980 Equitable Distribution Law,[19] the New York State Legislature took further steps to lessen the import of fault. Under prior law, a wife who was found guilty of misconduct, such as would constitute grounds for separation or divorce, could not be awarded alimony. This "Old World" punishment of a guilty wife forced the Court of Appeals to create two separate standards of cruel and inhuman treatment: one which applied when measuring the misconduct of a wife in a long-term marriage who was neither employed nor employable and who could conceivably starve if divorced without alimony,[20] and one for everybody else. Besides making the alimony (now called maintenance for actions commenced after July 19, 1980) provisions gender neutral as was mandated by constitutional principle,[21] the Legislature made a substantive and substantial change in the law by removing fault as an absolute bar to an award of maintenance in actions commenced after July 19, 1980, the effective date of the statute.[22]

Instead, there was substituted nine definite factors and a tenth "open" factor designed collectively to ascertain:

> ". . . the reasonable needs of a party . . . having regard for the circumstances of the case and of the respective parties. In determining reasonable needs, the court shall decide whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other."[23]

Marital fault was thus effectively removed from consideration in a maintenance award except as "any other factor which the court shall expressly find to be just and proper," as factor (10) states. Economic fault, however, is granted an independent place as the ninth stated factor for the determination of maintenance, where the court is instructed to consider "the wasteful dissipation of family assets, by either spouse." Similarly in the consideration of the equitable distribution of marital property, fault is not given a preferred status, merely remaining in the background for later possible use as "any other factor . . ." in an open tenth factor identical to that for maintenance.

It is perhaps this conspicuous absence of express discussion of marital fault within the amended statute which influenced the highly respected Justice Morrie Slifkin, Supreme Court, Westchester County, to opine, in a discussion of the importance of marital fault versus economic fault at a recent seminar, that "under the new law, gambling is far worse than gamboling."

Modern theory, then, treats the marriage as an economic partnership which, upon dissolution, must distribute its assets like a business dissolution, without regard to whose conduct caused the break-up. Not only does the theory forward the reverse summary judgment procedure but its practical application does, even more so. If the determination of "ordinary marital fault" (as opposed to the "extreme marital fault" found in *D'Arc v. D'Arc*[24]) will influence neither an award of maintenance nor equitable distribution, then a party motivated by economic considerations will have no qualms about accepting responsibility in exchange for an expedited entry of judgment.

In this writer's opinion, the advantages of the removal of the marital fault issue in this manner are twofold: first, to the parties; and second, to the court system.

The parties are benefited by the earlier entry of judgment of divorce in that they may easier shed the "emotional baggage" of an ended relationship and begin life anew. This will necessarily entail a new partner and will mean that fewer matrimonial litigants will be technical criminals by virtue of an anachronistic statute that makes adultery a crime. In addition, the tactic of attempting to extort an unfairly large marital settlement in exchange for the freedom of a divorce will more often be removed.

The court system will be benefited by the removal of a *pro forma* issue by motion. Once the removal of the emotionally charged marital fault is effectuated by motion, "out of court" settlements may proceed in a more businesslike manner, alleviating clogged calendars. Overcrowded trial calendars may further be trimmed, once the "status" issue of the marriage has been decided on motion, by the severance and referral of the ancillary issues for later determination by either an official referee or by the Family Court.

Within the package of statutory amendments popularly termed the equitable distribution law is an amend-

ment to Section 464 of the Family Court Act, which permits the Family Court, on reference from the Supreme Court, to hear and determine issues of temporary or permanent support or maintenance *or equitable distribution of marital property*.[25] Hence, while the Family Court is not empowered to enter a judgment of divorce, once the Supreme Court has done this, it may decide all of the ancillary issues.

In addition, some counties have a system of official referees of the Supreme Court to whom these cases may be referred again easing the burden on the trial parts. This idea was suggested by Justice Lockman, Supreme Court, Nassau County, in a Letter to the Editor of the **New York Law Journal**[26] after enduring an eight-week trial in the first reported equitable distribution trial in this state, *Nehorayoff. v. Nehorayoff*, 108 Misc. 2d 311, 437 NYS2d 584 (1981). It is obvious that the more effective litigation of court resources which this procedure will allow is necessary in these belt-tightening times. To repeat, entry of judgment, severance and referral will not preclude a spouse from raising the issue of marital fault where deemed relevant. It is submitted, however, that it will infrequently be deemed relevant.

In an unreported decision of Justice Kelly, Supreme Court, Rockland County, in the case of *Anonymous v. Anonymous*,[27] summary judgment was granted to the non-movant plaintiff/wife as the defendant's answer admitted the allegations of the complaint charging cruel and inhuman treatment, and hence, no triable issues of fact existed as to the matrimonial "res" aspect of the case. Despite the fact that plaintiff's attorney had filed a note of issue placing the matter on the contested matrimonial calendar, Justice Kelly directed the submission of findings and judgment providing for the referral of the ancillary issues to the Family Court.

Several months later, two decisions were reported, within days of each other, which followed the same theory. In the case of *Reardon v. Reardon*,[28] upon a cross-motion brought by this writer, Justice Duberstein, Supreme Court, Kings County, granted the first reverse summary judgment of divorce in New York City, where greater calendar congestion can be deemed a weightier factor militating in its favor. There, the plaintiff/husband's reply denied the adultery and cruelty counterclaims but admitted the abandonment counterclaim. Plaintiff moved for summary judgment in favor of the defendant on the abandonment counterclaim and withdrew his complaint seeking a divorce on the grounds of constructive abandonment. Justice Duberstein granted the cross-motion, citing both *Hickox* and *Anonymous*, and notwithstanding its authority under FCA 464 to refer the ancillary issues to Family Court, acknowledged that court's overburdened calendar within New York City and decided to refer the issues instead to a Special Referee of the Supreme Court, (which Kings County has several). Parenthetically, the case was ultimately settled, the emotional bite having been removed.

In Suffolk County, a few days earlier, Justice Oscar Murov also granted the defendant/husband's motion for a summary judgment of divorce on the plaintiff's cause of action on constructive abandonment, in the case of *Giannola v. Giannola*.[29] Justice Murov saw the key issue as being what weight marital fault should have in considering equitable distribution and maintenance. The court concluded that as the Legislature, in enumerating the relevant factors for maintenance and equitable distribution, did not ascribe any particular weight to one over another, the totality of the situation must be examined and so given the appropriate circumstances, marital fault could be relevant indeed. However, Justice Murov directed that there should be no referral of the case, choosing to continue it on the contested matrimonial calendar.

Aside from referral of the ancillary issues, were there any relevant differences between the manner in which these two cases were decided? It appears that there existed a difference of emphasis: Justice Duberstein relied on the summary judgment—*Hickox* reasoning that the defendant will have the same rights, *i.e.*, to claim marital fault as a relevant factor after judgment has been granted for abandonment as before. Justice Murov discussed the role of marital fault more deeply, but came to what might have been an unwarranted decision that marital fault "will not preclude an award of equitable distribution."[30] Sufficiently egregious marital fault, of the nature of attempted murder for example, should preclude an award of equitable distribution if the court, as a court of equity, may deny relief to a party with "unclean hands."

Justice Duberstein again relied on the *Hickox* language in granting summary judgment of divorce to the non-moving party in *Meyer v. Meyer*,[31] a case governed by DRL 236 Part A, as it was commenced prior to July 19, 1980.[31A]

In a personnel change, shortly after deciding *Giannola* but before signing the judgment of divorce that was so hard fought and eagerly anticipated, Justice Murov retired. When the judgment appeared on the desk of Justice Geiler, he refused to sign it. Presenting an exhaustive survey of the law in the 50 states, Justice Geiler concluded that the law generally, as in New York, was that marital fault (or at least economic fault in marriage) might influence, in varying degrees, awards of maintenance and property distribution. For this reason, the court refused to sign the judgment of divorce and ordered that the case continue in its normal place on the contested matrimonial calendar. Apparently, the court in this second *Giannola* decision misinterpreted the *Reardon* holding and inferred that once the

marital fault issue was decided by entry of a judgment of divorce, then the issue was closed and could not be raised as a factor for maintenance or equitable distribution. Nothing could be further from the truth. A better question might be whether the party who admitted fault for the purposes of making a reverse summary judgment motion could later, at the hearing on the ancillary issues, seek to deny fault alleged by his ex-spouse to be a relevant factor, or, in turn, himself seek to raise fault by the non-movant ex-spouse as a relevant factor for maintenance or property distribution. It is submitted that he would be estopped from denying the fault which he earlier admitted, but permitted to allege fault by the "innocent" spouse as that issue had not previously been raised.

Both(?!) *Giannola* holdings were cited as persuasive in the case of *Librizzi v. Librizzi*,[32] as Justice DeLuca, Supreme Court, Suffolk County, expressed a concern that to allow litigants to freely withdraw their denials and then move for summary judgment against themselves could lead to a circumvention of legislative intent and turn New York into a strict no-fault divorce state. Justice DeLuca allowed amendment of the answer to admit abandonment but refused to grant summary judgment on the claim.

A concern with possible collusion was not mentioned by Justice McCaffrey, Supreme Court, Nassau County, as he, too, attempted to deny a reverse summary judgment motion, in the case of *Miller v. Miller*.[33] In what was an extremely incisive and well-written decision, Justice McCaffrey denied the motion, not on the basis that statutory authority was lacking, nor on some mistaken notion of fault preclusion, but for the policy consideration that once the matrimonial issue was removed from the case, the parties would have less reason to settle and the severed "financial issues" would proceed to drag on and clog the court calendars.

Interestingly then, after stating opposition to bifurcation, the court, in effect, did just that by explicitly adopting as its findings of fact, the paragraphs of the complaint setting forth the cause of action. If the fault allegations are adopted as findings of fact before the contested trial, then necessarily all that will be left to try will be the ancillary issues. This only differs from the treatment given by the Appellate Division in *Hickox* and Justice Duberstein in *Reardon* and *Meyers* in that the parties remain married in law where they are not in fact.[34]

The best parts of the opinion deal with an examination of the role of marital fault in determining maintenance and property distribution. Justice McCaffrey concluded that it would be more the exception than the rule that fault will be a significant factor in determining economic issues, and then, only when marital fault has had such an adverse physical or psychological effect upon the other spouse as to interfere with his money-making potential or other financial dealings. Hence, a two-step process is endorsed: first, that there was fault; and second, that this fault had "such adverse effect upon the innocent spouse so as to be considered as a factor."[35]

Does this differ from the economic fault concept earlier enunciated? Apparently, in that it recognizes that marital fault can have an effect on people that translates into other aspects of their lives including the marketplace. Cruelty which leads to anxiety which leads to an aggravated ulcer which prevents full-time employment may be marital fault of this nature, but the bottom line is still a question of money.

If marital fault can be alleged in this two-step process, for financial issues, can discovery be had regarding it to prepare a defense? Here Justice McCaffrey ruled in the negative, citing cases precluding discovery as to fault and asserted that it is not the fault itself but rather the financial effect of the fault which is relevant. If that is so, should our matrimonial interrogatories be amended to question whether it will be alleged at trial that marital fault had any financial effect on the party?

Exception must be taken with Justice McCaffrey's conclusions regarding the ill effects of bifurcation in the matrimonial context. In the several cases of this nature with which this writer has been involved, bifurcation has not resulted in delaying matters and clogging the court calendars, but has increased and expedited settlement. The removal of the fault aspect in these cases actually lessens tensions and permits the dissolution to proceed in a more businesslike manner. Of the three reverse summary judgments in which I have participated (parenthetically, on both sides of the sword), all have been settled prior to trial on the ancillary issues. Moreover, rather than resulting in increased calendar congestion, this procedure can alleviate the same by more effectively utilizing the full resources of the court system.

Regarding the concern expressed by some jurists that this may result in collusion among parties in contravention of legislation holding New York to be a "fault" state, it is apparent that the legislative mandate is ambiguous at least and at most is pointing against fault. Were parties of a like mind to obtain an expedited divorce whatever the cost, reverse summary judgment is by no means the best method. All that need be done is for one party to sign the typical Blumberg form Affidavit of Defendant (Waiver and Consent) and the matter may proceed on the uncontested matrimonial calendar, with a decretal paragraph in the judgment reserving for future determination all ancillary issues.

It is a denial of everyday experience to question the bona fides of reverse summary judgment while accepting matter-of-factly the result of most cases appearing on the contested matrimonial calendar. Once the financial issues have been settled in these cases, one or both of the parties will withdraw their denial-filled responsive pleading and permit an inquest, sometimes a dual inquest. Sometimes all prior pleadings, where excessively acrimonious, are withdrawn. This writer does not condemn these practices, (anything leading to a fair settlement must be lauded), but objects to branding as collusive a procedure which is not.

When a party rejects a judgment of divorce on a silver platter, as reverse summary judgment gives, what is their real motivation? Aren't they attempting to stonewall the question and retain as an issue something which legally and equitably should not be? Should the courts acquiesce in unfair bargaining between spouses and, by silent acquiescence, approve thereof?

Endnotes

1. Penal Law, Section 255.17.
2. CPLR 4502(a).
3. DRL, Section 236 Part B(5)(d) and (6)(a).
4. CPLR 3212(d), Laws 1962 Chapter 308. See also, DRL, Section 211.
5. 73 Am.Jur.2nd Summary Judgment, Section 9.
6. L.1978, c. 532.
7. 22 NYCRR, Section 660.4(b)(3).
8. McKinney's 1978 Session Laws, 1730, 1893.
9. Although actions under DRL 170(3) or DRL 140(a)(b) and (f) will be equally appropriate if less frequently occurring.
10. 99 Misc.2d 801, 417 NYS2d 376 (Sup. Ct., Erie Co., 1979).
11. *Finlay v. Finlay*, 240 NY 429, 148 NE 624.
12. 100 Misc.2d 670, 420 NYS2d 127 (Sup. Ct. Suff. Co.).
13. 72 AD2d 688, 421 NYS2d 355 (App. Div., First Dept., 1979).
14. Two other causes of action, seeking monetary relief, were also alleged.
15. McKinney's Consolidated Laws of New York, as amended L. 1973 Chap 651.
16. The defendant didn't really say this but she might have thought it, or at least her lawyer did.
17. 42 NY2d 63, 396 NYS2d 817, 365 NE2d 849 (1977).
18. 421 NYS2d at 357.
19. L. 1980, c. 281.
20. E.g., *Hessen v. Hessen*, 33 NY2d 406, 353 NYS2d 421 (1974).
21. *Orr v. Orr*, 440 U.S. 952, 99 S.Ct. 1488 (1979).
22. DRL 236, Part B(1)(a); Practice Commentary C236A:4, C236B:21.
23. DRL 236, Part B(6)(a).
24. 164 NJ Super 226, 395A2d 1270 (1979).
25. L.1980, c. 281; (emphasis added) Naturally, in addition to its jurisdiction to decide custody and visitation issues.
26. N.Y.L.J. 4-10-81, p. 2, col. 6.
27. Decided February 27, 1981 (see Sanford Dranoff).
28. N.Y.L.J. 7-23-81, p. 12, col. 1, Sup. Ct., Kings Co.
29. 109 Misc.2d 985, 441 NYS2d 341 (1981).
30. 109 Misc.2d at 987.
31. N.Y.L.J. 11-13-81, p. 17, col. 2, Sup. Ct., Kings Co.

31A In later, *ex curia*, discussions, Justice Duberstein indicated that in future reversed summary judgment cases, she might entertain some safeguards of the marital estate in the event of the remarriage or death of one of the spouses prior to settlement or trial of the ancillary judgments, for example, by imposing in the order granting summary judgment, a restraint on both spouses from alienating, transferring or otherwise disposing of or encumbering any marital asset out of the course of ordinary business or everyday living, or alternatively, granting the judgment but withholding entry until the ancillary issues are, in some way, decided.

32. N.Y.L.J. 1-26-82, p. 11, col. 1, Sup. Ct., Suffolk Co.
33. N.Y.L.J. 2-4-82, p. 12, col. 3, Sup. Ct., Nassau Co.
34. See, Letters to the Editor, N.Y.L.J. 2-23-82, p. 2, col. 6.
35. *Miller v. Miller*, supra.

The Case for a No Fault Divorce Law in New York

By James B. Gitlitz
March 1983

For 180 years, from 1787 to 1967, the only ground for divorce in New York state was adultery and the guilty spouse was prohibited from remarrying. Where both parties wanted the divorce and adultery was not present, one party had to commit adultery whether or not the party wished to do so or to commit perjury, a common occurrence.

"With the enactment of Chapter 254, Laws of 1966, New York departed from its singular position as the only state of the Union, and one of the few jurisdictions in the world, which listed adultery as the sole ground for absolute divorce."[1]

Although five other grounds were thus added, New York still finds itself among the backward few states which do not permit divorce on proof of irreconcilable differences or an irretrievably broken marriage. Only about seven of our states still insist upon a finding of fault on the party of one spouse (or mental illness or prolonged separation) before the other spouse can be rewarded with a judgment of divorce. The Virgin Islands is with the majority.

Some advance was made in New York in the 1966 law which now permits divorce based on one-year separation pursuant to a decree of separation or written agreement. Construing that provision in the statute as retroactive, Chief Judge Fuld stated:[2]

> "Implicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them 'to extricate themselves from a perpetual state of marital limbo.' (*Adelman v. Adelman*, 58 Misc.2d 803, 805; see, also, Wadlington, Divorce Without Fault Without Perjury, 52 Va.L.Rev. 32, 81-87.)

The language quoted is equally applicable to the fault grounds in the statute. If it is "socially and morally undesirable" to compel continuation of a dead marriage which one or both parties have mutually elected to terminate, it would seem to be all the more socially and morally undesirable to require one party to a dead marriage to prove cruelty or abandonment or imprisonment or adultery on the part of the other in order to qualify for a divorce. Does the law find some sadistic satisfaction in forcing parties to wash their dirty linen in public?

For the law to insist upon proof of misconduct is to ignore the reality that in most cases the misconduct is the result rather than the cause of a marital breakdown. Moreover, the insistence upon recrimination, in a formal verified pleading and then in open court under oath or in an affidavit, is hardly conducive to reconciliation if that possibly exists.

The elimination in 1980 of misconduct as a mandatory bar to an award of maintenance and equitable distribution of marital property is a recognition by the Legislature that fault in a marriage breakdown is rarely one-sided and is usually difficult of assessment and attribution. Why then still retain the concept of fault as a statutory ground for divorce?

The only rational test, I submit, is an acknowledgment by both parties, after due time for reflection and self-examination, that the marriage is beyond saving, or a claim to that effect by one party, demonstrated to the satisfaction of the court.

In practice, the vast majority of divorces in New York today is, in effect, divorce by consent. The only real disagreements are with regard to children or money. For the last three and one-half years, after 45 years of active practice with the same firm, I have been working as a law assistant to a Supreme Court Justice, a position involving the processing of over 500 uncontested divorce applications a year. On the basis of that experience, I am convinced that any couple can obtain a divorce in New York almost immediately if one party agrees not to contest it, that they can easily avoid the one-year waiting period required in the cases of abandonment or separation agreements or judgments.

Almost all of the uncontested divorce applications are based on subdivision (1) of Section 170 of the Domestic Relations Law which provides:

> The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well-being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

Prior to the 1966 changes in the matrimonial laws, cruel and inhuman treatment was a ground for a legal separation only, not divorce. Former Section 200 of the Domestic Relations Law, subdivision 2, used the phrase "unsafe *and* improper." The courts construed that phrase narrowly "and the separation [was] granted only where the complaining spouse proved both physical or mental injury and endangerment in cohabitation." *Hessen v. Hessen*, 33 NY2d 406, 409, 353 NYS2d 421 (1974).

As Judge Breitel pointed out in the Hessen decision, at p. 409:

> "The new divorce provision, however, is different from the earlier language, authorizing a separation. The conjunction 'and' is replaced by 'or' to read 'unsafe or improper.' Under the new law, then, conduct endangering mental well-being by making cohabitation 'improper,' though not necessarily 'unsafe,' is a ground for divorce."

There is no legislative definition of the word "improper" and to date there has been no accepted judicial definition. In a handbook which I have prepared for the purpose of simplifying and improving the paperwork in uncontested divorces in New York, I have attempted to define the word as "'unreasonable,' that is, that a defendant's conduct is so at variance from what current mores consider 'reasonable' for a continuation of the marriage relation that a severance is justified."[3]

One may well argue that such a definition is in effect merely using other words to say the same thing, irreconcilable differences or irremedial breakdown, a standard which our legislature and courts have not yet adopted or sanctioned.

The suggestion that the wording of Section 170(1) of the Domestic Relations Law "encompasses divorce for incompatibility where the marriage relationship appears hopelessly destroyed" was rejected by the Court of Appeals in the *Hessen* decision, supra. In that decision, the court declared that the New York Legislature had not adopted the "no fault" provisions of a number of states and that "it was intended that marital misconduct to constitute cruel and inhuman treatment be distinguished from mere incompatibility, and that serious misconduct be distinguished from trivial" (p. 410). Any change, it was suggested, must come by legislative action rather than by judicial construction. However, the court then proceeded by judicial construction to insert into the statutory definition of cruel and inhuman treatment permission for the courts below "to exercise a broad discretion in balancing the several factors in each case." The court was clearly influenced by the fact that the law, as it then existed, mandated loss of support for a defendant wife found guilty of misconduct. It therefore upheld as a proper exercise of discretion denial of divorce to a husband taking into consideration the age of the spouses, the duration of the marriage, the absence of physical or mental injury to the wife and the injustice under the circumstances of cutting off all support even though the same facts would warrant a divorce in an uncontested action.

Under the present law (L.1980, ch. 281, in effect June 19, 1980), misconduct of the defendant spouse no longer cuts off all support although some consideration may be given to that fact.[4] There would therefore seem to be no reason any more for allowing a court to use such discretion in each case in deciding what it considers to be "improper" conduct or more than "mere incompatibility" even if the marriage is in fact irretrievably broken.

Nevertheless, in spite of judicial pronouncements in contested divorce cases that "mere incompatibility" furnishes no ground for a judgment most judges, in uncontested cases, almost never reject a divorce application which is based upon allegations of conduct which the plaintiff claims meet the statutory definition of cruelty even though, in a contested case, many courts might well find such conduct to amount to no more than "mere incompatibility." The reality is, therefore, divorce by consent.

Discussing the legislative change in 1966 of the phrase "unsafe *and* improper" in the definition of cruelty for separation actions to "unsafe *or* improper" in cruelty for divorce actions, Justice McInerney of Suffolk County, in a recent decision,[5] wrote:

> "The substitution of 'or' for 'and' was a most basic change; in effect, it ultimately allowed a divorce for incompatibility, except that incompatibility as a quantum was anathema because everyone knew that incompatibility was not a ground for divorce in New York, the courts having said so (*Hessen v. Hessen*, 40 AD2d 842, 337 NYS2d 498, aff'd. 33 NY2d 406, 353 NYS2d 421).
>
> Consequently, all the judge would have to do would be to find a synonym which superficially seemed to mean more than incompatibility, although subjectively meaning the same. Thousands of divorce decrees have been granted in this state for incompatibility under language which merely disguises the event. Since most are not appealed, the ineffable distinction is not usually analyzed, and the happy plaintiff is

awarded a divorce for 'improper' conduct.

Endemic in all of these charades by decent people was the feeling that divorce should be a legally approved separation of two people who simply did not wish to be together anymore, and a bewilderment and anger that the law should attempt to keep them together against their wishes.

If the phrase 'improper' is no longer surplusage, it must mean that conduct which is substantively offensive to the complaining party to such a degree that the divorce is reasonably sought and such a pragmatic resolution of an unworkable marriage should be of little concern to the rest of society provided it does not injure society."

Let us examine realistically the picture presented by the 1966 law. If two reasonable parties decide that they have come to a parting of the ways from which there is no possibility of turning back, the law mandates that they wait a year after executing an agreement before they become entitled to a divorce. However, if they are willing that one resort to public recrimination against the other, a divorce can be obtained immediately. If one spouse abandons the other, the other must wait a year before becoming entitled to a divorce. But if one adds to the allegation of abandonment a few additional allegations of misconduct which are usually present in such case, an immediate divorce is available.

The law thus rewards recrimination and penalizes the reasonable. If one bases a divorce upon adultery, it is necessary to furnish independent corroboration, usually a difficult task. However, if one bases the divorce on cruelty consisting of adultery or consorting or cohabiting with third parties, no corroboration is required.

The present state of the law can only engender disrespect for the law and for the judges who perform the charade of administering it.

The time has come, it is submitted, for the State of New York to join the majority of its sister states and to recognize once and for all that it is an unreasonable anachronism to insist by law that proof of a broken marriage is in itself not enough to justify a judicial severance of the marriage relation and that the parties must remain in holy deadlock. Particularly is the present state of the law unreasonable when in practice parties who agree can easily obtain such a divorce upon the ground of incompatibility if they call it cruelty. If the marriage is in fact dead, there is no longer any reason to permit one spouse to prevent a judicial declaration of its demise.

Endnotes

1. 16 NY Jur 437.
2. *Gleason v. Gleason*, 1970, 26 NY2d 28, 39, 308 NYS2d 347, 354.
3. Uncontested Divorces and Annulments in New York, Gould Publications, 1982 ed, p. 3-a.
4. *Miller v. Miller*, N.Y.L.J., 2/4/82, p. 12, see *Family Law Review*, p.1, for discussion.
5. *S.W. v. R.W.*, N.Y.L.J., 3/15/82, p. 16.

Point/Counterpoint

By Stanley A. Rosen
March 1984

The matrimonial attorney, now more than ever before, faces an ever-changing and ever-challenging body of substantive law. Equitable Distribution, while still in its legal infancy, has spawned new concepts and trends which had already exceeded those envisioned by the drafters. Issues are emerging regularly with which courts at all levels are struggling: serious, difficult and vital issues. Hardly a week passes when we do not come across a reported case that is, in some way, at material variance from a principle enunciated by an earlier decision of another court. Simply stated, *stare decisis* is a distant cousin to the matrimonial bar.

Lower courts and appellate courts, alike, are often at strong and learned odds over what the law should be or, in fact, what it is. Notwithstanding *Reed v. Reed*,[1] should an unvested pension be marital property within the meaning of the Equitable Distribution Law? *Conner v. Conner*,[2] aside, should a professional degree be a distributable marital asset? An oral stipulation placed on the record in open court in the presence of counsel—should it be binding in a matrimonial action, or should the court strictly construe the written requirements of DRL §236-B-3?[3] And on and on.

These are but a few of the complicated, challenging and perplexing questions which presently confront the family law practitioner. It may be months or years before we have answers; it may be never.

With the help of you, our readers, we will hereafter be publishing "Point/Counterpoint." The purpose of this new column—indeed, its hope—is to engender interest and discussion among those members of the bench and bar who are serious students of our field and concentration. Starting with the next publication of the *Family Law Review*, this column will print your comments and opinions on the emerging issues of family and matrimonial law. We are seeking positions of advocacy, and we are embarking upon this task with the fond and fervent hope of stimulating new ideas, differing viewpoints and quality thought to challenge us all.

Comments should be limited to 1,000 words or less and case citations, where applicable, will certainly lend authority to the position taken. Authors' names will be published, unless requested otherwise, and we will attempt to choose those writings which address the issues head on with clarity and cogency. Without further ado, and for publication in our June issue, the "Point/Counterpoint" question:

Should Partial Reverse Summary Judgment Be Granted in Matrimonial Actions?

Please send your comments, by June 1, 1984, to Stanley A. Rosen, Esq., 75 State Street, P.O. Box 459, Albany, NY 12201. Thank you.

Endnotes

1. 93 AD2d 105.
2. 97 AD2d 88.
3. *Lischynsky v. Lischynsky*, 95 AD2d 111.

Evidentiary Problems for the Matrimonial Lawyer

Hearsay: Plumbing Its Depths and Pondering Its Fate

By Paul Ivan Birzon

April 1985

An Overview

Matrimonial litigation is generally governed by the same evidentiary rules which prevail in other civil cases although some relaxation is experienced when custody is in issue and rules are judicially reshaped to serve significant social concerns.[1] However, while evidentiary problems encountered by matrimonial trial lawyers are in part shared by all attorneys who exercise their craft in the crucible of the courtroom, differences can be found in the *application* of the same rules by reason of certain distinctive features associated with the trial of a matrimonial action or proceeding.

With rare exceptions relating to a fault-finding,[2] the trial of a matrimonial action occurs in a non-jury posture presided by a lone judge sitting as arbiter of fact and law. Like other evidentiary rules which evolved in response to judicial concerns for impressionable and easily misled jurors, the rule mandating the exclusion of hearsay was not designed by its creators to function in a trial before the court, only.[3] It is therefore not uncommon that hearsay, banned by conventional definition, may nevertheless pass muster by a judge desirous of receiving the fullest measure of information and who knows that if proven too unreliable, it will simply be not factored into the court's decision.[4] Not all error committed in the process of admitting or rejecting evidence is reversible,[5] and if objectionable[6] hearsay does not dominate the court's decision,[7] error is not likely to compel reversal. This probably explains why reported matrimonial cases account for so few opinions involving questions of evidence and why the decisional development of the rules of evidence has largely occurred within the context of criminal and other civil cases.

Since all exclusionary rules tend to frustrate the fact-finding process and are therefore applied restrictively, when the factfinder is a judge and an objection is based on the hearsay rule, it particularly behooves the opponent of the evidence to have a sufficiently clear understanding of the rule to articulate its application to the evidence sought to be excluded.[8]

In this and succeeding articles, a quest will be undertaken to achieve an enlarged understanding of this aged exclusionary rule. Its component parts will be laid bare and examined, its application to the trial of a matrimonial action discussed and its prospects for survival assessed in light of current judicial trends and the proposed Code of Evidence for New York State, now under active legislative consideration. This article will attempt to place the rule in historical perspective by examining the reasons which gave rise to its creation and begin to scrutinize the parameters of its definition by addressing the concept of assertive and nonassertive nonverbal and verbal conduct.

The Creation of the Hearsay Rule

Stretching up from centuries long gone, the hearsay rule today is something of an architectural wonder, bent and misshapen but still standing despite relentless efforts to diminish its influence. Historically, the rule forbidding hearsay, which Wigmore has described as "that most characteristic rule of the Anglo-American law of evidence"[9] is a product of a system which, through a long process of evolutionary change, came to rely upon lay fact-finders whose principal function was to assess the accuracy and reliability of information in testimonial and documentary form presented publicly in court.

The hearsay rule became part of the filtration and purification process by which potential infirmities in the truth-finding process were sought to be regulated if not eliminated. Dangers of corrupted impression by the five senses, impaired memory, imperfect communication skills and the deliberate contamination of the truth were perceived safeguarded by the presence of the oath, the jury's ability to observe the witness's demeanor in open court and above all, cross-examination.

When the statement sought to be introduced into evidence was once removed from the witness and attributed to a declarant who was either not under oath, absent from the courtroom or not subject to cross-examination, the evidence was regarded as too unreliable for the factfinder's consideration and the hearsay rule arose as a barrier to its introduction. The trier of fact would be asked to believe the truth of only those statements made by witnesses testifying at the trial. They were not to be presented with any other statements and asked to believe they were true.

A tension was thus created between a rule excluding potentially undependable evidence and rules exerting powerful gravitational forces to admit all probative information so that the factfinder could appropriately discharge its function. The common law solution to this dilemma assumed essentially two forms. The first was to rigidly limit the exclusion of probative data to those statements which conformed with precise calibration to an accepted definition of hearsay. The second was to beget a profusion of exceptions, the common denominator of all of which was either the absence of one or

more of the dangers or the presence of one or more of the traditional safeguards. More modernly, courts have been granted or have arrogated unto themselves the power to admit evidence bearing hearsay characteristics which does not cleanly fit within any of the traditional categories of exceptions, but which possesses sufficient trustworthiness to justify consideration by the factfinder.[10] The manner in which this power is exercised in the future will largely determine the fate of the hearsay rule.

Recognizing and Defining Hearsay

While there is no universality of acceptance of a single definition of hearsay, all definitions contain at least two components: The first requires that the statement be made by a declarant under circumstances other than in the course of the trial in which it is offered, and the second requires that the statement be offered for the truth of the facts asserted.[11] While it is ordinarily not difficult to identify the first component, the second proves more troublesome because of uncertainties which have surrounded the definition of "statement." While it is clear that a person's oral or written assertions qualify as a "statement," the dispute has focused on the issue whether nonverbal conduct is within the reach of the hearsay rule. Consider the following evidentiary problems which are not unfamiliar to the matrimonial lawyer:

(1) On the issue whether a wife sustained an injury allegedly inflicted by her husband, a police officer testifies that when he arrived at the marital home he asked the wife, "Who hit you?" and the wife responded by pointing to the husband. The police officer then testified that he asked, "Is he your husband?" and she nodded her head.

(2) On the same issue as (1), the wife offers to testify that when the police arrived, they escorted her into an ambulance.

(3) On the issue whether a wife suffered emotional trauma as a result of her husband's conduct, she offers a duly authenticated prescription for an anti-depressant given to her by a physician.

(4) On the issue of custody, the mother offers to introduce evidence that on several occasions when the father returned from work and entered the marital home, the child would run to her room and lock the door.

(5) On the same issue as (4), the mother offers to testify that while she and the father were standing side by side, the child arrived home from school and ran to the mother, throwing her arms around her.

Problem (1) presents an obvious illustration of assertive conduct since the act of pointing or nodding one's head reflects an unmistakable intention to substitute a gesture for a verbal declaration. It is clearly hearsay.[12] On the other hand, problems (2) and (5) would be characterized as nonassertive conduct if a court found that the fact to be established is circumstantially inferable from the actor's belief, which itself is implied from his conduct. However, cases arising in other jurisdictions demonstrate that if the court determines, albeit through a process of inference, that the declarant's conduct was intended as a communication and offered in evidence for a purpose which required the factfinder to accept it as such, it would be classified as hearsay.[13]

The germinal case involving the question whether conduct is within the hearsay rule is traceable to the case of *Wright v. Tatham*[14] decided by the House of Lords 147 years ago and which has been required reading in every law school on both sides of the Atlantic ever since. The issue in this celebrated case was whether a testator was mentally competent. The proponent of the will offered to introduce several letters written to the testator by persons who were unavailable at the time of trial. None of the letters contained any direct assertion that the testator was competent, but they were offered on the theory that their content implied a belief of competency by the authors in that their tenor was such as would be written to a person of normal understanding from which the testator's competency could be inferred.

The court determined that the conduct, which the sending of the letters represented, was hearsay and therefore excludable as evidence. The court reasoned that since a statement concerning the testator's competency not made under oath in open court or subject to cross examination would be of itself inadmissible, the letters, offered to prove the truth of the implied statements (the testator's competency), were equally inadmissible. However, the court failed to draw a distinction between the nonassertive, nonverbal conduct of sending the letters and the nonassertive verbal expressions communicated to the testator by way of the letters.

In this state, fewer than a handful of cases have addressed the question whether nonassertive, nonverbal conduct is includable within the hearsay rule, and it was not until 1979 when the Court of Appeals decided *People v. Salko*[15] that such conduct was definitively placed out of its reach. In *Salko*, the issue, arising within the context of a charge of conspiracy, was the admissibility of certain nonverbal acts by a co-conspirator sought to be introduced without first establishing the existence of the conspiracy. The court stated:

> "*Distinction has long been made between acts and declarations.* The hearsay rule interdicts the introduction of an out-of-

> court statement offered to establish the truth of its assertion; it has, as a general rule, *no application to an act which is not intended to serve as an expressive communication . . .*"[16] (Emphasis added)

The holding in *Salko* presumably destroys the viability of pre-existing case law decided on the Appellate Division level which had suggested a contrary rule.

