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Notes and Comments

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Contesting a Pre-Nuptial Agreement—A Difficult Task

Prior to the Court of Appeals' decision in *In re Greiff*,[1] the person seeking to set aside a pre-nuptial agreement had the initial burden of proof. However, all that changed with the Court's pronouncement in *Greiff* that created a two-prong "burden of proof" standard which could shift the burden of proof from one party to the other. The high court explained that a spouse seeking to contest a pre-nuptial agreement has the threshold burden of proving, by a fair preponderance of the evidence, a fact-based inequality between the parties to the agreement "that demonstrates probable undue influence and unfair advantage." These words are pregnant with meaning and will undoubtedly be subject to different interpretations by the lower courts. Certainly, the remaining admonition made by the court that, if the contesting spouse meets this initial burden, the burden of going forward then shifts to the spouse who seeks to uphold the validity of the agreement to prove that the agreement was free from fraud, deception or undue influence, will be heeded differently from judge to judge.

One of the first courts to grapple with this standard was the Surrogate's Court of Nassau County, *In re the Estate of Rappaport*.[2] These abstract principles of law were discussed and applied, resulting in a finding that the surviving spouse could not upset the pre-nuptial agreement nor make an election against the decedent's will.

The facts of *Rappaport*, *supra*, are most interesting and should be reviewed at this juncture. The decedent, Fred Rappaport, met the surviving spouse who sought to contest the pre-nuptial agreement, Marguerite Downs, in 1983. She was 23 and he 49. In April of 1983, Marguerite moved in with Fred in his home in Mill Neck, New York, and they lived together almost continuously until Fred's death on December 31, 1998. (There was a five-month separation that occurred between September 1988 and February 1989). The couple married on June 23, 1990 (after living together for seven years), so at the time of Fred's death their marriage was eight years in duration. Marguerite had gone to college but never graduated. Prior to beginning her relationship with Fred, she held several jobs including being employed as a leasing agent in a commercial real estate concern. During the time that she lived with Fred, both before and during the marriage, she did not work, as Fred's income was more than sufficient to establish a meaningful standard and lifestyle.

The Surrogate noted, parenthetically, perhaps because Fred's estate placed importance on this fact, that, at the time of their prior separation, Marguerite had given an ultimatum to Fred to marry her and he refused.

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The Court then noted that only three witnesses were called at trial: the attorney who reviewed the pre-nuptial agreement with Marguerite, the attorney who drew the agreement for Fred and Marguerite herself. Surrogate Radigan then correctly went on to analyze the relevant factors that had to be considered by the Court to determine any inequality between the parties and whether there was probable undue influence and unfair advantage. (The test apparently is in the conjunctive not the disjunctive, requiring a finding of both undue influence and unfair advantage). The Surrogate set forth the test *seriatim*: (1) detrimental reliance on the part of the poorer spouse; (2) the relative financial positions of the parties; (3) the formality of the execution ceremony itself; (4) whether there was full disclosure of assets as a prerequisite to a knowing waiver; (5) the psychological or mental condition of the objecting spouse at the time of execution; (6) a determination of whether one party had superior knowledge or ability and an over-mastering influence on the part of the proponent of the agreement; (7) the presence of separate independent counsel for each party; (8) the circumstances in which the agreement was proposed and whether it is fair and reasonable on its face; and (9) the provisions for the poorer spouse in the will.

"In most respects, Surrogate Radigan made a thoroughly expansive decision [*in* In re the Estate of Rappaport]*."*

Unfortunately, the court did not expand further on how each factor should be determined, or what weight should be given to each. The decision does not give guidance of whether, for example, the lack of independent counsel standing alone, would be a sufficient basis to move to the second prong, and shift the burden to the decedents' estate to establish that the agreement was free of fraud and deception.

In most respects, Surrogate Radigan made a thoroughly expansive decision. But, for example, on the issue of detrimental reliance of the poorer spouse, he simply recited that Marguerite did not give up friends, family, assets or career objectives to marry Fred. Even if she had done so, he further remarked, it would have been insufficient, because her motive was merely to cohabit with Fred prior to marriage. It appears that the judge thereby penalized her for living together without the benefit of marriage.

The fact that there was a major disparity in the financial positions of the parties apparently did not impress the Surrogate, since Fred had millions and Marguerite a mere pittance by comparison. The judge held that there was no testimony that Marguerite had any physical or mental condition that prevented her from entering into the agreement voluntarily, although Marguerite complained she was pressured into signing the agreement. With respect to the "who had superior knowledge factor," he held that, even though Fred was a far more sophisticated businessperson than Marguerite, there was no evidence that he wielded an "over mastering influence on her" and he noted that her earlier ultimatum and decision to leave evinced an ability to think and act independently of Fred. One cannot but speculate that another judge might have reached an entirely different interpretation.

With respect to independent counsel, the Court noted that Fred's attorney drafted the agreement which originally contained a total waiver of all property in the event of either divorce or death as well as support. Marguerite admitted to speaking with a lawyer who was a friend of Fred's, or at least was known to him through his business attorney, but he denied he represented her. A second draft of the agreement contained a provision for Marguerite to receive $100,000, but there was still no provision for the payment of any support, regardless of the term of the marriage. There was testimony that, after the original and second drafts were made, Marguerite tore up the document in anger because it contained such meager terms. She also testified that Fred told her that the document was only a temporary measure. Finally, she claimed that, because of the pressures exerted upon her, she relented and executed the final agreement.

The Surrogate did not find Marguerite's testimony credible that she was badgered for three hours to execute the document. He further observed that, if Marguerite truly believed that the document was temporary, why had she done nothing to seek to set it aside or modify it for 8½ years. The Court then turned to the question of whether the agreement was fair and reasonable on its face, but in doing so, failed to discuss the relative financial positions of the parties. Rather, the court stated, out of context, that the pre-nuptial agreement was brought up weeks prior to the date it was executed, seemingly making any other deficiencies fall to the wayside. This was perhaps the most difficult part of the court's decision to follow, because it totally ignored the fact that Marguerite had no income and meager assets, while Fred was a multimillionaire.

Based upon his discussion and review of the facts, the Surrogate concluded that Marguerite had failed to sustain her threshold burden of proof to show any inequality of circumstances between herself and Fred to demonstrate "probable undue influence and unfair advantage." He concluded that the burden never shifted to Fred's estate to prove the agreement was absent of fraud, deception or undue influence.

When considering the Surrogate's conclusion, one cannot but speculate that there will be few circumstances sufficient for a disadvantaged financial spouse to sustain the burden of proof. Here, Marguerite did not have counsel of her own choosing, the lawyer who did give her advice apparently did not act in her best interest, nor was he capable of negotiating a fair agreement, and Marguerite only received $100,000 and no support, while Fred apparently died with assets of several million dollars (although the decision is not clear on this point).

"The Rappaport *case . . . should be required reading for any attorney who will engage in a contest of a pre-nuptial agreement."*

What would be more unfair than for a spouse to live with her millionaire husband in a happy marriage of eight years duration *that did not terminate in divorce*, and then, at the time of the husband's death, walk out with a bequest of but $100,000, when without the agreement she could have elected against his will and received several millions of dollars? It seems that the Court did not give sufficient weight to this factor which should have been sufficient to shift the burden to the estate. A finding by the Court to shift the burden to the estate would not necessarily mean that Marguerite would be successful, but would at least permit a full exploration of the issue of whether the agreement was free from fraud, deception or undue influence.

The *Rappaport* case is one of the first to interpret the holding made by the Court of Appeals in *Greiff*. It should be required reading for any attorney who will engage in a contest of a pre-nuptial agreement. Any witness you call should certainly review with you the factors contained in this decision before testifying in court in order to ensure that the record will be sufficient for judicial review. There is little doubt that each case will rest upon the scope of the testimony and the credibility of the witnesses. As more and more decisions are rendered, the Court of Appeals may choose to give further guidance to the bar as to the weight that should be given to the enumerated factors, and make it easier to determine the ultimate outcome of such litigation.

Endnotes

1. 92 N.Y.2d 341.
2. 184 Misc. 2d 660, 709 N.Y.S.2d 921 (Sur. Ct., Nassau Co. 2000).