In *Thompson v. Manhattan R. Co.,*[17] the plaintiff sought to prove she had suffered an injury to the spine by evidence that she was treated for spinal injuries by her physician. The court rejected the evidence stating:

> "We think such proof was in the nature of hearsay. The treatment of the plaintiff for a particular disease was no more than a declaration of the physician that she was suffering from such a disease. As the declaration would not be competent, we think proof of the treatment would not be competent."[18]

In *James K. Thompson Co. v. International Compositions Co.,*[19] and *Altkrug v. Whitman Co., Inc.,*[20] the court rebuffed an effort on the part of a seller to show that other customers had not complained about the quality of goods that a buyer claimed was defective.

While the opinion in *Salko* does not refer to Rule 801(a) of the Federal Rules of Evidence which excludes nonassertive, nonverbal conduct from its definition of hearsay, the court apparently accepted the Advisory Committee's supporting rationale that while evidence of this character was untested regarding the perception, memory and narration of the actor, "the situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity."[21]

Since similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, the question arises whether such conduct should likewise escape the clutches of the hearsay rule. While *Salko* noted the distinction between acts and declarations,[22] no court in this state has ever had occasion to address the precise issue whether the hearsay rule excludes the kind of nonassertive *verbal* conduct which is illustrated by the following evidentiary problems:

(a) On the issue whether a husband has been concealing unreported income from a close corporation of which he is the sole shareholder, he offers to introduce a properly authenticated letter from the Internal Revenue Service stating that a recently performed audit resulted in a finding of a $12 refund due to the corporation.

(b) On the issue of the value of a wife's business, the husband offers to introduce a recent purchase offer for the business in the amount of $125,000 from a competitive company.

(c) On the issue whether the wife sustained an injury allegedly inflicted by the husband, the wife, who had been brought to a hospital by the police officer, offers the testimony of that officer that at the hospital she said, "My husband is very strong."

(d) On the same issue as (3) above, a hospital nurse testifies that the wife said to her, "I don't want visitors, especially my husband."

(e) On the issue whether a former spouse and another person held themselves out as husband and wife, a witness offers to testify that he heard a third person address them as "Mr. and Mrs."

(f) On the issue of the existence of an illicit relationship between a spouse and a paramour, an offer is made to introduce an authenticated writing by the paramour found in the possession of the spouse, which states "I love you."

It is likely that under Rule 801(a) of the Federal Rules of Evidence, none of the statements contained in the foregoing problems would be held inadmissible since neither verbal nor nonverbal conduct not intended as an assertion is included within its definition of hearsay.

While the question in this state is still shrouded in doubt by reason of the absence of controlling authority, doctrinal consistency would appear to mandate that the hearsay rule has no application to any conduct—whether nonverbal or verbal—which is not intended as an expressive communication. Since insincerity is no longer a concern when a declarant does not intend to communicate a fact whose truth is in issue, the tug of war between probative evidence and an exclusionary rule should be resolved in favor of receiving the evidence.

This does not appear to be the view of the drafters of the proposed Code of Evidence for the State of New York which follows the federal model to the extent that it would exclude *nonassertive, nonverbal* conduct from the definition of hearsay,[23] but which has declined to follow the federal model by including nonassertive oral or written declarations within its definition of hearsay.[24] Neither the commentary to the proposed Code submitted for consideration to the Law Revision Commission in 1980 nor the comment accompanying § 801(a) of the proposed Code submitted to the 1983 session of the New York State Legislature by the Law Revision Commission casts a blinding light on the subject. However, the simple but all too conspicuous insertion of a punctuation mark in the 1982 draft[25] and in all bills involv-

ing the proposed Code which have been subsequently submitted to the Legislature,[26] which is not to be found in the 1980 draft, strongly suggests that the proposed Code does distinguish between acts and declarations.

It is, therefore, safe to conclude that the evidentiary offers set forth in illustrations (a) through (f) would be inadmissible under the proposed Code.[27] While it is this writer's opinion that the courts of this state will take a position compatible with that of the proposed Code and continue to distinguish between acts and declarations, the absence of case law in this jurisdiction continues to leave the problem enveloped in Stygian darkness.

Endnotes

1. *Kesseler v. Kesseler*, 10 N.Y.2d 445 (1962); *Lincoln v. Lincoln*, 24 N.Y.2d 270 (1960); *Perry v. Fiumano*, 61 A.D.2d 512 (4th Dept. 1978); *Baecher v. Baecher*, 58 A.D.2d 821 (2d Dept. 1977).
2. Dom. Rel. L. § 173.
3. Thayer, Evidence 509 (1898); 1 Wigmore, Evidence § 46 (3d Ed. 1940); Davis, An Approach to Rules of Evidence for Nonjury Cases, 50 ABA Journal 723 (1964).
4. See e.g., Dom. Rel. L. § 236, Part B, Subd. 5, par. g; *Koblyack v. Koblyack*, 62 N.Y. 2d 399, 403 (1984).
5. "An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced." CPLR § 2002.
6. "Civil cases in New York support the rule that inadmissible hearsay admitted without objection is entitled to be considered and given such probative value as, under the circumstances, it may possess." Richardson on Evidence (10th Ed.) § 207.
7. See *People v. Wing*, 63 N.Y. 2d 754, 755 (1984).
8. ". . . In general our question should not be why should this rationally probative evidence be admissible, but why shouldn't it be. To this basis principle of evidence the most important exception is of course the hearsay rule. But as important as that rule is, it is itself an exception to the basic principle of the admissibility of all rational probative evidence." *People v. Schmotzer*, 87 A.D. 2d 792, 793 (1st Dept. 1982).
9. 5 Wigmore, § 1364.
10. See e.g. *Letendre v. Hartford Accident and Indemnity Company*, 21 N.Y.2d 518 (1968); Federal Rules of Evidence (hereinafter Fed. R. Evid.) (Rule 803 (24) and 804(5); See Proposed Code of Evidence for the State of New York (hereinafter NYCE) § 804(c).
11. Richardson, *supra*, at § 200; NYCE § 801(c); *People v. Edwards*, 47 N.Y. 2d 493 (1979).
12. Richardson, *supra*, at 202.
13. Professor Morgan in an article entitled "Hearsay Dangers And The Application of The Hearsay Concept", 62 Harv. L. Rev. 177 (1948) provides several examples of this approach:

    > "That an inmate of a state home after appropriate examination for venereal disease was housed in a non-venereal ward was clearly, and was intended to be, a communication to all interested persons that she was free from venereal disease. (*People v. Bush*, 300 Ill. 532, 133 N.E. 201 [1921]). To rebut a contention of defendant that he had not stolen his grandmother's cow but had sold it to a neighbor in her absence and with her authority, evidence that on her return she demanded of the neighbor not the purchase price but the delivery of the cow was used as evidence of an assertion by her that she was still the owner of the cow (*Powell v. State*, 88 Tex. Crim. App. 367, 227 S.W. 188 [1921]). Likewise revocation of a license for reckless driving was a declaration to the licensee by the revoking authority that the licensee had driven recklessly (*McCurdy v. Fibotte*, 83 N.H. 143, 139 Atl. 367 [1927]). Instructions to an agent to demand cash and accept no paper from a named bank were a means of telling him that the bank's credit was bad (*Hanson v. State*, 160 Ark. 329, 254 S.W. 691 [1923]). In the same way a patient's demonstration of the strength of his hand or of lack of muscular control of his leg was a mere method of communicating the facts by nonverbal action (*Greinke v. Chicago City Ry.*, 234 Ill. 564, 85 N.E. 327 [1908]). Likewise the conduct of boys following a woman on the street and making fun of her was no more than a way of informing her and others that her appearance or action as abnormal (Hine, Appeal from Probate, 68 Conn. 551, 37 Alt, 384 [1897]). Less obviously, perhaps, placing a victim of an accident upon a stretcher rather than putting his body with those of victims who had died in the same accident was merely a means of declaring to the proper attendants that he was still living (*Estate of Loucks*, 160 Cal. 551, 117 Pac. 673 [1911])."
14. 7 A.R.E. 313 , 112 Eng. Rep. 888 (Exch. Ch. 1837), aff'd, 5 C.&F. 670, 7 Eng. Rep. 559 (H.L. 1838).
15. 47 N.Y.2d 230 (1979).
16. *Id*. at 239; See *People v. L.B. Smith, Inc.* 108 Misc.2d 261, 265 (Sup. Ct. Onondaga, 1981) in which the court stated: "Evidence of nonverbal acts, to be admissible, need only be relevant to prove the existence of the conspiracy."; See also *People v. Ortiz*, 119 Misc.2d 572 (Sup. Ct. Bronx, 1983) (Officer can testify to a person's actions at a lineup "since it will no constitute hearsay." *Id*. at 579.); *People v. Victor P.*, 120 Misc.2d 770 (Crim. Ct. City of N.Y., 1983) (observation of conduct would be admissible as nonassertive conduct).
17. 11 Ap. Div. 182 (1st Div. 1896). The holding of this case would exclude the prescription for the anti-depressant presented in problem (3).
18. *Id*. at 183, 184.
19. 191 App. Div. 555 (1st Dept. 1920).
20. 185 App. Div. 744 (1st Dept. 1919).
21. Fed. R. Evid. Rule 801 (a) Advisory Committee's Notes, 56 F.R.D. 183, 293.
22. *People v. Salko, supra* at 239.
23. NYCE § 801(a)(2).
24. NYCE § 801(a)(1).
25. The draft of the language of the proposed Evidence Code submitted to the Law Review Commission was identical in every respect to its counterpart, Fed. R. Evid. Rule 801(a). It reads:

    "(b) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it's intended by him as an assertion."

    Section 801(a) of the Proposed Evidence Code submitted for the 1982 session of the New York Legislature of the Law Revision Commission reads:

    "(a) Statement. A "statement is: (1) an oral or written assertion of a person; or (2) nonverbal conduct of a person if it is intended by him as an assertion."
26. See Senate bill S.2132 and Assembly bill A.2893.
27. But see *Hendrey v. Hendrey*, 101 AD2d 624 (3rd Dept. 1984) where the court, without discussion of the hearsay implications, refers to love poems from wife's male friend introduced to infer something other than a platonic relationship.

The Paper Chase: Motion Practice Abused

By Michael Dikman
February 1986

Matrimonial matters have, in the past few years, become increasingly difficult, costly and aggravating for judges, lawyers and litigants. I begin with two premises. First, that for an attorney to engage in motion practice primarily to generate paper, hours and fees is unprofessional, probably unethical and, in my view, obnoxious. Second, that discourtesy or "sharp" practice relative to motions causes unnecessary work, poor public relations and undue friction between the attorneys. It is clearly understood that motions, which are brought to assist in prosecuting or defending a case or to attempt to benefit a client, are a regular and necessary part of matrimonial practice. However, there are two areas in which layers ought to stop the nonsense and the games which do not benefit the client, the Court or the profession. Likewise, I submit that there are two areas where the judges can, without loss, minimize the grief and pressure motions are bringing to bear upon practitioners. These are the subject of this article.

I. Criticisms of Attorneys' Motions Practices

1. The first criticism is of unnecessary motions. There is also much unnecessary disclosure demanded too, but that is another topic. I have seen numerous motions made to amend pleadings. These motions are invariably granted. Lawyers *know* this. Wouldn't it be easier to call your adversary and ask if an amended pleading will be accepted? I am sure that in most cases there would be an affirmative response. The result—less motions, less work for the Courts and counsel. All too often a demand for a deposition or discovery is received and perceived to be improper for one reason or another. For example, a deposition scheduled for an inappropriate place; a demand for documents which seem too general or too far-reaching. The first impulse should *not* be to make a motion for a protective order. Pick up the phone! Or, write a letter. Many times I have reached easy agreement to change the situs of an examination before trial, or to limit the number of years for which documents are requested, or to have voluminous records inspected by adverse counsel or his or her accountant at the client's place of business. I have seen motions made, initially, for the production of books and records, before any formal or informal demand or request was made. Why? Why must we have this motion-happy waste? If you have made your demand and your adversary is stonewalling, then by all means, make your motion. But try it the easy way, the gentle way, first. It usually works. On the contrary, many motions are made for protective orders, against totally proper discovery demands and notices; motions which have no chance of success. I would like to see an increase in motions only in one area: cross-motions for costs and fees (which are granted) when baseless motions are received. I submit that a motion for a protective order, which has no purpose but to stall or create a few more billable hours, should not be made; and where obvious, sanctions should be imposed. Similarly, lawyers who should know better make motions for exclusive possession of a marital residence, when it is clear that the requisite danger to person or property is totally absent. Recently, I saw a motion for temporary support in a case where the parties were apart for ten years, the husband had sent the same amount of money each month and the wife had maintained the same, reasonable standard of living, without objection, all those years. In short, many, many motions are being made unnecessarily. They ought not be.

2. The second area of lawyer impropriety involves the exchange of motion papers and other motion shenanigans. How many times have you seen these offensive tactics (or, hopefully not, used them)?

(a) Causing the return date on an Order to Show Cause to be unduly short, for no significant reason;

(b) Answering papers served by mail (notwithstanding a 5-day or 7-day notice) the *night* before the motion. It's always the P.M. mail! There is never a call to so advise you. Heaven forbid. Then you could agree on time to reply and avoid a Court appearance to get it—or to find out whether your adversary is opposing the motion at all;

(c) Having your adversary make an application for more time, without having advised you of such intention;

(d) Having answered a motion, you receive a reply containing all sorts of new matters, not required by your opposition, but which clearly should have been part of the original moving papers; or the converse—

(e) Having properly replied to your opponent's opposition, without leave of Court and merely because he must have the last word, he or she submits a self-styled "Sur-Reply" for which the CPLR makes no provision;

(f) The papers you receive have exhibits missing, or photocopied so lightly as to be illegible. (Look at the Court's copy. They'll be clear as a bell!)

Fellow lawyers, these things happen every day. These are the practices which do not help clients. They only hurt lawyers and frequently invite retaliation. If these practices do not constitute malpractice or unethical conduct, at the very least they are inappropriate, impolite and annoying. They are GARBAGE. We owe it to ourselves, the Court, the profession and the clients to avoid the garbage.

II. The Judiciary Can Improve Its Handling of Motions

As I perceive it, judges cause us unnecessary problems in a variety of ways, which can be broken down into two categories, those before the motion is submitted and those involving motion disposition.

1. Before submission, the Court is involved only in applications. Fortunately, in general we have had judges, most of whom courteously and reasonably dispose of applications. But there have been occasional exceptions in every county. I do not refer to questions of weighing equities. What is to be avoided are arbitrary denials. How many times have you seen a judge who seems to delight in giving you something, anything, *other* than what you want? You ask for a week, you get 4 days. Ask for a Tuesday, you get a Monday. We know our busy schedules. The point is simple, and employed by the vast majority of judges. If a request can be granted without prejudice to the other side or inconvenience to the Court, it should be.

2. The more serious problems caused by the judiciary lie in motion determinations. Respectfully, I comment in three areas.

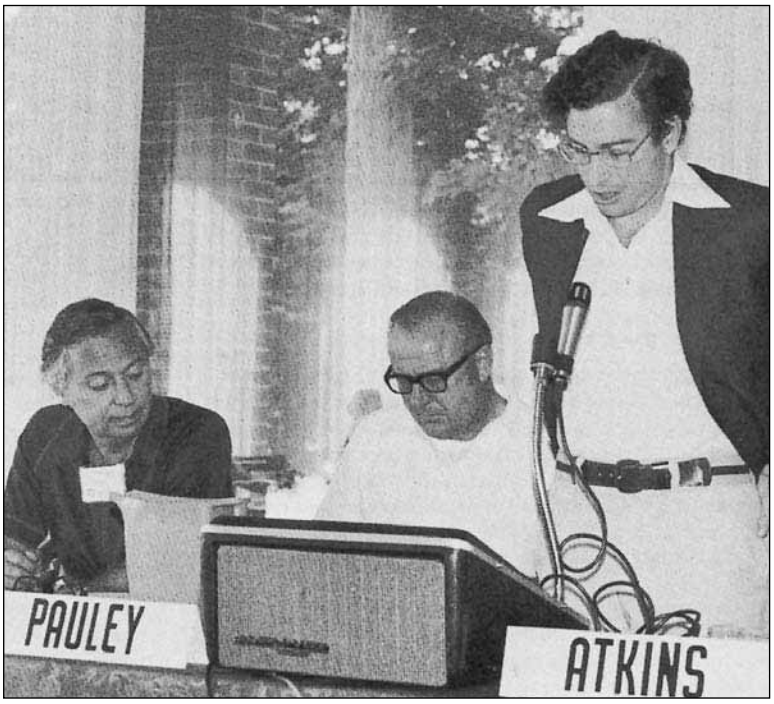
(a) Hearings. Too many motions have been disposed of by scheduling evidentiary hearings. Clearly, there are those which require them—most motions for contempt, exclusive possession and temporary custody. Occasionally in a temporary support motion, the Court is presented with such a wide divergence of allegations that no reasonable decision can be made without a hearing. But, as in the past, these should be the rare exception. It is the opinion of many of my fellow matrimonial practitioners that far too many hearings have been scheduled in temporary support motions, especially in cases with parties of modest means. The court must bear in mind the three major difficulties these hearings cause. First is delay. Normally, support motions are made because there is an immediate need. Scheduling a hearing three weeks later is generally illusory. Actual engagements by counsel, cases on trial by the Court, illness, vacations and other reasons (funerals, injuries, weddings, weather, etc., etc.) often result in adjournments, which are difficult to fault. The matrimonial part being as busy as it is, decisions after the hearings may take some time to be made, typed and filed. It is not unusual for a temporary order to issue three to six months after the initial motion is made. The order, by law, is retroactive. *BUT*, usually the wife and children have been made to suffer or beg or borrow for an undue time. And the retroactive arrears are frequently difficult to collect and often productive of more motions (to enforce, to determine what "credits" are appropriate, etc.). Two remedies spring to mind. First, the order which schedules the hearing can include a temporary support provision, subject to adjustment after the full hearing. Second, in most cases, the lawyers and parties would probably prefer the judge doing the best he can and making a decision on the papers. If in doubt, an award on the modest side is preferable. This is because if, after trial, it is found to have been too low, the recipient has a remedy—a retroactive increase. *Rodgers v. Rodgers*, 98 A.D.2d 386, 470 N.Y.S.2d 401 (Second Dept.) However, in retrospect, if the pendente lite award was too high, no recoupment is proper. *Klein v. Klein*, 58 A.D.2d 811, 396 N.Y.S.2d 266 (Second Dept.); *Matsis v. Matsis*, 65 A.D.2d 556, 408 N.Y.S.2d 961 (Second Dept.); *Rosenberg v. Rosenberg*, 42 A.D.2d 590, 345 N.Y.S.2d 73 (Second Dept.); *Grossman v. Ostrow*, 33 A.D.2d 1006, 308 N.Y.S.2d 280 (First Dept.) However, such overpayments could be considered under DRL § 236B(5)(d)(10) ("any other factor") in connection with property distribution. Aside from the delay, hearings consume a great deal of time for lawyers, litigants and the Court. That time translates into added expense of litigation, which the majority of litigants can ill-afford. I know some cases are settled before or after the hearing. Many of those would be settled without the hearing. This does not justify the severe imposition of the delay, time and expense of hearings, except where absolutely necessary. Some time ago, I received a motion to modify the support fixed by Separation Agreement and a subsequent Judgment. My opposition papers admitted all the factual allegations, but contested the movant's right to the relief sought, based upon those facts. The motion presented a pure question of law, and yet a hearing was ordered and some other judge had to deal with the question. For this there is no excuse.

(b) Covering all the bases. All too often decisions on motions and cross-motions do not dispose of all

branches, all requests for relief. This is remedied easily enough, by reference back to the Order to Show Cause or Notice of Motion, to be certain the decision is complete.

(c) Sanctions and fees. In line with the tenor of this article, I believe sanctions and fees ought to be more liberally awarded against parties whose misconduct or procrastination require motions to be made. The litigant who stonewalls discovery and is hit with his spouse's fees for the first motion made, by reason of his recalcitrance, may well be convinced to stop playing games which would otherwise necessitate several more motions. Further, if the unmonied spouses are to be properly represented and their lawyers are to make those motions which should be made to protect their interests, reasonable and not token counsel fees should be granted. Reserving fees to the trial Court should not be a routine disposition. Frequently this requires a lawyer's services to go unpaid for substantial periods of time, as some kind of interest-free loan to the monied spouse. It also gives him the advantage of making the lawyer for the non-monied spouse hesitate to keep rendering additional services and making more motions, even where necessary and proper.

In closing, I urge all those involved in matrimonial motions to consider the remarks above. Less unnecessary motions, less "cute" tactics, more communication and cooperation will go a long way toward reducing the backlog and burdens of the Court, thereby shortening delays; toward practising more responsibly, without churning; toward taking some of the pressure off us all; toward improving our public image, which is dismal! Let us stop killing each other. Somewhere I heard that's uncivilized.



Section Chairman Peter E. Bronstein makes a presentation, while panelists S. Gerald Richardson, left, and Raymond J. Pauley, both of Rochester, listen at the July 1975 Family Law Section Summer Meeting.

Sequel to *O'Brien*: Valuing Professional Licenses, Before, During and After Merger Into the Career

By Albert J. Emanuelli
June 1987

Introduction

Benjamin N. Cardozo, when Chief Judge of New York's Court of Appeals, once defined that Court's mission as "*translating into law the social and economic forces that throb and clamor for expressions.*"[1] The facts presented to me, when I first interviewed Loretta O'Brien in 1980 personified that force. The "professional license syndrome" of *O'Brien* clamored for expression and redress.

Many articles and decisions have been written flowing from *O'Brien*, and having frankly been cajoled by a number of colleagues and judges to do likewise, I too enter the maze. Most of this article contains material originally presented in my trial memorandum and appellate briefs, beginning in 1981 through the Court of Appeals. I have waited until now because the matter is no longer sub-judice, having been totally affirmed by the Appellate Division in November 1986 on remand from the Court of Appeals for the trial court's reasoning.

The Court of Appeals in *O'Brien v. O'Brien*, 66 N.Y.2d 576, unanimously affirmed Justice Richard J. Daronco's decision in *O'Brien v. O'Brien*, 114 Misc.2d 233. It found Dr. O'Brien's medical license marital property subject to equitable distribution under its Domestic Relations statute, thus giving birth unto New York, a hitherto unknown property right.

It was always my feeling that given the broad concept of property inherent in New York's unique statute, the courts had but little choice to hold as they did.

While the *O'Brien* holding answers many questions, *inter alia*, that a professional license is marital property and, therefore, subject to equitable distribution pursuant to D.R.L. Sec. 236(B)(5) many questions remain unanswered.[2]

I have therefore, extracted from my briefs, many of the proposed unanswered questions and the suggested ways they could be handled. For example:

a) marital property rights in non-professional licenses and degrees;

b) merger of the license into the practice or salary

c) valuation of the license/practice or salary during merger;

d) pre-license equitable remedies; and

e) modifiable distributive awards.

While there are a myriad of possibilities yet to be presented to the courts, the Goddess of Law, though blindfolded, is not supposed to be shortsighted. I, therefore, offer some thoughts in these emerging areas and will trust in her wisdom.

O'Brien History

Dr. O'Brien began an action for divorce following a nine and one half year marriage, which began with his wife Loretta, urging him to complete his last year of college. He instituted the divorce action two months following the issuance of his medical license. During the marriage, Loretta had relinquished her job as a teacher and the opportunity to obtain permanent certification which would have meant a substantial increase in her earnings. The parties moved to Mexico, where the doctor attended medical school and she worked as a teacher, homemaker and tutor. Upon return to New York, Dr. O'Brien enrolled in post medical school studies and commenced a medical internship. Through the marriage, Mrs. O'Brien had contributed all of her earnings to their joint expenses. Though both had contributed toward paying their living expenses and doctor's educational costs, having received additional financial help from both of their parents, Mrs. O'Brien had contributed 76% of the finances. The trial court rejected mere reimbursement as an equitable remedy. Rather, it awarded Loretta 40% of the present value in said license (the only real asset of the marriage) payable in annual installments over eleven years for a total of $188,800.00.

A New York Property Right

While the Court of Appeals unanimously upheld that a professional license was marital property subject to equitable distribution, did they have any other choice?

As to the intended concept of marital property, I argued that the medical license was the *only* asset of the

marriage; a thing of value and ". . . a heretofore unknown species of property right which comes into being, not with the service of the divorce summons, but with the marriage acquisition of the first earned asset." *Kriger v. Kriger*, 115 Misc.2d 595.

The Domestic Relations Law at Sec. 236(B)(5)(d)(6), mandated that the Court consider ". . . any equitable claim to, interest in, direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts for expenditures and contributions and services as a spouse, parent, wage earner and homemaker and to the *career or career potential* of the other party . . ." Clearly, the New York Legislature produced a *unique* statute that specifically addressed the professional license, non-working spouse syndrome. This entirely new concept of *intra-spousal property right* was not to be viewed in the light of third parties, but as marital economic partners. It was argued that this new concept rejected traditional principals governing a professional practice; its marketability and the like as expressed in *Spaulding v. Benenati*, 57 N.Y.2d 418. Nor was it intended that the law of partnership apply, since in the dissolution of a professional partnership, *each* professional would exit with a license in relative parity. That a fair reading of our statute should include a license notwithstanding the fact it did not fit into the traditional definition.

Arguments were made against the property approach: that the license was difficult to evaluate; the professional might face a hardship; a license was personal to the holder, was not to be sold and had no exchange value; it was an assignment of future earnings (rather than a present value methodology, which utilized future earnings.)

But, I urged, likened to the tree which is planted, grown and nurtured during marriage before it bears fruit, the license retained its intrinsic separate value until merger, but in all cases remained property. We all seem to have agreed that had the tree born fruit, we would have shared the fruits of the tree. Was it not, therefore, only fair to share the inherent fruit bearing capacity of the tree itself prior to its bearing fruit?

It was not a question of whether the development of the professional's faculties. Individual achievement and knowledge in the field of his or her specialty was property. It was rather, that the license itself was the expression of that achievement, in the form of a property right, to be shared between spouses as economic partners.

The court apparently agreed when it said, surely, "the function of equitable distribution is to recognize that when a marriage ends, each of the spouses based on the totality of the contributions made to it, has a stake in and right to share of the marital assets accumulated while it endured, *not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.*" *Wood v. Wood*, 119 Misc.2d 1076, 1079, *O'Brien*, p. 587. The Court of Appeals also utilized the reasoning of *Majauskas v. Majauskas*, 61 N.Y.2d 481, comparing vested but unmatured pension rights which were marital property to the license.

Addressing this point further, Judge Richard Simon, writing for the Court of Appeals, said "a professional license is a *valuable property right* reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder which may not be revoked without due process of law," *Bender v. Board of Education*, 262 A.D.2d 627, *O'Brien*, p. 586. If so protected it had value and should be considered property.[3]

Early on, I felt heartened by early supporters of the property approach who concluded that marital *property* should be broadly interpreted. That it should include all assets acquired during the marriage, including licenses unless specifically excluded as separate property by legislative definition.[4] For it was not the value of the license to the doctor himself nor third parties that mattered, but its value as between spouses, viewed as economic partners.

Yet while New York has now firmly established a property right in professional licenses, the non-licensed spouse in order to share in it, first has the *burden* to demonstrate that a) the license was acquired during the marriage; b) the license had real independent value (the cost of presenting the present value of certain licenses might not be worth the effort); c) that contributions were made, and; d) the value of those contributions, both direct and indirect (again the cost of the proof might exceed the value sought to be recovered). This is especially so, since some licenses can be obtained rather quickly and easily and no doubt without any real attendant valued contribution from the non-licensed spouse, i.e. a driver's license.

In all cases, the contributions and values, if any, of each license will and should necessarily vary. The practitioner should examine and weigh, however, the merit of other equitable remedies, i.e. maintenance and/or reimbursement discussed later.

Clearly now, it is prudent for the practitioner to carefully evaluate the non-licensed spouse's interest in the professional license and if economically worthwhile, present it in a cogent and credible fashion. If not worthwhile, the attorney should obtain the client's written waiver acknowledging that the attendant costs of proof, on balance, do not merit the anticipated recovery. In certain cases, the valued contributions of the non-licensed spouse may be deminimus *despite* the existence

of the property right. A concerted effort, therefore, for maintenance, rehabilitative or otherwise may well be in those situations the only real remaining valued remedy.

For all the above reasons and for logic and continuity, though O'Brien was restricted to holding a professional license was marital property, it is my belief that *all licenses* should be treated as property subject to equitable distribution.

Moreover, degrees should be treated as marital property subject to equitable distribution. The medical degree in *O'Brien* was merged into and became a part of the medical license and was, therefore, necessarily not given separate consideration. So consider, therefore, in that light Judge Titone's remarks, *O'Brien*, p. 592, "I join in the majority opinion . . . and like Justice Jackson, forth rightly surrender my contrary views in *Conner v. Conner*, 97 A.D.2d 88 . . . to a more cogent position."

Merger Doctrine Full and Partial

The Merger Doctrine was perhaps the single most persuasive portion of my license property/valuation argument. The concept, as presented in my briefs was freely distributed to colleagues since 1981, but, I have not read it as presented though the appeal process. It resolved, I believe, the often posed problem that dissenters raised to the separate valuation of a professional license if indeed it was considered property.

That valuation of a license and one's enhanced future earning capacity would create an injustice by "double counting" the license and professional practice in later years. That if a license was property shortly after its receipt, especially when no other traditional assets existed, *O'Brien, supra*, it had to remain property forever necessarily causing "double counting." This was in fact the problem faced by the Court in *Stern v. Stern*, 66 N.J. 340, when Judge Mountain found Mr. Stern's ongoing law practice to have a value and mistakenly, therefore, rejected his potential earning capacity or license as *ever* capable of having separate value if no practice existed. New Jersey, a forerunner in equitable distribution, therefore, had unnecessarily and negatively convoluted the concept of marital property in this area and was no doubt followed too closely by other jurisdictions without a close examination of their statute. Judge Mountain gratuitously rejected for the wrong reasons, that the license could have a separate value if no practice existed. By so doing, intended or not, the concept appeared lost. Whether the result was intended (he could have simply rejected the license as having separate value as it had already merged into an ongoing law practice) it is now moot.

I respectfully submitted, the solution in New York was though a *Merger Doctrine*. That the license, like the substance of water, retained forever its intrinsic chemical properties, but was capable of taking on different shapes in the nature of a liquid, vapor or solid form. And so it was with a license before, during and after merger.

It is now with interest that I note reported cases of recent vintage wherein professional licenses are valued and the Merger Doctrine is utilized. In *Vanasco v. Vanasco*, 603 N.Y.S.2d 480 (1986), the Court unequivocally found that the value of the license had *merged* into the husband's ongoing accounting practice; a track record has been established and the Court stated that the value of the license was subsumed into the value of the practice. Again, in *Korman v. Korman*, N.Y.L.J. 9/16/86, the Court was faced with considering the medical licenses of two physicians, husband and wife, and the medical practice of the husband. The Court found the husband's medical license had merged into his practice, awarding the wife 30% thereof. The wife had no medical practice so it valued but her medical license. The husband received 20% of the value of the wife's medical license in that the Court found she did not have an ongoing practice.

But what of the Merger Doctrine? The newly acquired professional license, capable of having an assigned present value at some point in time, finds its expression in the value of a practice, salaried employee, or none at all. We agree that we cannot separately value and add together both the license and practice, for we would be guilty of that unpardonable sin of double counting.

Our law is replete with an already established line of cases that professional practices, legal, medical, accounting, etc., are subject to valuation and distribution *Litman v. Litman*, 61 N.Y.2d 918; *Nehorayoff v. Nehorayoff*, 108 Misc.2d 311; *Cohen v. Cohen*, 104 A.D.2d 841.

But not all enhanced earning potentials fall within the *O'Brien* "property right" and properly so. For in *Morimando v. Morimando*, N.Y.L.J. 2/6/87, p. 16, col. 1, the Court rejected the status of a physician's assistant as a recognized profession for licensing distinguishing it from a medical license. The Court held that such a status did not fit within the purview of marital property and although the plaintiff's earning capacity had improved, without any property right, regardless of the other spouse's contribution, the Court was powerless to render a distributive award. (Consider *O'Brien's* $103,390.00 present value of contributions approach as an alternate remedy if indeed no property right exists.) But the question still remains whether *O'Brien* is to be construed to exclude such a property right as in cases like *Morimando*.

When then does such a merger occur if we are to apply this doctrine? At some point in time other traditional assets, i.e., house, automobiles, bank accounts

and the like, are usually also acquired from the stream of income generated by the practice or salary. The courts, when finding a *complete* merger have in essence found that the professional's *potential* has been achieved.

Examine then the interesting case of *Tessler v. Tessler*, N.Y.L.J. 4/15/86. The Court granted, on motion, fees to an expert to evaluate the husband's license to practice medicine. The career of that professional who had a newly acquired medical license was that of a salaried hospital employee. The Court noted that this professional was beyond the newly acquired license category, yet certainly not into the established practice category, having chosen a career of a salaried professional. *The Court assumed* that the value of the license was included in the value of the practice, but, it was careful to state that expert valuation during trial would present a more clear picture. But what will be the basis or reasoning of the court that a merger has in fact occurred, since by definition it is rarely an event which occurs instantly.

I would watch for this type of case to emerge to establish the *Doctrine of Partial Merger*. Appropriately applied, it would avoid potential arbitrary results where it is unclear whether a merger has taken place as was clear in the pre-merged value of the license in *O'Brien* or with the after-merged value of the license into the practice as in *Vanesco, supra*. *O'Brien* and *Vanesco*, in retrospect, will be the easy fact patterns. Their difficulty being primarily in the area of the valuation of the license or practice alone and the value of the contributions of the non-licensed spouse thereto. But whoever said that the work of the practitioner and judiciary was easy. At least, however, the judiciary possesses inherent ". . . flexibility and discretion to structure the distributive award equitably . . ." *O'Brien*, p. 588, and to do justice under all circumstances presented.

In the completely merged situation, we know that the trial court can distribute to the non-licensed spouse the after acquired traditional assets to alleviate the necessity of distributive awards in lieu of the practice.

The issue of whether a professional license has merged or not merged into the professional's practice or career (salaried employee) *is critical*. I submit that it is inappropriate to summarily find, without a very careful review of all the facts, that such a professional license has either merged or not merged. In that regard consider the case of *Cronin v. Cronin*, 131 Misc.2d 879, wherein the plaintiff-wife, who acquired a law license during the marriage, argued that her enhanced earning capacity was expressed in her chosen career as that of but a salaried government employee. Not having any private practice she was without a license or practice subject to separate valuation or distribution. However, the court carefully noted that the plaintiff's legal license (the legal degree merged into the law license as in *O'Brien*) may not necessarily be reflected in her present employment and therefore, further discovery was warranted. Though this court also found that a marketing degree is not property subject to equitable distribution (by constraints of *Conner v. Conner*, 97 A.D.2d 88), the writer reminds us of Judge Titone's forthright surrender of his contrary views therein. *O'Brien*, p. 592.

But how is the Court to determine if the professional is in that transitional merger period between the license and the practice? The decision may well have a tremendous financial effect upon the parties, *Cronin, supra.*

Surely, the courts have already been faced with that task for they must measure whether one is diligently pursing his or her earning ability in relation to his or her obligation to pay maintenance. *Hickland v. Hickland*, 39 N.Y.2d 1; *Sullivan v. Sullivan*, 55 Misc.2d 691. One's potential ability to earn a living and station in life, in contrast to actual earnings, has already, therefore, been used as a yardstick to measure a *good faith* effort, *Hickland and Sullivan*, *supra*. This necessary decision and standard is also viewed by the trial court in light of the witnesses' credibility. *Boyd v. Boyd*, 252 N.Y. 422 and I submit should be applied to license holders during the transitional period of *partial merger*. Factually determining whether the license holder has indeed exercised good faith to find his or her nitch in his or her chosen career, whether as a salaried employee or professional in practice, would avoid the possible unfair black and white merger or non-merger approach by utilizing this partial merger concept. Whether a license holder has in fact passed through his or her "career hiatus" to the point that according to his or her own ability and potential, has acquired other traditional assets sufficient to permit the court to achieve equity, is to be viewed on a case by case method from all of its own circumstances.

The Partial Merger Doctrine would have particular application if the court found that the professional was purposely putting a career on hold, awaiting the dissolution of the marriage, prior to going into full "bloom." On the other hand, a truly salaried employee, as a lawyer who has chosen a career as a Judge for example, would have the value of the license fully merged into his or her salary.

It is however, the practitioner's burden to present credible proof of the value of the license as compared to the value of the practice and/or salaried employee's status by acceptable valuation methodology standards. To avoid "double counting," the combined value of the practice as well as other traditional marital assets, would be *subtracted* from the value of the license, to

achieve a total net value of all assets *until* the merger was considered complete.

Maintenance/Reimbursement Equitable Remedies

Jurisdictions in general had attempted to cope with the problem of repaying a spouse for past contributions by using maintenance as a vehicle to that end. It was argued in *O'Brien* that this method was flawed, since maintenance is modifiable and terminable on death or remarriage and was, therefore, altogether illusory giving rise to the more desirable distributive award approach. The Appellate Division in *O'Brien* erroneously used maintenance as a vehicle to repay a spouse. The erroneous position was substantiated in *Capiello v. Capiello*, 66 N.Y.2d 107 (October, 1985) rendered after submission of *O'Brien* briefs (Sept., 1985). In *Capiello*, the Court stated that DRL Sec. 236B(6)(8) provided for maintenance to meet the reasonable needs of the party; suggested futurity rather than retroactivity, and was not authority for an award of maintenance *prior* to the commencement of the action nor an award in lieu of earnings lost during the period of the marriage.

I had outlined as early as 1982 in a national publication, the various remedies and relative advantages available to a spouse for license contributions throughout the country.[5] That neither maintenance nor reimbursement were suitable under those circumstances so that the Court's statement in *O'Brien* at pg. 507 was particularly gratifying when it stated: "Limiting a working spouse to a maintenance award, either general or rehabilitative, not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of dependence that the legislature sought to extinguish by equitable distribution", and mere reimbursement was not intended either, for "If the license is marital property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced." *O'Brien, supra*, p. 588.

Because of the above language, some of my colleagues have written that *O'Brien* may have affected *Duffy v. Duffy*, 94 A.D. 711. I do not agree. In *Duffy*, the return of investment was the *separate* property of the spouse which had been used for the down payment. The balance of the appreciated value was apportioned equitably. In my brief to the Court of Appeals, I set forth, by example only, the inequity to the non-licensed spouse receiving but reimbursement of marital funds rather than a share in the present value of a license to receiving back but the deposit on the marital residence rather than a share in its equity. I believe the Court was referring to this example and nothing more was intended but to illustrate how mere reimbursement was repugnant to the concept of an economic partnership, when it stated: "By parity of reasoning, a spouse's down payment on real estate . . . would be limited to the money contributed, without any renumeration for any incremental value in the asset, because of price appreciation." *O'Brien*, p. 588.

Present Value Contributions As A Pre-license Equitable Remedy

New York has already addressed the situation when an action is commenced prior to the issuance of the license. It found that at least reimbursement for actual dollar contributions toward the professional's education was appropriate. *Conteh v. Conteh*, 117 Misc.2d 42. However, reimbursement for dollar contributions, brought to present value can be substantial and should be considered as a remedy for contributions to the professional's pre-license education. *O'Brien, supra*, p. 582; ($103,390.00). Maintenance as a supplement also may be available.

Foreign Jurisdictions

A comparison of the way other jurisdictions handle the professional license/working spouse syndrome is all but meaningless because their statutes are different. Suffice to say, inherent in most of those jurisdictions are the problems of awarding modifiable and/or terminable maintenance and mere reimbursement. Community property states, i.e. California, et al. do not divide property rights unless the property is of joint ownership. Since a professional license is not of joint ownership, New York's equitable property approach is impossible.

Hardship/Modifiable Distributive Award

Throughout *O'Brien*, arguments against non-modifiable distributive awards were raised. It was alleged that a potential hardship existed if the professional was obligated to pay the distributive award without relief; unable to pursue his or her chosen career and was regulated to involuntary servitude which precluded career changes. The licensee might not be able to earn the income as projected when the license was valued at the time of the award. In his concurring *O'Brien* opinion, Judge Meyer pondered the burden of such a final award when he stated, ". . . should a general surgery trainee accidentally lose the use of his hand . . ." *O'Brien, supra*., p. 592.

But what of the non-licensed spouse? Could the professional volunteer to pay the non-licensed spouse a higher sum or accelerate the payments if (he) came into a windfall or did better than projected in court? I doubt it.

I suggested, therefore, that if the courts were concerned with a possible hardship upon the professional,

it permit a modification of distributive award as to the *pay out schedule only*. Any permitted modification of that payment schedule only should in all cases be mutual, permitting either party to seek one, upward or downward. The nature of that final judgment, as I believe intended by the legislature, would not be judicially altered, thereby preserving the sanctity and finality of distributive awards.

Nor is the distributive award a hardship in the nature of an assignment of future earnings. Rather, it is a future pay out of property acquired during the marriage and prior to the commencement of the action based on the non-licensed spouse's contributions to the present value of the license. *Reiner v. Reiner*, 100 A.D.2d 872. The professional is to pay but the mortgage on his license being free to keep all other earnings and appreciation, while the non-licensed spouse receives devalued dollars over future years. Moreover, in our system of jurisprudence, we do not tailor the award to the plaintiff based upon the defendant's ability to pay. In fact, defendant's ability or inability to pay is expressly excluded from consideration. Therefore, once all factors are weighed and an award made, it is the defendant's obligation to satisfy the debt. The professional, Dr. O'Brien, took with him his license and its enhanced earning capacity, the only asset of that marriage.

Furthermore, any alleged hardship upon the second spouse whose new spouse has had to share a piece of the license or practice with the first, is no more or less different from a second marriage to a professional who is obligated to pay maintenance. Any contributions the second spouse makes to the professional's license or practice is necessarily then taken from that point in time and that spouse marries the professional aware of the obligation.

But what if the professional opts never to utilize the license or intended career? Is it fair to be burdened with the debt to the non-licensed spouse? But was it fair to have taken from the non-licensed spouse during the marriage then ". . . money, effort and lost opportunity for employment expended in its acquisition . . ." *O'Brien*, p. 586.

Apparently, the Court of Appeals has indicated by *O'Brien*, that though the option to utilize the professional license with its enhanced earning capacity is up to the professional, the obligation to compensate the contributing non-licensed spouse is not.

Valuation

The Legislature did not tell us how to value marital property but the statute itself does direct us to deal with future financial *probabilities* and career *potentials*. DRL Sec. 236(B)(5)(d)(6) and (8).

At the trial level my expert in *O'Brien*, Stanley Goodman, Esq., C.P.A., was furnished the facts. Aware of the then prevailing views in the United States, he urged bringing to present value Loretta's monetary contributions or $103,390.00. I on the other hand, wanted to calculate the present value of the license as property. A compromise was struck and we presented proof on both approaches. We analogized the evaluation of the medical license in a dead marriage to the evaluation of a wrongful death to a widow. Judge Daronco opted for the latter and his views were reinforced when the Court of Appeals stated that "Its value is the enhanced earning capacity it affords the holder and although fixing the present value of that enhanced earning capacity may present problems, the problems are not insurmountable. Certainly they are no more difficult than computing total damages for wrongful death or diminished earning capacity resulting from injury and they differ only in degree from the problems presented when valuing a professional practice for purpose of a distributive award, something the courts have not hesitated to do." *O'Brien*, p. 588.

The valuation of future earnings in wrongful death actions was an already established and accepted method in proving damages, especially when based upon a proper foundation with the aid of recognized statistical data. *Franchell v. Sims*, 73 A.D.2d 1; *Bartkowiak v. St. Adalbert's R.C. Church Soc.*, 40 A.D.2d 306. Furthermore, the valuation of anticipated future earnings was acceptable proof. *Zaninovich v. American Airlines*, 26 A.D.2d 155.

The valuations in *O'Brien* were conservative at best, in that the expert did not begin with capitalizing excess earnings over the doctor's third year of college as the facts revealed, but *after* he earned his college degree. What is important in all events, is that whether we are evaluating a license or a practice, it is taken at a particular point in time. The newly acquired license of Dr. O'Brien, taken just months after he received it, necessarily involved capitalizing excess earnings over his productive life years. The license itself will decrease in value until it has completely merged into a practice or as a salaried employee. Neither a science nor an art, valuation is but a necessary procedure and an expert may testify to the present value or present loss of anticipated earnings, *Sanches v. Denver*, 538 F 2d 304; (1 N.Y. PJI 2d 2:290) even if based upon possible performance, *Dugan v. Dugan*, 457 A.D.2d 1 (N.J.) 1983, as opposed to probable performance. Moreover, expert testimony to determine lost earnings, brought to present value, was advisable and admissible because, in its absence, the court may base the award of damages on conjecture instead of a proposed economic formula. *Delong v. County of Erie*, 89 A.D.2d 376; *Mercado v. City of New York*, 46 Misc.2d 358.

To suggest, therefore, that the methodology used in valuing Dr. O'Brien's license was not a method used by the Courts of New York and New Jersey for valuing professional practices is a puzzling statement.[6] Recently, as in *O'Brien*, the trial court in *Holihan v. Holihan*, __A.D.2d __, N.Y.L.J., 1/15/87, p. 13, col. 2, accepted the valuation of a lawyer's license received in 1979, based upon capitalized excess earnings between age 47 as projected to retirement to age 65.

The valuation of a closely held corporation which is routinely performed is not easy in that there is little, if any, trading on the open market; or, if so, at irregular intervals, all of which makes valuation, as in licenses, all the more difficult. In any event, projecting statistics is commonplace as well as the reliance upon forecasts of future cash flows which are discounted to present value.[7] But this is not to say that expert valuation of professional licenses and/or practices will not differ.[8] Others state that valuation should not be relegated to a rigid formula approach.[9] That it must be elastic and flexible so as to permit the trier of the facts to weigh the value of such intangibles as the sacrifice of one's own career, homemaker contributions, foregoing present material benefits or loss of income and the like.

Yet, indeed, a professional practice may be found to have no value, *Bidwell v. Bidwell*, 122 A.D.2d 364, but credible methodology should be employed.[10]

Moreover, a remand for re-evaluation will result from improper valuation, *Matsuo v. Matsuo*, __ A.D.2d __, 508 N.Y.S.2d 630; *Raff v. Raff*, 102 A.D.2d 507; or for failure of the court to state reasoning essential to its decision; CPLR 4213(b); *Nielsen v. Nielsen*, 91 A.D.2d 1016.

It has been suggested that we reduce the valuation methodology of a license to that of a pension. Interestingly, *O'Brien*, p. 584 and p. 589, referred to the leading pension case *Majauskas, supra*, in the property argument. However, a formula approach as suggested by some would create "double counting" of the license and practice and would not implement any merger.[11]

But the valuation of marital property, especially professional licenses, is such new ground that one is tempted to apply a formula, at a point in time during the difficult *partial merger period* yet being careful to avoid double counting.

EXAMPLE: Assume a couple married in 1981. At that time husband/doctor had completed three years of formal medical school education. The wife contributed to the marriage and doctor's career from the onset with both direct financial aid and indirect homemaking. Doctor received his license and started a practice in 1985. Suit was commenced in 1986. At that time, they had acquired some traditional assets now worth at the 1987 trial as follows: house $225,000.00; autos $15,000.00; bank accounts $10,000.00; retirement plans $20,000.00; and furniture $30,000.00. The practice was valued at $80,000.00 and the license at $500,000.00.

Applying a suggested formula to the license only, as follows: the numerator being the number of years the wife contributed to the acquisition of the license during the marriage to date of issuance (5) over a denominator, being the number of years the professional husband pursued a formal medical education to the date the license was issued (8). This 62½% coverature fracture represents that portion of the professional license which is marital property subject to equitable distribution. Further assume, the trial court awards the wife 50% of all marital assets having, considered both her direct and indirect contributions to the marriage as an economic partner.

The total value of after acquired traditional marital assets excluding the practice purchased from the stream of income generated from the practice and the wife's income is fixed at $300,000.00. The net unmerged value of the license at trial is now $120,000.00; having subtracted from it the merged value of the practice and other assets. Applying the coverature percentage to the net unmerged value of the license (62½% x $120,000.00) we calculate the marital portion to be $75,000.00.

The wife, therefore, is entitled to 50% of the unmerged marital portion of the license or $37,500.00 and 50% of the value of the traditional hard assets and professional practice for an additional $190,000.00 or $227,500.00 in total assets. There are sufficient hard assets available to provide the trial court with flexibility in its distribution to have minimal effect, if any, on the professional.

Bankruptcy to Discharge Distributive Awards

Whether an unsecured distributive share of a professional license is awarded as a division of property or reimbursement for financial contributions, both are in peril of being discharged in bankruptcy.[12] Non-dischargeable debts in bankruptcy must be "in the nature of" alimony, maintenance or child support. 11 USC Sec. 523(a)(5); 11 USC Sec. 1328; In *Re Spong*, 661 F.2d 6.

Lump-sum alimony to the non-licensed contributing spouse for her contributions to the professional education, dental degree and license is not dischargeable in bankruptcy. *Atkinson v. Atkinson*, 15 BR 223 (Bankruptcy Court D, Nebraska, 1981, #A80/314).

The Federal Bankruptcy Court has recently recognized the need to protect the non-licensed spouse who contributes toward a professional's license or education, by excluding "alimony in gross" as a dischargeable debt in bankruptcy. Chapter 40 of IMDMA amending

Section 504(B). However, the debtor may seek to discharge in bankruptcy only those debts which have "matured or accrued" as of the date the petition is filed. 11 USC Sec. 502. In this regard the *O'Brien* court below has, in its wisdom, spread out the professional's obligation over eleven years which obligations mature successively.

It is certain that the Federal Government must review this area for I doubt it was ever intended that an unsuccessful marriage litigant should discharge a state mandated unsecured judgment by utilizing Federal Bankruptcy Laws. Some jurisdictions like New Jersey have attempted to cure this problem by creating reimbursement alimony which is not modifiable or dischargeable in bankruptcy. *Reiss v. Reiss*, 490 A 2d 378 (N.J. Supra. 1985).

However, were Dr. O'Brien to file bankruptcy, I certainly would urge that any payment sought to be discharged, be credited against the overall evaluation of his license, thereby rejecting the application. Furthermore, if the creditor is willing to be paid pursuant to a regular 10% or court imposed wage deduction order, bankruptcy would appear remote.

Conclusion

Now that professional licenses are property, it remains to be seen, whether all licenses will be treated accordingly.

In any event, what will be determined on a case by case basis is whether a non-licensed spouse has a valued property right therein. Valuation will also be an area of concentration. Methodologies should be clear, concise, generally accepted in the trade and above all credible.

The boundaries in which the law was intended to extend as between spouses, beyond measuring ones enhanced earning capacity in professional licenses will be of developing interest. But, at least as to valuing professional licenses, the Court of Appeals was quite aware of the principles presented in my merger arguments, when it rendered *O'Brien*.

For the practicing attorney, my experience was obviously a rewarding one. The E.D.L. as I perceived it was alive, well and headed in the right direction. As I argued my case, during the question and answer dialogue before the Court of Appeals, I could not help but feel, Justice Cordozo's presence as the Court translated . . ."into law the social and economic forces that (throbbed) and (clamored) for expression."

Endnotes

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Report of the New York State Commission on Child Support

By Judith M. Reichler
September 1988

The New York State Commission on Child Support recently forwarded its 1987 report to the Governor and state legislature. The report contains recommendations for action by the legislature and state agencies that would further strengthen child support laws and procedures in New York.

The Commission noted that, although great progress has been made in strengthening support enforcement, the amounts ordered for child support often are insufficient and have not been in keeping with the incomes of parents. One of the major recommendations contained in the report is that the legislature adopt statutory child support guidelines to be used by judges and hearing examiners in setting amounts for child support. Two such bills are currently pending in the legislature. One is a Governor's program bill (A.6931, Weinstein, Nadler et al); a similar bill has been filed in the Senate (S.6957-A, Goodhue, Dunne et al).

For four consecutive years, Governor Cuomo has made child support part of his proposed legislative program, and the commission noted that both the Governor and the legislature have been consistent in their efforts to ensure that child support obligations are met. According to the Governor, "The Support Enforcement Acts of 1985, 1986 and 1987 greatly improved New York's system for the establishment and collection of both child and spousal support and demonstrated the continuing concern for the children of this state. New York has been and will continue to be in the forefront of support enforcement legislation as we move through the Decade of the Child."

Noting that there is still much work that needs to be done, Judith Avner, chairperson of the Commission on Child Support, said: "During the last three years, New York has added especially effective methods of enforcing child support, It would make a mockery of these efforts if the orders that can be enforced continue to be set haphazardly and do not adequately reflect the ability of the parents to provide for their children so that the children are left lacking, in most cases, and impoverished in others."

The Child Support Enforcement Act of 1985, 1986 and 1987: (1) created an expedited process in family court which provides for hearing examiners in every county to decide child support cases; (2) required that temporary orders and money judgments be given; (3) made enforcement of support orders easier through income deduction and interception of federal and state income tax refunds; and (4) extended the statute of limitations for enforcing child support orders from six years to twenty years.

In addition to the legislative action, local child support agencies have increased the services they offer to persons who do not receive public assistance, and advocacy groups have received greater acceptance within the courts.

The severity of the problem is revealed in recent statistics from the U.S. Census Bureau, which indicated that 14.8 million children lived with a single parent in this country in 1985. Of this group, approximately 90 percent lived with their mothers. This represents almost a quarter of all the children under the age of 18 and is up almost a million since 1982. Yet, close to three-quarters of these families received no child support. Furthermore, the mean amount of support ordered for these children (around $200 per month for two children) decreased 12.4 percent in real terms since 1983, even though the average income of men increased more than five percent in the same time period.

In order to further strengthen child support enforcement in New York, the Commission formulated a series of additional recommendations. These recommendations are directed to the state legislature, the Office of Court Administration, state and local agencies, and those agencies which handle interstate child support enforcement. The Commission on Child Support was created by Governor Cuomo in November 1984 and charged with recommending methods for improving the child support system and making it more responsive to the needs of all children eligible for support.

The following are some of the 1987 recommendations of the New York State Commission on Child Support.

The Child Support Standards Act

Proposed at the request of the Governor, the "Child Support Standards Act" would rectify the problems of very low and inconsistent amounts of child support found in current court determinations.

The proposal would require the court to establish a basic child support obligation by multiplying the combined parental income by the following percentages:

17% of combined income for one child
25% of combined income for two children
29% of combined income for three children
31% of combined income for four children
35% of combined income for five children

The obligation is then divided proportionately between the parents based on their contribution to the combined parental income, and the non-custodial parent must pay his or her pro rata share of the obligation to the custodial parent, unless a variance from the formula is considered appropriate.

Reasonable child care expenses and health care would also be shared by the parents, and educational expenses would be considered by the court. Any variance from the formula would be based on a series of factors, including tax consequences, special health needs or the comparative financial circumstances of the parties.

For the Legislature

1. The legislature should require all support payments to be automatically collected through income withholding, wherever possible.
2. The legislature should provide that a finding by scientific testing of a high probability of paternity would be sufficient to establish a presumption of paternity.
3. The legislature should extend the statute of limitations for the collection of child support and maintenance or alimony from six years to twenty years for all orders.
4. The legislature should provide that only written waivers of child support by custodial parents which set forth exceptional circumstances shall be effective as a defense to the enforcement of child support.
5. The legislature should require access to matrimonial records for research purposes.

For the Office of Court Administration

1. The Office of Court Administration should conduct semiannual training for hearing examiners and annual training for judges in the area of child support.
2. The Office of Court Administration should appoint a coordinator for the hearing examiner program, who will be responsible for training, coordination and supervision.
3. The Office of Court Administration should establish a comprehensive policy for the coordination of intake procedures and develop a model which can be replicated in each family court.
4. The Office of Court Administration should keep statistics which would assist in studying the effectiveness of the new "expedited process," as well to gain information leading to possible improvements in the program.

For State and Local Agencies

1. The State Department of Social Services should increase priority and resources made available to the state child support agency, which should take a greater role in supervising and monitoring the activities of the local child support agencies.
2. Many functions of the local child support agencies should be centralized at the state level through automation.
3. The state child support agency should develop annual individual district management plans, along with different fiscal incentives and penalties and should establish recommended staffing levels for each county.
4. The state child support agency should supplement the federal incentives for serving the non-public assistance population.
5. The state child support agency should develop and require training for child support coordinators and attorneys and assist with litigation and appeals.
6. An advisory committee should be established and demonstration projects set up to test and compare alternative service delivery mechanisms.
7. The state child support agency should improve its outreach campaign to further publicize its services and encourage the payment of child support.

8. The state child support agency should increase public awareness of parental responsibilities and support education in this important area.
9. Increased funding should be made available to legal services and community organizations to provide legal counsel to custodial parents seeking child support.
10. The present law school clinic program should be viewed as a model to be replicated throughout the state.
11. The state Attorney General should assist in providing public education on the problems and remedies for child support and assist in litigation of certain cases.

Interstate

1. New York should repeal its interstate support legislation and replace it with a modified version of the Revised Uniform Reciprocal Enforcement of Support Act (RURESA).
2. New York's reciprocal enforcement of support law should provide for the interstate extradition of persons who have been charged with violating a criminal statute for non-support.
3. The state child support agency should conduct training sessions for local staff involved with interstate cases to assist them in determining the proper remedy for each case and monitor their performance.
4. The Office of Court Administration should provide training for court clerks who handle interstate support matters to assure that their service to support petitioners includes the full range of interstate options.
5. The federal office of child support enforcement should monitor state and local child support agencies and evaluate their performance in interstate matters.
6. The federal office of child support enforcement should impose a penalty on local child support agencies which do not forward support payments to the initiating state within 10 days of receipt.

Copies of this report, and other Commission publications are available from the New York State Commission on Child Support, 80 Maiden Lane, Room 304, New York, NY 10038. 212-804-1026.

The Child Support Standards Act: An Orwellian Demon in Need of Judicial Exorcism

By Timothy M. Tippins
December 1989

When one examines a nascent statute, particularly one as complex and convoluted as New York's Child Support Standards Act,[1] one may become so captivated by the many specific features of its visage as to lose sight of more fundamental aspects of its character. So distracting are its mandatory and discretionary income imputations and add-backs, income deductions and obligatory and optional add-ons, that one might be forgiven for neglecting a more basic assessment of the essential character of this legislative lovechild.

What has sprung forth from the legislative womb? Is the CSSA a remedial statute which will bestow positive blessings upon matrimonial litigants and their children, or is it a monstrosity possessed of demonic peculiarities in dire need of judicial exorcism? The postulation here is that the CSSA is, indeed, a legislative freak; one which emerged from a serpentine and painful legislative gestation, flawed by demonic attributes which, if not promptly exorcised by a vigilant and vigorous judiciary, may wreak devastation upon the landscape of family values long cherished by our society. Simultaneously, however, and with equal force, it must be said that within the body of this statutory neonate repose the seeds of its redemption, found in the fact that its future development has been entrusted to judicial hands.

The Conception of the CSSA

The CSSA has its roots in the 1984 Federal amendments to the Social Security Act,[2] which were aimed at putting teeth into the collection of child support to reduce the number of children receiving welfare. The federal amendments required tighter state enforcement of child support awards. They also mandated that every state have numeric child support guidelines. The guidelines could be mandatory, presumptive or advisory only. The sanction for noncompliance was the loss of federal funding for state welfare programs. No legislation was required in New York, however, because the state was deemed to be in compliance by virtue of the administrative guidelines promulgated under Social Services Law § 111-i.

In late 1988, a new federal mandate emerged in the Moynihan bill, legislation again aimed at reducing the cost of public assistance. The Moynihan mandate required that the state child support guidelines be given the status of a rebuttable presumption.[3] It was in direct response to the Moynihan amendment that the CSSA emerged.[4]

The Essence of the CSSA

Contrary to popular parlance, the CSSA does not establish support guidelines. Rather, it presents to the court a choice of methodology to be employed in making a child support determination. The court may determine the amount of child support by one of two methods. It may apply the support formula[5] or it may determine its award in the traditional manner of a factor-based cost-allocation of the reasonable needs of the child.[6] Although the formula, in accordance with the Moynihan mandate, is granted the status of rebuttable presumption, it will be seen below that the presumption is readily rebuttable. Before addressing that issue, however, it is important to consider the essential nature of the two methodologies.

The New York Formula

The signal feature of New York's support formula is that it is entirely income-driven. While calculation of parental income is, in itself, no mean feat, once the parental income is determined, the child support amount is determined by multiplying that income by the appropriate child support percentage.[7] The applicable child support percentage is determined solely by the number of children for whom support is being determined.[8] The fact that the cost of rearing children will vary by virtue of their age, or due to geographic location, such as urban vs. rural, is totally ignored by the formula.

Significantly, the formula also ignores the underlying economic data upon which it purports to be predicated. The seminal research to which proponents of the formula pointed for justification was the work of Thomas Epenshade and its subsequent refinement by Dr. Robert G. Williams. The Epenshade studies were directed at the "average" expenditures of families relative to the number of children in the household. However, the rub here is that the households under Epenshade's economic eagle eye were intact households.[9] What relevance such data has to a support schemata in divorce cases where the parents are separated and burdened with the cost of maintaining a second independent household remains an enigma.

Further, although Williams was imported by proponents of the formula to speak on behalf of the proposed legislation, he was primarily an advocate of the income-shares model of child support determination, a paradigm which, although also predicated upon data relative to parental expenditures in intact households,[10] reflects yet another economic reality which is not mirrored by the

New York formula. Williams' model accommodates the fact that, while the number of dollars spent on children by the average family increases as family income goes up, the percentage of family income spent on the needs of the children decreases. Thus, under the income-shares approach, a decreasing child support percentage is applied as parental income increases.[11] In contrast, New York employs a flat percentage approach, akin to that adopted by Wisconsin,[12] so that the same child support percentage, *e.g.*, 17% for one child, is utilized whether the parental income is $10,000 or $20,000 per year.

Finally, it must be noted that the New York formula operates to exclude consideration of the custodial parent's income, thereby abrogating the well-established precept that child support is a mutual obligation of both parents. This significant flaw is not readily perceptible upon cursory examination of the statute. The surreptitious subversion of the mutuality of obligation is hardly accidental. Governor's Program Bill #55, the original statutory offering in this realm, was, at least, an honest bill in this respect. It clearly reflected the fact that the child support amount was solely a function of the noncustodial parent's income, with the resources of the custodial parent counting for naught. Understandably, such patent inequity generated tremendous opposition. Accordingly, when the next version of the support formula emerged, lo and behold, it spoke in terms of "combined parental income," thereby creating an illusion of fairness where none existed in fact.

The New York formula requires the court to compute the child support award by a three-step process. First, the court must determine combined parental income,[13] which is the sum of the income of both the custodial and noncustodial parent.[14] Second, the court multiplies the combined parental income by the appropriate child support percentage.[15] Finally, step-three requires that the court prorate the obligation between the parents in the same proportion as the income of each parent bears to the combined parental income.[16]

A couple of examples will illustrate the irrelevance of the custodial parent's income under the formula.

Assume that the wife is the custodial parent and that the husband is the noncustodial parent. Assume further that the parties have two children. Also assume, at this juncture, that there are no add-ons for health care, childcare, or educational expenses.

Example #1: Assume that the husband's income is $40,000.00 per year and the wife's income is zero. Now work the guidelines.

Step #1: Determine combined parental income:

Husband's income $40,000.00
Wife's income $0.00
Combined Parental Income $40,000.00

Step #2: Multiply combined parental income by appropriate child support percentage. Reference to DRL § 240(1-b)(b)(3) states that 25% is the appropriate percentage for two children. Thus, $40,000.00 x 25% yields a product of $10,000.00. This represents the basic child support obligation.

Step #3: Prorate the basic child support obligation between the parents in the same proportion as each parent's income is to the combined parental income. In this case, because the husband's income equals 100% of the combined parental income, he is chargeable with the entire child support obligation. In other words, he must pay to the wife the sum of $10,000.00 per year in child support.

Example #2: Assume that the husband's gross income is $40,000.00 per year. This time, assume that the wife's income is also $40,000.00. Again, work the guidelines:

Step #1: Determine combined parental income:

Husband's income $40,000.00
Wife's income $40,000.00
Combined Parental Income $80,000.00

Step #2: Multiply combined parental income by appropriate child support percentage. Reference to DRL § 240(1-b)(b)(3) states that 25% is the appropriate percentage for two children. Thus, $80,000.00 x 25% yields a product of $20,000.00. This represents the basic child support obligation.

Step #3: Prorate the basic child support obligation between the parents in the same proportion as each parent's income is to the combined parental income. Because the husband's income equals 50% of the combined parental income, he is chargeable with the 50% of the child support obligation. In other words, he must pay the wife the sum of $10,000.00 per year in child support.

As the examples reveal, the noncustodial parent earning $40,000.00 per year will be charged with a basic child support obligation, assuming no add-ons, of $10,000.00 per year for two children, whether the custodial parent earns nothing or whether the custodial parent is earning $40,000.00 per year. One can plug in any numbers at all, so long as the combined parental income stays within the statutory cap of $80,000.00 and the result will be the same. The income of the custodial parent is rendered irrelevant and the concept of mutuality is thereby entirely vitiated by the formula.

The Traditional Cost-Allocation Approach

The alternative methodology permitted by the CSSA is one with which the matrimonial bench and bar is well familiar. That is the traditional factor-based cost-allocation approach. Under this traditional method, the court determines the reasonable needs of the child, as reflected by the standard of living enjoyed by the child prior to

separation,[17] and then allocates the cost thereof between the parents proportionately to their respective incomes, a critical apportionment which reinforces the mutuality of the child support obligation.[18]

The hallmark of the cost-allocation approach is that the court looks to the standard of living established by the family before the bar as the criteria against which the child's needs are measured. It is this feature of the cost-allocation approach which contrasts so dramatically with the formula method, which blithely assumes that the needs of a child turn only on the amount of available parental income. Because cost-allocation looks to the standard of living actually established by the individual family, it is predicated upon reality rather than presumption, so that differences in the cost of childrearing occasioned by variation in age and geographic location, elements ignored by the formula, are accommodated.

Most significantly, cultural and ethical values, which are totally subverted by the formula, are deemed worthy of judicial respect under the principles of cost-allocation. Under the traditional approach, the court is charged with the duty of preserving the standard of living established for the children by the family prior to the onset of domestic discord and disintegration. Unlike the formula methodology, the court is not in the business of imposing state-sponsored standard of living contrived by omniscient social architects who are the willing, indeed enthusiastic, handmaidens of Big Brother.

Essentially, the traditional approach respects an important family value which is dramatically dispatched by the support formula: that each family has the right to determine its own standard of living and individual family differences in values will be respected by the state.

Pursuant to this approach, the Green family has the right to decide that it wishes to imbue the work ethic in its children, a value reflected by the fact that the parents provide the basic necessities but the children are expected to work for the frills. In this family, paper routes, rather than parental allowances, are the order of the day. The Smith family, on the other hand, may not be so enamored of the worth ethic and may fervently cling to the notion that the darling bi-product of their genetic pool should be denied nary a whim.

Society has long embraced the belief that the Green family knows what is best for the Greens and the Smith family knows what is best for the Smiths. In the event of domestic strife, under the traditional approach to child support, the courts will do their best to preserve those lifestyle choices by equitably distributing the financial burden of maintaining them.

In marked contrast, such lifestyle decisions count for nothing under the formula methodology. Where the formula is employed, the state simply steps in, casts out the values of the individual family, and substitutes its own divine wisdom. In effect, the State says that neither Father nor Mother know best. Rather Big Brother knows best.

Variance Factors: The Statutory Seeds of Redemption

Although the CSSA is possessed by the Orwellian demon, embodied in the support formula, its Legislative sire was careful to plant within its body the seeds of its own redemption, seeds which must be brought to harvest by painstaking judicial cultivation. The redemptive quality of the CSSA is that it retains judicial discretion as the ultimate arbiter for determination of child support. While the formula methodology, in accordance with federal requirements, is granted presumptive status, the presumption is readily rebutted upon the judicial finding that its result is either unjust or inappropriate.[19]

The perpetuation of judicial discretion cannot be taken lightly. Indeed, throughout the three-year course of debate and discussion which preceded passage of the CSSA, the proponents of the formula repeatedly reassured all who would listen that their brainchild would in no way hamper the free exercise of judicial discretion. This point was, in fact, a political prerequisite. Any proposal to eviscerate the judiciary of its discretion to bring human wisdom to bear upon human problems would probably have been denied passage by all but the most radical legislators or those members either infatuated or terrified by the special interest groups which touted the formula. So central to the CSSA is the continued vitality of judicial discretion that it is cited as a fundamental value in the Legislative Declaration which introduces the statute.[20]

The CSSA provides the framework for the exercise of judicial discretion. It sets forth an extensive list of narrative factors, any one of which may impel the judicial hand to cast out the formula.[21] The factors number ten in all, consisting of nine express enumerations, many of which have antecedents in pre-CSSA law,[22] and a concluding catch-all consideration by which the court is freed of the formula constraints based upon any other factors which the court deems relevant in any given case.

Most importantly, Factor #3 provides that the court may reject the formula upon a finding that its result is inappropriate when viewed against "the standard of living the child would have enjoyed had the marriage or household not been dissolved."[23] In effect, this requires that whenever the proof adduced at trial shows that the preseparation lifestyle established by the family varies from the preordained, state-sponsored standard dictated by the formula, Big Brother must bow to the sanctity of the individuated family values. Once that showing is made, the court should deposit the formula in a well-deserved place in the judicial dustbin. At that point, Factor #1, which directs the court's attention to the resources

of the respective parents,[24] facilitates the traditional allocation of the financial burden of preserving the standard of living instituted by the family.[25]

Conclusion

In sum, the CSSA is a child of hapless parentage. It was spawned by federal legislation aimed at relieving the welfare burden. It was nurtured prenatally by the social architects who would reorder society to comport with their own socialist ideology. It was carried to term by a Legislature more concerned with counting votes than with considering the merits of the matter.

But now, fortunately, the care and custody of that statutory child has been entrusted to a judiciary endowed with the requisite discretion to prudently shape its future development. The first step is for the courts to exorcise the Orwellian demon which lurks within the statutory body by clearly and forcefully holding that whenever it is proven that the standard of living actually established by any given family is at variance with the formula result, the proper exercise of judicial discretion requires that the formula be jettisoned and the child support amount be determined in accordance with traditional and equitable cost-allocation principles.

That such a holding is invited by the structure of the CSSA is evidenced by the attention to detail evinced by the existence of enumeration of variance factors which the statute embodies. Indeed, the force and continued availability of judicial discretion is expressly ensured by the Legislative Declaration which introduces the new law. However, whether that discretion, the mental muscle of the judiciary, will remain vital depends upon what the courts now do with it. Like physical muscle, its continued vitality requires regular and vigorous exercise. If the judiciary allows itself to be seduced by the virtually ineluctable charm and seeming simplicity of the support formula, resorting to Texas Instruments instead of human brainpower, then the mental muscle of our courts will surely atrophy and, ultimately, die. This of course, is precisely the denoument which the social architects crave. Having been unable to gut the courts of their discretion by legislative fiat, they now count on judicial sloth to self-inflect the fatal wound.