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Reality—What a Concept

By Joel A. Rakower

While the recent Court of Appeals decision in the matter of *Grunfeld v. Grunfeld*[1] offered a glimpse of sunshine, it fell short of being a guiding light. This article will explore and expand upon a number of issues addressed by both the Supreme Court and the Court of Appeals.

History of the Appraisals

Initially, the trial in *Grunfeld*, previously reported as *Rochelle G. v. Harold M.G.*[2] dealt only with the appraisal of Mr. Grunfeld's interest in his law firm. During the pendency of the trial, the Court of Appeals released its decision in *McSparron v. McSparron*,[3] which eliminated the concept of a "merger" of the license into the professional practice itself, thus, the litigants were unexpectedly faced with the valuation of Mr. Grunfeld's "license" reflected by his enhanced earnings in completing law school during the time frame of the parties' marriage. Each party retained new appraisers to compute the enhanced earning capacity of Mr. Grunfeld, with an added nuance, the value ascribed to the license/enhanced earnings could not overlap the value ascribed to the practice. My services were retained by Mrs. Rochelle Grunfeld to value Mr. Grunfeld's license/enhanced earnings.

"While the recent Court of Appeals decision in the matter of Grunfeld v. Grunfeld *offered a glimpse of sunshine, it fell short of being a guiding light."*

Each of the initial two business appraisers retained by the respective parties appraised Mr. Grunfeld's interest in his law firm utilizing the excess earnings approach:

> The court first determined the amount that defendant actually earned in excess of "reasonable compensation," the amount paid to an attorney of similar age and background in the same geographic area without any ownership interest in a law practice. After subtracting taxes and the income theoretically derived from defendant's share of the firm's tangible assets ("return on equity"), by agreement of the parties, the resulting amount was capitalized using a multiple of three. Then, defendant's interest in the firm's tangible assets was added to the capitalized earnings to arrive at defendant's interest in his practice, which Supreme Court found to be $2,581,760.[4]

To provide a clearer perspective, the parties' two business appraisers, Martin Sheinkman for Mrs. Grunfeld and Jay Fishman for Mr. Grunfeld, offered the following with respect to the total normalized earnings (forecasted sustainable earnings) of the practice and reasonable compensation:

	Sheinkman 1992	Fishman 1992
Normalized benefit (earnings pretax) New York and Boston combined	**1,844,743**[5]	**1,600,000**[6]
Reasonable Compensation for 1992	**320,848**[7]	**375,000**[8]

Avoiding Overlapping Between the Practice and the Enhanced Earnings

In addressing the computation of the enhanced earnings of Mr. Grunfeld, two vital components needed to be analyzed: the earnings of the practice which pass to the individual and the reasonable compensation which were ascribed to Mr. Grunfeld by the appraisers.

Both appraisers agreed that the earnings from Mr. Grunfeld's practice should be reduced by "reasonable compensation" for the individual in arriving at the normalized benefit stream or excess earnings to be capitalized in determining the value of the practice. Hence, a defined amount in excess of reasonable compensation for Mr. Grunfeld's services was attributed to the earnings of the practice and capitalized at a rate which each appraiser deemed appropriate. Thus, only those earnings in excess of an amount deemed to be reasonable compensation were considered in computing the value of the firm and Mr. Grunfeld's interest therein.

The question then arises in computing the enhanced earnings of Mr. Grunfeld: does one utilize the total earnings that pass to the individual, or does one utilize what has been deemed to be reasonable compensation?

To avoid the concept of double dipping or "overlapping" in the enhanced earnings computation, I opined that one should limit the earnings base to that which is deemed to be reasonable compensation. Accordingly, one eliminates speculation as to the firm's earnings and the stability of same. Secondly, one has not utilized the same earnings stream, in that only the earnings in excess of reasonable compensation were uti-

lized in the value of the entity, leaving the reasonable compensation income stream to be used in the enhanced earnings equation. Lastly, one can view Mr. Grunfeld's earnings base as being sustainable because it is not directly tied to the earnings of the firm.

Maintenance and Equitable Distribution

At this juncture of the discussion, we note that we have two assets which do not overlap with one another, the license and the practice. The complicating issue, which will now be brought before Supreme Court once again is how to equitably distribute the assets, being in part the enhanced earnings and the practice, and also provide for maintenance without double dipping.

The Court of Appeals stated:

> Most significantly for the case at hand, McSparron also cautioned lower courts to "be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses" (id.). To allow such duplication would, in effect, result in inequitable, rather than equitable, distribution. In contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital dependent upon the future labor of the licensee. The asset is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived. To the extent, then, that those same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being twice charged with distribution of the same martial asset value, or with sharing the same income with the non-licensed spouse.
>
> Here, as Supreme Court's opinion acknowledges, in setting the level of maintenance, it did include as part of defendant's earning capacity the projected earnings derived from his professional license. As previously discussed, however, the court also used the same earnings attributable to the law license to determine the present value of the license as a marital asset. To comply with McSparron, Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two. *Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout* . . . (emphasis added).[9]

Granted, the primary discussion in the *Grunfeld* case revolved around the license and maintenance, however, can we now ignore the fact that a second income stream was in fact capitalized and recognized as another asset? That being those earnings in excess of reasonable compensation which formed the basis of the intangible asset, the goodwill of the practice. The Court emphasized this point yet a second time within the opinion, "*There is no double counting to the extent that maintenance is based upon spousal income which is not capitalized and then converted into and distributed as marital property.*"[10]

"Has the pendulum now begun to swing? In the 80s, with the inception of equitable distribution, the courts appeared to have embraced new theories and methods tending to create assets to which 'fair market values' were attributed, but which had no value other than their intrinsic value, as they could not be bought or sold."

Has the pendulum now begun to swing? In the 80s, with the inception of equitable distribution, the courts appeared to have embraced new theories and methods tending to create assets to which "fair market values" were attributed, but which had no value other than their intrinsic value, as they could not be bought or sold. As an example, notwithstanding any ethical prohibitions precluding the sale of an attorney's practice and, thus, the recognition of goodwill, for purposes of equitable distribution there has been the assignment of a value to the theoretical goodwill of a law practice since the early 1980s. Cases such as *Harmon v. Harmon*[11] and *Rice v. Rice*[12] have embraced theories which create values which run afoul of common sense or contract law.

In the *Harmon* matter, the value ascribed to Mr. Harmon's partnership interest was computed in accordance with the death provisions of the partnership agreement. Hence, Mrs. Harmon was provided with 50% of a sum of money which only the heirs to Mr. Harmon's estate would enjoy. In *In re Rice v. Rice*, Mr. Rice was a partner in the firm of Coopers and Lybrand, one of the then "Big Six" accounting firms. His partnership agreement provided only for a return of his capital

account upon his voluntary or involuntary withdrawal from the partnership. However, a value was ascribed for goodwill utilizing an excess earnings approach. Here again, a value which Mr. Rice would never receive, as recognition of goodwill and a distribution of same, was prohibited by the very agreement which made him a partner.

Are we now to abandon those theories and cases which recognize an asset which is only theoretical in nature, or are we now to adjust for the inequity of recognizing the asset and providing maintenance from the same income stream? It appears that in *Grunfeld*, the Court addressed the latter, cautioning against the use of the same income stream to satisfy a maintenance obligation, while simultaneously distributing the same income stream as an asset.

"Are we now to abandon those theories and cases which recognize an asset which is only theoretical in nature, or are we now to adjust for the inequity of recognizing the asset and providing maintenance from the same income stream?"

Assume that we have a legitimately marketable business, owned 100% by the titled spouse. The normalized earnings of the entity are $600,000. The appraiser determines that reasonable compensation is $200,000 thus, there is $400,000 of excess earnings. Further assume that, based upon the risks of the industry and the business itself, it is determined that a proper return on investment for the company is 33%, a multiple of 3. The value ascribed, overly simplified, is $1,200,000 ($600,000 less $200,000=$400,000 multiplied by 3). The titled spouse retains his/her interest in the business worth $1,200,000 and the non-titled spouse receives the only other asset of the marriage $1,200,000 in cash.