In the final analysis, as a matter of judicial conscience, the courts must decide what system of domestic dispute resolution the citizens of New York deserve. Will our families be deemed worthy of distinguished judicial determinations, whereby their problems are resolved by the application of human experience, judgment and wisdom, or will they be treated as mere fungibles, relegated to push-button, computerized justice? The answer now rests in judicial hands.

Endnotes

1. L. 1989; Ch. 567.
2. Public Law 98-378.
3. Public Law 100-998, § 103, amending § 467(b) of the Social Security Act.
4. For more extensive treatment of the legislative history of the Child Support Standards Act, see 1 Tippins, *New York Matrimonial Law and Practice*, Callaghan & Company, Chapter 5A, § 5A:10.
5. DRL § 240(1-b)(c).
6. DRL § 240(1-b)(f).
7. DRL § 240(1-b)(c)(1); DRL § 240(1-b)(c)(2).
8. DRL § 240(1-b)(b)(3).
9. Epenshade, Thomas J., *Investing in Children*: *New Estimates of Parental Expenditures,* Urban Institute Press, Washington, D.C., pp. 7-8.
10. Williams, Robert G., "Development of Guidelines for Establishing and Updating Child Support Orders, Interim Report," 6-7-85, U.S. Department of Health and Human Services, Office of Child Support Enforcement, p. 65.
11. Williams, Robert G., "Guidelines for Setting Levels of Child Support Orders," *Family Law Quarterly*, Vol. XXI, No. 3, Fall 1987, pp. 291-295.
12. Wisconsin Administrative Code HSS 80.03(1).
13. DRL § 240(1-b)(c)(1).
14. DRL § 240(1-b)(b)(4).
15. DRL § 240(1-b)(c)(2).
16. DRL § 240(1-b)(c)(2).
17. DRL § 236(B)(7), prior to amendment by the CSSA, set forth a list of five statutory factors designed to guide the court in determining the amount of child support to be awarded. Among them was the standard of living the child would have enjoyed had the marriage not been dissolved. The statute wisely qualified this factor by stating that it should be considered only to the extent practical and relevant, a legislative recognition that, except in families possessed of substantial means, the loss of economy of scale, inherent in the need to maintain a second household, required that the standard of living of all family members be somewhat contracted. *See* Hebron v. Hebron, 116 Misc.2d 803 (Sup. Ct., Queens Co. 1982).
18. Carter v. Carter, 58 A.D.2d 438, 447 (Second Dept. 1977); *See also,* Whitaker v. Whitaker, 141 A.D.2d 722 (Second Dept. 1988); Pulitzer v. Pulitzer, 134 A.D.2d 84, 87-88 (First Dept. 1988); Falcone v. Falcone, 112 A.D.2d 796, 797 (Fourth Dept. 1985).
19. DRL § 240(1-b)(f). It should be noted that the Legislature previously had before it a proposed guidelines bill which would have imposed a more stringent standard for deviation from the support formula methodology. The Smith-Present-Goodhue bill (3733-A), introduced in the 1985-1986 Regular Session, permitted departure from the support standards only upon a showing of "special or unusual circumstances when application of the standards will result in an inequitable support order." (For the full text of 3733-A, see 2 Tippins, *New York Matrimonial Law and Practice*, Appendix Q, 1989 Appendix Supp. P. 81, Callaghan & Co., Deerfield, Illinois) By rejecting such a variation standard and adopting the significantly easier criteria by which the court can reject the formula approach simply upon finding that it produces an inappropriate result, the Legislature reaffirmed its commitment to the essentiality of judicial discretion.
20. L. 1989, Ch. 567, § 1.
21. DRL § 240(1-b)(f)(1)-(10).
22. *See* former DRL § 236(B)(7)(a).
23. DRL § 240(1-b)(f)(3).
24. DRL § 240(1-b)(f)(1).
25. Carter v. Carter, 58 A.D.2d 438, 447 (Second Dept. 1977).

Judicial Allocation of Tax Benefit—Fourth Department Orders Custodial Parent to Waive Dependency Exemption

By Nancy D. Peck
June 1990

Introduction

Prior to the passage of the Deficit Reduction Act of 1964, the Internal Revenue Code authorized state courts to allocate the dependency exemption to a non-custodial parent (IRC Section 152[e] [1982]). In 1984, I.R.C. Section 423(a), 98 Stat. 494, 799, Section 152(e) was amended, allocating the dependency exemption to the custodial parent but permitting the custodial parent to transfer the exemption by executing and delivering a waiver to the non-custodial parent.

The trial court's decision in *Sheehan v. Sheehan*, (un reported) (Sup. Ct., Monroe County), directed "that the father shall be entitled to take the child as a dependent on his federal and state income tax returns and the mother will promptly execute any documents, including but not limited to Internal Revenue Service Form 8332, Release of Claim for Child of Divorced or Separate Parents, to effectuate the intent of this provision." The mother appealed from this order, arguing that the language of IRC Section 152(e) precluded the court from ordering the execution of the waiver, relying on only the reported New York case addressing this issue, *Bennett v. Bennett*, 140 A.D.2d 400 (2nd Dept. 1988). The Fourth Department, in a memorandum decision, *Sheehan v. Sheehan*, 152 A.D.2d 942, (4th Dept., July 12, 1989), held that ". . . the court did not exceed its powers in directing defendant, as custodial parent, to execute a waiver of her right to claim that exemption."

In *Bennett*, the appellant-husband moved for a modification of a previous judgment to award him a tax exemption for the child of the marriage. The trial court refused to do so, without explanation. In fact, the trial court on hearing the motion, commented "I don't have anything to do with that." The Second Department affirmed the lower court without reference to the extent of financial contribution the father made to the child or his changed circumstances upon which he grounded his application. Instead, the court paraphrased Internal Revenue Code Section 152(e) and found only that the trial court had not erred in refusing to transfer the exemption from the mother to the father. As the commentary to Section 236B of 14 McKinney's Domestic Relations Law, (C236B:32), points out: "While the court noted that the federal income tax law allows the custodial parent to claim the exemption, unless he or she releases it, the court did not expressly rule on whether the courts have the power to compel such a release."

Thus it appears that the *Bennett* ruling in the Second Department and the *Sheehan* ruling in the Fourth Department are not in conflict, because the Fourth Department is the only Appellate Division in New York which has ruled on the authority of State courts to compel the release of a waiver.

Discussion

The Second Department memorandum decision in *Bennett* is in conflict with the determinations of the appellate courts in most of the other jurisdictions which have considered this issue and compelled the waiver by the custodial parent. See, e.g., *Pergolski v. Pergolski*, 143 Wis. 2d 166, 420 N.W.2d 414, 417 (Wis. Ct. App. 1988); *Cross v. Cross*, 363 S.E. 2d 449, 456-460 (W. Va. 1987); *Lincoln v. Lincoln*, 155 Ariz. 272, 746 P.2d 13, 16-17 (Ct. App. 1987); *Fudenberg v. Molstad*, 390 N.W.2d 19, 20-21 (Minn. Ct. App. 1986); *Fleck v. Fleck*, 427 N.W.2d 355, 357-359 (N.D. 1988); *Wassif v. Wassif*, 77 Md. App. 750, 551 A.2d 935; *In Re Marriage of Milesnick*, 765 P.2d 751 (Mont.); *McKenzie v. Jahnke*, 432 N.W.2d 555 (N.D.); *In Re Marriage of Einhorn*, 178 Ill. App. 3d 212, 533 N.E. 2d 29; *Hughes v. Hughes*, 35 Ohio St. 3d 165, 118 N.E.2d 1213; *Hooper v. Hooper*, 1988 W.L. 10082 (Tenn. Ct. App., n.o.r.) *lv denied* __ S.W.2d __ (Tenn., decided May 2, 1988); but see *Lorenz v. Lorenz*, 166 Mich. App. 58, 419 N.W.2d 770, 771 (1988).

In *Fudenberg v. Molstad*, the Court of Appeals of Minnesota analyzed the issue in considerable detail. The court reviewed the legislative history of the 1984 Amendment of Section 152(e) of the Internal Revenue Code and concluded, at page 21:

> It appears from the legislative history that Congress was most concerned with alleviating the burden on the IRS caused by factfinding determinations. Under the old law, the question of how much support had been provided by each parent was a fact question that had to be resolved by the IRS when the parents could not agree and each sought to claim the exemption. Under the new law, the IRS no longer needs to be concerned with these fact questions. The only questions are which parent is the custodial parent, and whether he or she has waived the right to claim the exemption.

> State court allocation of the exemption does not interfere with Congressional intent. It does not involve the IRS in factfinding determinations. State court involvement has no impact on the IRS. Thus the allocation of the exemption is permissible. Cf. *Valento v. Valento*, 385 N.W.2d 860 (Minn. Ct. App. 1986) (affirming, as within the trial court's discretion, allocation of the exemption to the custodial parent).

In *Cross* (at p. 457), the West Virginia Supreme Court of Appeals engaged in a similarly extensive analysis of the legislative history and rationale underlying the 1984 amendment. In addition, it reviewed the two tests articulated by the United States Supreme Court for determining whether there is a conflict between a federal statute and state law.

> The first of these tests provides that a conflict exists when "compliance is a physical impossibility. . ." *Florida Lime and Avocado Growers Inc. v. Paul*, 373 U.S. 132, 83 S. Ct. 1210 (1963). The second tests provides that a conflict will be found when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress" *Heinz v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399 (1941). (*supra*, p. 459).

In deciding that there is no conflict between the Internal Revenue Code section at issue and the power of a trial judge to allocate the dependency exemption, the court concluded:

> Our holding today concerning a court's power to order a custodial parent to waive the dependency exemption meets both tests. IRC Section 152(e) seeks only certainty; it requires a waiver to allocate the dependency exemption to the non-custodial parent and a court-ordered waiver is as acceptable as any other. The second test relating to Congressional intent is also met: the amended IRC Section 152(e) is designed to ease the IRS's administrative burden and not to rearrange economic benefits between divorced parents (*op. cit*.)

The *Cross* court also responded to the argument that the amendment of Section 152(e) was designed to confer, by federal law, a collateral financial benefit upon the custodial parent. "Nothing, however, could be further from the truth. What the new Code section sought to achieve was certainty in the allocation of the dependency exemption for *federal tax administration purposes* . . . The new statute is entirely silent concerning whether a domestic court can *require* a custodial parent to execute a waiver, and this silence demonstrates Congress's surpassing indifference to how the exemption is allocated as long as the IRS doesn't have to do the allocating" (*Cross*, at 457) (emphasis in the original).

The Supreme Court of Appeals of West Virginia added:

> ". . . there is *no prohibition*—express or implied—on a state court's requiring the execution of the waiver, and because state court allocation of dependency exemptions has been custom and usage for decades, it is more reasonable than not to infer that if Congress had intended to forbid state courts from allocating the exemption by requiring the waiver to be signed, Congress would have said so. *Cross*, at p. 458 (emphasis in the original).

It is important to note that, if the trial court has the authority to direct the execution of the waiver and so allocate the exemption, it also has the further obligation to review whether awarding the exemption to the noncustodial parent is appropriate in the light of the entire financial record of the case. In *Sheehan*, the noncustodial parent called a certified public accountant as an expert witness who described the tax effect of the allocation of the dependency exemption on each of the parties. The Accountant testified that the custodial parent, the mother, was the only parent entitled to claim head-of-household filing status and offered testimony as to the tax saving effect of such status to the mother. This testimony was persuasive in showing that, given the incomes and tax brackets of the parties, the benefit of the head-of-household status to the custodial parent was worth substantially more in tax relief than the dependency exemption assigned to the non-custodial parent by the trial court's decision.

Conclusion

The reasoned analysis of the other jurisdictions that have considered the relationship between Section 152(e) and the authority of a trial court to equitable resolve matrimonial disputes was apparently more persuasive to the Fourth Department than the *Bennett* decision. The Second Department did not directly discuss the trial court's power to order the execution of the waiver.

Sheehan stands for the proposition that there is nothing in the 1984 Amendment to Section 152(e) of the Internal Revenue Code which precludes a trial court from allocating the dependency exemption as an integral part of its child support determination. By ordering the custodial parent to execute the waiver required by the Internal Revenue Code, it is merely implementing its finding as to support obligations, an inherent power conferred on trial courts, and not diminished by the Internal Revenue Code amendment.

Domestic Relations Law § 236B(4)(b): A Mirage of Discretion for Valuation Dates of Marital Property

By Dawn Elizabeth Capanna
June 1991

In 1986 the New York Legislature enacted Domestic Relations Law § 236B(4)(b) which applies to all equitable distribution proceedings commenced on or after September 1986:

> As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be any time from the date of commencement of the action to the date of trial.[1]

The statute itself permits judicial discretion for assigning a valuation date or dates to marital property as long as the valuation date or dates are between the date of commencement and the date of trial.

Yet it is not a literal reading of the words of DRL § 236B(4)(b) which influences the selection of a valuation date for all forms of marital property. The judicial discretion conferred by the language of DRL § 236B(4)(b) is actually a mirage. As the practitioner approaches the valuation horizon, broad discretion vanishes and is replaced by a minefield of fixed valuation dates, deceptive burdens of proof and compelled persuasive diction. Each of the four Departments has effectively circumvented the judicial discretion conferred by DRL § 236B(4)(b) for at least one form of marital asset, thereby altering the literal reading of the statute. The unsuspecting desert traveler must pay particular homage to the true valuation terrain: those lower court opinions lacking an adequate and weighty list of factors to support a valuation date contrary to the departmental fixed valuation date are either reversed or remanded to develop the record to conform the opinion.

It is crucial to an understanding of DRL § 236B(4)(b) to analyze all precedents according to three questions: 1) is there a fixed valuation date assigned to a particular marital asset; 2) what is the corresponding burden of proof to support or rebut the fixed valuation date; and 3) what is the particular parlance which did or did not overcome the fixed valuation date. Using this analysis, it is possible to transform mines into markers and effectively prepare for court.

The Second Department

The leader of valuation issues is the Second Department. Its opinions, generally revolving around three marital assets, constitute an integral part of the direction taken by the other departments on cases involving DRL § 236B(4)(b).

Marital Residence. In 1986, shortly after passage of DRL § 236B(4)(b), the Second Department decided *Wegman v. Wegman*.[2] Although DRL § 236B(4)(b) was technically inapplicable to the case at bar, a fortuitous presentation of valuation dates by the parties permitted the court to fashion a valuation presumption which fit comfortably within the guideposts of DRL § 236B(4)(b). During the *Wegman* trial, expert testimony was received from both parties estimating the value of the Freeport residence at the 1973 date of purchase, the 1983 date of commencement of action and the 1984 date of trial. The court held that the marital residence was to be valued at the date of trial for distributive award purposes. It should be noted that the date of trial was selected based upon precedent, authors' commentaries and a survey of opinions from foreign jurisdictions.

Intentionally or not, the ruling of *Wegman* became a fixed valuation point: "Where the asset to be valued is the marital residence, we have generally held that the valuation date employed should be the date of trial."[3] The majority of Second Department opinions which concern the valuation date of the marital residence adhere to this fixed valuation date of trial. In *Siegel v. Siegel*, the court valued the marital residence and an apartment at the date of trial. The opinion simply referenced the *Wegman* fixed valuation date and declared the properties' respective values as of the date of trial in 1984.[4] In *LeStrange v. LeStrange*, the court opinion merely commented that ". . . it was within the court's discretion to use the date of trial of the equitable distribution issues as the valuation date for the various parcels of property."[5] In *Ierardi v. Ierardi*, the court referenced and applied the *Wegman* opinion, again reinforcing ". . . we have generally held that the valuation date employed should be the date of trial."[6]

The party who wishes to use the date of trial valuation for the marital residence should simply and easily invoke the *Wegman* doctrine. Even in those factual situations recognized by the court to cause detriment to a

spouse, the fixed valuation date for marital residences was upheld. One case in particular, *Kane v. Kane*, contained a prospective ruling from the Second Department: "Moreover, the equitable distribution court would be *precluded* from selecting the earlier date [of commencement] as the valuation date for the marital residence or other marital property, a result with further potential negative consequences to the wife."[7] (emphasis added).

The burden of persuasion is thus shifted to the opposing counsel who seek a different valuation date to demonstrate a unique justification for use of a particular, alternative valuation point. A golden illustration of the overwhelming factors required to rebut the date of trial presumption and employ the date of commencement is the recent case of *Moody v. Moody*.[8] In 1964, although informally separated, Charles and Pearl Moody jointly purchased a home for $26,500. The husband lived there only intermittently and permanently left the marital residence in 1972. In 1987, 15 years after permanent separation, Charles Moody brought an action for divorce and sought valuation of the parties' only marital asset at its 1988 fair market value of $265,000.

The trial court set the valuation date at the date of separation in 1972, finding a fair market value of $33,000.00. The Second Department declined to disturb the net effect of the trial court's decision, citing the following factors:

- In 1972, the husband ceased making any contribution toward maintaining the home and he thereafter made no contribution toward repayment of its mortgages;
- As a result of the husband's failure to report certain income on jointly filed tax returns, tax liens and delinquent tax assessments were filed against the property, and the wife was required to repay the Internal Revenue Service approximately $12,000.00;
- The husband made no payments to the wife, who was employed, toward her support; and
- Except for a few payments for parochial school expenses, the husband made no contribution toward the support of the parties' daughter, as a result of which the wife bore virtually all of the financial and custodial burdens of raising and educating the parties' daughter through college.

The court directed that the wife pay the husband a distributive award of $18,000.00, that sum representing 50% of the home's 1972 value plus the amount the husband contributed toward the down payment and closing costs.

Essentially, the party seeking an alternative valuation date must paint a fountain in the desert landscape which revives the very philosophy of the *Wegman* court that "The purpose of using this date is to avoid the injustice to one spouse which could result from either appreciation or depreciation in the value of the residence between the date of commencement of the action and the date of trial."[9] Injustice, at least for now, must be demonstrated by conclusive proof of the financial contributions of one spouse as in *Moody*.

Business Interests. Most opinions concerning business interests focused on the closely-held corporation interests of the husband. These interests, with some exceptions, are valued pursuant to a fixed commencement valuation date unless that valuation would so "distort" the parties' economic situation as to result in "an unfair distribution of assets."[10]

This presumption also arises from the *Wegman* decision, which held that an interest in a closely-held corporation should be valued at the date of commencement. The particular outcome of the Wegmans' own circumstances distinguishes the general rule to articulate an exception. The fact pattern in *Wegman* concerned the development of a family mail order business into Advance Biofactures Corporation. By the time of trial, the corporation employed approximately 60 persons, had four subsidiaries and held retained earnings of nearly $3,000,000. The linchpin factor which influenced the court to value the corporation at the date of trial was the evolution of the specific product from which the corporation significantly increased its earnings. The product, collagenase, received approval from the FDA in 1965, but was not actively marketed until 1972, accounting for 95% of the corporation's income by the time of trial in 1984. The non-titled spouse successfully articulated her contributions to the economic partnership during the period of adoption and marketing of collagenase as non-monetary contributions whose effects were not realized until the product became successful.[11] The Second Department agreed and entitled the non-titled spouse to a distributive award on remand of the corporation, valued at trial at over $6,500,000, of which 60% was marital property.

The *Siegel* opinion, also relevant to this area of discussion, presents a fact pattern which applies the date of commencement as the fixed valuation date. Any discussion regarding an appropriate valuation date was pared to a citation of the *Wegman* opinion. The court instead reviewed the expert testimony, finding the wife's expert to be "overly speculative, and therefore unworthy of belief," and the husband's expert "equally unpersuasive." The court dubbed its authority to arrive at an accurate valuation of two carpeting and rug retailers at $1,265,000 as of the 1981 commencement date as "independent fact-finding powers."[12]

Several other opinions concerning interests in closely-held corporations followed a perfunctory citation of *Wegman* in the application of the fixed valuation date presumption. Most recently, *Kallins v. Kallins* reduced the presumption to a definition of the equation for the value of the appreciation of the business of which the non-titled spouse is entitled to an equitable share as ". . . the difference between the value of the business at the time the parties were married and its value at the time of the commencement of the action."[13]

The titled spouse should be prepared to present the valuation of the business at the point of marriage (or formation) and at the point of commencement of the divorce action. The valuation for the Second Department should follow the capitalization of earnings method for valuing a closely-held corporation.[14] It is important that the valuation data be presented by a credible expert witness and include a written statement for the court.

The titled spouse, however, may be requested to submit to discovery requests concerning the business through the date of trial. At least two rulings from the Second Department have granted additional discovery to the non-titled spouse for full disclosure of all evidence for the period after the date of commencement for the purpose of establishing the true worth of the asset.[15]

The non-titled spouse should aggressively use this discovery privilege to arrive at a valuation also following the capitalization of earnings method for valuing a closely-held corporation for the date of marriage (or formation), the point of commencement of the divorce action and the date of trial. The non-titled spouse must then form a persuasive argument along one of three lines. First, that the effects will be enjoyed by the titled spouse even beyond the date of trial.[16] Or, second, that the efforts of the non-titled spouse were crucial to the formation of the business (*e.g.*, attracted capital contributions).[17] Or, third, that the non-monetary contribution of the non-titled spouse continue to facilitate the ability of the titled spouse to improve his business (*e.g.*, care of children as custodial spouse).[18] The non-titled spouse must, therefore, argue that the economic partnership, which was created when the parties were married, positively influenced the business interest of the titled spouse and will continue to influence the titled spouse even after the court declares the spouses "divorced."

Retirement Investments. Those investments, such as pension plans, made for retirement income are strictly held to a date of commencement fixed valuation. The corpus of the funds accumulated during the marriage and prior to the commencement of the divorce action constitute marital property pursuant to DRL § 236B(1)(c) and are thus valued at the date of commencement.

The opinion which established the fixed valuation date, *Marcus v. Marcus*, relied upon the earlier opinion of *Majauskas v. Majauskas* as well as the procedural definition of marital property.[19] The facts of the *Marcus* opinion are not elaborate; the court merely comments that the husband was the titled spouse to a retirement plan trust "being in the nature of a pension plan." All other opinions, without exception, have thus far followed *Marcus* as an irrefutable presumption to an alternative valuation date for any retirement investment similar to a pension.

The First Department

An earlier First Department case, *Capasso v. Capasso*, appeared to closely parallel the Second Department approach.[20] The case valued several parcels of real property as of the date of trial (citing *Wegman*) and valued business interests held by the titled spouse as of the date of commencement.

While the First Department hinted at following the Second Department approach, it appears from a very recent decision that the First Department now intends to use a "passive"—"active" categorization of marital assets to affix valuation dates. Those assets deemed "passive" will presumptively attach a fixed valuation point of date of trial, while those assets deemed "active" will presumptively attach a fixed valuation point of date of commencement. "Passive" assets are those which appreciate in value strictly as a result of random market fluctuation or the efforts of others. "Active" assets are those that appreciate due to the efforts of the titled spouse, such as undeveloped real estate and mutual funds.

The case which lays out this approach, *Greenwald v. Greenwald*, was decided February 1991.[21] The opinion concerned the valuation and distribution of such marital assets as an ESOP stock trust, security accounts and a limited partnership interest. The ESOP stock was held in the husband's name by Katz Communications, Inc., for which he began working after the parties were married. Fifteen years later, after several promotions, the husband became president and chief executive officer of the corporation. The ESOP trust was thus dubbed an active asset ". . . in recognition that its substantial appreciation in value was the product of [his] labors" and the valuation of the ESOP stock was set at the commencement of the action.[22]

Two security amounts held in the husband's name by Merrill Lynch were also deemed active assets. The First Department imparted a rule-of-thumb for securities which discounts the significance of the titled spouse's financial advisor. "Though he/she acts

through an agent, the decisions are still those of the titled spouse and the results, be they beneficial or adverse, are the product of his/her labors, not random fluctuations."[23] The quantum of evidence presented by the titled husband to earn the active involvement classification: ". . . to identify the approximate number of shares held and give the time of purchase and price, as well as other relevant details."[24] Finally, the husband's interest as a limited partner in a partnership formed to invest and trade securities was deemed a passive asset and valued as of the date closest to date of trial. The court rested upon fundamental business principles: "While a general partner may have a fiduciary duty to a limited partner, the former is not the latter's agent" and, furthermore, the limited partner had no voice in the partnership's investments or trades.[25]

The Third Department

The Third Department asserts the broad principle that all marital assets should be valued as of the date of commencement of the action, with the exception of the marital residence which should be valued as of the date of trial (pursuant to *Wegman*). The principle is based upon the Third Department decision of *Lord v. Lord*,[26] which stated: ". . . unless doing so would be patently inequitable, valuation of marital property is properly fixed at the commencement of the action."[27]

The Third Department adopted the *Wegman* trial valuation of the marital residence in *Patelunas v. Patelunas*.[28] The court considered several "special circumstances" which compelled valuation as close to the time of trial as possible. The facts of this case state that the plaintiff-husband did not commence a special equitable divorce proceeding until more than five years after the divorce decree. The husband resided in the marital home (which he considered a "profit maker") from the time of divorce until he was prepared to move. In addition, the six-fold increase in the net value of the marital residence was due to overall market activity and not attributable to the efforts of the plaintiff. On these bases, the Third Department shifted its approach to valuation of the marital residence to a fixed valuation at the date of trial.

Ducharme v. Ducharme is one example of the showing required to deviate from the *Lord* commencement of action presumption.[29] The property at issue included the marital residence and the family farm business. The farm business clearly involved a mixture of market forces and the husband's labor on the land with the animals, but the court weighed the husband's contribution during the 3-½ year pendency of the action against his retention of farm profits, the receipt of the tax benefit of unused depreciation and the origin of all assets of the farm held or acquired during pendency, as traceable to marital property. The court articulated the philosophy behind its exception as if a court of equity: "When a business is under the complete control of one spouse, the court must select a valuation date that will permit a meaningful and realistic appraisal of the business' true worth, to avoid patent inequities to the nonmonied spouse."[30]

The Fourth Department

The Fourth Department opinion of *Rosenberg v. Rosenberg* is most revealing of its direction toward the Second Department on valuation issues.[31] The opinion concerned three genres of marital assets: retirement funds in the form of a pension and Keogh plan, the marital residence and a business interest in the form of a law firm partnership.

The parties separated in 1983 pursuant to an agreement to live apart. The agreement postponed resolution of economic issues without prejudice to either party. In 1987 an action was brought for distribution of the marital assets. Although there was no discussion, the opinion approved of the trial court's valuation of the pension and Keogh Plans as of the date of the parties' separation. The opinion then referenced *Wegman* for the authority to reverse the trial court and find that ". . . the value of a marital residence is generally fixed at the time of trial."[32] Finally, the opinion concluded that the titled spouse's interest in her law partnership should be equal to the amount in her capital account as of the date of the parties' separation.

The *Rosenberg* opinion and the *Wegman* opinion were cited in tandem to reverse at least one trial court opinion which improperly selected an alternative valuation date for the marital residence.[33] The *Hutchings v. Hutchings* opinion also served to expand the marital residence valuation category to include those properties purchased after separation with marital funds.[34]

Conclusion

The opinions concerning valuation date(s) are clearly as important as the language of DRL § 236B(4)(b). It is an area that requires close attention to Departmental opinions on presumed valuation dates, corresponding burdens of proof and carefully formulated arguments. The topic is one which will become increasingly complex as other forms of marital property are brought before the various Departments. Several opinions have already hinted at valuation dates for property such as artwork,[35] brokerage accounts and Individual Retirement Accounts.[36]

In addition to the issue of the actual date of valuation selected by the court, several procedural questions remain unanswered. For example, what is the "trial" referred to in DRL § 236B(4)(b)? The Second Department in a 1988 case considered the 1982 divorce action

the date of trial (an equitable distribution action followed in 1985), but in a 1989 case considered the equitable distribution action as the date of trial (expressly rejecting the divorce action as the date of trial).[37] Also, for example, what degree of specificity is required of the trial court opinion? The Second Department in a 1987 case requested that the trial court state the valuation date it selects, the reasons therefor and the method by which it arrived at that date.[38] This opinion was overruled in a 1989 opinion, however, which accepted the failure of the trial court to delineate its specific reasons for selecting a date in between the date of commencement and the date of trial as the valuation date, stating: "We conclude that it is not necessary to set forth the reasons for choosing a particular valuation date where the record, as here, discloses an adequate basis for the court's determination.[39]

Absent direction from the New York Court of Appeals on the specific valuation issues found within DRL § 236B(4)(b) and in light of the lead taken by the Second Department, the practitioner is forced to remain abreast of rulings of all Departments both on valuation and on the definition of marital property.

Endnotes

1. L. 1986 c. 884, eff. Sept. 1, 1986.
2. *Wegman v. Wegman*, 123 A.D.2d 220, 509 N.Y.S.2d 342 (2nd Dept. 1987).
3. *Id*. at 349.
4. *Siegel v. Siegel*, 132 A.D.2d 247, 523 N.Y.S.2d 517, 521 (2nd Dept. 1987).
5. *LeStrange v. LeStrange*, 148 A.D.2d 587, 539 N.Y.S.2d 53, 54 (2nd Dept. 1989).
6. *Ierardi v. Ierardi*, 151 A.D.2d 548, 542 N.Y.S.2d 322, 323 (2nd Dept. 1989).
7. *Kane v. Kane*, 163 A.D.2d 568, 558 N.Y.S.2d 627, 629 (2nd Dept. 1990).
8. *Moody v. Moody*, __ A.D.2d __, __ N.Y.S.2d __ (2nd Dept. Apr. 2, 1991).
9. *Id.*
10. *Wegman*, *supra* at 353.
11. *Id.*
12. *Siegel, supra* at 520-521.
13. *Kallins v. Kallins*, __ A.D.2d __, 565 N.Y.S.2d 227, 229 (2nd Dept. Feb. 4, 1991).
14. *Stolow v. Stolow*, 149 A.D.2d 683, 540 N.Y.S.2d 484, 486 (2nd Dept. 1989), *as amended* 152 A.D.2d 559.
15. *Sanford v. Sanford*, 146 A.D.2d 622, 536 N.Y.S.2d 530 (2nd Dept. 1989); *Tallering v. Tallering,* 129 A.D.2d 696, 514 N.Y.S.2d 458 (2nd Dept. 1987).
16. *Wegman, supra*.
17. *Id.*
18. *Greenwald v. Greenwald*, 164 A.D.2d 706, 565 N.Y.S.2d 494 (1st Dept. 1991).
19. *Marcus v. Marcus*, 135 A.D.2d 216, 525 N.Y.S.2d 238, 241 (2nd Dept. 1988), *as amended* 137 A.D.2d 131, *citing Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699.
20. *Capasso v. Capasso*, 129 A.D.2d 267, 517 N.Y.S.2d 952 (1st Dept. 1987).
21. *Greenwald, supra*.
22. *Id*. at 500.
23. *Id*. at 502.
24. *Id.*
25. *Id.*
26. *Lord v. Lord*, 124 A.D.2d 930, 508 N.Y.S.2d 676.
27. *Ducharme v. Ducharme*, 145 A.D.2d 737, 535 N.Y.S.2d 474, 476 (3rd Dept. 1988).
28. *Patelunas v. Patelunas*, 139 A.D.2d 883, 527 N.Y.S.2d 325 (3rd Dept. 1988).
29. *Ducharme, supra* at 477.
30. *Id.*
31. *Rosenberg v. Rosenberg*, 145 A.D.2d 916, 536 N.Y.S.2d 605 (4th Dept. 1988), *as amended* 149 A.D.2d 985 (1989).
32. *Id*. at 608.
33 . *Hutchings v. Hutchings*, 155 A.D.2d 971, 547 N.Y.S.2d 970 (4th Dept. 1989).
34. *Id*. at 971.
35. *Siegel, supra* at 521.
36. *Rosenberg v. Rosenberg*, 126 A.D.2d 537, 510 N.Y.S.2d 659, 662 (2nd Dept. 1987).
37. *LeStrange, supra* at 54; *Wood v. Wood*, 139 A.D.2d 506, 526 N.Y.S.2d 608, 610 (2nd Dept. 1988).
38. *Yunger v. Yunger*, 133 A.D.2d 451, 519 N.Y.S.2d 666 (2nd Dept. 1987).
39. *Cohn v. Cohn*, 155 A.D.2d 412, 547 N.Y.S.2d 85 (2nd Dept. 1989).

Increase in Value: Active-Passive or Passive-Aggressive

By Sandra Jacobson
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Two recent decisions, *Greenwald v. Greenwald* [1] and *Zelnik v. Zelnik*,[2] have further muddied the less than pristine waters of the equitable distribution of the increase in value of separate and marital property.

DRL § 236 uses the language "increase in value" only in defining separate property. Subdivision 1(d)(3) reads in relevant part:

> "The term separate property shall mean:
>
> property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;"

However, since subdivision 4(b) provides that

> "The valuation date or dates may be anytime from the date of commencement of the action to the date of trial.",

in fact, in a case of any duration, there will probably be a difference in value of both separate and marital property between the commencement date and the trial date.

Jolis v. Jolis[3] was for many years cited as authority for the proposition that

> "the Legislature intended a construction of the meaning of a spouse's 'contribution or efforts' toward the appreciated value of 'separate property' to exclude considerations of services as a spouse, parent, wage earner, homemaker or other spousal career advancement factors."[4]

What is often overlooked is that the trial court also found that

> "In fact, it appears the greatest increase in profits which occurred in recent years resulted from the 'diamond fever' of the market-place, something beyond even the control of DDI."[5]

and the Appellate Division stated:

> "We agree that the omission of the quoted language from section 236 (part B, subd 1, par d, cl[3] is relevant to the construction of the section. However, we decline to foreclose the possibility that other cases may disclose circumstances in which services as a spouse, parent, wage earner, or homemaker in fact contributed to the appreciation of the other spouse's separate property, circumstances not presented in the instant case."[6]

In *Price v. Price*,[7] the Court of Appeals held:

"The question under section 236(B)(1)(d)(3) as to indirect contributions of the non-titled spouse as parent and homemaker is whether there was an appreciation of separate property due to the efforts of the titled spouse; during the period when it is shown that those efforts were being aided or facilitated in some way by these indirect contributions. If so, the amount of appreciation during that period is considered a product of the marital partnership over which the trial court 'retains the flexibility and discretion to structure [a] distributive award equitably' (*O'Brien v. O'Brien*, 66 N.Y.2d 576, 588, *supra*). The nature and measure of the services performed by the non-titled spouse as parent and homemaker and the degree to which they may have indirectly contributed to the appreciation of separate property, are matters to be weighed and decided by the trial court—*not* in making this initial determination under section 236(b)(d)(3)—but in making its distribution of the appreciation as marital property under section 236(B)(5)."

Here we must disagree with the Appellate Division in its holding that this initial determination whether to treat the appreciation in separate property as marital property 'will depend on a variety of factors including the length of the marriage, the relationship between the parties, [and] the type of services actually performed by the non-titled spouse' (113 A.D.2d 299, 306-307). In

> making this determination, the court is not concerned with evaluating the contributions or efforts of the non-titled spouse or with determining the extent, if any, of the appreciation due to those efforts. These and the other factors mentioned by the Appellate Division are appropriate considerations in making the equitable distribution of the appreciation as marital property (see Domestic Relations Law § 236[B][5][d][2], [6], [10]).[8]

Price has been viewed as creating a "passive-active" dichotomy for determining what is marital and what is separate property. However, many decisions which purport to follow *Price* actually fail to do so in that they have characterized as "active" or "passive" not the increase in value of an asset but the asset itself.[9] Further, many decisions have floundered on the opening language of *Price*:

> "We hold that under the Equitable Distribution Law an increase in the value of separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property (Domestic Relations Law § 236[B][1][d][3]).[10]

In light of the actual holding in *Price*, this language should be considered dicta.

For example, *Robinson v. Robinson*,[11] cited in *Zelnik*, quoted this dicta of *Price*. However, plaintiff-wife in that action had also made financial contributions to household expenditures, presumably freeing defendant-husband's income to pay the mortgage and increase his equity in the property.

The Appellate Division in *Greenwald* affirmed, with minor modifications, the well-reasoned decision of Supreme Court, New York County (Silbermann, J.). This writer submits that in at least one of the modifications made by the Appellate Division, the opinion of Supreme Court was more in accord with the holding in *Price*.

Mr. Greenwald had been a participant in the Employer Stock Ownership Plan of the corporation of which he was President and Chief Executive Offer since the inception of the ESOP eight years before the parties separated. Four years before the action was commenced, Mr. Greenwald had received the maximum amount of shares in the ESOP. No additional contributions were made by the corporation. All changes in the number of Mr. Greenwald's shares thereafter were the result of forfeitures or stock purchased by the Plan from departed employees.

The court below ordered that 50% of Mr. Greenwald's shares in the ESOP be distributed to the wife pursuant to a Qualified Domestic Relations Order. In another context, the court also stated that "the momentum for the appreciation of the marital assets was already underway in 1980 when the parties separated."

The Appellate Division quoted this language with approval. However, as to the ESOP, the Appellate Division stated that the court below had found the ESOP to be an "active asset and held that Mrs. Greenwald's 50% interest was accordingly limited to the number of Mr. Greenwald's shares in the ESOP as of commencement date, even though the increase in the number of his shares after commencement date was due solely to the reallocation of shares forfeited to, or repurchased by, the plan. In other words, the increase in value was not due to the efforts of either spouse. It was a "passive" increase of an asset actively obtained.

In *Zelnik*, the Appellate Division paraphrased the dicta in *Price* to award a wife half of the appreciation in value of a residence owned by the husband before the marriage.

> "The statutory definition of separate property excludes therefrom the increase in value of the property 'to the extent that such appreciation is due in part to the contributions or efforts of the other spouse.' (Domestic Relations Law § 236B[1][d][3]. The Court of Appeals has spoken on the proper interpretation of this section, holding in *Price v. Price* (69 N.Y.2d 8, 11) that 'an increase in the value of separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property [citation omitted].'"

This should also be considered dicta in *Zelnik* in that the court also noted that the increase in value of the residence was due in large part to extensive renovations paid for from marital income and supervised by the wife. Further, mortgage payments were made from marital income. Thus, the increase in value was attributable both to the efforts of the non-titled spouse and to the investment of marital funds.

Mr. Zelnik had been President of the United States subsidiary of a large French clothing concern and holder of ten percent of the parent company's stock. The parent company bought out Mr. Zelnik's stock interest in connection with the termination of his employment. The stock was concededly marital property.

The court stated that the stock was a "passive asset" because there was no evidence that Mr. Zelnik's work with the United States subsidiary "directly increased the value" of the parent company's stock. It held, therefore, that the increase in value of this marital asset was marital, a correct result but a confusion of the language.

License cases are a recognition *sub silentio* that "the momentum. . .was already underway." The value of a license is calculated by using statistical probability, what the average similar licensee will earn above what the average person holding a lesser degree will earn. These earnings are future, post commencement date, earnings. What is ignored in making the evaluation is the fact that the future earnings will necessarily be "active", *i.e.*, due to the efforts of the licensee. What is being valued is a right to work at a particular profession. What is being overlooked is the fact that if the licensee does not practice, he or she will earn nothing by reason of the license.[12]

Consider, as another example, the bonus for a year period paid at or after the end of the year. If the parties marry during the year or start a marital action during the year, is the bonus all marital or all separate property or part marital and part separate? If a business deal many years in the making comes to fruition shortly after a marriage or the commencement of a marital action, how should it be treated?

The problem, but not its resolution, predates equitable distribution. In *Hunter v. Hunter*,[13] the Appellate Division, First Department, reversed a decision of Supreme Court, New York County, granting a wife an examination before trial of the husband to ascertain his income and assets. The court did say in dicta:

> "A caveat, however, with respect to the rare case is necessary. There undoubtedly are instances, especially, but not exclusively, in marriages of long standing, where the wife is entitled to share in a progressive increase in the standard of living which is frustrated only because of the wrongful separation. A classic example would be the working wife who helps her husband through professional school, or the early years of professional or business growth, only to be displaced as the husband begins to reap the gains from a jointly invested foundation of savings, abstentions, and sacrifices. In such cases the husband's past and present income and assets – and perhaps his prospective income – may be appropriate matters for exploration."[14]

Shades of *O'Brien*!

This writer submits that attention must be given primarily not to the "active" or "passive" nature of an asset, but to the presence or absence of activity which produces an increase in the value of the asset or a future income stream. While momentum does not terminate when a summons is served, we do not live in a frictionless world and somewhere along the way, an additional push is needed to keep the ball rolling.

Endnotes

1. 565 N.Y.S.2d 494 (A.D. 1st Dept. 1991).
2. *New York Law Journal*, August 7, 1991.
3. 111 Misc.2d 965 (Sup. Ct., New York Co. 1981), *mod.*, 98 A.D.2d 692 (1st Dept. 1983).
4. 111 Misc.2d at 979.
5. 111 Misc.2d at 980. Approximately a year thereafter, when the diamond market collapsed, DDI became virtually worthless.
6. 98 A.D.2d at 692.
7. 69 N.Y.2d 8 (1986).
8. 69 N.Y.2d 18-19.
9. One scholar, Leonard G. Florescue, has wisely suggested that the right phrase to use is not "active/passive" but "causal/non-causal."
10. 69 N.Y.2d at 11.
11. __ A.D.2d __, 560, N.Y.S. 2d 665 (2d Dept 1990).
12. What is also overlooked is that "average" earnings in this context is the arithmetical mean, rather than the median or the mode. Since income curves are generally skewed, most practitioners will earn less than the "average."
13. 10 A.D.2d 291 (1st Dept. 1960).
14. 10 A.D.2d at 295.

Look Into the Gift Horse's Mouth

By Donald M. Sukloff
September 1993

"He ne'er considered it as loth to look a gift horse in the mouth."

Samuel Butler

Introduction

Under New York Law, marital property is subject to equitable distribution, while separate property is not.[1] The term "separate property" is defined in part as property acquired by gift, "from a party other than the spouse,"[2] whereas "marital property embraces all property acquired by either spouse during the marriage before the execution of a Separation Agreement or the commencement of a matrimonial action or otherwise provided by proper agreement, but excluding separate property.[3]

Property acquired in exchange for separate property or the increased value of separate property continues as separate property, except to the extent the appreciation is due in part to the contributions or efforts of the other spouse.[4] The offered rationale for excluding gifts from third parties from the marital pot is that these are not the products of the marriage, whereas gifts between spouses are[5]; in reality it is a matter of legislative preference since many jurisdictions deem gifts between spouses as creating separate property.[6] Gifts before the marriage even by future spouses also are separate property.[7]

Because of the concept that marriage is an economic partnership, the New York Court of Appeals has determined that "marital property" should be construed broadly, while "separate property," being an exception to marital property, should be construed narrowly.[8] Therefore, a mere claim or denial of a gift requires much more to eliminate the property from equitable distribution.

Is It a Gift

To establish a gift under traditional rules, the gift should be from a competent donor by voluntary transfer with an irrevocable present donative intent, without consideration or compensation and accompanied by delivery and acceptance.[9] Aside from the issue of to whom the gift was made, *i.e.* husband, wife or both, the first inquiry is whether or not the property is a gift. Equitable distribution cases primarily deal with two instances involving gifts. First, whether a claimed gift of a spouse's separate property to the other spouse was in fact a gift. If no gift is proven, it remains the spouse's separate property. The second common instance is whether a transfer from a third party to a spouse was a gift or, in reality, was made with consideration or as compensation.

Burden of Proof

Clearly the burden is on the person trying to exclude the property from the marital pot, since this is contrary to the presumption of an economic partnership.[10] Thus, in *Pullman v. Pullman*,[11] where the husband asserted he had $750,000 in his safe deposit box at the time of the marriage which he dedicated to the purchase of property during the marriage, the Appellate Court reversed a finding that most of the property therefore was separate property. The Appellate Court held that in the absence of clear proof that the husband owned this money when married, all assets would be deemed marital. On the other hand, in *Sarafian v. Sarafian*,[12] the husband showed he sold real estate two years before the marriage and purchased four $100,000 T bonds during the marriage and then two years later sold another item of separate property and purchased $100,000 in T bonds. Since no other possible source existed for the acquisition of these bonds, the Appellate Court determined that the conclusion was inescapable that the bonds were separate property and the presumption was rebutted. Similarly, in *Heine v. Heine*,[13] uncorroborated testimony was accepted to show that the only source for the purchases was the husband's separate assets.[14] In *Spector v. Spector*,[15] the wife was able to trace her separate property from gifts and an inheritance to the purchase of the marital home and farm equipment thereby causing a reversal of the lower court and a finding that the items were separate property rather than marital property.

Gifts Between Spouses

Although gifts between spouses in New York are statutorily declared to be marital and, therefore, subject to equitable distribution,[16] if it is proven not to be a gift, it retains its original classification. Thus, in *Woertler v. Woertler*,[17] the husband gifted his inherited Mercedes to his wife so that it became marital property, whereas in *DeCabrera v. Cabrea-Rosete*,[18] the wife was able to prove that the property purchased in both her and her husband's names was from the proceeds of a gift to her

only, so that she was entitled to the property exclusively. And in *Mortellaro v. Mortellaro*,[19] merely placing the funds in the wife's name in a pass book over which she never had control was deemed not to be a gift.

Gifts from Third Persons

Generally the third party is the parent or parents of one of the spouses.[20] The issue then frequently is not the existence of a gift, but whether it was intended as a gift to one or both of the spouses. It is not surprising that a gift to both husband and wife later turns out to be intended only for the blood relative when the marriage turns sour. As Shakespeare noted, "Rich gifts wax poor when givers prove unkind." If the gift is made to one, the property is clearly separate and not subject to equitable distribution. However, if it is a gift to both, then it falls into the marital pot.

Interestingly, a literal reading of the statute does not necessarily indicate a joint gift to be marital property. Although it is property acquired by both parties during the marriage, gifted property is excluded as separate. If the courts considered such gifts as separate to both, a 50/50 distribution would probably be mandated. However, where the courts treat a joint gift as marital, it is subject to equitable, but not necessarily equal, distribution.

In *Vogel v. Vogel*,[21] the husband received bonds from his mother delivered to him personally rather than to him and his wife. These bonds were used for the purchase of the marital home. It was held to be the husband's separate property.

In a recent Third Department case,[22] the trial court was faced with conflicting testimony on whether land deeded by the wife's family to both spouses upon which they built the marital home was intended as a gift to the wife alone or whether it was intended as a gift to both. The court credited plaintiff's version of the facts as a gift to her, and this was affirmed on appeal.

Although in New York it makes no difference whose relatives make the gifts,[23] other states provide authority on awarding property to the spouse whose relatives are the source of the gift.[24] This underlying current may well be a factor in a judge's view of the evidence in determining whether the gift was intended for one or both spouses or in the equitable distribution in determining an unequal distribution of the property. Thus, in *Ackley v. Ackley*,[25] a gift of a home from the wife's parents was made to the wife and husband as tenants by the entirety. The lower court found the gift was intended primarily for the wife on the expectation that her marriage would continue. The Appellate Court disagreed, holding that this was a clear gift to both. Nevertheless, the Appellate Court did not disturb the equitable distribution award granting the wife the lion's share of the property.

In *LeRuzik v. LeRuzik*,[26] the husband's mother gifted a home to the husband and wife as tenants-by-the-entirety. This was held to be marital, and the equitable distribution resulted in the wife's receiving $15,000 out of the total value of $39,400 as her share of equitable distribution. Also, in *Maher v. Maher*,[27] the court awarded jointly owned property to the wife only because the property had been occupied by the mother's family for two generations and was put in her husband's name only on recommendation of an attorney for tax purposes.

Commingling

The commingling of separate property can occur in various investments and in joint bank accounts. A commingling in a joint bank account is reinforced with the Banking Law presumption of equal ownership.[28] Thus, in *DiNardo v. DiNardo*,[29] the husband failed to overcome this presumption where a check from his mother's estate was commingled in the joint account where it remained for seven years. Indeed, New York law has expressed that courts should apply a strong presumption that a true joint tenancy was intended when the joint account is in the husband's and wife's names and that only under exceptional and compelling circumstances should it be found that the account was used merely for convenience.[30]

In *Lischynsky v. Lischynsky*,[31] the commingling of separate money in active joint accounts, coupled with the lack of proof identifying the portion used to purchase realty, failed to establish separate property. Likewise, in *Icart v. Icart*,[32] funds given by the husband's mother that were placed in a joint account and used to satisfy the joint mortgage debt were held to be a gift or loan to both parties and not separate property.

In *Dugue v. Dugue*,[33] the husband asserted that he should be credited with an undocumented $30,000 loan advanced to him by his mother which was deposited in the parties' joint account and then withdrawn to begin his business. The court held that the presumption that the parties are equally entitled to deposits made to joint accounts was not overcome by his proof; thus the loan proceeds were thereby converted into marital property. On the other hand, in *Mink v. Mink*,[34] likewise a Third Department case, the husband while married sold his separately owned real estate and deposited the $7,500 into the parties' joint savings account. The wife conceded this and therefore the court credited him with this amount, but not additional sums he claims to have contributed to the savings account from the sale of other personal property. Also, in *Hochman v. Hochman*,[35] where gifts of money from the wife's parents were

deposited in a joint account temporarily and then reinvested in the father's business, the money was considered separate property with the joint account being a mere conduit.

In *Alwell v. Alwell*,[36] the wife sold real estate in Florida that she owned before the marriage and deposited the proceeds in their joint checking account. Thereafter, the proceeds were used to purchase 100 shares of Niagara Mohawk Power Corporation stock, half title to the husband and the remaining half to the wife. In spite of the Banking Law presumption, the court held that the presumption was rebutted by evidence that title was placed in the husband's name only for tax purposes, and, thus, the shares were classified as separate property belonging to the wife.

The Banking Law presumption and the cases imposing it have been seriously weakened by an amendment to the Banking Law[37] which now allows depositors to establish "Accounts for convenience only." This enactment may make it far more difficult to rebut the presumption of a gift of one-half of the proceeds of the joint account. The amendment provides that one making the deposit to a convenience account does not affect the title to the deposit nor is the depositor considered to have made a gift of one-half of the depositor any additions or accruals to the other person; thus, on the death of the depositor, the other person does not have a right of survivorship in the account.[38] One can reasonably assume that the burden of proving the joint account to be a matter of convenience thereby overcoming the presumption will be more difficult than ever, if not unlikely, since the owner could have placed the disputed funds in a convenience rather than joint account.[39]

Commingling of separate property in various investments has also resulted in a gift presumption. Thus, where the husband's father transferred property to his son and daughter-in-law as tenants by the entirety 14 years after their marriage, it was deemed marital property.[40] Likewise, in *Coffey v. Coffey*,[41] the husband transferred inherited properties to himself and his wife as tenants by the entirety and later claimed the conveyance was made to eliminate the wife's estate tax liability in the event he predeceased her. This was deemed to be marital property.

On the other hand, where the wife's parents loaned the wife $30,000 for the purchase of a home, and the deed transferred one-half to the parents who thereafter transferred their one-half to the wife, this portion was held to be separate property.[42]

A line of cases deal with the question of whether the property or the asset transferred was a gift or, in reality, remuneration. In *Sclofani v. Sclofani*,[43] an alleged gift of stock to the husband employed by his brother's corporation was held to be compensation and, therefore, marital property subject to equitable distribution. The court found the stock to represent bonuses for past performances and to insure continued loyalty and services. In *Hackett v. Hackett*,[44] stock that was offered to the husband as consideration was at his request transferred to his friend who, after the commencement of the divorce action, transferred the stock to the husband. This was deemed to be marital property as the product of his work rather than a gift from a friend. On the other hand, in *Lolli-Ghetti v. Lolli-Ghetti*,[45] the husband received a loan from his father's business to buy an interest in property and he paid the loan through a gift from his father. The wife claimed the loan was related to the husband's employment services, but the court held the husband's interest in the property to be separate. Also, in *Tallering v. Tallering*,[46] the husband received 64.2 percent interest in a large oil company owned by his father over a period of several years; this was held to constitute the husband's separate property (gift tax returns were filed). The court pointed out that valuable, useful and appreciated employment by the husband in the family business does not necessarily transform a father's gift of his interest in the business into compensation for services rendered thus making the stock marital.

Wedding Gifts

It is well established that wedding gifts presumably are jointly owned and therefore marital property subject to equitable distribution,[47] unless one can clearly and unequivocally show the gift to be intended specifically for one party, or that the nature of the gift is peculiarly intended for one of the parties such as shaving items, or a sewing machine or rod and reel (assuming, of course, only one of the spouses uses same).[48] Thus, in *Bidwell v. Bidwell*,[49] a wedding gift of an apartment house in Venezuela was deemed to be marital.

Conclusion

A gift has to be more than merely asserted. The person asserting a gift to exclude property as marital or denying a gift that would create marital property must prove it. As between husbands and wives, if the gift of separate property is not rebutted, it is available for equitable distribution. As to gifts from third parties to spouses, the issue is whether it was a gift to one or both. If the gift is to one, it is separate property and not subject to equitable distribution. If the gift is made to both, it is marital property and subject to equitable distribution. However, once the property is deemed to be in the marital pot and available for equitable distribution, the courts may well make an unequal equitable distribution to salve the wounds. New York has a

strong policy to deem property as marital, and with the amendment to the Banking Law parties will find it more difficult than ever to rebut the presumption of a gift between spouses in joint bank accounts. The trend is clear and New York may well follow the maxim: "it is better to deserve without receiving than to receive without deserving."

Endnotes

1. DRL § 236B5(b)(c).
2. DRL § 236B1d(l).
3. DRL § 236B1c.
4. DRL § 236B1d(3).
5. Foster, Freed, Brandes, *Law and the Family*, 2d Ed., Vol. 2, Section 10:1, Pg. 796.
6. *See* 24 Am Jur Sec. 885.
7. Novak v. Novak, 135 Misc. 2d 909, 516 N.Y.S.2d 878 (Sup. Ct., Dutchess Co. 1987); Romano v. Romano, 139 A.D.2d 979, 530 N.Y.S.2d 155 (2d Dept. 1987); Woertler v. Woertler, 110 A.D.2d 947, 488 N.Y.S.2d 265 (3rd Dept. 1985).
8. Price v. Price, 69 N.Y.2d 8, 503 N.E.2d 684 (1986); Capasso v. Capasso, 129 A.D.2d 267, 286, 517 N.Y.S.2d 952 (3rd Dept. 1987).
9. *See Lindey on Separation Agreements an Antenuptial Agreements,* rev. ed. 1989, Section 11.02(3).
10. Price v. Price, 69 N.Y.2d 8, 503 N.E.2d 684 (1986); Heine v. Heine, 176 A.D.2d 77, 580 N.Y.S.2d 231 (1st Dept. 1992).
11. 176 A.D.2d 113, 573 N.Y.S.2d 690 (1st Dept. 1991).
12. 140 A.D.2d 801, 528 N.Y.S.2d 192 (3rd Dept. 1988).
13. 176 A.D.2d 77, 580 N.Y.S.2d 231 (1st Dept. 1992).
14. *Accord* Foppiano v. Foppiano, 166 A.D.2d 550, 560 N.Y.S.2d 831 (2d Dept. 1990).
15. 136 A.D.2d 939, 524 N.Y.S.2d 896 (4th Dept. 1988), *appeal dismissed*, 72 N.Y.2d 952 (1988).
16. DRL § 236B1c; DRL § 236B1d(1).
17. 110 A.D.2d 947, 488 N.Y.S. 2d 265 (3rd Dept. 1985).
18. 70 N.Y.2d 879, 518 N.E.2d 1168 (1987).
19. 91 A.D.2d 862, 458 N.Y.S.2d 390 (4th Dept. 1982).
20. Rywak v. Rywak, 100 A.D.2d 542, 473 N.Y.S.2d 239 (2d Dept. 1984) (gift of home from parents).
21. Vogel v. Vogel, 156 A.D.2d 611, 549 N.Y.S.2d 438 (2d Dept. 1989).
22. Daisernia v. Daisernia, (3rd Dept., 1992).
23. Nehorayoff v. Nehorayoff, 108 Misc. 2d 311, 437 N.Y.S.2d 584 (Sup. Ct., Nassau Co. 1981).
24. 24 *Am. Jur.* Sec. 884, pg. 864.
25. 100 A.D.2d 153, 472 N.Y.S.2d 804 (4th Dept. 1984), *appeal dismissed*, 63 N.Y.2d 772 (1984).
26. 127 A.D.2d 940, 512 N.Y.S.2d 532 (3rd Dept. 1987).
27. 144 A.D.2d 343, 533 N.Y.S.2d 961 (2d Dept. 1988).
28. Banking Law § 675(b); Wiercinski v. Wiercinski, 116 A.D.2d 789, 497 N.Y.S.2d 179 (3rd Dept. 1986); Zacharek v. Zacharek, 116 A.D.2d 1004, 498 N.Y.S.2d 625 (4th Dept. 1986).
29. 144 A.D.2d 906, 534 N.Y.S.2d 25 (4th Dept. 1988).
30. Foster, Freed and Brandes, *Law in the Family*, 2nd Ed., Vol. 2, Section 11:9 (1988).
31. 120 A.D.2d 824, 501 N.Y.S.2d 938 (3rd Dept. 1986).
32. __ A.D.2d __, 589, N.Y.S.2d 127 (3rd Dept. 1992).
33. 172 A.D.2d 974, 568 N.Y.S.2d 244 (3rd Dept. 1991).
34. 163 A.D.2d 748, 558 N.Y.S.2d 329 (3rd Dept. 1990).
35. N.Y.L.J. October 1, 90, p. 30, col. 4 (Sup. Ct., Nassau Co.).
36. 98 A.D.2d 549, 471 N.Y.S.2d 899 (3rd Dept. 1984).
37. Chapter 436 Section 675, effective January 10, 1991.
38. Banking Law § 678(1).
39. *See* Matter of Bobeck v. Bobeck, 143 A.D.2d 90, 531 N.Y.S.2d 340 (2d Dept. 1988), involving an estate where the presumption was held to have been rebutted.
40. Niles v. Niles, 157 A.D.2d 951, 550 N.Y.S.2d 208 (3rd Dept. 1990).
41. 119 A.D.2d 620, 501 N.Y.S.2d 74 (2d Dept. 1986).
42. Whispell v. Whispell, 144 A.D.2d 804, 534 N.Y.S.2d 557 (3rd Dept. 1988); *Accord* Sommers v. Sommers, N.Y.L.J. 10/02/90, pg. 27, col. 1 (Sup. Ct., Nassau Co.).
43. 178 A.D.2d 830, 577 N.Y.S.2d 711 (3rd Dept. 1991).
44. 147 A.D.2d 611, 538 N.Y.S.2d 20 (2d Dept. 1989).
45. 165 A.D.2d 426, 568 N.Y.S.2d 29 (1st Dept. 1991).
46. N.Y.L.J. December 6, 1989, pg. 21, col. 1 (Sup. Ct., Nassau Co.).
47. Denholz v. Denholz, 147 A.D.2d 522, 537 N.Y.S.2d 607 (2d Dept. 1989).
48. 75 A.L.R.2d 1365, "Rights in wedding presents as between spouses"; Avnet v. Avnet, 204 Misc. 760, 124 N.Y.S.2d 517 (Burrough of Manhattan, City Court of City of New York, 1953), questioned, 60 Misc. 2d 94 (1969).
49. 122 A.D.2d 364, 504 N.Y.S.2d 327 (3rd Dept. 1986).

Ode on the New Rules

By Stuart A. Gellman
September 1994

Last November the practice of law took a turn
And brought all of us to a new low.
The client, once friendly, has forced us to ask
"Who comes to our door, friend or foe?"

The highs that we had, with profound satisfaction
Have receded into an abyss,
And the once friendly meeting of client and lawyer
Is probably handled like this.

"Why hello Mrs. Smith, my name's Harold Jones
And I'm happy to make your
acquaintance,
My name is impeccable, matter of fact
The church had anointed me Saint once."

"Now before we get started, allow me to read
You your rights as the courts have
suggested,
No, no, no Mrs. Smith, this is not like a warning.
Just calm down, you're not being arrested."

"For you see, there are rights which enhance your
position.
In reality, everything's fine,
They're like adding some rights to our land's
Constitution,
It's just your Constitution, not mine."

"Now the next thing . . . What's that? Why how nice
Mrs. Smith
I am flattered you find me quite striking.
When you first arrived, I must tell you that you
Compared favorably to *my* liking."

"But unfortunately, what I must say to you now
May upset you and cause indigestion,
There are rules that we divorce lawyers must follow
So that sex is just out of the question."

"But I have an idea, if you discharge me now,
Then rehire me without delay
To attend to your closing or plan your estate,
Then the rules say sex is okay."

On reflecting, she opted to keep me and so
We discussed my $5,000 retainer,
My daughter, you see, was a freshman at Brown,
And it cost quite a bit to maintain her.

But prior to paying, I had to explain,
Though my name was quite clean in the city,
That if she did not like the service I gave
She could contact the Grievance
Committee.

She pondered and laughed and then made it quite clear
That a rule such as this was quite rash,
But she took my instructions and marked down the
number
Dial 1, then 800, TAKE CASH.

Well the trial took place and we battled and fought
And presented her case several ways.
The decision came in. We had won. Mrs. Smith
was secure for the rest of her days.

She smiled and she clapped and she shouted with joy.
Was incessantly happy until
Just a few days thereafter she opened her mail
Which included the rest of my bill.

Well the time and the effort I spent seemed for naught,
The result just was no consolation,
She scanned all her rights, read the part at the end,
And demanded to have arbitration.

She asked for, I gave her, the lay person list
And she read all the names one by one,
I looked at her choice; closed my eyes; gave a sigh,
She selected Atilla the Hun.

Well friends there you have it.
Offensive? Perhaps.
And demeaning? Oh my is it ever,
If one had suggested some ten years ago
This would happen, we'd all answer "never."

But never has come and perhaps we should think
Not of where we are but where we were.
And should spend our time thinking more of the
disease
Than obsessed as we are with the cure.

Could it be that the fire's been raging for years?
And our language is misunderstood?
And we're paying today in great part for the times
That we didn't do all that we should?

And perhaps, just perhaps, as we live with these rules,
We might think a bit more of our
brother,
The criterion's not what the public may think
But of what we should think of each other.

The Aging Family: Marital Status Issues For the Older Client

By Willard H. DaSilva
December 1995

I. Concerns Upon Entering the "Golden Years"

The purpose of this article is to highlight some of the problems and issues relating to marriages of persons in their elder years. Some of the problems are not unique to those persons and may very well pertain to persons contemplating marriage regardless of age. However, some of the issues are those which give great concern to what is often called "golden year marriages."

I am not sure what is meant by the "golden years" and have found little insight from any legal reference. Neither were other references particularly helpful. I am not sure how the name developed. Possibly, it might have stemmed from a golden anniversary or birthday being at the 50-year mark. Or perhaps, because gold has historically been considered an extremely valuable property, then "golden years" could relate to the best years of a person's life.

Regardless of the origin of the term, it would appear that most people consider golden years as those which occur in the twilight of their lives. As science, medicine and personal care, among other things, tend to prolong life, it would, therefore, be logical to assume that "golden years" begin later and later, depending upon the longevity of the persons involved.

Just as we prepare psychologically and financially for those later years of our lives, creating pension plans and other forms of deferred income, it is, perhaps, even more important to plan ahead for future sociological events, one of which may be a marriage or remarriage, as the case may be.

Divorces appear to have become more prevalent among older persons than in prior years. There are serious concerns upon the occurrence of that event. It is a responsibility of the attorney, whether the attorney has predominantly a family law or an elder law practice or not, to recognize the issues which may arise and be in a position to advise clients with respect to their rights and obligations under those circumstances. Therefore, the thrust of this article is to create an awareness of the problems which may confront the attorney who deals with the problems of older persons and to point out some of the pitfalls and concerns which may exist. A full discussion of each of the issues and possible answers is far beyond the scope of this article. My primary purpose is to raise questions and not, necessarily, provide the answers. If an attorney can recognize that an issue exists, a solution may be found. My aim, therefore, is simply to alert the reader that marriages and divorces in a person's later years occur for reasons which may not be evident and which create special problems which require special solutions, among which is the prenuptial agreement.

II. Why Marry?

A. Companionship and Affection

Humans are gregarious. They like other people. The underlying sociological structure is the family unit (which, unfortunately, has disintegrated significantly in recent decades). From birth, a child is nurtured by parents or surrogate parents. Education is developed by association with other children and with teachers. Most young persons look forward to a career and marriage (the order being an individual preference). Even if marriage is not the priority, it is now commonplace that a "live-in" relationship is an acceptable social standard. Marriages (and often non-marriages) result in the procreation of children. At some point the children move out of the "nest," leaving the parents or parent alone. In later years there is an expectation that a husband or wife may die, leaving the survivor alone.

Having led a life of companionship and affection in one form or another throughout a person's lifetime, it is not unusual for a person who is left alone in later years to seek to renew that companionship and affection in one form or another. Sometimes it occurs with members of the same sex, while at other times with the opposite sex. A remarriage may be contemplated to fill the void created by the loss of a family member.

B. Caretaking

In later years, there may be a need on the part of a person to require or have the benefit of assistance in maintaining a home, doing the shopping, cleaning, cooking, chauffeuring, scheduling appointments and activities, assisting in medical needs and a myriad of other responsibilities in sustaining a person in a living environment. An obvious aid to the fulfillment of those responsibilities is another person, who can share not only the chores but also the benefits of living together. Thus, the making for a marriage exists.

C. No Other Family Relations

Loneliness can be a terrible trauma, debilitating and often frightening, for a person. A person who has been heavily family-oriented can be devastated if the family has somehow disappeared, either by reason of moving to distant places, death, estrangement or other reasons. Marriage to a person with a family helps fill that void. The surrogate family becomes a substitute and solace for the person who would otherwise be left alone. Finding the right companion under the correct circumstances can very well lead to a marriage in a person's later life.

D. Financial Needs

As a person grows older, the cost of health care and many other living requirements escalate. Financial planning developed years earlier might not have been updated and have become wholly inadequate in order for a person to sustain a reasonable lifestyle. The adage "two can live as cheaply as one" may not be entirely true; however, there are economies which may be effected. Also, the second person may have significant financial means, which may be made available to help support the economically disadvantaged person. Easing financial responsibilities and providing for necessities, which would otherwise be beyond one's financial reach, present a further inducement to marriage in later years. It is not suggested that money alone is the motivating factor in most instances. Nevertheless, it does present a consideration, whether consciously recognized or not, in determining whether to marry in later life. This factor may also exist with younger persons, but it is particularly significant among the elderly, where the potential for earning capacity is extremely limited or nonexistent. Thus, financial practicality presents a further incentive to marriage.

E. Other Reasons

There are, no doubt, many other reasons why older persons marry, and it is not the function of this article to set forth all of them. Instead, one should be aware that the kind of "love" which may exist in the minds and hearts of younger people may take a different form among the older population and play a relatively insignificant role in determining whether or not to marry. If the reasons for marriage can be identified, then problems which may be inherent in the marriage can be recognized and addressed in order to minimize the risks of a bad marriage.

III. Basic Problems for Identification and Consideration

Marriage is a very serious undertaking. It should not be entered into by whim, temporary infatuation or with reckless abandon. Among younger persons, errors in marriages are frequently easy to correct. As persons grow older, resolving marital conflicts becomes more and more difficult. If a reason for marriage is companionship and affection, a serious problem may exist if one of the marital partners is really different psychologically and emotionally than originally anticipated. Counseling and therapy may help — or it may be a futile remedy. However, once the parties have resolved to marry and are convinced that each is a suitable candidate for the other in a continuing, close and long-term relationship, a major step forward has been taken. The initial hurdle having been cleared, there nevertheless remain a number of other problems which cannot be ignored and which must be examined.

A. Lack of Capacity to Marry

In dealing with older persons, particularly, it is important that each partner be mentally competent to understand the nature of the marital relationship and all of the obligations that are attendant to it. There are serious responsibilities, and each partner should be mentally and emotionally capable of understanding the nature of the act and the legal implications that arise from it. A marriage contracted by a person who is incompetent, at least for the purposes of an annulment of the marriage, may discover that the desired marriage may no longer exist by virtue of legal action taken by the spouse, family members or other interested persons. The benefits of the marriage would end, but there may be underlying responsibilities and economic losses. Even though the marriage may be annulled, nevertheless it is still a "matrimonial action" in most jurisdictions. The issue of equitable distribution or a division of community property, as well as maintenance, may be raised. Therefore, the mental capacity of a person to enter into the marital relationship is a consideration, particularly with regard to older and infirm persons.

B. Responsibility Involving Prior Children and Stepchildren

A common concern of any older person who remarries is the effect of the marriage upon children or stepchildren (collectively called "children" herein), whose rights may be affected by the marriage. This is a problem which is not unique to older persons, but it is certainly more common among them. The concerns exist not only on the part of the partners to the marriage but also on the part of the children. If the children are not properly considered and provided for, they may create circumstances which could militate against the viability of the marriage. It is absolutely essential that the financial impact of the marriage upon children be carefully considered. Frequently, the children should be

involved in decision-making processes. If the children feel secure and are satisfied with arrangements which are made from a financial viewpoint, then their relationships with both the parent and parent's new spouse can be rewarding; in the absence of such arrangements, they can be extremely detrimental and destructive. Specific measures, such as a prenuptial agreement or restructuring of estates, should be given extremely serious consideration prior to the marriage. Family meetings and even guidance by therapists, counselors and financial advisors, as well as attorneys, can be helpful.

C. Assumption of Financial Burdens

In the absence of a prenuptial agreement, the creation of a marital relationship includes the financial responsibility of each of the partners to the other. In some cases, there are sufficient financial means on the part of each marital partner so that neither will become a burden upon the other. However, that is not the usual case. More often, one of the spouses will be financially disadvantaged compared to the other. In that case, the spouse with superior economic resources will necessarily assume an obligation for the care and support of the other partner. If the parties are reasonably healthy, there is the obligation of support in accordance with the standard of living established by the parties. As the marital partners become older, however, significantly higher expenses may be anticipated for medical care. The body does not usually wear out all at one time. There can be a series of medical events spread over a period of years, each of which may cause a serious financial burden. Even more significant expenses may be incurred in the event of a debilitating event whereby a spouse requires long-term care, either at home or at a nursing facility or in a more structured environment. The expenditure of $100,000 per year is not unusual and can quickly exhaust the financial resources of both parties. The marital partners should be aware of the financial undertaking prior to the marriage and make suitable provision to cover those potential obligations.

D. Possible Loss of Medicaid Benefits or Other Government Entitlements

Because Medicaid and other governmental entitlements are dependent upon the financial circumstances of both marital partners, a person receiving Medicaid benefits may lose them in the event of a marriage to a financially superior spouse. Before taking the step of marriage, the economic and financial background of the parties should be carefully examined. Budgets should be established, and a determination of how the budgets have been met become an important consideration. Failure to make suitable inquiry may subject a financially sound spouse to severe economic losses, especially if they could otherwise have been avoided through careful planning.