The titled spouse will theoretically receive $400,000 annually on his/her investment due in part to the high risk implicit in the investment. Remember the greater the perceived risk, the greater return on investment. The non-titled spouse invests the cash of $1,200,000 in triple tax-free bonds earning interest at 5% annually, $60,000. The current trend in judicial decisions is to provide maintenance due to the vast differential in earnings. However, based upon the concepts set forth in *Grunfeld*, should we not now state that the only earnings from which we can consider maintenance is $200,000, reasonable compensation? The $400,000 income stream was capitalized, converted into a marital asset and then distributed as a marital asset. The fact is that not all assets are created equal and equity will have to be served on a fact specific basis, case by case. However, should the legal fictions created in the past now be modified to adjust for what appears to be a potential inequity to the titled spouse, who in most cases carries both the greater risk associated with maintaining the value of the business asset and a distribution in the form of maintenance from the same income stream?

Attorneys for the non-titled spouse will instinctively state that the titled spouse has recouped his/her investment in three years, hence, an inequity. We are forgetting that the non-titled spouse having $1,200,000 can invest in equally risky ventures, thus earning an equal amount. However, most people choose not to invest in such risky ventures, thus the non-titled spouse will typically earn a lesser amount, recouping his/her investment in some six to eight years. One should additionally note that the non-titled spouse's investment is liquid in contrast to the titled spouse's investment which is not liquid. One and all seem to forget that the non-titled spouse has cashed out both risk and tax free. When a partner is bought out of a partnership, do we continue to provide payments to that person in excess of the agreed upon price, reflecting the continued income of the entity?

Most look toward businesses as a long term asset which the titled spouse will cash out at the time of retirement. However, times are changing, and the lifespan of a business is questionable. Remember this at Christmastime when the family watches *Miracle on 34th Street* and the kids ask what Gimbles is. Remember, the local bookshops, hardware and small grocery stores which still existed in the 70s and 80s. All of these entities were viewed as minimal risk businesses, that is, until the superstore concept of the 90s. Remember what a typewriter, carbon paper and turntable were?

The above position can be rationalized for a business which in fact can be sold. However, looking now toward the legal fiction involved with the goodwill of a professional practice, we have a different problem. Typically, the appraisal of a professional practice entails the use of the excess earnings approach as indicated within the *Grunfeld* decision. One and all will agree that, in reality, upon retirement most professionals will never realize the amount assigned to goodwill in the divorce action. Recognizing that low multiples are typically assigned to professional practices, the excess earnings are recouped in one to three years, however the income stream in this instance does continue with a fraction of the risk as compared to an actual business concern such as a retail store or manufacturing concern. Is it fair to now say that one should not receive maintenance on the excess earnings when long term maintenance is at issue? In reality, in cases where long-term maintenance is at issue, would it not be more equitable to discard the goodwill assigned to the fiction and base maintenance

upon the entire earnings stream? In that instance the value assigned to the entity would be its net asset value. Hence, can we now view the upstate and downstate issues to possibly include a decision as to wave the non-titled spouse's interest in the goodwill of the entity and collect maintenance, or wave maintenance and retain an equitable share of the goodwill?

Where license income is considered in setting maintenance, a Court can avoid double counting by reducing the distributive award and base maintenance on that same income. One advantage of this method is that the maintenance award may be adjusted in the future if the licensed spouse's actual earnings turn out to be less than expected at the time of the divorce. On the other hand, there maybe cases where it is more equitable to avoid double counting by reducing the maintenance award. Where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance. Recently Justice Diamond in *In re R.R v. P.R.* addressed this issue.[13]

A distinction was made by the Court in *Grunfeld* between those income streams utilized in the calculation of assets, license and practice, and the income which may be derived from other sources.

The Court stated:

> On the other hand, Supreme Court's decision does not expressly explain how the Court took into account defendant's income from outside sources in determining the amount that the license distribution award should be reduced to avoid double counting. There is no double counting to the extent that maintenance is based upon spousal income which is not capitalized and then converted into and distributed as marital property. Thus, if Supreme Court fixed maintenance on the basis of defendant's income from all sources (adjusting for any appropriate setoffs), the proportionable share of maintenance attributable to defendant's unearned income should have been excluded from the Court's calculation reducing the license value by the value of maintenance.

Concept of the "Bare License"

A second aspect of this case, which I have been asked to expand upon on numerous occasions since the Supreme Court's decision, pertains to the two-part computation of the enhanced earnings.

The computations applicable to the enhanced earnings of Mr. Grunfeld were complicated by the fact that a portion of law school was completed prior to the couple's marriage, specifically 50%. The traditional approach has been to compute the enhanced earnings and apply a 50% coverture, thus giving credit to the titled spouse for the education which had been completed prior to the marriage. However, there is the ever-pervasive question if this is an equitable analysis? In the instant case, Mr. Grunfeld had risen to a level of earnings which had exceeded those attorneys in the 90th percentile. Thus, arises the question: "Was his formal education alone responsible for this?" Undoubtedly, many would respond in the negative arguing that the formal education provides nothing more than a platform from which a career is developed.

"There still remains unanswered, 'To what extent does an individual's personality, character and intellect affect the earnings achieved?'"

The First Department has held that a career can indeed be a marital asset.[14] Additionally, each of the remaining departments, while not openly acknowledging, has recognized that on-the-job training is indeed a marital asset. The most blatant example is that of a physician. Assume for example that we have a physician who has completed medical school and an initial internship and residency program which would qualify him/her as a family practitioner, at the point the marriage occurs. During the marriage the physician completes a four-year residency program in general surgery, becoming a surgeon. Each of the four departments has uniformly recognized the additional residency program as a marital asset. Yet no expenditure of marital funds has occurred, as there are no fees associated with a residency program; further the physician has earned a salary throughout the program. The residency program is nothing less than on-the-job training or career development.

Accordingly, Mr. Grunfeld's earnings could be broken down into two distinct components. The first component being the degree itself and the earnings which

can be attributed to it, and the second distinct component being the development of a career and the earnings associated with the career.

The attainment of a law degree and ultimately the license to practice places one in the probable defined role of a law firm associate and the earnings stream which can be generated as an associate. Granted, one can establish a practice directly from law school, however, within reasonable parameters and given common sense probability, becoming an associate is the career step which would most often be taken. Statistical data as to what associates earn provides a barometer of what the education itself offers one rather than any career advancements which were attained. Hence, the enhanced earnings attributable to the earnings stream as an associate (degree only) can be identified and computed.

The first computation took the statistical median earnings of an associate in 1992 who had been admitted to the Bar in 1974. Those earnings were then compared to the statistical median earnings of a male with a Bachelor's degree and a 50% coverture fraction was applied.

The second part of the computation compared the figure utilized as reasonable compensation in the practice appraisal and compared it to the earnings utilized for the associate. I did not apply a coverture fraction, although a 7% coverture fraction was applied by the Court, representing the separate property component, which I believe to be in error.[15] The sum total of the two figures represented the enhanced earnings of Mr. Grunfeld.

The Defense

I have emphasized on numerous occasions while lecturing to attorneys that complacency in accepting the traditional equitable distribution percentages for enhanced earnings, those which are determined by the length of the marriage rather than to the contributions which generated the asset is too frequently encountered. The enhanced earnings of an individual should not be held equivalent to that of a house or bank account. There is one opinion which began to address the issue of contributions to the asset, that being an unreported decision from Supreme Court, Nassau County. Justice De Maro, in the matter of *Gold v. Gold*[16] which stated:

> . . . Her distribution amount as to future enhanced earning is impacted by two factors—one is the fact that she will not be there to contribute to the exploitation of the income enhanced (continuing the economic partners fantasy) and that maintenance will come from the same income stream.
>
> While interesting covertures are offered by plaintiff on a pension rule basis and for potential ill health of plaintiff these are overly constrictive on the Court's equity powers and overly limiting.
>
> The Court in this case rejects them. Defendant is entitled to a fair equitable share in the income enhanced based on an assessment of the potential income it will produce; however, as many with licenses can attest the exploitation is fraut with the perils of economics, changing structures of government regulations and require many hours of labor beyond a 9 to 5 "job". This is not an asset which by dint of time alone income is generated.
>
> The Court finds in such matters that 50% of the future income from the income enhanced (over the base income potential of the licensed party at the time of marriage) should be reserved for the exploiter and the other 50% be subject to distribution. Plaintiff is entitled to preserve the first 50% because only his time, risk and toil will be available to exploit the asset."