E. Possible Loss of Spousal Social Security Benefits

Under 42 U.S.C. § 402, a spouse, even though divorced, is entitled to old-age or disability insurance benefits based upon the employment of the other spouse, provided that the non-employee spouse is not entitled to his or her own primary benefit in an amount equal to or greater than one-half of the amount due the other spouse. The non-employee spouse must be unmarried and at least 62 years of age. If divorced, the marriage must have existed for at least 10 years immediately before the effective date of the divorce. However, if the non-employee spouse should remarry before attaining the age of 60 years, then those benefits will be lost, unless that marriage is terminated prior to the recipient's attaining the age of 60 years. The loss of social security benefits is a factor which is often overlooked in marriages of older persons. The specific rules whereby the benefits are lost or may be regained should be carefully examined before rendering any advice. A telephone call or a visit to a Social Security Office may be a sound recommendation to obtain the actual entitlements and possible jeopardy of receiving them.

F. Possible Loss of Capital Gain Exclusion

It is common knowledge that capital gains taxes apply to the sale of a residence. However, under Internal Revenue Code § 121, there is an exclusion of $125,000 from the gain in determining the tax, provided certain requisites of that section have been met. This exclusion is a once-in-a-lifetime use by a person who is single or jointly by a married couple. The married couple has the same $125,000 exclusion as does a single person. Once it is used, or any part of it is used, it ceases to exist and may not be later claimed for any reason by either party, despite the subsequent termination of the marriage, whether by divorce, death or otherwise. Each of the parties to that marriage is "contaminated" and cannot take advantage of any further exclusion rights. If, for example, that "tainted" person should remarry a person who had never used the exclusion, then the $125,000 exclusion is no longer available to either party to the marriage because one of them was "contaminated," having already used the exclusion in a prior marriage. Consequently, an important question to be asked is whether or not either partner to the contemplated marriage has ever used the $125,000 exclusion. This is part of the premarital planning process, which is particularly important in the case of older persons.

IV. Special Problems of Elder Divorce or Annulment

A. Grounds May Not Exist

In those few jurisdictions, such as New York, which require marital fault for dissolution of the marriage, those grounds must exist in order to warrant the granti-

ng of a divorce, separation or annulment. If there is no such marital misconduct, there exists a serious problem if one of the parties is not receptive to the thought of a divorce or other termination of the marriage. This is particularly true among older persons, where marriages are typically shorter in duration and the kinds of marital misconduct are not as prevalent as among younger people. Acts of cruelty may be difficult to prove or may be nonexistent. There might not have been any physical separation or sexual abandonment, as the law requires. The elements relating to each cause of action must be met, and the absence of any of them may cause the denial of the termination of the marital relationship. The denial, however, will not bar a court from providing financial assistance to a needy spouse.

B. Lack of Capacity to Settle

If there are differences between the parties which may be resolved by negotiation and settlement, it presumes that each is sufficiently competent to understand the nature of the issues and their solutions. Among many older persons, that lack of capacity represents a serious problem. There may be doubt as to whether such capacity exists. In that case, it may be necessary to have a guardian *ad litem* appointed for that person. This may make negotiations even more difficult.

C. Rancor and Unpleasantness

The emotional and psychological problems of older persons may be readily magnified with the advent of marital problems. There may be a desire to involve other persons such as children or stepchildren in the negotiating and even litigation process. The introduction of more persons into the arena simply complicates the resolution of problems, partly because those additional persons may have personal interests which are injected into the case.

D. Medicaid as a Planning Tool

In determining Medicaid eligibility, the financial resources of both marital partners are examined. However, if there should be a divorce, then only the applicant's financial background and resources are pertinent. A question commonly presented to attorneys by clients is whether it would be appropriate for a married couple to divorce, have an equitable division of marital resources and a limitation of support in order to salvage as many of the financial assets of the parties as possible and permit one of them to become eligible for Medicaid benefits. It is a rather sad commentary when, for example, a woman who has been married to her husband for 50 or more years inquires whether she should obtain a divorce from her husband, whom she still dearly loves, in order to protect the few meager financial resources which they had accumulated over the years of the marriage. It is, therefore, incumbent upon the attorney to explore all possible alternatives to that suggested by the client. However, divorce may be the only viable solution in some cases.

E. Doubling the IRC § 121 Exclusion

If the parties are married and obtain a divorce and have otherwise been eligible for the IRC § 121 exclusion from capital gains on the marital residence, they have the right, together, to use a single $125,000 exclusion from capital gains on the marital residence if it is sold during the period of their marriage. However, if a divorce is contemplated, then it may be wise to defer the sale of the residence until after the marital relationship has been terminated. In that way, each of the parties will be entitled to the exclusion of $125,000. If the house were owned jointly as tenants by the entirety, as is the usual case, that tenancy converts automatically by operation of law to a tenancy-in-common, whereby each former spouse has an undivided one-half interest, unless there is a valid agreement to the contrary. When the residence is then sold, each former spouse may exercise an exclusion to the extent of $125,000. In short, if the couple were to utilize the exclusion while married, they would be limited to a total of $125,000; however, if utilized after a divorce, each would have that exclusion for a total of $250,000. Therefore, the divorce may be used as a planning tool to minimize or eliminate capital gains taxes on a residence, if the parties otherwise qualify. The basic qualification is that a party exercising the exclusion (or at least one of a married couple) must be at least 55 years of age at the time of the sale and the residence shall have been that party's principal residence for three out of the most recent five years immediately prior to the sale of the residence.

F. Religious Barriers

Older persons who contemplate terminating a marital relationship may have certain religious scruples which prevent recognition of a divorce. Also, persons may have religious beliefs and practices which require a religious divorce. Statutes in some states, such as New York's Domestic Relations Law section 253, require the parties to obtain a religious dissolution of the marriage as a condition of obtaining a civil dissolution. Although the constitutionality of such statutes may be questioned, they appear to be enforced.

V. Minimizing the Problems

A. Restructuring of the Estate Before Marriage

If there are basic problems regarding the assumption of financial burdens, possible loss of Medicaid benefits and other concerns, it may be wise for one or both of the parties contemplating marriage to restructure their estates prior to entering into the marital relationship. Restructuring can be done with the guidance of a competent attorney so that there can be an appropriate distribution and safe-guarding of assets to minimize

many of the problems which have been discussed above. Such restructuring can be accomplished in the form of making gifts of varying amounts to selected persons, of creating trusts of various types in order to divest certain assets from the estate of the person who is marrying and also other transfers of assets and Medicaid planning to avoid unexpected and unwanted problems.

B. Prenuptial Agreement

One of the most obvious ways of minimizing problems which can arise after a marriage, regardless of whether the persons are elderly or not, is a prenuptial agreement. Agreements of this type have become fairly common among older persons who marry or remarry. Many precautions should be taken because the agreements are usually strictly construed, being in derogation of common law and of statutory law. There are three indispensable requirements to a valid prenuptial agreement. First, there must be complete financial disclosure by each of the parties to the other in writing. Second, each party must be separately represented by counsel of that person's own choosing and without any suggestions by the other party as to that choice. Third, there must be sufficient time between the signing of the prenuptial agreement and the marriage to avoid a claim of duress or coercion or failure to have sufficient time to consider all of the terms and implications of the agreement. Historically, prenuptial agreements have often been limited to the elimination of estate rights in the event of death of one of the marital partners. Since the advent of the equitable distribution law, the agreements now typically include a waiver of any claim to premarital property and also to marital property. Frequently, there is a provision for life insurance in the event of the death of one of the parties. Among older persons, in particular, it is common to have provisions to cover medical contingencies and problems and even long-term care. Where older people are involved, many experienced matrimonial practitioners try to include the concerns of children and stepchildren regarding the remarriage of a parent. Sometimes, it is expedient to have the client review those concerns with the children and stepchildren in the presence of the attorney. By having the children and stepchildren feel secure, financially and otherwise, as to their role in the forthcoming marital relationship, it will help eliminate many of the problems which could otherwise exist.

C. Impact of Religious Marriage Contracts

Religiously observant persons frequently enter into a written religious marital contract. In preparing a prenuptial agreement the attorney should be careful to inquire whether or not a religious ceremony is contemplated. If it is and a prenuptial agreement is prepared, the prenuptial agreement should contain specific language that it supersedes the provisions of the religious marital agreement. This will help avoid a court interpreting the religious agreement as a modification or a replacement of the previously signed prenuptial agreement. Caution should be taken to inquire into the nature of the religious agreement and its actual provisions in the preparation of any prenuptial agreement. If there is no prenuptial agreement, then most certainly the attorney should advise the client of the legal ramifications of the religious agreement, many of which contain provisions relating to the support of the other spouse and even division of property.

D. Preparation of Advanced Directives

In connection with persons marrying during their golden years, even more so than younger persons, the attorney should advise the client of the benefits of making certain directions in the event of various contingencies. Among these directives are a health care proxy, a living will, a durable power of attorney, guardianship designations, organ donations and, particularly, a last will and testament. While younger persons often do not consider the fragility of life, older persons usually have become keenly aware of human frailties and the need to have structure in one's life even though that person may not have the capability of taking care of those needs. Much of the work of the elder law attorney in vexatious litigation, both with regard to procedures in administrative agencies as well as in the judicial system, can be avoided or certainly minimized if there had been adequate planning in advance and sufficient directives given by the party involved.

E. Avoid Marriage

One solution to minimize or eliminate any problems with respect to the marriage among elderly persons is not to marry at all. If that is the case, some of the benefits of what the marriage would have provided may still be available. Consequently, it is not unusual for older persons to have an informal "live in" arrangement on a contractual basis. The failure to have any legal obligation to each other may add a feeling of insecurity between the non-marital partners. And indeed, that may be true in many instances. However, there are circumstances whereby the simple "live in" arrangements do not afford the protections which each of the parties may desire. For example, if one of the parties is the tenant in a rent-controlled or rent-stabilized apartment and should die, the other party is in serious jeopardy of being ejected from that residence. If the parties were married, the surviving spouse would have rights even though not named in a lease or recognized as a prime tenant. A possible solution in that event would be to have both parties named as tenants, if that is permissible under the circumstances. There may also be a problem of medical coverage available only to a "spouse" and not to a "live in" companion. Some few medical plans permit such medical coverage to a "live-

in" companion, but most do not. Of course, there are no estate rights and in the event of a dispute and termination of the "live-in" status, there would be no support obligation and no obligation to divide what otherwise could be considered marital property. If it is advantageous not to marry, then the "live in" partners may wish to consider entering into a "palimony" agreement. By entering into a contractual relationship, obligations and benefits may be negotiated and provided for in a structured manner to provide many of the benefits of marriage, while at the same time avoiding some of the problems and pitfalls which may be encountered if a legal marital relationship legally existed.

VI. Conclusion

The primary purpose of these materials is to create an awareness of some of the problems which lurk in relationships which are established or may be created among persons who are in their "golden years," whatever age that may represent. Only a small sampling of problems have been indicated and even fewer illustrated. What is important is that the attorney recognize that many problems exist in various areas—Medicaid planning, income taxation, distribution of property, support, long-term care, health costs, relationships with various family members, difficulties of disentangling the relationship and alternatives to marriage to serve the needs and desires of the parties.

Once alerted to the issues and potential problems, then solutions may be explored and provisions may be made to minimize or even obviate the problems which might otherwise exist. It may be necessary to enlist the aid of professionals, not only in other areas of the law, but also in other disciplines, such as mental health professionals and financial and estate planners. However, without the initial awareness, the problems cannot be recognized, nor their solutions be found. Marriage among the elderly presents unique legal, administrative and psychological problems, and it is incumbent upon the elder law attorney to deal with those problems and to find effective solutions.

Rochelle G. v. Harold M.G.: An Economic Analysis and Critique

By John R. Johnson and Robert W. Jones
December 1996

In the wake of *O'Brien*,[1] *McSparron*,[2] *Hartog*,[3] *Cassano*,[4] *et al.*, judges, attorneys and valuation experts have struggled to render decisions and/or structure settlements that are true to both the legal and economic principles of license and practice valuation. Judges and attorneys have struggled to grasp the subtleties and intricacies of the financial underpinnings of license and practice valuation; valuation experts have struggled to interpret the case precedent which have been vague, muddled and, oftentimes, at odds with sound economic theory.

Recently, Justice Friedman, in *Rochelle G. v. Harold M.G.*,[5] has put forth a decision which we believe will be a watershed in matrimonial law for his valid attempt at a systematic approach to evaluating and reconciling the competing opinions of valuation experts. However, while we find Justice Friedman's efforts to navigate through the tempest created by the convergence of *O'Brien, McSparron, Hartog, Cassano*, *et al*. commendable, and his explanation of his decision invaluable, we take exception with several of his interpretations which we hold to be contradictory to the economic spirit, if not the letter, of *McSparron*.

A decade has passed since *O'Brien* and in that time the Court of Appeals provided no guidance on the many thorny issues collateral to license and practice valuation and duplicative awards. The Court of Appeals made a valid attempt to resolve some of these issues in *McSparron*, but still provided little computational direction. Another decade may pass before further guidance is forthcoming. We are concerned that, devoid of information, practitioners will look to Justice Friedman's decision for guidance, and mistake its seeming clarity for economic veracity. We have no doubt that Justice Friedman's decision will be cited extensively in matrimonial litigation in the ensuing months. What we offer here is an economic analysis of this decision as a tool to assist judges and attorneys in distinguishing between the application of legal precedent and sound economic principles. Justice Friedman's decision is now part of case law and will remain so unless modified on appeal. In order to combat inequitable decisions in the future as a result of piecemeal reliance on this decision, judges, attorneys and valuation experts will need to consider not only the strict interpretation of the decision, but also the economic and financial principles which should govern license and practice valuation. As we will point out in this article, even minor economic misinterpretations, combined with legal precedent, can create materially inequitable results.

Justice Friedman's approach to evaluating the competing results of the teams of valuation experts was to systematically evaluate the underlying assumptions of each expert and choose the assumptions he believed to be the most representative of economic reality. We will operate in a similar manner, offering our economic analysis as we interpret the written decision. Our review covers the following topics:

- Valuation Date
- Practice Value
- Reasonable Compensation
- Weighted Average vs. Simple Average
- Mortality Rates
- Real Interest Rate
- Bifurcation of Licenses
- License and Maintenance Overlap
- Ordering of Awards and Distributions

Valuation Date

The husband's attorneys argued that factors beyond the control of the husband had caused the value of his law practice to decline in the period between the commencement of the divorce proceedings and the date of trial, and, accordingly, that the relevant valuation date should be the trial date rather than the commencement date. Justice Friedman noted the Court of Appeals' remarks regarding the need for flexibility in determining the valuation date, but decided that deviations from the standard of using the commencement date required exceptional circumstances, such as when the value of the business virtually disappears prior to trial. The court noted that the husband would not have been likely to press for a trial date valuation if passive forces had caused an *increase* in his practice's value, rather than a *decline*.

We agree with Justice Friedman's decision to abide by the standard of commencement date valuation. Upon commencement, the parties must recognize that they have severed an implicit economic partnership between themselves and their spouse. From that date,

the non-owner spouse has a fixed claim on the equity of the practice, similar to debt. The owner spouse is now operating a quasi-'leveraged' entity and should take steps to mitigate the risk inherent in operating a leveraged business. If the owner spouse continues to manage the practice in a manner which does not recognize the loss of equity at the commencement date, he should bear the consequences of his actions, not the non-owner spouse. Naturally, the owner spouse will not know for certain as of the commencement date what percentage of the practice will be distributed, but in most cases a reasonable expectation can be formulated. The non-owner can then implement risk reduction strategies similar to those that would be implemented if the practice were trying to counter the effects of a debt obligation.

We disagree with a statement of Justice Friedman regarding the applicability of expert testimony on the outlook of the profession in determining the proper multiple in the 'excess earnings' valuation methodology. Justice Friedman states that if the structural changes in the profession which were the basis for arguing for a later valuation date were properly quantified through expert testimony, these issues could be considered in the outlook of the profession for valuation purposes. This would be correct only if these structural changes were foreseeable as of the valuation date. It would be incorrect to incorporate information regarding industry trends which were observable only after the valuation date into the outlook for the profession and the resulting valuation multiple. If these trends were observable at the valuation date and simply realized between the commencement and trial dates, the impact of the trends on financial value would be zero, since the expectation would have been incorporated into the commencement date valuation. Only *new* information will create value changes between the commencement and trial dates. By valuation standards, new information, available only after the commencement date, should not be considered, whether properly quantified by an expert or not.

Practice Value

Both the husband's and wife's experts determined the value of the practice by an excess earnings methodology, making adjustments to reported income to reflect reasonable compensation and a return on net tangible assets. Both experts then tax-impacted the earnings. We assume that both experts correctly applied an after-tax discount rate or capitalization multiple to the after-tax earnings stream. Equivalent results can be obtained by using non-taxed earnings and pre-tax discount rates.

Reasonable Compensation

The wife's expert argues that reasonable compensation should be based on the earnings of an attorney admitted to the bar in 1974, the year the husband began practicing. The husband's expert attempted to determine reasonable compensation based upon a survey of managing partners. Justice Friedman found fault with the lack of precision in the definition of 'managing partner' and chose the wife's expert's methodology, adjusting for year-to-year changes in attorneys' income which were not properly accounted for by wife's expert. The court also opined that "the formula (Rev. Ruling 68-609) is not designed to subtract the value of the services actually rendered or there would be no 'excess'." We disagree. In the sentence immediately preceding the prior quote, Justice Friedman stated that the purpose of the inquiry is to deduct "from the earnings of the business a reasonable amount for services performed by the owners or partners engaged in the business (Rev. Ruling 68-609)." In our opinion, reasonable compensation should reflect the amount that would have to be paid to a non-owner employee to perform all of the services of the partner. This is the amount of reasonable compensation that must be subtracted from reported income. Any income to the partner related to the performance of any duties is simply compensation for work performed. Only income in excess of this amount is attributable to practice ownership, and only the excess will be paid for by a prospective purchaser of the practice.

Weighted Average vs. Simple Average

In the determination of excess earnings, Justice Friedman stated, "There is no doubt that the more accurate method, adopted by every other expert who has testified over the years before this court, is to use a weighted average for a five year period." Statistically, the only difference between the weighted average used by the husband's expert and the simple average used by wife's expert is the weights applied to each year's results. A simple average is a weighted average with all years weighted equally.

The process of weighting results is used to give greater emphasis to particular historical results. Since the historical results of the practice are being analyzed to form an expectation of future performance, the valuator will want to give greater emphasis to results which occurred in an environment most similar to what is expected to exist in the future. We hope that Justice Friedman's rejection of the simple average is not a blanket rejection of the method of using a simple average, but rather a rejection of the idea that each of the past five years' performance is equally as likely to occur in the future. Assuming that the husband's experts weighted the practice's more recent years' performances more heavily, Justice Friedman is implicitly assuming that the more recent years' operating results are more representative of expected future performance. However, statistically, there is no foundation for an *a priori* assumption that a weighted average is more accu-

rate than a simple average, since the latter is a special case of the former.

McSparron Issues

In an attempt to render a decision consistent with *McSparron's* warnings against duplicative awards, the court took additional testimony from experts on this matter. Both experts in this hearing used license valuation techniques that were commonly accepted, but not indisputably correct. The commonly accepted practice of applying mortality factors to future earnings and the use of a 3% real discount rate for determining the present value of future earnings are less accurate than readily available alternatives.

Mortality Rates: Estimating expected future earnings by applying mortality rates to projected earnings is flawed because it assumes that only death will prevent a professional from working until age 65. In reality, people exit and re-enter the workforce throughout their lives for voluntary and involuntary reasons, including, but not limited to, disability, frictional unemployment, sabbaticals and early retirement. The worklife expectancy tables published by the Bureau of Labor Statistics account for these exits from the workforce for reasons other than death. Failure to consider these factors overstates license values.

Real Interest Rate: The use of a 3% real interest rate, referred to as the 'true' interest rate in this case, is also economically contestable. The real rate of interest is unobservable since one important component in determining the real rate is inflation expectations. Therefore, the real interest rate can only be *estimated* in retrospect, based on the assumption that inflation expectations are, on average, correct. Furthermore, the real rate of interest is a function of the supply and demand for credit, which varies according to the level of capital formation, government borrowing and savings rates. Economists have argued that not only is the real rate of interest *not* constant, but it may be non-stationary, a statistical term which means that if the rate moves up or down at some point, it will not necessarily ever revert to its prior level. To assume that the real rate of interest is always 3% has no basis in finance or economics and is often used merely for expediency. We believe that projections based on nominal rates of interest and inflation rates, both of which are readily observable, produce results which are more accurate than the blind application of a constant real rate which is unobservable and inconsistent with the fundamental economic principles of supply and demand.

There are additional references to discount rates in Justice Friedman's opinion, discussing the appropriate rate for discounting future earnings. The testimony of husband's expert that 20% represented an appropriate rate for discounting future earnings was dismissed as speculative and arbitrary, but Justice Friedman did recognize that there were risks inherent in the future earnings of the professional which were not captured in the 3% discount rate. Justice Friedman then remarked that there is substantial reason for using a 10% discount rate, which would seem equally as arbitrary. It is not clear from the article whether Justice Friedman applied the 10% discount rate, nor is it material since, ultimately, no license value was distributed.

From an economic and financial point of view, it is indisputable that the risk-free rate of interest does not capture the risks associated with the future earnings of professionals. As a result, to the extent that they are based upon the risk free rate, the reported value of professional licenses are biased upward. We believe, however, that the benefits of adhering to a risk free discount rate which admittedly introduces a known bias into the valuation is preferable to introducing another highly subjective component into a valuation process which is already highly subjective and prone to litigation.

We believe that is preferable to choose a discount rate which simply accounts for the time value of money. The impact of professional risk should be recognized by the court and considered in the distributive award percentage. This burden of risk that the license holder bears is one reason, we believe, that distributive awards of professional licenses should always be significantly less than 50%. As is clear from this case, attempting to capture professional risk in the discount rate for future earnings will lead to sizable differences in opinion, based primarily on subjective and insupportable assessments. This will reduce the likelihood of pretrial settlements and encourage trial of the issue.

Bifurcation of License

Both valuation experts in the post-*McSparron* hearing valued the law license of the husband as two separate components; the license and the enhanced earnings. Justice Friedman himself entertained the notion that graduates of professional schools entering a profession possess two assets, the license and enhanced earnings. He also noted that both *O'Brien* and *McSparron* indicate that the 'license' referred to in those decisions is the combined value of those two assets. Justice Friedman then appeared to revert to considering the license and enhanced earnings separately, discussing the coverture fractions of each component. The *modified* license considered in this case is the equivalent of the statistical license, defined by some measure of average attorney earnings versus average college graduate earnings. This approach computes enhanced earnings as the reasonable compensation level used in the practice valuation less average attorney earnings, for this case.

First, we point out that there is only one asset, the enhanced earnings of the license holder. A license itself,

absent the prospect of future enhanced earnings, is worth only the paper it is printed on. Second, even the statistical license, called simply the license in this case, has a component of enhanced earnings, otherwise it would have no value. The attempt to bifurcate the license and the enhanced earnings seems to be driven by the desire to mitigate the impact of premarital attainments, the husband's year and a half of law school.

We believe the application of coverture fractions (or the *Majauskas* formula) based on chronological measurements are inaccurate because a professional license is, in most instances, a non-divisible asset. There is no value, for example, in getting half way through law school. You either become a lawyer or you don't. In this case, the husband had completed half of law school. If we suppose that he had been married from the beginning of law school until the middle of his second year, what value would have been ascribed to his attainment? There would have been little or no earnings enhancement based upon this attainment. The majority of the earnings enhancement occurs upon *completing* the degree. A person who has completed half of law school is unlikely to generate half of the enhanced earnings of an attorney. We believe the proper method to determine the value of the license is to consider the earnings achievable by the titled spouse as of the date of marriage. If there is some value in partially completing a professional program, it should manifest itself in the potential earnings of that individual given his or her qualifications at the time of marriage and be reflected in the baseline earnings of the valuation computation. This approach recognizes that not all years of professional training are equal. We believe that the distributive awards should also reflect this reality and be based on the contribution of the non-titled spouse in a way that considers more than simply the passage of time.

License and Maintenance Overlap

Justice Friedman was diligent in his effort to avoid overlapping awards of maintenance and license value, and was unquestionably successful, by virtue of granting no distributive award of the husband's law license. The court compared the maintenance award with the portion of the license deemed to be distributable and decided that since the maintenance award *exceeded* the pro rata share of husband's enhanced earnings which created the license value, any distributable award of the license would be duplicative. In our opinion, this decision incorrectly interprets the notion of duplicative awards. We also believe it is useful to highlight the effects of the *ordering* of the maintenance and license awards.

Citing *Wadsworth*,[6] Justice Friedman wrote, "The court concludes that *McSparron's* anti-duplication rule requires that the value of the maintenance award be compared with the earning differential used in the license calculation." The court then concluded that, since the wife was entitled to 50% of the license value, the maintenance award should not exceed the other 50% of the enhanced earnings. This interpretation failed to consider all of the earnings *not* included in the license value, such as the earnings attributable to the practice[7] and the earnings attributable to the husband based upon his experience and educational attainments as of the date of the marriage. Furthermore, it failed to exclude the non-distributed portion of the license which was awarded to the husband.

Our interpretation of the *McSparron* anti-duplication rule, from an economic and financial perspective, is that a dollar of income should not be considered as both property (license and practice value) and income. Doing so would allow the possibility that the license holder could be required to make payments in the form of property distributions and maintenance awards that exceed his total ability to pay. To prevent duplication, the enhanced earnings attributable to the practice and the enhanced earnings attributable to the license should be exempt from consideration as income for maintenance purposes, since these earnings are considered as property in the practice and license valuation, respectively.

Ordering of Awards and Distribution

Both *Wadsworth* and *Rochelle* determined maintenance awards *prior* to the distribution of license value. Although the DRL[8] is circular regarding the proper ordering of property and mainteance distributions and awards, it is clear that when maintenance is determined prior to the distribution of the license value, the total awards to the non-titled spouse will be smaller and the non-titled spouse's ability to recognize the value of the professional license as a marital asset may be hindered. Court precedent[9] and economic sense suggest that equitable distribution should be determined prior to the award of any maintenance.

The primary factor which influences the value of the awards received by the non-titled spouse is whether the titled spouse's enhanced earnings attributable to the license are distributed as property, or the enhanced earnings are used as the basis for incrementally higher maintenance payments. If the license is awarded as property, the award is tax-free to the recipient. Maintenance payments are taxable income to the recipient. Therefore, as in the Friedman decision, the court's decision to transfer the value of the enhanced earnings to the wife in the form of higher maintenance payments, rather than as a property distribution, reduces the value of the award to the recipient by the recipient's marginal tax rate, which could be as high as 40%.

Additionally, a non-titled spouse who receives higher maintenance in lieu of a property distribution also faces the risk of failing to realize the full value of the license as a marital asset. If the duration of maintenance, for reasons of death of either spouse or remarriage of the non-titled spouse, is less than the worklife expectancy of the license holder, then the non-titled spouse will not receive the full value of the enhanced earnings which create the license value. Property awards do not run the risk of being cut short by death or remarriage. High maintenance payments in lieu of property distributions have been described as holding the non-titled spouse 'hostage' to the property award, because in order to realize the full value of the property, the non-titled spouse cannot remarry.

Conclusion

The detailed opinion in *Rochelle G. v. Harold M.G.* has provided us Justice Friedman's in-depth review of many of the factors which comprise the license and practice valuation process. Although his attempt was commendable, in some areas, the court's interpretation of economic and financial matters appears flawed. Blind reliance on this decision could produce biased property and maintenance awards. As this case will likely be frequently cited in matrimonial proceedings because of its detail and breadth, it is paramount that attorneys and judges alike recognize which of Justice Friedman's statements are based on sound financial and economic principles and those which are not.

Endnotes

1. *O'Brien v. O'Brien*, 66 NY2d 576, 498 NYS2d 743 (1985).
2. *McSparron v. McSparron*, N.Y.L.J., 12/8/95 p. 27, col. 3 (N.Y.).
3. *Hartog v. Hartog*, 85 NY2d 36, 623 NYS2d 537 (1995).
4. *Cassano v. Cassano*, 85 NY2d 649, 628 NYS2d 10 (1995).
5. N.Y.L.J., 8/14/96 p. 22, col. 1 (N.Y.).
6. *Wadsworth v. Wadsworth*, 419 AD2d 410, 641 NYS2d 779, 782 (4th Dep't 1996).
7. In the notes to his published opinion, Justice Friedman dismissed the argument that the Court of Appeals decision in *McSparron* regarding the duplication of maintenance and license awards should be extended to include maintenance and practice goodwill.
8. DRL § 236, Pt. B, subd. 6, par. a(1) *also* DRL § 236, Pt. B, subd 5, par. d(5).
9. *McCauley v. Drumm*, 217 AD2d 829, 629 NYS2d 838 (3d Dep't 1995).

Amending the Domestic Relations Law Enforcement Provisions: A Modest Proposal to Avoid Chaos in the Courts

By John P. DiBlasi
March 1997

Recently, I completed an assignment in one of the three supreme court matrimonial parts in Westchester County. In the course of that assignment, in which I dealt extensively with the numerous problems that arise during the course of divorce litigation, I found that, while each case presented its own thorny issues, the common thread running through most of the actions was the need for the parties to understand their obligations, as well as their rights. Too often, this has come down to the need to enforce compliance with court orders. Absent adherence to those orders, the rights of any litigant are rendered meaningless, for "[i]f one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."[1]

The courts of this country have often sounded the warning that no individual may take it upon himself or herself to decide whether to comply strictly with the terms of a court order. Thus, it has been stated that "[t]he orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'"[2] In contested matrimonial actions, it is most often within the context of financial obligations that the need for enforcement becomes paramount.

Various sections of the Domestic Relations Law (DRL) provide the means for enforcement in the supreme court of financially related orders, both final and *pendente lite*. Consequently, where a party disobeys an order, the court's options include requiring the posting of security,[3] sequestration of property,[4] entry of money judgments,[5] income deduction orders (sometimes referred to as wage garnishments)[6] and punishment for civil contempt.[7] Additionally, to enforce an order directing the payment of child support, or combined child and spousal support, the supreme court may suspend the driving privileges,[8] or the state professional and business licenses,[9] of an offending party.

Despite what appears to be an arsenal of legal remedies upon which to rely when one party defaults in payment of court-ordered obligations, there are numerous restrictions upon the authority of the supreme court to punish individuals who violate various types of orders. Additionally, the DRL creates significant differences between the proof requirements placed upon litigants who seek to enforce orders in proceedings in the supreme court as compared to family court. These differences, which I believe should be eliminated, create substantial and unwarranted burdens upon a party who brings a supreme court proceeding to enforce an order directing the payment of money which is being violated by a present or former spouse.

I believe that the time has come to close these existing "loopholes" in the enforcement statutes, so that parties to pending or completed matrimonial actions are not subject to distinctions in treatment which are not supportable in law or practice, and do not find themselves with hollow victories at the conclusion of enforcement proceedings. The discussion that follows presents my opinion of three significant problems which require immediate legislative correction.

First and foremost among the difficulties created by existing DRL enforcement provisions is the burden placed upon a moving party before the supreme court may punish an individual for contempt by means such as incarceration. When a court order or judgment directing the payment of money is violated, and enforcement is sought in a supreme court proceeding, DRL section 245 requires the court to first find to be unavailable all of the other enforcement remedies set forth in the DRL, *i.e.*, sequestration, security, money judgment and income deduction order, before punishment for civil contempt may be imposed (hereinafter "the exhaustion of remedies requirement").

In its application, DRL section 245 initially requires that, on a contempt motion in the supreme court, the moving papers must support a presumption that the order which has been violated cannot be enforced by any of the other remedies set forth above.[10] Absent such a showing at the time the papers are presented, it is improper for the court to even direct that a contempt hearing be conducted.[11]

More significantly, where the occurrence of a violation is contested, the movant must establish at a hearing that these alternate remedies are unavailable. In certain cases, this requirement may not present a substantial hurdle. Thus, where the obligated party is

self-employed, it is clear that resort to an income deduction order is ineffectual.[12] Similarly, a money judgment and sequestration are viewed as unavailable alternatives where the defaulter owns property, but only in conjunction with others.[13] Nevertheless, in far too many cases, where the other party has some assets or income, the exhaustion of remedies requirement can render the contempt remedy all but illusory.

While it is true that the remedy of contempt should not be lightly invoked, and that incarceration should be a penalty of last resort,[14] the existence of other means of enforcement should not to be an absolute bar to the contempt remedy, because the time and procedural requirements for using such other remedies often completely undermine what should be the goal of an enforcement procedure, *i.e.*, prompt relief to the injured party. Thus, while a party may have property which could be sequestered, for example, by an order providing for a forced sale for the benefit of the party seeking enforcement, such a procedure may take months to fully implement. Similarly, a money judgment may be an essentially meaningless remedy to a party seeking enforcement of a child support or maintenance order, since the time involved in executing upon a judgment can be so lengthy as to make it essentially of no value to a party who needs previously ordered payments to meet present obligations for housing, clothing, food, or other necessities for his or her own children or himself or herself.

I believe that there is no constitutional bar to amending DRL section 245 so as to remove from the moving party the exhaustion of remedies requirement. This conclusion is supported by present requirements applicable to all civil contempt proceedings, as well as the absence of such a burden in similar provisions under the Family Court Act (FCA).

As an initial consideration, under both the existing form of DRL section 245 and the amended version that I propose, the obligated party has an absolute right to be represented by counsel in any contempt proceeding where incarceration is a possible outcome.[15] Additionally, in every case where the papers submitted in opposition to the contempt application raise an issue of fact, a hearing must be conducted by the court.[16] Moreover, removal of the exhaustion of remedies requirement will have no impact upon the movant's burden of proof, which is the same in all civil contempt proceedings. Thus, it will still have to be established "that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect," that the obligated party "had knowledge of the court's order," and "with reasonable certainty, that the order has been disobeyed."[17] Along with those proofs, the movant will continue to be required to establish that "the failure to abide by [the] order was willful in that it was calculated, or actually did defeat, impair, impede, or prejudice the rights or remedies of the other party."[18] Consequently, none of the procedural due process protections afforded in civil contempt cases will be denied to any obligated party in a DRL section 245 contempt proceeding even with the change I propose.

Legislative support for the removal of this impediment to enforcement of payment obligations exists under both the DRL and the FCA. For example, it is settled that the DRL section 245 "precondition [to a contempt finding] applies only where the order or judgment directs the payment of a sum of money."[19] More compelling is that, while the parallel FCA provision, *i.e.*, FCA section 454, authorizes the court upon a contempt finding to impose any of a variety of remedies,[20] nevertheless, where a willful violation has been found, up to six months of incarceration may be imposed,[21] without any showing that the other FCA remedies are unavailable.[22] Certainly, if in instances where a party violates an order directing the transfer of assets[23] or a visitation order,[24] or is found in a family court proceeding to have willfully violated a support order,[25] punishment for civil contempt may be imposed without a prior showing that other remedies are unavailable, no rational basis exists for imposing such a requirement in supreme court proceedings to enforce child support or maintenance orders.

Where immediate compliance with orders, including payment of accumulated arrears, is required under the circumstances presented to a court, what is obviously needed is the authority to bring home to the offending party, in the clearest of terms, that the order of a court must be satisfied in full. As I have seen, it is most often only the threat of incarceration which will cause an offending party to immediately make current all financial obligations imposed by an existing order.[26] Given the additional burden created by the exhaustion of remedies requirement, that potential for severe punishment is too often not available.

Therefore, I propose that DRL section 245 be immediately amended to delete the exhaustion of remedies requirement. Such a change will have the effect of placing upon the obligated spouse the duty to provide the financial support as previously ordered by a court, without impacting in any manner upon his or her constitutional protections. In those instances where other assets exist, it will, as it should, become the obligated party's responsibility to liquidate such assets in order to remain current in the court-ordered obligation, with the threat of incarceration acting as a sword of Damocles to encourage compliance. Finally, lest there be any concern that a contempt adjudication will prevent an obligated party from accessing such assets prior to incarceration, there will continue to be a requirement that "any term of imprisonment must be conditioned upon the [oblig-

ated party's] failure to pay all arrears within a specified time."[27]

Further disparate treatment of enforcement proceedings in the supreme and family court was created by the 1995 legislation authorizing the suspension of driving and state professional and business licenses for failure to pay court-ordered support. Under DRL sections 244-b and 244-c, such suspensions may only be ordered where arrears exist in payments of child support, or combined child and spousal support. Since "support" under the FCA includes both child support and spousal support, the parallel FCA provisions authorizing such suspensions permit the use of this remedy even if only spousal support has been ordered.[28] Whether this difference between the DRL and FCA provisions was intentional or a mere oversight, its effects are significant in the supreme court, where a large percentage of the support orders relate solely to spousal support. I believe that no rational basis exists to differentiate between the authority of the supreme and family courts in the use of the suspension remedy, particularly considering that the financial difficulties faced by a party not receiving court-ordered support are the same regardless of the forum in which enforcement is sought. Therefore, I propose that DRL sections 244-b and 244-c be immediately amended to authorize their use where arrears for maintenance alone have accrued to the levels which trigger the suspension remedy.

Finally, I believe the time has come to change DRL section 243, which provides for the posting of security by a nonpaying party, because in its present form it applies solely to orders for the payment of child or spousal support.[29] Thus, while this statute permits the supreme court to direct a nonpaying party to post an amount set by the court to ensure a fund which can be drawn against in the event that future payments are not timely made, it does not authorize the court to use this remedy to ensure the payment of monies as part of an equitable distribution award ordered at the conclusion of a divorce action.

As a result, when one party has been ordered, for example, to make periodic payments as part of such equitable distribution, but fails to do so as required, the court cannot direct that any security be posted by that party. This is particularly unfair to the recipient party, since the manner in which equitable distribution is determined is based on many factors, including the extent to which spousal support is to be paid. Consequently, in those cases where a party's distributive share was intended to provide an ongoing source of income in lieu of maintenance, and the obligated party fails to make the periodic payments as directed, thereby depriving the recipient of what is effectively his or her current income, the lack of authority to direct the posting of security substantially undermines the court's ability to enforce its orders without the need for the recipient spouse to return to court each time a payment is not made. To correct what I view as an unwarranted distinction in the availability of this enforcement remedy between obligations to make periodic support payments as opposed to periodic payments of an equitable distribution award, DRL section 243 should be amended to permit its use in any situation where one party bears an obligation to make periodic payments to another in matrimonial actions, including post-judgment proceedings.

Where the daily existence of one party is dependent upon another's compliance with a lawful mandate, by freeing the dependent party from the DRL section 245 exhaustion of remedies requirement, by applying the suspension of driving and state professional and business licenses remedy to orders for maintenance whether or not part of an order for child support, and by making the remedy of security available to proceedings to enforce equitable distribution awards, our legislature can greatly enhance the ability of its citizens to freely enjoy their lives within the boundaries of the law, by denying means of avoiding enforcement to any party who purposely ignores his or her court-ordered financial obligations. In so doing, a great step can be taken to prevent the chaos and tyranny that follow when anyone is permitted to set himself or herself above the law.

Endnotes

1. *United States v. Mine Workers*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring).
2. *Maness v. Meyers*, 419 U.S. 449, 459 (1975), quoting *United States v. Mine Workers*, *supra*, 330 U.S. 293; *see Balter v. Regan*, 63 NY2d 630 (1984), *cert. denied*, 469 U.S. 934 (1984).
3. DRL § 243.
4. *Id.*
5. DRL § 244.
6. Civil Practice Law and Rules 5241, 5242 (CPLR). Although this relief is set forth in the CPLR, it is specifically authorized in matrimonial actions pursuant to DRL § 244.
7. DRL § 245.
8. DRL § 244-b.
9. DRL § 244-c.
10. In relevant part, DRL § 245 provides that where a spouse in a variety of proceedings now falling under the general definition of a "matrimonial action," *see* CPLR 105[p], "makes default in paying any sum of money as required by the judgment or order directing the payment thereof, and *it appears presumptively, to the satisfaction of the court*, that payment cannot be enforced pursuant to" the other enforcement provisions of the DRL, the court can impose punishment for contempt pursuant to Judiciary Law § 756 (emphasis supplied). *See Heitzman v. Heitzman*, 105 AD2d 682 (2d Dep't 1984); *see also Allen v. Allen*, 83 AD2d 708 (3d Dep't 1981).
11. *See Heitzman v. Heitzman*, *supra*, 105 AD2d 683.
12. *See Farkas v. Farkas*, 209 AD2d 316, 318 (1st Dep't 1994).

13. *See id*.

14. *See Farmer v. Farmer*, 123 Misc. 2d 298, 305 (Fam. Ct., N.Y. Co. 1984).

15. *People ex rel. Lobenthal v. Koehler*, 129 AD2d 28 (1st Dep't 1987).

16. *Quantum Heating Services Inc. v. Austern*, 100 AD2d 843, 844 (2d Dep't 1984); *cf. Bell v. Bell*, 181 AD2d 978, 979 (3d Dep't 1992).

17. *McCormick v. Axelrod*, 59 NY2d 574, 583 (1983).

18. *See Rothstein v. Rothstein*, 145 Misc. 2d 481, 487 (Sup. Ct., Nassau Co. 1989); *see also Oppenheimer v. Oscar Shoes, Inc.*, 111 AD2d 28, 29 (1st Dep't 1985).

19. *Gordon v. Gordon*, 210 AD2d 929, 930 (4th Dep't 1994).

20. These include a judgment for arrears, the posting of security to ensure future payments, sequestration of assets, and suspension of driving and state professional and business licenses.

21. FCA § 454 goes even further, by permitting the family court to impose incarceration while also directing one or more of the other forms of relief set forth above.

22. At least one court has concluded that the DRL § 245 exhaustion of remedies requirement applies under FCA § 454. *Farmer v. Farmer*, *supra*, 123 Misc. 2d 305. While the Appellate Division, Fourth Department applied that requirement in one case, *Nagle v. Nagle*, 155 AD2d 990 (4th Dep't 1989), it did so in terms of the exercise of discretion of the family court. In arriving at its conclusion, that court cited *Covello v. Covello,* 68 AD2d 818 (1st Dep't 1979), a case which applied the exhaustion of remedies requirement in a matrimonial action, solely upon the authority of DRL § 245, with no mention of any constitutional law basis for that requirement. Indeed, in another case, the Appellate Division, Fourth Department held that the family court in that action did not err in imposing incarceration "without first attempting other means to enforce payment of arrears." *Ramsey v. Scott*, 214 AD2d 957, 958 (4th Dep't 1995). Consequently, it appears that only statutory law, and not constitutional mandate, call for the exhaustion of remedies requirement.

23. *See Gordon v. Gordon*, *supra*; *see also Merzon v. Merzon*, 210 AD2d 462 (2d Dep't 1994).

24. *See Gordon v. Janover*, 121 AD2d 599 (2d Dep't 1986).

25. FCA § 454.

26. Indeed, in most cases, once incarceration has been ordered, subject to a short period of time in which to purge the contempt finding, the defaulting party inexplicably produces the money he/she was previously without any source from which to pay it. *See*, *e.g.*, *Sands v. Sands*, 105 AD2d 788 (2d Dep't 1984), *mot. for lv. to app. dsmd.*, 64 NY2d 604 (1985) (court specifically noted defendant's failure to explain his payment of $1,250.00 within the 30-day purge period set by the trial court in the face of his claims at a contempt hearing that the purge condition was beyond his present financial resources).

27. *See Stempler v. Stempler*, 200 AD2d 733, 735 (2d Dep't).

28. FCA §§ 458-a and 458-b.

29. Insofar as relevant, DRL § 243 provides that security may be directed "[w]here a judgment . . . or an order . . . requires a spouse to provide for the education or maintenance of any of the children of a marriage, or for the support of his or her spouse."

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Former Representative Bella S. Abzug, second from right, addressed members of the Family Law Section at the Section's January 25, 1985 Annual Meeting in New York. From left to right were Program Chair Willard H. DaSilva, Garden City; Julia Perles, New York, member of the Section's executive committee and a featured speaker; Abzug; and Section Chair Sanford S. Dranoff, Pearl River.

Relocation Case Law: *Tropea* and Its Offspring

By Barbara Ellen Handschu
September 1998

Two years ago the Court of Appeals decision in *Tropea v. Tropea*[1] set off a gaggle of commentators. Some suggested it was merely a recital that all custody decisions rest upon a "best interests" analysis. This writer went further out on a limb, characterizing *Tropea* as a "Revolution in Relocation" law, doing away with the predictability offered by the "exceptional circumstances" test in *Weiss v. Weiss*[2] or the three-tiered analysis set forth in *Radford v. Propper.*[3] Commentaries abounded in the *New York Law Journal*[4] and in the *New York State Bar Journal*.[5] At the same time that the Court of Appeals decided *Tropea*, a California court decided a relocation case (*In re Burgess*), and front page articles appeared in the media on relocation cases.[6] Stories have run in the *Wall Street Journal*[7] and in the *American Bar Association Journal*.[8] The American Academy of Matrimonial Lawyers passed a Model Relocation Act[9] which has been adopted in one state and considered by others. The most discussed and most troubling area in custody is relocation. It is with some temerity that this commentator attempts an assessment of the post-*Tropea* developing law in relocation.

Relocation cases are fact-sensitive. There never are two exact replicas. This is equally true in all areas of family law, but we can extract some basic rules and premises from, for instance, equitable distribution cases with separate property origination credits or transmuted property. We should be able to extract some basics now that there have been more than two years of appellate case law since *Tropea* was decided. (Appellate cases are the focus of this article, although trial courts may receive occasional comment.)

Several tentative conclusions can be drawn. Some are tentative because they need more articulation from the courts. Nonetheless, since the limb was a comfortable place two years ago—here we go again in a similar spot, perhaps to encourage other commentary.

Here are my conclusions:

(A) The best interests analysis suggested by the Court in *Tropea* seems to be evolving into a traditional custody best interests assessment, especially when custody has not previously been decided by a court.

(B) There have been numerous cases remanded either because they were decided on the old tests (exceptional circumstances or the three-prong tests) or they had undeveloped records.

(C) The courts seem to reject moves based solely upon a desire for a "fresh start"—this was the language that suggested to this commentator and to others that the Court of Appeals had seriously relaxed the economic necessity/exceptional circumstances test. Parallel moves are not being imposed; nearby moves often are approved.

(D) Looking at 27 months of appellate cases, the custodial parent (or primary parent) has not had as much of an advantage as originally anticipated when *Tropea* was decided.

(E) Clauses in separation agreements, despite the suggestion in a footnote to *Tropea,*[10] have not been a focus of appellate litigation.

(F) There is little or no predictability in assessing the chances for a relocation. Advising trial or appellate clients involves a high degree of guesswork. Costly custody litigation is involved; as predicted, *Tropea* has meant employment for mental health professionals, lawyers and law guardians.

(G) Some of the Appellate Divisions are weaving their own constructions of the law. Some will be discussed subsequently. The Third Department seems excessively restrictive, rarely permitting even nearby, accessible moves, while the Fourth Department, using a best interests analysis, seems to focus on the economic underpinnings.

Each of these conclusions will be considered separately with some supporting authority.

Best Interests Standard

Several times the *Tropea* court stressed that the best interests standard must be the test in a relocation case.[11] The Court then suggested a number of factors, many specific to relocation cases, which went into a best interests determination. None of these factors was weighted or prioritized, since the Court rejected what was characterized as "artificial tests" in deciding relocation.

To better understand the best interests standard, it may be instructive to go back to the Court's decision in *Daghir,*[12] where the Court held that the relocation decision was not the classic custody case where a court was asked to choose between differing factual assessments about the best interests of a child. In his dissent, Judge Meyer challenged the Court and set forth a differing best interests analysis, suggesting that ". . . custody should not be changed to punish one parent or enforce the rights of the other, but only when it has been shown to be in the child's best interest to do so."[13] In a footnote, Judge Meyer suggested that traditional best inter-

ests considerations, such as the emotional, social, moral, material and educational needs of a child, should be the proper best interests focus in any custody or relocation case.[14] If one is trying a relocation case or writing a brief, this dissent and the authorities relied upon by Judge Meyer may be helpful.

Some post-*Tropea* cases have indicated that relocation cases involve more traditional best interests considerations. While directing a remand, the Second Department, in *DiMedio v. DiMedio*,[15] indicated that the best interests test should have been utilized and that forensic examinations should have been directed, since one parent's stability was challenged. The trial court was directed to consider "traditional factors," such as the stability of each home. This case suggests that the best interests inquiry goes beyond whether the child's best interests are served by the move. Similarly, in *Hilton*,[16] the Fourth Department—which before *Tropea* had suggested that the exceptional circumstances test included a best interests analysis—used traditional best interests concerns and took into account a parent's history of domestic violence and the fact that one parent had been the child's primary nurturer and was better able to provide for the child, including her educational needs. In *In re Sara P. v. Richard T.*,[17] the trial court suggested that in instances where there was an agreed upon shared custody arrangement, relocation must involve a traditional best interests determination. In this writer's opinion, this is likely to be the evolving state of the law.

While traditional best interests considerations may be operative, one should keep in mind that the best interests standard vests the trial courts with expansive discretion. Consequently, when litigating relocation cases, one should focus upon the reasons and motives for the move and the history of access, the impact upon access, replacement time and transportation arrangements and costs, along with the more traditional best interests concerns, such as parental fitness and the home environment. While the Court in *Tropea* suggested that "parental guilt" was not a proper factor in a relocation case, "best interests" often involves an analysis that goes this way: "I'm fit—my spouse is less fit/unfit." After weighing relative fitness and best interests, the finger of parental guilt is likely to be pointed at the other spouse, sometimes by indirection.

Remands/Complete Records

When the *Tropea* decision was announced, this commentator suggested that there would be numerous remands at considerable cost to litigants and the already burdened judiciary. This prediction seems accurate. Cases that had been tried prior to *Tropea* have been remanded by some of the Appellate Divisions.[18]

These remands suggest a strategic consideration in trying or appealing relocation cases. As trial counsel, if the court limits proof to best interests as it relates to relocation—stressing the reasons for the move or the grounds for opposition—make an offer of proof or bring a motion *in limine* to enlarge the record bringing forth traditional best interests issues, such as home environment and the child's needs. You may also suggest that such a best interests inquiry include forensics and home studies, where appropriate, and perhaps appointment of counsel for the child.

As appellate counsel, when confronted with a limited trial record focused on relocation, the most promising approach may be to argue that the lower court did not have sufficient facts for a best interests determination. Several appellate cases have suggested this when remitting matters for a new trial.[19]

"Fresh Starts"; "Parallel Moves"; "Nearby Moves"

The initial reaction to *Tropea* as favoring moves by custodial parents cited the dictum that endorsed moves based upon a desire for a "fresh start" and the Court's suggestion that the remaining parent might be directed to make a "parallel move." Since *Tropea* involved two nearby moves (*i.e.*, within three hours driving distance), it was anticipated that courts would continue to approve intrastate or short-distance moves. A review of each area suggests that those predictions were not entirely correct.

Two appellate courts have refused moves based on the desire for a "fresh start."[20] If you use this factor as trial counsel, the desire for a fresh start should be combined with other factors when proposing relocation. For instance, a fresh start claim combined with a return to family support, lower cost housing and free child care presents a much more compelling scenario as contrasted with a move based solely on a fresh start.

The *Tropea* court suggested that, under proper circumstances, a move could be permitted with the remaining parent directed to make a "parallel move." While it raises some interesting arguments (*i.e.*, is there a fundamentally protected right *not* to travel to exercise parental rights?) two appellate courts, in approving somewhat distant moves, have suggested that the remaining parent could also move. One involved a parent who was employed by Jenny Craig;[21] the other involved moving a short geographic distance.[22] Again, litigators are urged not to seek relocation with primary reliance on the other parent's ability to make a parallel move.

As anticipated, some appellate cases have permitted nearby moves, often those which can be driven in approximately three hours' time.[23] Such moves generally permit weekend access, although they rarely allow mid-week contacts. While the litigator seeking reloca-

tion may feel some comfort when there is a proposed nearby move, all relocation and best interests factors should be thoroughly litigated. A short-distance move litigated solely on those grounds may be defeated if the other parent and extended family have been highly involved in child-rearing and the child has been thriving.

Relocation Clauses

The second footnote in *Tropea* suggested that a relocation clause (restrictive only?) might affect future litigation. Thus far, appellate cases either have not focused on prior clauses or the cases being decided on appeal have not included prior contractual restraints.[24]

The jury is out as to the weight afforded to relocation clauses. (Beware of undue emphasis.) However, a recent appellate case that did not involve a move suggests that parents may, by agreement, alter statutory custody modification standards so long as there is no affront to public policy.[25] This may be authority for contractual relocation limitations which might place the burden of proof and the burden of proceeding on the relocating parent. It might sanction clauses readjusting access time and transportation provisions in the event of court-approved moves. Clauses automatically transferring custody with a proposed move are probably unenforceable, since automatic forfeitures deprive a court of its *parens patriae* functions.

Overall Assessments

After a little more than two years of decisions since *Tropea,* we can draw some conclusions. First, there have been a large number of reported cases on the appellate and trial levels—some 27 appeals and 15 trial courts. Next, while there were more moves allowed by appellate courts (16 allowed moves, 11 denied moves), the trial courts were almost evenly split (seven allowed; eight denied).

One of the most prolific courts has been the Third Department. While prior to *Tropea,* the Court fashioned the nearby drive rule permitting three-hour driving moves, it has now become quite restrictive, permitting five moves and denying eleven others. Interestingly, the only cases where moves were allowed involved moves proposed by fathers or, in one case custody granted to a father in Florida. While this is somewhat puzzling, it suggests that perhaps men's economic reasons for moves may be afforded disproportionate weight. More time and decisions are necessary to test this suggestion.

Two significant long-distance moves have been approved. One move permitted by the Fourth Department permitting a move to Vancouver[26] and one trial court allowed a move to Saudi Arabia.[27]

The Fourth Department seems to be continuing to mix traditional (custody) best interests with relocation best interests. Two remarriage cases—the Vancouver move, based upon an engagement, and a denied move to Delaware after marriage[28]—seemingly have economic underpinnings. The permitted long-distance move involved a prospective marriage to a wealthy man; the disallowed move had limited financial advantages with a marriage to a life-long Delaware resident.

Finally, the Second Department has permitted moves in a majority of the cases reported in these 27 months (six allowed moves; one denied move). Most of those moves involved significant geographic distances.

The post-*Tropea* years have been exciting and stimulating. At least two of the Appellate Divisions are beginning to interpret the dictum in *Tropea*. Trial courts are citing factors. Signs indicate that there may be a mixing of traditional best interests and relocation best interests, as the standards when a court makes an original custody determination. If relocation issues arise either after a stipulated custody arrangement—perhaps embodied in a separation agreement and/or a divorce judgment—or prior to a custody determination—perhaps in divorce litigation or between unmarried parents in the Family Court—one should be prepared to litigate and argue mixed traditional custody best interests along with relocation.

A final caution to litigators: given the complexities of relocation law as it has been developing, one should not build up expectations for clients when evaluating or litigating cases. Clients tend to hear whatever supports their position. Carefully explain the complexities of litigation as we all await further guidance from the courts as they move us into the 21st century.

Endnotes

1. *Tropea v. Tropea,* 87 NY2d 727, 642 NYS2d 575 (1996).
2. *Weiss v. Weiss*, 52 NY2d 170 (1981).
3. *In re Radford v. Propper*, 190 AD2d 93, 597 NYS2d 967 (2nd Dept. 1993).
4. Florescue, *The New View of Relocation of the Custodial Parent*, N.Y.L.J., May 13, 1996, p. 3, col. 1; *Relocation of the Custodial Parent*, N.Y.L.J., 3/10/97, p. 3, col. 1; Felder, *The Court of Appeals and the Rules of Relocation*, N.Y.L.J., April 8, 1996, p. 3, col. 1; Brandes and Weidman, *Relocation Revisited*, N.Y.L.J., April 23, 1996, p. 3, col. 1; Handschu, *Revolution in Relocation*, N.Y.L.J., May 17, 1996, p. 3, col. 1; Weiss, *Relocation after 'Tropea/Browner': Revolution or Recognition of Reality?*, N.Y.L.J., May 30, 1996, p. 2, col. 1; Cohen and Sicher, *'Tropea' and 'Browner': The Missing Evidence*, N.Y.L.J., August 5, 1996, p.S5.
5. Jacobson, *Moving the Child*, Fam. Law Rev., Vol. 28, No.2 (June 1996); Marnell, *Should the Court of Appeals Have Changed the Law in Custody Relocation Cases?*, Fam. Law Rev., Vol. 28, No. 4 (Dec. 1996).
6. New York Times, *Appeals Court Lifts Restrictions on Divorced Parents' Moving*, March 27, 1996, p. 1; USA Today, *Custody Wars: Relocating*, April 22, 1996, p. 1.
7. Margaret A. Jacobs, *Courts Let Custodial Parents Move*, Wall Street Journal, Feb. 10, 1998.

8. *A Parent's Moving Checklist*, ABA JOURNAL, Feb. 1998. p. 26.
9. American Academy of Matrimonial Lawyers, Model Relocation Act, passed at the organization's mid-year meeting in Cancun, Mexico, (March 1997); copies available by contacting: American Academy of Matrimonial Lawyers, 150 North Michigan Avenue, Chicago, IL 60601, 312-263-6477.
10. *Tropea v. Tropea*, 87 NY2d 727 (1996) at p. 741, fn 2, where the Court indicates that "[a] geographical relocation restriction agreed to by the parties and included in their separation agreement might be an additional factor relevant to a court's best interests determination."
11. *Tropea*, *supra*, where the Court indicated: "[P]redominant emphasis being placed on what outcome is most likely to serve the best interests of the child." *Id*. at 739; "[T]he rights and needs of the children must be accorded the greatest weight . . ." *Id*. at 739; "The courts must determine . . . whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests." *Id*. at 741.
12. *Daghir v. Daghir*, 56 NY2d 938 (1982).
13. *Id*. at 944.
14. *Id*. 946, fn.2
15. 233 AD2d 394, 650 NYS2d 746 (2d Dept. 1996).
16. 665 NYS2d 203 (4th Dept. 1997).
17. 670 NYS2d 964 (Fam. Ct., Monroe Co. 1998).
18. The Second and Third departments have remanded cases which were tried and appealed either before *Tropea* or appealed after *Tropea*. Representative of such remands are the following cases: *Millay v. Millay*, 226 AD2d 728, 641 NYS2d 699 (2d Dept. 1996); *Sandman v. Sandman*, 228 AD2d 809, 643 NYS2d 755 (3d Dept. 1996).
19. *Cf*., *Fragola v. Alfaro-Fragola*, N.Y.L.J., Jan. 30, 1998, p. 30, col. 6; *Castler v. Castler*, 233 AD2d 720, 650 NYS2d 351 (3d Dept. 1996); *Rolls v. Rolls*, 633 NYS2d 345 (3d Dept. 1997).
20. *Sawyer n/k/a Porter v. Sawyer*, 664 NYS2d 505 (4th Dept. 1997); *Clark v. Williams*, 229 AD2d 686, 645 NYS2d 160 (3d Dept. 1996).
21. *Caganek v. Caganek*, 233 AD2d 701, 650 NYS2d 365 (3d Dept. 1996).
22. *Harder v. Yandoh*, 228 AD2d 814, 644 NYS2d 83 (3d Dept. 1996).
23. Nearby moves were permitted in *Carlson v. Carlson*, 670 NYS2d 297 (4th Dept. 1998) (25 miles); *Schindler v. Schindler*, 227 AD2d 634, 643 NYS2d 196 (2d Dept. 1996) (move to New Jersey); *Harder v.Yandoh*, *supra* (65 miles). These cases should be contrasted with *Rolls v. Rolls*, 633 NYS2d 345 (3d Dept. 1997) which denied a move one hour away from the father's home. This is somewhat puzzling coming from the Appellate Division which prior to *Tropea* permitted moves that could be driven in three hours or less.
24. In *Carlson v. Carlson*, *supra*, the radius restriction (children remain in same county) was not effectuated; in *In re Mascola v. Mascola*, N.Y.L.J., June 12, 1998, p.36, a court-imposed restraint on any future relocation was removed by the Appellate Division, restoring the original stipulation which required new negotiations with any proposed move.
25. *Studenroth v. Phillips*, 230 AD2d 247, 657 NYS2d 257 (3d Dept. 1997).
26. *Gillard v. Gillard*, 241 AD2d 966, 661 NYS2d 378 (4th Dept. 1997).
27. *Lazarevic v. Fogelquist*, 175 Misc. 2d 343, 668 NYS2d 320 (Sup. Ct., N.Y. Co. 1997).
28. *Sawyer n/k/a Porter v. Sawyer*, 664 NYS2d 505 (4th Dept. 1997).

'Til Taxes Do Us Part . . . Recent Developments in the Innocent Spouse Rule

By Harvey G. Landau and Barbara E. Bel
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Married couples typically file joint income tax returns. The husband and wife are jointly and individually responsible for payment of correct taxes on their taxable income. One spouse may contribute little or no income, but will still be liable if the other spouse understates or makes an underpayment of the amount of income tax due. (Any reference to "tax" includes interest and penalties, if applicable.)

Matrimonial practitioners are well aware that, in some situations, one spouse may not know of the failure of the other spouse to properly report or pay all required taxes due. It is not uncommon to have such a spouse inform her attorney that during the marriage, either her husband signed her name to the joint tax return or presented the return for her signature on or about April 15th, giving her little or no opportunity to review the return before signing it.

Upon separation or divorce, one spouse, presumably the wife for the purposes of this article, may not be aware of the incorrect tax reporting or underpayment of tax by the husband. For example, tax may be due on the husband's self-employment income. Yet, in many settlement agreements, the wife is required to file a joint return for the relevant calendar year. Filing a joint tax return, rather than a separate return, usually results in a lower tax liability. Often, the agreement provides for a tax indemnification between the spouses with respect to any tax liability, and the husband/income-producing spouse is often required to indemnify and hold his wife harmless from any tax liability. This indemnification may also apply to joint returns in prior years. Unfortunately, the Internal Revenue Service (IRS), not surprisingly, insists on full payment of taxes due. If the spouse responsible for the incorrect reporting or nonpayment of tax has insufficient assets to pay the tax bill, the IRS collectors likely will demand the balance from the other spouse, whether the parties are still together, separated or divorced.

In 1971, Congress enacted the first "innocent spouse" provision of the Internal Revenue Code (I.R.C.) in order to protect spouses with no knowledge of incorrect tax reporting by the other spouse. The provision was modified in 1984, but it still offered limited relief. It provided no escape clause for a spouse who "innocently" signed a joint tax return as an accommodation and was then confronted with collection efforts by the IRS because there was an *underpayment* of taxes as opposed to an *understatement* of income or overcalculation of deductions, creating further tax liability. In other words, in those cases where the parties' tax return accurately reflected the parties' joint taxable income, but the spouses failed to remit the full taxes due, the so-called innocent spouse had no redress if the IRS sought collection from her rather than the now debt-ridden, asset-depleted former husband.

New Tax Options

Congress, by enacting the IRS Restructuring and Reform Act of 1998 signed by President Clinton on July 22, 1998, gave further relief to innocent spouses by making the old rules more flexible; and it enabled a spouse to claim one or more types of relief, to wit: (1) innocent spouse, (2) separation of liability and (3) equitable relief.[1]

Briefly, the recently enacted amendments provide for relief to spouses in certain circumstances from joint liability for tax due on a jointly filed tax return, plus interest and penalties. The burden of proof is on the individual making the election to establish the deficiency allocatable to him or her.

Innocent Spouse Option

The recently amended innocent spouse rule or option makes such status easier to obtain in several ways. Under prior law, there were certain minimum understatement requirements which have been eliminated. Also, the understatement of tax must have been deemed grossly erroneous in order to qualify. A spouse can now elect to seek innocent spouse status if he or she meets all of the following five criteria:

1. A joint return was made;
2. There was an understatement of tax attributable to erroneous items of the individual's spouse;
3. In signing the return the individual did not know, and had no reason to know, that there was an understatement of tax;
4. Taking into account all of the facts and circumstances, it is inequitable to hold the individual liable for the deficiency in tax; and

5. The individual files an innocent spouse election with the IRS and elects to apply for relief no later than two years after the date of the service's first collection activity after July 22, 1998, with respect to the individual.

The new law also builds in some flexibility with regard to the knowledge or reason to know requirement. If the innocent spouse has knowledge of a portion of the understatement, but was unaware of the full nature of the understatement and otherwise meets the prerequisite for relief, he/she is responsible only for the tax relating to that portion.[2]

Separation of Liability Option

Of particular interest to matrimonial attorneys are the new separate rules for divorced and separated taxpayers. The I.R.C. now has separate elective rules for taxpayers who are no longer married, legally separated or not living together.[3] If a spouse qualifies for such an election, the divorced or separated spouse's liability for any assessed deficiency cannot exceed the portion of such deficiency considered allocatable to the individual spouse. Relief from the other spouse's liability is barred to the extent the electing taxpayer had actual knowledge of the understated tax.

The electing taxpayer carries the burden of proof to establish the allocatable deficiency. The IRS, however, has the burden of proof to show that any assets that were transferred between individuals were part of a plan to defraud the IRS. The IRS also has the burden to show that, at the time the joint return was signed, an individual had *actual knowledge* of an item creating a deficiency that was not allocatable to such individual. If the taxpayer can show that the return was signed under duress, actual knowledge is permissible.

A divorced or separated individual seeking separation of liability status with regard to a previously filed joint return must meet the following criteria:

1. A joint return was made;
2. At the time relief is elected the individual is no longer married to, is legally separated from, or has been living apart at all times for at least 12 months from his or her spouse or former spouse; or the spouse died;
3. The individual elects to apply for relief no later than two years after the date of the IRS's first collection activity after July 22, 1998, with respect to the individual; and
4. The liability remains unpaid at the time relief is elected.

A spouse entitled to "separation of liability status" thus avoids tax created by the other spouse understating his or her tax income and/or deductions.

Equitable Relief Option

Neither the innocent spouse nor the separation of liability option authorizes relief from tax liabilities that were properly reported on the return but not paid. However, such relief is now available as an "equitable relief" option.[4] Congress enacted this catch-all provision with the intention that the IRS exercise equitable relief when a spouse "does not know and has no reason to know that funds intended for the payment of tax were instead taken by the other spouse for such other spouse's benefit." The exercise of equitable relief by the IRS would also be appropriate if "taking into account all the facts and circumstances it is inequitable to hold an individual liable for all or part of any unpaid tax or deficiency arising from a joint return."[5]

As of December 1998, the IRS revised its form 8857 entitled Request for Innocent Spouse Relief (And Separation of Liability and Equitable Relief), which is not filed with the joint tax return but mailed separately to the IRS Center in Cincinnati, Ohio or directed to a specific IRS agent in the event of an examination or notice of deficiency. In electing any of the three options available, the requesting spouse attaches a detailed explanation as to why he or she believes it would be unfair to hold him or her, instead of the spouse (or former spouse), liable for the understatement or underpayment of tax.

As a result of these changes, practitioners should consider revising the income tax provision contained in their agreements to incorporate the language of the new tax code to enhance their clients' ability to elect innocent spouse, separation of liability, or equitable relief tax treatment, and to prevent the former spouse from opposing or recanting the facts and circumstances which would underscore the client's ability to receive favorable tax treatment.

Suggested Tax Provisions

The following is illustrative of the language that may be utilized:

A. The Husband acknowledges that there are outstanding arrears of income taxes, interest and penalties due on the parties' tax returns for the calendar years [insert years]. The Husband agrees to be responsible for the payment of any taxes, interest or penalties that may be assessed on the parties' prior joint tax returns, and he hereby indemnifies and agrees to hold the Wife free and harmless from the same, together with all reasonable expenses in connection therewith. The Husband further represents and acknowl-

edges that, at the time that the Wife executed the parties' joint tax returns, any erroneous items contained in the tax return, including the failure to make sufficient quarterly or estimated tax payments, was unknown to the Wife in that she did not know, nor had reason to know, that there was a substantial understatement of tax liability when she signed the returns; and that considering all of the facts and circumstances, the Husband recognizes that it would be unfair to hold the Wife responsible for these Federal and New York State tax obligations, including penalties and interest.

B. As an accommodation to the Husband, the Wife agrees to execute and file jointly with the Husband Federal and New York State income tax returns for the calendar year [insert year] on the following terms and conditions. The Husband or his accountant shall provide the Wife and her accountant with a copy of the proposed tax return at least 20 days before the Wife shall be obligated to execute the tax return. The Husband agrees to be responsible for the payment of any taxes, interest, penalties, or other amounts due thereon whatsoever. The Husband shall exclusively pay and discharge the same, and he hereby indemnifies and agrees to hold the Wife free and harmless from any such expense or liability in connection with said returns or any review or audit thereof, except to the extent that the additional tax assessments, penalties, interest, or other payments result from the Wife's failure to properly report her income or deductions for the year in question. The parties acknowledge that both prior and subsequent to their physical separation, the Husband has not informed the Wife fully as to his income or deductions and that the Wife, by signing and filing these joint tax returns, has no independent knowledge or reason to know the Husband's full income and source of deductions as reflected on the tax returns, except for the information furnished by the Wife to the Husband concerning her own income, if any, and deductions. Specifically and without intending it to be a limitation, to the extent there has been an underpayment of tax by the Husband, his withholding of funds to pay such tax did not inure to the benefit of the Wife, and taking into account all of the facts and the circumstances, it would be unfair and inequitable to hold the Wife responsible for any such taxes or liability caused by either the Husband's underpayment of tax or understatement of tax, and the Wife shall have the right with the filing of such tax return to file IRS form 8857 requesting innocent spouse relief and/or separation of liability and/or equitable relief from the Internal Revenue Service in connection with the filing of these joint returns.

C. The Husband, who has previously filed an individual [insert year] Federal and New York State tax return, further represents that upon the filing of the (amended) joint [insert year] tax returns, two years will not have elapsed after the date the Internal Revenue Service has sought collection activity regarding his tax obligation for that calendar year. To the extent there has been an underpayment of tax by the Husband, he shall advise the Wife and/or her accountant in writing, together with the proposed tax return, of the manner in which he tends to satisfy his tax obligation to the appropriate taxing authorities.

The favorable IRS determination may also result in the local or state taxing authorities granting a spouse similar relief. However, most states such as New York have only the innocent spouse or separation of liability elections. The equitable relief option has not been adopted by state law.

Endnotes

1. I.R.C. §§ 3201(a) and 6015.
2. I.R.C. § 6015(b)(2).
3. The electing spouse may not be a member of the same household as the individual with whom the joint tax return was filed at any time during the 12-month period ending on the date of the filing of the option. I.R.C. § 6015(c)(3)(A)(i)(II).
4. I.R.C. § 6015(f).
5. H.R. Conf. Rep. No. 599 105th Cong., 2d Sess., 254 (1998).