Interestingly the Court of Appeals in *Grunfeld* began their "analysis" with the following:

> In O'Brien v. O'Brien (66 NY2d 576 498 NYS 2d 743, 489NE 2d 712), this Court ruled that, to the extent that it is acquired during marriage, a professional license is marital property subject to equitable distriubtion (id., at 584). In addressing the issue of valuation, we held that "[t]he trial court retains the flexibility and discretion to structure the distributive award equitably ***and, once it has received evidence of the present value of the license and the working spouse's contributions toward its acquisition and considered the remaining factors mandated by the statute (see, Domestic Relations Law § 236[B][5][d][1]-[10]), it may then make an appropriate distribution of the marital property including a distributive award for the professional license *if such an award is warranted* (id., at 588 [emphasis supplied]).

Rarely is the issue addressed as to *"if such an award is warranted"* it has been taken for granted that cohabitation alone warrants an award, or that such acts as dri-

ving the titled spouse to an interview warrants an award. Can one equate, on parity, the years of study, effort, risk, personal strain and foregoing of material assets and social events to that of being driven to an interview, or typing a paper for the titled spouse? The Appellate Division First Department, in *In re Elkus, supra*, "*It is the nature and extent of the contribution by the spouse seeking equitable distribution, rather than the nature of the career, whether licensed or otherwise, that should determine the status of the enterprise as marital property*." Should we now be taking a closer look as to how the asset was developed? Should the standard be, but not for the non-titled spouses contributions, would this asset have been created, and if so to what extent was the true contribution of the non-titled spouse? These are the issues which must be presented by counsel and addressed by the courts.

An area which has the potential for abuse under the concept of enhanced earnings and distributions thereof lies with a license which requires minimal effort, but nonetheless a requirement for a particular position. A perfect example is that of a Series 7 license, which allows an individual to sell certain financial products such as mutual funds. The Series 7 License is nothing more than a 40-hour review course and exam. Truck drivers require more training than individuals seeking this designation. Assume that a car salesperson for Chrysler or Ford earning $30,000 annually interviews with Mercedes and lands a sales position in one of their showrooms, with the provision that a 40-hour class which centers upon the Mercedes car and its advantages over all competing lines, and the passage of a four-hour exam is completed. The course and the exam are successfully completed and the salesperson now earns $70,000 annually selling Mercedes. Do we now compute the enhanced earnings of a Mercedes salesperson?

An important issue to be addressed is the concept of a quid pro quo scenario. Assume the following hypothetical example: Husband and Wife are the same age and marry directly out of high school. Both go onto college, husband receives a B.A. in education and the wife a B.A. in English literature. Both continue onto differing forms of higher education, Husband receives both a masters and Ph.D. in education, and Wife a J.D. In line with their chosen educations, Husband maximizes his earnings at $90,000 annually and Wife $250,000. In computing their respective enhanced earnings, Wife's exceeds Husband's by $1,000,000. Is it equitable for Wife to now distribute to Husband a portion of the $1,000,000 for choosing a career path which earns her a greater living? At some point are individuals not responsible for their own actions? Is there not a quid pro quo, both received equal educations, however, in areas for whatever reason suited their individuality? This concept can be further demonstrated with two individuals, same age, same education received during the marriage who become physicians. One completes a residency in plastic surgery and the other in colon and rectal surgery. Not startling, the plastic surgeon's earnings exceed the rectal specialist, and thus, the value associated with the enhanced earnings higher. Should the rectal specialist now be compensated upon divorce for the differential in earnings?

One additional point should be addressed within this subsection, that being the asset that isn't. There are many instances where the receipt of a degree does not necessarily translate to enhanced earnings. The individual may go onto an alternate career, the degree can become stale, the subject matter becomes outdated, or the degree is just not required. In my experience, this situation is encountered most often with the receipt of an MBA. A nexus should be drawn between the degree and the career, obviously on a case by case basis. In many instances the job does not require the degree or license received, hence, it did not enhance the earnings of the individual and no value should be assigned.

"Should the standard be, but not for the non-titled spouses contributions, would this asset have been created, and if so to what extent was the true contribution of the non-titled spouse? These are the issues which must be presented by counsel and addressed by the courts."

Child Support

Unfortunately, the issue of double counting and child support was not addressed by the Court of Appeals. Further, the computation of child support is governed by statute which may on its face prove difficult to overcome.

Often we will see income imputed to one spouse for varying reasons. If we are converting an income stream into an asset and then distributing the asset, does this now create a basis for the imputation of income to the recipient of the theoretical income stream? In essence, one could reverse the conversion back into an income stream in the hands of the non-titled spouse.

Fundamental Issues of Enhanced Earnings and Double Dipping

The distribution of one's enhanced earnings represents a shifting of income from the titled spouse to the non-titled spouse. For example, if we have an enhanced

earnings figure of $1,000,000 which represents the present value of the titled spouses earnings stream over a 20-year period, then we are assuming, granted overly simplified, earnings of $50,000 annually. If we distribute 50% to the non-titled spouse, then we have a shifting of income, decreasing the titled spouses earnings by $25,000 and, in effect, increasing the non-titled spouses earnings by $25,000. Hence, for purposes of determining the non-titled spouse's needs and imputed earnings, one may consider the fact that he/she has received, in many, although not all cases, a lump sum, risk-free distribution of earnings, which, if invested reasonably, should provide him/her with an annual income figure which equals or exceeds the figure of $25,000 for 20 years, net of taxes.

This concept is easily demonstrated. Assume that we have a divorcing couple with two assets, the professional with her license worth $1,000,000 and the non-titled spouse with a bank account of $1,000,000. Conceptually by pre-*McSparron* reasoning, we have an even distribution of assets. The professional will earn $50,000 above her statistical base of $25,000 for a total of $75,000 annually. The non-titled spouse will invest his $1,000,000 and receive $50,000 annually, risk free without working.

Take the above a step further: Assume the assets of the marriage consist of (1) the $1,000,000 license, (2) a house worth $500,000 and (3) a bank account with $500,000. The non-titled spouse takes the house and the bank account and decides to reside in the house, post divorce. The non-titled spouse still has $1,000,000 in assets today while the titled professional still has her job earning, $75,000 annually and no tangible assets. For purposes of determining the non-titled spouses available earnings, should we not still impute $50,000 of available earnings? It is the choice of the non-titled spouse how he will invest his funds, hence, the reality of the situation is that the earnings are available, however, the decision was not to exploit the earnings.

If one is to recognize that a shifting of income has taken place, can't the court impute income to the non-titled spouse in the computation of child support, to relieve the titled spouse of the reality that his/her income has indeed been reduced, despite what is shown on the tax return? Providing an award through maintenance as opposed to equitable distribution accomplishes such a goal and will be reflected on the tax returns of the individuals, thus meeting the statutory requirements for child support.

The computations presented within the above discussion as to Mr. Grunfeld represents the differential in earnings between that of an individual with a B.A. and those earnings deemed as reasonable compensation. Therefore, any distribution of the total value does not include the earnings up to those of the B.A. earnings, which may be available for consideration for maintenance and/or child support.

The total enhanced earnings stem from an earnings stream which has been tax impacted. If the Court was to award a distribution in the form of taxable maintenance to the non-titled spouse, a form of double taxation would occur. In instances such as this, where maintenance and not equitable distribution of an asset is utilized, the gross earnings, net of only social security taxes,[17] should be utilized in the computation.

The traditional present value discount of 3% utilized in computing one's enhanced earnings is a net figure between anticipated growth at a rate equivalent to the Consumer Price Index and a discount figure which exceeds inflation by three (3) percentage points. Inflation has fluctuated widely over this century, however, on average, we can state that the imputed discount rate falls between 5% and 8%.