Judicial Alchemy: Turning Losses into Marital Assets

By Robert Z. Dobrish and Lydia A. Milone
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New York courts continue to recognize that "all is fair [game] in love [wars]"—and all means *all.* Well established throughout the state are the precepts that licenses,[1] advanced degrees[2] and celebrity status[3] are marital assets subject to equitable distribution. That licenses no longer merge into practices further expands the concept of marital property.[4] Included among these non-traditional marital property concepts is the attainment of a professional distinction, such as membership in a professional society, which results in enhanced earnings.[5] It has also been held that season hockey tickets[6] and lottery tickets[7] are marital property subject to equitable distribution.

The right to purchase an apartment under a cooperative offering plan is yet another instance of this ever-expanding concept of marital property.[8] Also held to be marital property is the lower than fair market value price at which a lessor of a rent-stabilized apartment can purchase that apartment even after the initial offering plan and original insiders offering price have both expired.[9]

The First Department has been particularly expansive in its construction of what constitutes marital property. Last year, the First Department held that a husband's certification as a certified financial analyst, which he obtained during the marriage, was marital property subject to equitable distribution even though the certification was not a prerequisite for employment or advancement.[10]

A recent pronouncement favoring a generous construction of the term "marital property" once again emanated from the First Department when, following its reasoning in *Murtha,*[11] it determined that enhanced earning capacity is subject to equitable distribution regardless of whether the career in question requires a license.[12] Before the First Department decided that issue in *Hougie,*[13] the Fourth Department had already held that a party's enhanced earning capacity alone is *not* subject to distribution if it does not result from a professional degree or license obtained during the marriage.[14] The Fourth Department found that the absence of any license or degree placed the case beyond the scope of *O'Brien* and its progeny. The court further found that the husband's enhanced earnings from his "banking career" were not a marital asset as his was not "a unique career" as was that of the opera singer who had achieved fame and fortune rising to the top of her art in *Elkus v. Elkus.*[15]

The Appellate Division, First Department, continues to broadly interpret the term "marital property." In *Finkelstein v. Finkelstein,*[16] that court has now spoken on the question of whether a capital loss carryforward is a marital asset subject to equitable distribution. Until this recent decision, the only case law on this issue was a Third Department decision which held that "this tax circumstance is not the type of 'property' addressed in Domestic Relations Law § 236(B)."[17] No doubt much to the joy of many a soon-to-be-divorced taxpayer (or at least to the joy of half of them), the First Department disagreed. In a case of first impression in that Department, the Appellate Division unanimously affirmed the trial court's decision which, among other things, distributed to the wife a portion of the husband's capital loss carryforward.[18]

To take a step back, a capital loss is, in simple terms, the loss on a sale of stock, or some other capital asset, which exceeds the gains for a given year.[19] The loss can be "carried forward" indefinitely to be applied in future years. It can be deducted only to the extent of capital gains in any given year. In addition, any capital loss not previously deducted can also be applied against other income up to $3,000.[20] In this era of electronic day trading where everyone attempts to beat the market, capital losses from prior years can be valuable in the future because they shelter gain and income. For example, the huge gains one may make on *tech* stocks are sheltered, to some extent, by the losses on less stellar stock purchases.

In *Finkelstein,*[21] the husband earned his livelihood during the marriage by trading penny stocks. He traded accounts for various family members, including the UGMA[22] accounts he had established for the parties' children, and IRAs and other stock accounts owned by each of the parties. His income consisted of the commissions earned on all of the stocks he traded plus the gains on the stocks in the non-IRA accounts owned by the parties. In order to maximize the income earned

and simultaneously minimize the tax bite attributable to capital gain, the ability to offset capital gains against capital losses was an essential component of this family's financial plan.

In affirming the trial court's conclusion that the capital loss carryforward was a distributable marital asset, the appellate court noted that marital property is not "a traditional property concept." In support of this premise, the appellate court cited the landmark case of *O'Brien v. O'Brien*[23] as broadly construing the term "marital property" to consist of "things of value arising out of the marital relationship," and one of its progeny, *Elkus v. Elkus*.[24]

In attempting to reconcile the divergence between the First and Third Departments, it must be pointed out that the Third Department appears to have approached the issue as a "tax consequence," one of the statutory factors to be considered in awarding equitable distribution.[25] The *Cerretani* decision provides little guidance in this respect except to state that tax consequences are to be considered only as a consequence of the property distribution in a case.[26] In any event, the Third Department specifically indicated that it decided this issue "[w]ithout determining whether [the capital loss carryforward] is marital property subject to equitable distribution."[27]

It remains to be seen whether the issue of a capital loss carryforward constituting marital property finds it way to the Court of Appeals by reason of the split in the First and Third Departments. These writers posit that, if and when the time comes, this state's highest court will affirm the First Department and thereby add yet another spoke to the broad umbrella opened as a result of its historic *O'Brien* decision. Expanding the scope of marital property to include the capital loss carryforward is consistent with the legislative intent of the Equitable Distribution Law and reflects the financial plan and economic reality for spouses who file jointly during the marriage.

While it is certainly true that the present value of past tax losses to be used in the future is somewhat ephemeral, the speculative nature of this asset ought not bar its designation as marital property. The fact that a surgeon, or an attorney, might become disabled and thereby earn nowhere near the sums projected in valuing his or her license and practice has not dissuaded the courts from including these assets in the marital estate. The fact that celebrity status can fade, or that an opera singer could lose the use of his or her voice, did not cause the court to exclude these assets from marital property. It should follow then that no impediment exists simply because, where spouses file their tax returns as married filing separately, a capital loss carryforward is available only to the taxpayer to whom it is attributable.[28] Likewise, no bar ought arise because a capital loss carryforward cannot be sold or divided in kind or may not be used at all in the future as a result of a change in the tax laws or because there is no gain or income against which to allocate the loss carryforward. The operative legal principle is the value of the capital loss carryforward somewhere between the date of commencement of the action and the date of trial.[29]

A question arises as to the result which should be reached where the parties file separately throughout the marriage. One can argue that, even under those circumstances, the tax savings inure to the benefit of the economic partnership and therefore ought to be distributed as marital property. Should a different result obtain where the capital loss carryforward emanates from separate property? Questions then arise as to active versus passive management of the asset.[30] It can be argued that, even if a separate asset gives rise to the loss and there was no active management of that asset, the tax savings argument applies nonetheless.

Where a cash payment is awarded in lieu of a capital loss carryforward that the non-titled spouse no longer qualifies to use under the Internal Revenue Code and accompanying regulations,[31] and there is no pool of money from which to make such a payment—unlike *Finkelstein*—does the court unfairly burden a spouse as a result of what some see as a fiction created by *O'Brien* because hard cases make bad law? These writers believe that, until and unless the legislature acts to, in effect, repeal *O'Brien* and the courts follow suit in their determinations, this question must, and should, be answered in the negative.

If this trend of broad construction continues, we will likely see additional non-traditional assets fall within the penumbra created by *O'Brien*, which might one day include such assets as the use of a website or an e-mail address, subscriptions to the opera, ballet or the theater, and the right to use a vacation home or a timeshare.

Appendix

The *Finkelstein* decision is important for several other reasons. It affirmed the award of a cash payment to a party where that party could no longer avail herself of the capital loss carryforward because the time had expired for filing amended joint income tax returns. In her decision, the trial Justice found that the wife had credibly testified that, once she realized the husband had filed incomplete tax returns for a number of years during the marriage,[32] she refused to file jointly with him for fear of exposure to liability and loss of her innocent spouse status. In addition to affirming the trial court's award of a cash payment for the loss carryforward,[33] the appellate court also affirmed the determination that the wife's actions in filing separately did not constitute marital waste under the circumstances.

The trial court's decision is also noteworthy because, on appeal, its award of lifetime maintenance was upheld in this 22-year marriage. This award of non-durational maintenance was significant in several respects. Firstly, the decision after trial indicates that this 49-year-old wife had a Master's degree in education, a second Master's degree from New York University in science and biology, and was about to receive her M.B.A. from Baruch College, C.U.N.Y. Although the wife had forfeited her career as a high school biology teacher after the birth of their first child,[34] throughout the marriage she assisted the husband with voluminous paperwork and record keeping associated with his stock trading activities. This was in addition to many indirect contributions by the wife.

Even in light of the wife's considerable higher education, the trial court noted that her age and prolonged absence from the work force would negatively impact her future earning capability. Notwithstanding the considerable distributive award she received, the trial court also awarded lifetime maintenance in the sum of $5,000 per month. The appellate court specifically noted that the wife's ability to become self-supporting did not intrinsically bar lifetime maintenance and "did not obviate the need for the court to consider the pre-divorce standard of living."

Secondly, the appellate court also affirmed the award of child support despite the substantial value of the child's UGMA account. Just as importantly, the First Department held it was a proper exercise of discretion not to have given the husband a reduction in child support once he was also required to pay for college expenses. The basis for the trial court's finding was that "the parties never used nor intended to use the child's resources" to pay for his college expenses.

A final important aspect of the appellate decision is its affirmance of the child support award even though neither the specific calculation nor the amount of income imputed to both parties were set forth in the trial court's decision. The appellate court noted that "the underlying basis for the court's conclusion is apparent from the record."

In one sentence devoid of any detail, the appellate court found that the award of counsel fees was "a proper exercise of discretion." One must read the trial court's treatment of this issue to appreciate the magnitude of the counsel fee award ($285,000) which constituted 75% of the wife's counsel fees billed through the time of the post-trial counsel fees submission to the trial court. The husband's chicanery and machinations make for interesting reading. The trial court based the counsel fee award on the "intransigent, unreasonable and baseless positions" which necessitated an inordinately long trial and made discovery "prolonged and difficult." The trial court also noted that the testimony offered by the husband's experts to support some of these positions "lacked credibility and were based on poor analysis."

Conclusion

On balance, *Finkelstein* is a case rich in possibilities for the family law practitioner. It appears to have consequences more far-reaching than either party might have contemplated when they embarked upon this tortuous litigation.

Endnotes

1. *O'Brien v. O'Brien*, 66 NY2d 575 (1983), *on remand*, 120 AD2d 656, 502 NYS2d 250 (2d Dep't 1986).
2. *McGowan v. McGowan*, 142 AD2d 355, 535 NYS2d 990 (2d Dep't 1988); *DiCaprio v. DiCaprio*, 162 AD2d 944, 556 NYS2d 1011 (4th Dep't 1990) [Master's degree].
3. *Elkus v. Elkus*, 169 AD2d 134, 572 NYS2d 901 (1st Dep't 1991), *appeal dismissed*, 79 NY2d 851 (1992).
4. *McSparron v. McSparron*, 87 NY2d 275 (1995), *mot. dismissed*, 88 NY2d 916 (1996).
5. *McAlpine v. McAlpine*, 176 AD2d 285, 574 NYS2d 385 (2d Dep't 1991).
6. *Dobbs v. Dobbs*, N.Y.L.J., Feb. 6, 1999, at 26, col. 1.
7. *Campbell v. Campbell*, 213 AD2d 1027, 624 NYS2d 493 (4th Dep't 1995).
8. *Jeruchimowitz v. Jeruchimowitz*, 128 Misc. 2d 888, 491 NYS2d 576 (Sup. Ct. 1985).
9. *Chew v. Chew*, 157 Misc. 2d 322, 596 NYS2d 950 (Sup. Ct. 1992). The court sought to prevent a possible windfall to the husband, who apparently continued to lease and to occupy the rent stabilized apartment. Due to the wife's direct contributions to the rent and renovation of the apartment and her indirect contributions as homemaker, wife and in sharing some child care responsibilities for the husband's children of a prior marriage, the court directed that if the husband exercised his right to purchase the apartment within five years of the court's determination and then sells at a profit, the net proceeds would be divided equally between the parties.
10. *Murtha v. Murtha*, ___ AD2d ___, 694 NYS2d 382 (1st Dep't 1999).
11. *Id.*

12. *Hougie v. Hougie*, 261 AD2d 161, 689 NYS2d 490 (1st Dep't 1999); *but see West v. West*, 213 AD2d 1025, 625 NYS2d 116 (4th Dep't 1995). For a recent illuminating article on this issue, *see* Myrna Felder, *Hougie v. Hougie and Enhanced Earning Capacity*, N.Y.L.J., Feb. 14, 2000, at 3.
13. *Hougie, supra* note 12.
14. *West v. West, supra* note 12.
15. *West*, 625 NYS2d at 17.
16. *Finkelstein v. Finkelstein,* N.Y.L.J., Jan. 18, 2000 at 27, col 1.
17. *Cerretani v. Cerretani*, 221 AD2d 814, 817, 634 NYS2d 228, 231 (3d Dep't 1995).
18. Hon. Jacqueline W. Silbermann rendered a 39-page decision after trial. Curiously, the trial court decision was not published in the *New York Law Journal*. A copy of that decision, edited for publication, appears as the Appendix to this article, beginning on page 9. With all due respect, this came as somewhat of a surprise to these authors because of the potential import of distributing the capital loss carryforward in light of existing appellate authority to the contrary, even though such authority was merely persuasive and not binding. The trial court decision is also significant in that it addresses several other important issues mentioned later in this article. Now that the trial court's decision has been unanimously affirmed, family law practitioners can avail themselves of that previously unpublished determination and the reasoning behind it.
19. *See* I.R.C. § 1211(b) (2000).
20. *Id.*
21. *Finkelstein, supra,* note 16.
22. Uniform Gift to Minors Act, NY EPTL §§ 7-6.1 *et seq.* (McKinney 1999).
23. *See supra* note 1.
24. *See supra* note 3.
25. NY DRL § 236(B)(5)(d)(10) (McKinney 1999).
26. *Cerretani*, 221 AD2d at 817.
27. *Id.* at 816-817.
28. IRC Reg. No. 1.1212-1(c) (2000).
29. *See Wegman v. Wegman*, 123 AD2d 220, 509 NYS2d 342 (2d Dep't 1986), *amended*, 512 NYS2d 410 (1987); *see also Greenwald v. Greenwald*, 164 AD2d 706, 565 NYS2d 494 (1st Dep't 1991), *appeal denied*, 78 NY2d 855 (1991).
30. *See Hartog v. Hartog*, 85 NY2d 36 (1995).
31. At the time of trial, the time to file a joint amended tax return had already expired for one of the years in question. The wife could therefore no longer avail herself of the joint loss carryforward. Furthermore, the very real fear that she could lose her innocent spouse status by filing joint amended returns was validated by the trial court's finding of no marital waste as a result of her refusal to file jointly in the first instance.
32. The trial court decision indicates that the husband had failed to file Schedule Ds with the joint tax returns for a number of years even though he had, or could ascertain, the information necessary to do so.
33. The appellate court unanimously modified the sum awarded by the trial court for the capital loss carryforward, reducing it based upon testimony in the record.
34. The marriage produced three children, two of whom became emancipated before trial.

APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

———————————————————————————————X

ELLEN FINKELSTEIN, : Index No. 308285/94

Plaintiff, : **DECISION AFTER TRIAL**

-against-:

BARRY FINKELSTEIN, :

Defendant. :

———————————————————————————————X

Jacqueline W. Silbermann, J.:

* * *

This was a bitterly contested divorce action. The trial commenced with the Husband through his former counsel alleging his incompetence to prepare for and participate in trial. This was done through the testimony of a psychiatrist who had seen the Husband for only five sessions; four of which were shortly after the death of his mother. After the completion of that testimony the court found there was insufficient evidence to find the Husband incompetent to proceed to trial. After that decision was rendered the Husband who had not been present in court during the doctor's testimony appeared and fully participated in his own defense thus setting the tone for the rest of trial.

* * *

FINDINGS OF FACT

* * *

The parties were married in a civil ceremony on December 29, 1971 and in a religious ceremony on January 29, 1972. At the time of the marriage the Wife was twenty-three years of age and the Husband was twenty-seven. There are three children of the marriage [two of whom became emancipated during the pendency of this action].

At the time of the marriage, the Wife had completed a Master's degree in education . . . and was employed as a high school biology teacher . . . earning approximately $13,500 per year. She [obtained] a second Master's degree . . . in science and biology . . . in 1975. She has since the commencement of this action begun studies . . . for an M.B.A.

The Husband received a B.A. . . . in 1966 and an M.B.A. in 1969. . . . At the time of the marriage, he was a fifty per-cent partner in a brokerage firm he had established. . . .

Just prior to their marriage each had been living at home with their respective parents. They began their married life in a four room apartment on the third floor of a walk-up building near the husband's parents. In 1975 the parties purchased a four bedroom, single family residence in Jamaica Estates, New York for $106,000. They made a down payment of $74,000 and assumed an existing mortgage of $32,000. This remained the family's residence throughout the marriage and is the home in which the wife presently resides.

QUESTIONS PRESENTED

This appears to be a very simple case with little valuation problems as all of the assets are brokerage accounts except for the marital home. Yet, the court is called upon to resolve a few unusual issues to wit: what is the appropriate allocation of a credit for the capital loss carryforward; whether the post-commencement appreciation of defendant's stock account at Bishop Rosen is marital property; whether the Wife wastefully dissipated marital assets by changing the penny stocks for treasury bills and blue chip type stocks; whether the Husband's trading activities constitute a business; and whether the Wife is guilty of economic fault due to removing her Husband as account executive on her accounts.

* * *

15. Bishop Rosen Account #045-804177-39

This IRA account in the Husband's name is concededly marital property. The sole issue before the court relating to this account is which date of valuation to use, to wit, date of commencement or date of trial for valuing this asset which is beyond peradventure the parties' most valuable asset.

In deciding this issue, it is most important to turn to the Husband's own testimony. Throughout the trial

the Husband alleged that due to the Wife's actions in removing her account and others from his control, he no longer was able to be a "market maker" and that he had to "pull in his horns." It was his testimony that her actions left him unable to meet an alleged capital requirement to act as a "market maker" and that he was rendered incapable of researching new stocks. Thus, he stated that the positions taken on stocks in his account were acquired in 1994; that it takes him many years to acquire positions; and that basically the seed of all investment positions in that account were at least partially planted prior to 1994.

It is also relevant to note that since the commencement date there has been a minimal level of activity in the account. Indeed, even the sales can hardly be called an active transaction since the positions were as stated acquired prior to commencement and any purchases based on his testimony would have had to have been based on research done prior to the summer of 1994.

It is also true that in the years since the parties' separation the stock market has experienced an almost unparalleled rise as indicated by virtually all stock indices. For this reason, it would be most inequitable to suggest that because of few sales and purchases in the account the court is required to find this to be an active asset and accordingly that it must be valued as of the date of commencement. As the court stated in *Cohn v. Cohn,* 155 A.D.2d 412, 413 (2d Dep't 1989): "It is well established that the trial courts possess the discretion to select valuation dates for the parties' marital assets which are appropriate and fair under the particular facts and circumstances presented (citations omitted)".

Thus, based on the bulk of his testimony and positions taken in earlier testimony prior to the adjournment of the trial on financial issues, the court finds that it is equitable to value this asset as of date of trial at $8,636,477.70

* * *

22. Capital Loss Carryforward

During the marriage the parties accrued a large loss carryforward.

During the years 1987 and 1989 through 1994 the parties filed incomplete personal income tax returns due to the fact that the Schedule D was not included. . . .

* * *

The Wife was concerned by this failure to prepare the Schedule D and begged her Husband to complete the returns many times prior to their separation to no avail. His testimony that he had completed 90% of the work required to file the forms were unbelievable especially in view of the fact that to date he has yet to file the Schedule D's.

The Wife's accountant testified that based upon the cost bases information he was able to garner, he determined that as of the end of the tax year, 1992, the parties had a loss carryforward in the sum of $827,140.

The Husband argues that the Wife's refusal to file a joint tax return with him in 1994, thus allocating the loss carryforward between them, should preclude her from sharing in this asset.

Clearly, based on the credible testimony of the Wife adduced at trial as to the facts of this particular case and the fact that she would be exposed to liability and the loss of innocent spouse status by signing a joint return, the Wife should suffer no negative consequences for completing and filing individual tax returns after the parties were separated. Based on her credible testimony as to his threats as well as his actions since the commencement of the action, her fear of filing a joint return was justifiable.

The Husband's other arguments against sharing the loss carryforward with the wife are without merit. The court finds the loss carryforward of $827,140 to be marital property subject to distribution as hereinafter set forth.

Equitable Distribution of Marital Property

The court is mandated to consider the thirteen factors set forth in Domestic Relations Law § 236(B)(5)(d) in determining the distributive award.

* * *

8. Future Financial Circumstances of the Wife

The Wife is forty-nine years old and will be embarking on a new career after having left the work force at the time of the birth of her first child in 1973. She will fortunately be in a position to do this since she returned to school during the pendency of this litigation. Despite the fact that this court personally believes at fifty she is still a young person, her age clearly will present difficulties in her search for employment as will the fact that she has not been employed outside the home for over twenty years. It is, however, likely considering her demonstrated perseverance and intelligence that she can be expected to eventually earn about thirty-five thousand dollars a year. This sum is substantially less than what is needed to maintain the lifestyle she enjoyed prior to the divorce.

The Husband has demonstrated an ability to earn substantial sums as a professional stock trader. He, unlike his Wife, who has demonstrated courage and good faith in an attempt to make a new life for herself and her family, has merely bemoaned his fate. His

claims that he can no longer be a "market maker" or earn money as a trader were unproven and indeed credibly controverted. Moreover, the Husband's financial future is further enhanced by what is undoubtedly a large inheritance from his mother. One can assume the estate was large in part due to the magnitude of the so-called "loans" the Husband received from his mother and also because of his failure to rebut a presumption of the estate's magnitude by producing the documents demanded during the course of the litigation. Indeed, it appears he chose to be precluded by court order rather than produce the documents demanded.

* * *

11. The Wasteful Dissipation of Assets

The Husband has taken, unreasonable at best and dishonest at worst, positions which have served to substantially increase the costs of this litigation. Illustrative of this was the charade used in an attempt to delay the beginning of this trial. This factor will be taken into consideration more fully in the counsel fee portion of this decision.

Throughout this case it was the Husband's claim that the Wife dissipated marital assets by giving her stock account to Bishop Rosen and allowing Isaac Schlesinger to trade the volatile penny stocks that were in this account for more secure blue chip stocks and Treasury Bills. It is his position that the manner in which the stocks were sold resulted in far less being received for them than he could have gotten. The Wife credibly testified that throughout the marriage her Husband told her how volatile and treacherous these penny stocks could be and that they required constant watching. Indeed, he would say he couldn't go on vacations or be away from a telephone due to their volatility. Her testimony revealed that her intent in liquidating the prior holdings was to place the money in safer investments thereby preserving these assets for herself and their children. The sales of these stocks was accomplished by Bishop Rosen, the very company the Husband had been working with. The sale was done openly and with the benefit of an experienced broker. Thus, there was no concealment, a factor which mitigates against her actions being classified as wasteful dissipation. *Lenczycki v. Lenczycki,* 152 A.D.2d 621 (2d Dep't 1989). The fact that in hindsight one can now see that more money would now be in those accounts had the stock not been sold cannot be used to argue that the acts were wasteful dissipation. *Willis v. Willis,* 107 A.D.2d 867 (3d Dep't 1985).

Additionally, it cannot be said that the Wife's refusal to sign joint tax returns was a form of economic fault or wasteful dissipation. Learning that the Husband had filed incomplete returns in prior years justified her concerns relevant to filing a joint return and sacrificing her innocent spouse status. Indeed, the fact that to the date the trial was concluded, the Husband had not yet filed amended tax returns lends further credence to her reasoning.

* * *

The premise of the equitable distribution law as it has been written and interpreted by the courts of this state is that the marriage is an economic partnership. (*O'Brien v. O'Brien,* 66 N.Y.2d 476 (1985)). The success of this partnership depends not only on the contributions of the wage earner spouse but on various contributions made by the non-titled spouse. In *Price v. Price,* 69 N.Y.2d 813 (1986), the Court of Appeals recognized this concept stating: "The Equitable Distribution Law reflects an awareness that the economic success of the partnership depends not only upon the respective financial contributions of the partners, but also on a wide range of non-remunerated services to the joint enterprise, such as homemaking, raising children, and providing emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home."

As this court wrote in *Greenwald v. Greenwald,* N.Y.L.J., 6/6/90, p. 22, col. 5: "Although it is true that under New York Law at the present time, equitable distribution is not necessarily synonymous with equal distribution. Nevertheless, the legislative history bespeaks an intent that the courts direct an equal distribution unless the circumstances of an individual case clearly require an unequal distribution. More often than not, equal distribution should be and is the rule."

The court in *Conner v. Conner*, 97 A.D.2d 88 (2d Dep't 1983) voices its opinion stating: "According to the Assembly memorandum in support of the new law [1]c *Zett-Kaufman - Kraut,* N.Y.1 Div. Prac., Appendix B p. 8): 'The basic premise for the marital property and alimony (now maintenance) reforms of this legislation (§ 236) is that modern marriage should be viewed as a partnership of co-equals. Upon the dissolution of a marriage, there should be an equitable distribution of all family assets accumulated during the marriage and maintenance should rest on the economic basis of reasonable needs and the ability to pay. From this point of view, the contributions of each partner to the marriage should ordinarily be regarded as equal and there should be an equal division of family assets, unless such a division would be inequitable under the circumstances of the particular case. (Emphasis supplied) Id. 96.' "

In the case at bar the parties were married for over twenty-two years at the time this action was commenced. It is impossible in a marriage of long duration such as this to allocate in minute detail contributions to the marital assets between the two parties. The Wife sacrificed career potential and had primary responsibili-

ty for child care and homemaking chores. The Husband was the primary "bread winner" but was assisted in this endeavor by the Wife.

Accordingly, the judgment settled herein should result in a 50-50 distribution of all the assets. The Wife should retain the marital residence on her side of the equation. The miscellaneous stocks should be divided 50-50 in kind.

Maintenance

In deciding the Wife's request for maintenance the court has considered the following factors as enumerated in Domestic Relations Law Section § 236 B(6)(a):

* * *

3. The Present and Future Earning of the Parties

The Husband has demonstrated an ability to earn money through investments. The Wife has by dint of perseverance and hard work in obtaining additional education placed herself in a position to gain employment. However, due to her age and long history of not being employed outside the home it will likely be difficult for her to get a job. Nevertheless, it can be expected that in the future she will be able to earn up to about $35,000 per year.

* * *

Since the parties' separation the Husband has neither contributed to the Wife's support by making payments to her directly nor has he paid any third parties on her behalf.

"A time limitation on maintenance should be imposed only to obtain training to become financial independent [citation omitted] or to allow such spouse to restore . . . her earning power to a previous level." *Zelnick v. Zelnick*, 169 A.D.2d 317 (1st Dep't 1991). In this case, the Wife has already undertaken such education and will soon receive her degree. The Court of Appeals has held that the ability of a spouse to be self-supporting "in no way obviates the need for the court to consider the pre-divorce standard of living; and (2) certainly does not create a per se bar to lifetime maintenance. *Hartog v. Hartog,* 85 N.Y.2d 36 (1995); see also, *Summer v. Summer,* 85 N.Y.2d 1014, recons. denied, 86 N.Y.2d 886 (1995).

Likewise, given plaintiff's age and the disparity in the parties' income-earning ability, an award of lifetime maintenance is appropriate. *Rosenkrantz v. Rosenkrantz,* 184 A.D.2d 478, (1st Dep't 1992); see also, *Delaney v. Delaney,* 111 A.D.2d 111 (1st Dep't), modified on other grounds, 114 A.D.2d 312 (1985); see also, *Brownstein v. Brownstein,* 167 A.D.2d 127, (2d Dep't 1990) appeal denied, 77 N.Y.2d 806 (1991); *Reingold v. Reingold,* 143 A.D.2d 126 (2d Dep't 1988), appeal dismissed, 73 N.Y.2d 851 (1988).

Moreover in this case, it appears the Husband will have additional resources provided by his mother's estate.

For all these reasons, the Wife is awarded non-durational maintenance of $5,000 per month.

Child Support

This court pursuant to Domestic Relations Law § 240 (1-b) had considered to calculations delineated in Domestic Relations Law § 240 (1-b)(c) as well as the factors set forth in Domestic Relations Law § 240 (1-b)(f) which permit a deviation from the calculation set forth in Domestic Relations Law § 240 (1-b)(3).

The Wife has not been employed outside the home since the birth of the parties' first child. It stated before she is currently completing studies for a degree which she hopes will lead to gainful employment. The Husband has a demonstrable capacity to earn significant sums from his investment activities and has recently inherited substantial funds from his mother.

Although the three children have substantial UGMA accounts it is clear that while the parties were married none of these monies were utilized for the children's school or other expenses. The facts in this case simply belie the Husband's testimony to the contrary. Moreover, since there is clearly no need to require the children to diminish their assets a court should not require them to do so. *Malamut v. Malamut,* 133 A.D.2d 101 (2d Dep't 1987).

As a result of his own doing the Husband has no relationship with his sons nor has be made any monetary contribution to their support since on or about September 1994. It appears except for an award herein for the one child who is still a minor, the Husband is unlikely to make any contribution to their support either financial or otherwise.

The Wife, however, has continued to provide a home for all three children and to pay for their education and other expenses.

Based on these facts, the court awards the Wife $2,835 for basic child support of the parties' son Brian. Additionally, the Husband is to pay 65% of all college fees including room, board, tuition, school fees, and books and 65% of all unreimbursed medical expenses including dental and psychiatric or psychologist fees.

* * *

Counsel Fees and Expert Fees

Domestic Relations Law § 237 specifically authorizes the court to award counsel fees and expert fees including appraisal fees, actuary fees and investigative fees. In exercising its discretion to award counsel fees, the court as required considered and reviewed the rela-

tive financial circumstances of both parties, together with all other circumstances of the case including the "relative merits of the parties' positions." *DeCabrera v. Cabrera-Rosete,* 70 N.Y.2d 879 (1978). The court has clearly enunciated the law of the State of New York which holds that indigency is not a prerequisite to an award of counsel fees pursuant to Domestic Relations Law § 237. In considering an application for an award of counsel fees the court is obligated to consider the "equities and circumstances" of the case before it. *Basile v. Basile,* 122 A.D.2d 759. Moreover, the Appellate Division, Second Department reversed a lower court's decision stating: "we conclude that the court improperly denied the plaintiff Wife's application for counsel fees on the ground that, after the marital assets were distributed, she would have sufficient funds to meet this obligation. (*See* Domestic Relations Law §237)" *Hachett v. Hachett,* 147 A.D.2d 611, 613 (2d Dep't 1989).

Similarly, in *Brancoveanu v. Brancoveanu*, 177 A.D.2d 614 (2d Dep't 1991), the court held that in determining a counsel fee award, the court should review not only the financial circumstances of the parties, but all relevant circumstances, including the relative merit of the parties' claims. In *Koerner v. Koerner,* 170 A.D.2d 297 (1st Dep't 1991), it was found that the plaintiff will have assets as a result of the equitable distribution does not act as bar to the court awarding counsel fees.

Moreover, the fact that the plaintiff in this case has already paid most of her counsel fees, to wit $344,543.08 of a total of $379,588.93 billed through March 2, 1998 does not prevent the court from awarding her counsel fees. *Ross v. Ross,* 90 A.D.2d 541 (2d Dep't 1982). *Goldstein v. Goldstein,* 133 A.D.2d 739 (2d Dep't 1986).

In the instant case this court, after trial, has found many of the positions taken by the Husband which unduly prolonged this litigation and prevented any possibility of settlement proved to be unreasonable, meritless and most importantly often based on untruthful testimony.

Although prior to this court receiving the case for trial, it is alleged that discovery was stonewalled by the Husband, this court will only refer herein to matters this court witnessed commencing the summer of 1997 when this case was referred for trial. In this connection, delays by the Husband in the production of documents continued while the case was on trial and at its conclusion. This gives credence to the Wife's counsel's contention concerning the earlier discovery problems which this court did not witness.

On the very first day of the trial the Husband, through counsel, attempted to be declared incompetent to proceed to trial. This sham was proved spurious not only by the Wife's counsel's excellent cross-examination of the doctor who testified as to the incompetency claim but by the Husband himself. Once this court determined there was insufficient basis to find out the Husband could not assist counsel and proceed to trial, he appeared in court and from that time on fully and coherently participated in the trial. Thus proving that the claim was an utter sham.

The Husband's claim of a loan of $400,000 from his mother required much time and proved to be as much of a sham as the claim of incompetence. The Wife credibly testified that $400,000 from his mother's account was deposited into their joint account when the Husband took great exception to his mother's new will which divided the estate equally between their children and his brother. He thought he should get a larger share having managed her account and earning much of the money. For this reason she testified the Husband's mother wrote him a check for $400,000 for services he rendered to her. Her testimony is bolstered by the handwritten notes in evidence (Ex. 37) and his credibility is seriously impeached by his explanation of those notes as given on pages 1779-1792 of the transcript.

The Husband's testimony that he borrowed this money to buy stocks is belied by the fact that at the time of the alleged loan, there were marital assets in excess of $4,000,000 and the fact that the money was never utilized to purchase stocks.

* * *

The Husband caused the Wife to incur extra legal fees to refute testimony *** by [one of his experts] on a theory developed at trial that the Husband's trading activities were a business. It is clear that this theory was one which was newly developed because the net worth statements make no reference to a business and the parties' joint returns make no reference to Schedule E, business income. Moreover, during pre-trial no claim of a business was made such that appraisals could be exchanged or so the court might appoint a neutral appraisal. The testimony also does not comport with the holding in *Higgins v. Comm'r Internal Revenue,* 312 U.S. 212 (1941) which held: "A taxpayer's management of this own investments is not a trade or business even if the taxpayer engages in investment management activities on a full-time basis. However, a taxpayer who actively trades in corporate stocks may be conducting a trade or business when the accumulation of investment income by the taxpayer is not a primary objective."

The Wife was also caused to expend substantial sums for counsel to refute spurious claims of economic fault. She, out of fear of her Husband's vindictiveness and his failure at times to monitor their highly volatile accounts removed him as account executive from accounts in her name and their sons' UGMA accounts. The facts at trial revealed she was justified in her fears. She credibly testified that after an argument with Seth,

during the Jewish holidays in 1992, in the heat of anger the Husband removed all funds from Seth's account. Her testimony was supported by the testimony of their son Seth and by the evidence of the transaction. His testimony explaining this act as an attempt to test "Mazel" was truly bizarre and contrived.

* * *

The Wife's explanation for removing approximately half ($664,000) of the funds in the parties' bank accounts in the summer of 1994 was credible and reasonable under the facts of the case. She was understandably concerned seeing missing checks and remembering her Husband's threats that he would deny her access to monies. Indeed, this action by her prevented him from accomplishing his effort to withdraw $976,000 from the joint accounts.

The claim that these acts deprived him of the ability to be a "market maker" were unsupported by any other facts in the case. His claim that one needs $5,000,000 to be a "market maker" was not supported by any documentation, or by the testimony of any of the other witnesses.

The Husband also claimed to have millions of dollars at the time of the marriage. This claim was made without any documentary support such as bank or brokerage account statements. Indeed, the evidence illustrates his half interest in Amswiss held at the time of the marriage consisted of an investment of only $20,000 and years later when the company was dissolved he received only $1,000,000.

The cumulative result of all this incredible testimony and the taking of these unsupportable positions was the necessity of a lengthy trial which was even longer because of the Husband's inability to answer the questions posed without launching into a prolonged and irresponsive stream of consciousness answers. This was true on both direct and cross-examination.

Accordingly, the court finds as a result of the Husband's intransigent, unreasonable and baseless positions, a trial of inordinate length was required and discovery proceedings were prolonged and difficult. The experts presented to support some of the position offered testimony that lacked credibility and were based on poor analysis. These invalid and unsupported contentions continued to the very end and required the Wife's counsel to expend numerous extra hours on discovery and in preparing for cross-examination. Based on all the foregoing, the court grants Wife's request for counsel fees to the extent of directing the Husband to pay the Wife the sum of $285,000 as and for his share of the Wife's counsel fees.

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