In many instances, although obviously not mandated by the Court of Appeals in *Grunfeld*, when an equitable distribution award is to be paid out over time, a statutory interest rate of 9% is utilized. However, the award of interest at 9% exceeds the amount by which the earnings stream has been discounted, again typically 5% to 8%, which provides the non-titled spouse with a greater award than initially calculated. Hence, if the court were to award interest on a payout of the enhanced earnings, an inequity can occur.

It would appear that the most equitable way to distribute enhanced earnings is through the distribution of a percentage of the titled spouse's earnings. This would pertain primarily to salaried individuals as opposed to those being self- employed. In good years, the non-titled spouse will enjoy the benefits that the market bears, and in leaner years will receive less, thus, reducing the likelihood that either spouse will receive a windfall. Additionally, this method avoids the probability of double dipping between the value ascribed to the career, maintenance and child support.

If one were to implement such a concept, an understanding of the individual's increase in earnings over time should be addressed. Growth in earnings for an individual, unless by union negotiation, are typically broken down into two components. The first component represents an increase based upon inflation. The receipt of a cost of living increase each year does not place one into a more comfortable lifestyle; rather, it maintains the status quo. The second component of earnings growth pertains to productivity as based upon the individual's personal efforts. Productivity increases are typically not factored into enhanced earnings computations.

Those with a basic understanding of the IRS regulations dealing with maintenance are aware of a concept known as the "recapture provisions." Congress understood that people would attempt, when possible, to structure equity distributions in the form of taxable maintenance for obvious reasons. To limit the use of this mechanism the recapture provisions were created. They apply to the first three calendar years subsequent to the divorce and address wide fluctuations in distributions. A full discussion of the recapture provisions goes beyond the scope of this memorandum, however, the code does provide for an exception.[18]

"Maintenance payments can *survive remarriage."*

Should the individuals choose to make the distribution as a taxable event to the recipient spouse in the form of maintenance, they must be aware that the divorce agreement notes that the payments and related obligation cease upon the death of the recipient spouse. If there is an ongoing obligation past the date of death, the payments will not qualify as maintenance. Maintenance payments *can* survive remarriage.

The final area of double dipping to be discussed is the issue of the valuation date and interim support. Typically, the date of valuation is the date for the commencement of the action for divorce. Payments in the form of temporary support from the date of commencement, which is the date of valuation, and the subsequent award which can be years later, can overlap with any temporary support order as the income stream from which the temporary support originates is also included in the value of the enhanced earnings, hence, potential double dipping between the value of the license and the temporary support award.

Endnotes

1. 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000).
2. 170 Misc. 2d 808, 649 N.Y.S.2d 632.
3. 87 N.Y.2d 275, 286.
4. *Grunfeld v. Grunfeld*, Court of Appeals, N.Y.L.J., May 12, 2000, p. 27, col. 3.
5. Sheinkman redline report as imputed from tables 11A and 13.
6. Fishman report dated Sept. 12, 1995, p. 3.
7. Sheinkman redline report, p. 90.
8. Fishman report dated Sept. 12, 1995, p. 3.
9. *Grunfeld v. Grunfeld*, Court of Appeals, N.Y.L.J., May 12, 2000, p. 27, col. 3.
10. *Ibid*.
11. 173 AD2d 98.
12. 222 AD2d 493, 634 N.Y.S.2d 761.
13. One may also address *Lincer v. Lincer*, Justice Glen, N.Y.L.J., Oct. 23, 1990.
14. *Golub v. Golub*, 139 Misc. 2d 440, 527 N.Y.S.2d 946 and *Elkus v. Elkus,* 169 AD2d 134, 572 N.Y.S.2d 901 (1991 N.Y. App Div.).
15. The educational component (the bare license) has been computed with a coverture fraction applied. The second portion of the computation dealt strictly with career development which occurred only during the timeframe of the marriage, hence, no coverture fraction should have been applied.
16. Nassau County, Index 6351/92 decided Sept. 18, 1997.
17. Social security taxes would be paid by the titled spouse regardless of characterization as taxable or nontaxable maintenance.
18. I.R.S. § 71(f)(5)(C), Fluctuating Payments Not Within Control of Payor Spouse—for purposes of this subsection, the term "alimony or separate maintenance payment" shall not include any payment to the extent it is made pursuant to a continuing liability (over a period of not less than three years) to pay a fixed portion or portions of the income from a business or property or from compensation for employment or self-employment. Hence, one can award maintenance based upon a percentage of the titled spouse's earnings without recapture.

Mr. Rakower is president of Financial Appraisal Services, Ltd. located in Commack, N.Y. He is offering this article as an educational tool for attorneys, accordingly, some of the theories espoused do not reflect the opinion of Mr. Rakower, rather they are to stimulate the thought process of the reader.

Selected Cases

Editor's Note: It is our intention to publish cases of general interest to our readers which may not have been published in another source and will enhance the practitioner's ability to present proof to the courts in equitable distribution and other matters. The correct citations to refer to in cases that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, *e.g.*, Spring 2001) New York State Bar Association

We invite our readers and members of the bench to submit to us any decision which may not have been published elsewhere.

Angela A. v. Januarius C., Family Court, Kings County (Levy, Carole P., September 27, 2000)

Angela A. ("Petitioner") commenced this action for paternity and support on March 4, 1999 alleging that Januarius C. ("Respondent") was the father of Trevon A., born 3-6-98 and requesting an order of support. On the initial return date of April 9, 1999, both parties appeared with counsel before Hearing Examiner Conteratos. Jurisdiction was challenged and a traverse hearing on the issue of service was scheduled for May 26, 1999. A hearing was commenced on May 26, 1999 and continued on June 8, 1999, when jurisdiction was found complete (Conteratos, H.E.) and Respondent requested a genetic marker test. The tests were ordered (Conteratos, H.E.) and Respondent directed to pay at the first instance pursuant to Family Court Act § 532(c).

On October 28, 1999, both parties appeared with counsel. The results of the genetic marker tests as reported by Microdiagnostics suggested a 99.98% probability of paternity. Respondent requested further tests. As Petitioner did not consent, and Respondent contested paternity, the matter was respectfully referred to a judge.

On December 9, 1999, a trial was commenced and continued on December 20, 1999. Respondent admitted paternity and an Order of Filiation for the child Trevon, d.o.b 3-6-98 was entered (Porzio, J.) and the matter referred to this court on the issue of support.

On January 31, 2000, both parties appeared with counsel before this Court. A temporary order of support was entered in the amount of $204 bi-weekly, effective February 10, 2000, through Support Collection Unit. As the combined income of the parties was in excess of $80,000, the matter was adjourned to May 3, 2000 for a hearing on the issue of support over $80,000. Discovery was to be completed by March 27, 2000.

The following documents were entered into evidence: Petitioner's 1998 tax return with W-2, 1999 tax return with W-2; Financial Disclosure Affidavit (FDA) ; a notarized letter from Ms. Norma Wilson dated September 14, 1999 stating that she cares for the subject child and is paid $100 weekly; a contract with Up the Ladder Day Care Center for July 5, 2000 to September 1, 2000 (summer camp); Respondent's 1999 tax return with W-2; FDA; Respondent's paystub dated March 24, 2000 from Brooklyn Hospital Center.

Testimony and documentary evidence submitted reveal the following:

Petitioner and Respondent are both employed by Brooklyn Hospital Center. She is a registered nurse and he is in the accounting department. Petitioner testifies that she pays $100 weekly to Ms. Norma Wilson for the care of the subject child from 7:00 a.m. to 4:35 p.m. while she is at work. Ms. Wilson has verified that she cares for the child (see letter). Petitioner further testifies that Ms. Wilson had personal problems in June 2000 and returned to St. Vincent. She testified that she paid her in cash and never got receipts. She currently has the subject child enrolled in Up the Ladder Day Care Center. She produces a contract for care at said facility which indicates a $150 registration fee and cost of $100 weekly for summer camp from July 5, 2000 to September 1, 2000. No competent evidence of payment was provided. With regard to fees after September 1, 2000, the fee will increase to $150 weekly; however, she also states that Ms. Wilson may return in September.

Petitioner owns a two-family home in Ozone Park, New York which she bought in 1995 for $145,000. Her brother lives there in a rental apartment; it is not clear whether or not he pays rent. She reports $3,600 as annual rental received from the property on her 1999 income tax return. Her mortgage payment is $4,655 annually, which is more than the reported income. After expenses and depreciation, she claimed a $9,271 loss on her tax return. Petitioner's 1999 tax return also reveals $1,284 in added income from tax-free interest ($433), ordinary dividends ($113), capital gains ($738), and a tax refund from the previous year of $2,276. Her 1998 tax return shows similar entries.

Petitioner testifies that all her needs and the needs of the child are being met. She lists $300 monthly as an education expense on her FDA in obtaining her B.S. in nursing. She claims $5,210 on her tax return. She states she gets a $2,000 reimbursement from the hospital in the year after the expense. She states she finished her program in January 2000. Upon questioning, Petitioner

revised some of her expenses as listed on her FDA, thereby reducing her monthly expenses to $3,126 of which $345 is for repayment of debt.

Respondent's 1999 W-2 and tax return reveal that he earned $45,191 from Brooklyn Hospital Center. He has additional income from interest in the amount of $468. He lists one dependent. His FDA shows $1,749 total monthly expenses, including payments for a car loan, charge accounts, and a hardship loan totaling $488 per month. He states that he is married and has a child, but his tax return is filed as head of household listing one dependent for a total of two exemptions.

The income of the parties is as follows:

	Petitioner—as shown on 1999 W-2	Respondent—as shown on 1999 W-2
Gross	$68,141.01	$45,190.56
—FICA	4,224.74	2,655.99
—Medicare	988.04	621.16
—New York City	2,010.67	896.71
	$60,917.56	$41,016.70
Added income	1,284.00	468.00
Adjusted Gross Income	$62,201.56	$41,484.70

Combined Adjusted Gross Income $103,686.25

Respondent 40%; Petitioner 60%

At the conclusion of the hearing, the attorneys were give opportunity to submit written summations; upon receipt of the summations, the Court reserved decision.

When determining the appropriateness of a guidelines order where the combined parental adjusted gross income is in excess of $80,000, Family Court Act § 413 states that the Court shall multiply the combined parental income up to $80,000 by the appropriate child support percentage and shall prorate the result in the same proportion as each parent's income is to the combined income. However, ". . . When the combined parental income exceeds eighty thousand dollars, the court shall determine the amount of child support for the amount combined parental income in excess of eighty thousand dollars through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage. . . ."

The Court of Appeals has addressed the issue of the $80,000 provision contained in the statue in *Cassano v. Cassano*, 85 N.Y.2d 649, specifically focusing its attention on the Child Support Standards Act and its application to the combined income in excess of $80,000.

Thus, there is a two-tiered method for computing the child support obligation for the non-custodial parent. The first level of the two-step calculation is a straightforward mathematical calculation whose result is not in dispute here and is as follows:

Combined parental income $80,000.00

Basic child support percentage for one child 17%

Basic combined child support obligation . . . . . $13,600.00 annually

Petitioner—60% . . . . . 8,160.00 annually

Respondent—40% . . . . . 5,440.00 annually

209.23 bi-weekly

It is the second level of the calculation which is at issue here. Petitioner argues that the combined income should be considered and offers little reasoning other than matters unrelated to this proceeding and little evidence in support of the factors listed in the statute the Court must consider. Respondent argues that the Court should consider the financial circumstances of the parties, Petitioner having a greater income and disposable income, that the needs of the child are being met, and that the child has no special medical or educational needs. Thus, the Court should limit the child support obligation to the first $80,000.

This Court agrees. Petitioner is directed to cases such as *Cassano*, as well as *Glickman v. Qua*, 253 A.D.2d 267, *leave to app'l den.* 93 N.Y.S.2d 814, in which the court pointed out that to apply the statutory formula blindly on all income above $80,000 "would constitute an abdication of judicial responsibility rendering meaningless the statutory provision setting a cap on the formula."

This Court must consider the statutory factors as set forth in FCA § 413(1)(f)(1-10) when deciding whether or not to deviate from the guidelines calculation in setting an order of support for the subject child in his matter. Petitioner has a greater income than Respondent, both as W-2 wage-earners and from outside sources. The Court does not even address the rental property either from the point of view of income or expense other than the mortgage payment offsets the income declared. Clearly, the rental property provides an additional source of income. Comparison of the parties' FDAs discloses that Petitioner has greater disposable income available to her. Petitioner has not alleged that the child has any special medical or educational needs warranting consideration. Petitioner states that the needs of the child are being met without the added child support; the needs will certainly be met with the additional support which is tax-free to Petitioner. Neither party has raised the resulting tax implications of the order of support. Although Petitioner claims expenses incurred for school, she has finished her course and will thus benefit, presumably in increased income. She also testified that the hospital reimburses her.

After considering all of the factors, the Court finds that the facts warrant limiting the basic child support order to the first $80,000 of combined income, making Respondent's child support obligation $209.23 bi-weekly.

No additional child care is awarded at this time. Petitioner testified as to her costs, but was unable to provide proof of actual payment, testifying that she paid her child care provider in cash. The letter from Ms. Wilson, the caregiver, indicated that she watched the child; however, Petitioner states she no longer does so and is, in fact, out of the country, thereby making it impossible for her to testify. A contract for a summer camp day care was provided, but no competent evidence of payment was provided the Court. It was also prospective in nature; further Petitioner stated that her previous caregiver might return from St. Vincent. At such time as Petitioner makes arrangements and provides competent proof, she may request that child care be added.

ORDERED, order of support for one child is $209.23 bi-weekly, effective October 6, 2000, through Support Collection Unit. Retroactive support from the date of filing of March 4, 1999 to October 6, 2000 is $8,683.04. Support Collection Unit is directed to credit all payments made under the temporary order of support and reduce the retroactive support accordingly. Medical insurance is provided by both parties as they share the same employer, and unreimbursed expenses are to be shared pro rata according to income.

Notify all parties, attorneys, and Support Collection Unit.

* * *

Anthony S. and Patricia K. v. Patricia S., Family Court, Dutchess County (Amodeo, Damian J., January 30, 2001)

Laniqua C. v. Lisa C., Family Court, Dutchess County (Amodeo, Damian J., January 30, 2001)

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These child protective proceedings bring up for review the adequacy of fees authorized for services performed by attorneys acting as assigned counsel and law guardians in Family Court. In each of these cases assigned counsel has requested compensation at the rate of $75 per hour for all work performed. This is considerably above the $40 per hour rate set for in-court work and $25 per hour rate set for out-of-court work provided in County Law § 722-b.[1]

Prior to accepting the assignment in each case, counsel indicated an unwillingness to do so unless the court would at least consider his request for compensation at an enhanced hourly rate. In making its determination of counsel's request in these cases the court will not address the specific facts of either case, but will review the issue of counsel fees in a somewhat broader manner. The court does note that it was only as a result of the experience and expertise of the attorney involved that each of these difficult matters was resolved with relative dispatch.

The court has selected these cases because each involves an attorney whose situation is typical of others in this county who have a long and dedicated history of serving this court as law guardians and assigned counsel. Samuel P. Brooke, Esq., is the senior member of a very active and well-respected three person law firm. He and another member of that firm are certified to act as law guardians (Family Court Act §§ 243(2), 244(b); Judiciary Law § 35(7)) and each regularly accepted cases in that capacity and all members of the firm had regularly accepted work on an assigned counsel basis. Within the last year, each attorney requested that his name be removed from both the assigned counsel and law guardian lists. Each cited financial reasons, relating to the low fees paid for these assignments, as the primary reason for his decision. It was only at this court's personal urging and even pleading that Mr. Brooke agreed to remain an active law guardian.

For years the need for increasing the compensation paid to attorneys for performing assigned work has been a topic of much discussion and concern. Judges and others have long expressed alarm at the consequences of failing to overcome the long-standing stalemate in addressing the need for a substantial increase in the fees paid to the attorneys willing to accept assigned work.

Virtually everyone in the executive, legislative and judicial branches of government has expressed understanding and sympathy for the plight of attorneys being asked to perform professional services at rates which have not been increased in more than 15 years. Clearly, the cost for these attorneys to maintain their professional and personal lives has increased substantially during the last 15 years. Regrettably, expressions of understanding and sympathy do not readily convert into the dollars necessary for these attorneys to pay office rent; purchase law books, computers or supplies; compensate their paralegal or secretarial staffs; or to pay their home mortgage, auto lease or college tuition.

To fully appreciate the scope of the crisis which has developed as a result of the woefully inadequate compensation being paid to these attorneys, the problem must be viewed in the proper context. In a substantial number of cases coming before this court an attorney is assigned to represent one or more of the adult litigants. In virtually every case involving a child an attorney is assigned to represent that child. As a result, the impact of the crisis created by the inadequate fee structure is felt in some way in almost every case that comes before the Family Courts throughout the state. The matters handled by these attorneys regularly involve some of the most critical issues facing families—which of two loving and able parents should have custody of a child; whether a child should be placed in an institution for inappropriate conduct; whether a parent's rights to care for and raise a child should be terminated; or how issues of domestic violence should be addressed.

It has become increasingly difficult and time-consuming for the court to find attorneys willing to handle cases. It has also become more common for the court to assign counsel in a particular matter and mail copies of all material to the attorney, only to have the attorney reject the assignment, citing his or her unwillingness or inability to handle the matter due to an already overburdened inventory of assigned cases. In such instances the court staff is required to seek out an attorney willing to take the matter and duplicate the entire effort of preparing a new assignment order and copying and transmitting necessary documents to the newly assigned attorney. The court often does not receive notification of the unavailability of counsel in sufficient time to make a new assignment to meet a scheduled court appearance or in sufficient time for the newly assigned attorney to effectively communicate with his or her client prior to a scheduled appearance. Adjournments, delays, inconvenience and additional costs to the court system and to the parties, through loss of wages, extra childcare expenses, or absence from school, are common consequences of the state's failure to act on the counsel fee issue.

It is a fundamental obligation of the State to provide adequate counsel for those unable to afford an attorney (*See, e.g., Gideon v. Wainwright*, 372 U.S. 335; *In Re Gault,* 387 U.S. 1; *In re Orlando F.*, 40 N.Y.2d 103; *see also* Family Court Act §§ 241, 249, 262). At the same time, it has always been acknowledged that attorneys undertaking the representation of indigents and children understand that their fees will necessarily be lower and that some financial sacrifice will be involved (*See, e.g., People v. Perry*, 27 A.D.2d 154; *In re Werfel*, 36 N.Y.2d 624). However, long-standing inaction by and even resistance from legislative and executive offices concerning enhanced counsel fees has had the practical effect of shifting the burden of providing legal services from the state to those attorneys still willing to take these assignments.

The overhead of a typical attorney is often nearly equal to or exceeds the amount which an attorney can expect to receive from assigned cases. Trained and experienced attorneys should not be compelled to work at rates which are far less than those established for other professionals who provide services to the court. Nor should these attorneys be compelled to work for a net wage which is less than they pay their own secretarial or paralegal staffs or for a net amount, which, in some instances, is below the minimum wage. The attorneys who continue to accept assignments out of a sense of obligation to the public should not be subsidizing the state's obligation to provide adequate legal representation to those who cannot afford to do so.

The crisis in the court system which this inaction has caused must be addressed in some manner to insure that those who typically have no one to lobby on their behalf in the legislative or executive halls will continue to receive adequate and effective representation.

Courts have long expressed great reluctance to decide an issue in a manner which might be viewed as acting in a legislative capacity. To avoid encroaching on the prerogatives of the legislature courts have long practiced the exercise of examining existing legislation in an effort to craft a creative solution to a problem in the context of that legislation.

Section 722-b of the County Law,[2] and Section 35 of the Judiciary Law,[3] after outlining the limits for compensation, provide that in "extraordinary circumstances a trial . . . court may provide for compensation in excess of the foregoing limits. . . ." Traditionally, the court's discretionary application of the "extraordinary circumstances" language has been limited to the facts of a specific case (*See State v. Brisman*, 173 Misc. 2d 573;[4] *People v. Sinkler*, 157 Misc. 2d 103). Some have suggested that the "extraordinary circumstances" language applies only to the maximum dollar amount set forth in these statutes as opposed to the hourly rates themselves. In a

very recent appellate ruling, the Third Department rejected an attempt to limit the interpretation of the phrase "foregoing limits" in § 722-b of the County Law to the maximum dollar amount based on the classification of the work performed as opposed to the maximum permissible hourly rate. (*People v. Herring*, ____A.D.2d____; N.Y.L.J., Jan. 24, 2001, at 31, col. 3).[5]

The question presented is what "extraordinary circumstances" may the court consider in exercising its discretionary authority under County Law § 722-b and Judiciary Law § 35. Neither statute defines "extraordinary circumstances" nor gives any general or specific guidance as to how that language is to be applied.

In this court's view, a pervasive and extremely compelling array of "extraordinary circumstances" exists, when, among many other things:

1. A large body of attorneys, who have long, well and faithfully served the young children and indigent adults who come to our courts are being asked to work for compensation which is grossly inadequate. These attorneys have not received an increase in the rate of their compensation for more than 15 years. During that same period of time virtually every other person performing a service for the judicial system, every legislator and staff person, every person in the executive branch of government and most individuals in the general work force have received a substantial increase in compensation.
2. Assigned counsel and law guardians are being required to subsidize the representation of young children and indigent adults, when such representation is a constitutional and/or statutory responsibility and obligation of the state.
3. Attorneys, in ever increasing numbers, are requesting that their names be removed from the law guardian and/or assigned counsel panels or are requesting that the number of cases assigned to them be either reduced substantially or be limited to matters which traditionally consume less time.
4. A diminishing number of attorneys are being requested to handle an increasing number of cases involving more complex and time-consuming issues.
5. Repeated appeals to members of the local bar to become members of the assigned counsel and law guardian panels have failed to increase the number of attorneys available to serve the needs of the court.
6. Attorneys are, at times, less prepared than they might be due to the increasing caseload of the dwindling number of attorneys willing to remain on the assigned counsel and law guardian panels.
7. Court calendars are delayed, on an almost daily basis, due to an inadequate number of attorneys willing to serve as assigned counsel or as law guardians.
8. Judges and court staff are required, on an almost daily basis, to expend additional time to obtain attorneys who are willing to accept a particular assignment, when such a process should only require selecting an attorney from a panel on a rotational basis.
9. The court must increasingly rely on less experienced attorneys to handle the often complex, challenging and emotionally charged matters regularly coming before the court.
10. Judges are required to write individual letters or issue lengthy decisions in order to justify each instance when that judge believes counsel should be compensated at a rate in excess of the basic rate set forth in the County or Judiciary Law.
11. Groups of attorneys practicing in some courts have indicated an intention to "boycott" the courts by refusing to accept additional assignments and other groups have commenced legal proceedings to seek increased compensation as assigned counsel or law guardians.
12. Those whose adequate legal representation is at stake—children and indigent adults—represent constituencies with whom the general public has little empathy. They have virtually no organized or effective voice in the political community which will ultimately determine the limits of their attorney's compensation.

These circumstances permeate every aspect of the Family Court process and have had and continue to have an increasingly adverse impact on virtually every case coming before the court. To suggest that the foregoing factors, taken together, do not constitute "extraordinary circumstances" would beg the question. To require the courts to justify, on a case-by-case basis, the need for enhanced compensation has itself become an unrealistic and unnecessarily time-consuming exercise.

As my colleague, the Hon. James V. Brands, Family Court Judge, noted in a very recent decision on the same issue, the financial impact which our rulings will have cannot be ignored (*In re Sweat v. Skinner*, N.Y.L.J., Jan. 24, 2001, at 31, col. 1). This court is acutely aware of the competing public policy issues presented by the question being considered (*See State v. Brisman, supra* at

585-90). However, it is compelled to act to insure the integrity of the Family Court system in this county. Hopefully, recent judicial review of this issue will stimulate action to address a situation which can only be described as disgraceful. This court remains confident that the members of all branches of government using their collective wisdom can formulate a creative solution to a problem which many years of neglect has created. While there have been some hopeful indications that this issue may be the subject of serious consideration in upcoming months, and while the court would encourage such attention, the history and political realities surrounding this subject suggest that legislation addressing this issue is far from a certainty in the foreseeable future. Facing such realities, this court has an overriding obligation to the citizens of this county to make every effort to ensure that the very important and vital matters coming before it are handled in an effective and efficient manner.

Chief Judge Judith S. Kaye has proposed that assigned counsel and law guardians be compensated at the rate of $75 per hour for work performed, both in and out of court. This court is certain that the rate suggested by the Chief Judge was the subject of much reflection before it was advanced. While still far below the "going rate" charged by attorneys in this and other areas, it represents a reasonable compromise between the need to be fair with the attorneys who take on these assignments and the need to preserve the public purse.

Accordingly, the court finds that extraordinary circumstances exist and directs that the vouchers submitted in the above-captioned proceedings shall be paid by at the rate of $75 per hour for all work performed.

Furthermore, this holding shall be applicable to all future vouchers submitted to this court for payment and will constitute a continuing finding of "extraordinary circumstances" justifying compensation at the rate of $75 per hour for all legal services rendered by law guardians and assigned counsel.

The foregoing shall constitute the decision and order of this court.

Endnotes

1. The fee structure for law guardians is outlined in § 35 of the Judiciary Law and parallels the wording of § 722-b of the County Law.
2. Relating to compensation for assigned counsel in adult cases.
3. Relating to compensation for attorneys assigned to act as law guardians for children.
4. *State v. Brisman, supra* at 577-82, contains an excellent analysis of County Law § 722-b and its legislative history.
5. In *Herring*, the court restated the holdings in *In re Werfel* (36 N.Y.2d 19); *In re Director of Assigned Counsel Plan of City of N.Y.* (87 N.Y.2d 191) and *People v. Ward* (199 A.D.2d 683) which barred appellate review of discretionary awards of counsel fees. (*See Rotta v. Rotta*, 233 A.D.2d 152; *People v. Ward*, 199 A.D.2d 683). Any challenge to counsel fees paid pursuant to County Law § 722-b and Judiciary Law § 35 must be made through administrative channels (*People v. Young*, 185 Misc. 2d 365).

* * *

Laura "LL" v. Robert "LL"[1] Family Court, Albany County (W. Dennis Duggan, December 12, 2000)

The matter before the Court is the Respondent-Father's Motion for Summary Judgment, seeking to dismiss the Mother's petition for modification of the parties' custody and visitation order.

The legal question to be resolved in this case is whether the blackletter law standard for granting summary judgment in civil cases applies without alteration to modification of child custody cases. The Court finds that it does not and that a different standard applies.[2] The Court holds that, on a summary judgment motion in a child custody modification case, the Court is permitted to search, not only the record before it as contained in the moving papers, but also the entire case record and the Court's own historical memory of the case. The Court's historical memory is the product of having presided over the prior, on-the-record appearances of the parties, and of having reviewed the previous pleadings and affidavits filed in support of those proceedings as well as the various court-ordered assessments and evaluations submitted to the Court. The use of these available records and resources is not only helpful, but essential, to the Court. Their use enables the Court to evaluate each party's allegations and put them in the proper context as they relate to the children's best interests at this point in time.

To briefly restate the blackletter law on summary judgment, one cannot improve on quoting Professor David D. Siegel:

> CPLR 3212 allows the court on motion to grant summary judgment for a party. The grant means that the court, after going through the papers pro and con on the motion, has found that there is no substantial issue of fact in the case and therefore nothing to try. Summary judgment is often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue. As the procedural equivalent of a trial, it is used sparingly. When saved for a proper case it is a perfectly constitutional weapon. It does not deny the parties a trial; it merely ascertains that there is nothing to try. Rather than resolve issues, it decides whether issues

> exist. As is often said of the motion, issue finding rather than issue determination is its function. (Siegel, N.Y. Practice § 278, at 438 (3d ed); footnotes omitted.)

One reason that the law of summary judgment, as it applies to custody cases, should be different from that as applied to *ordinary* civil cases is that there are children involved. Indeed, they are not just involved, they are, by any measure, the main parties in interest. However, they are silent parties and, for this reason, the Court must give special considerations to a summary judgment motion made in a custody case.

Professor Siegel notes that "if a main element in the case is a highly subjective one, such as fraud (because of the investigation of intent that it entails), the case is likely to be unsuitable for summary judgment" (Siegel, *supra* at p. 439, citing *Falk v. Goodman,* 7 N.Y.2d 87). Considering this, it immediately comes to mind that there are few, if any, more subjective standards in the law than that of the "best interests of the child." One could infer from the principle enunciated in *Goodman* that summary judgment is seldom if ever appropriate in custody modification cases. However, for other valid reasons, just the opposite is the case.

Every Family Court Judge in this and every other state knows from experience that protracted custody litigation is poisonous to children's emotional (and often physical) health. Social scientists have empirically verified this experience, and the Court has specific evidence in the record in this case to support such a conclusion with respect to the "LL" children.[3] A Family Court Judge occupies a unique position to view a family's emotional health. Under our one family, one judge system, the assigned judge virtually lives through the often protracted and always painful family conflicts that face the children. The Court sees the parents on a regular basis, sometimes once a month for a year or more. We are provided with forensic psychological reports, family assessments, home studies, CASA reports, DSS investigative reports, substance abuse reports, medical records, school records, law guardian reports and legal memoranda. The Court is made privy to a family's most private behaviors. With this information, the Court arms itself to protect the children. Just as in old England, where the jurors were chosen from the community *because* they knew the parties and the facts of the case, a Family Court Judge often brings to a case a large and long institutional memory and a history of having literally managed the conflict, in the most detailed respects, over extended periods of time. Put this way, the question presents itself as follows: Would the law require a Family Court Judge to discard this historical record, erase his or her memory and approach the case as a blank slate, relying just on the papers placed before it on the motion? The answer is no, simply because that would not be in the children's best interests.

In searching this expanded record, the trial court must be mindful that "alteration of an established custody arrangement will be ordered only upon a showing of sufficient change in circumstances reflecting a real need for change in order to ensure the continued best interest of the child" (*Kelly v. Sanseverino*, A.D.2d (3d Dep't, December 7, 2000) quoting *In re VanHoesen v. VanHoesen*, 186 A.D.2d 903). "Absent some indication that such a change will substantially enhance the child's welfare and that the custodial parent is unfit or less fit to continue as such, an established custody arrangement should not be disturbed" (*Kelly, supra*). Using this standard to provide the filter through which the evidence in a child custody case must pass, it is clear why the usual "issue finding" summary judgment test is too narrow to protect children from the corrosive effects of sequential custody litigation.

The Appellate Courts have long held that a hearing is not necessary when the Court possesses sufficient information to undertake an independent review of the children's best interest (*Hermann v. Chahurmanean*, 243 A.D.2d 1003, 1004; *Shabazz v. Blackmon*, A.D.2d (3d Dep't, July 20, 2000)).

An independent review of the expanded record in this case reveals a pattern of custody litigation which, as noted above, is very harmful to the children.[4] The "LL" parents have petitioned Family Court twenty-one times in the last four and one half years. These 21 petitions have generated 36 court appearances. That is an appearance about every six weeks for more than four years. And this comes *after* the parents went through their divorce proceedings! The divorce proceedings carry a 1993 index number which means that the parents have been litigating these issues for almost eight years. This is about 75 percent of their children's lives. These appearances have resulted in 19 court orders. Supporting these orders (almost all on consent) are a number of psychological reports, including a full forensic psychological evaluation done in October 1997, running 22 single-spaced, typed pages. The Court also has available to it three recent psychological reports from the three therapists treating the family.

In granting summary judgment for the Father, the Court has made an extensive search of this equally extensive record. The Court finds that the affirmations of the Mother that can truly be claimed to constitute a change in circumstances, accepting them as proven, would not support a finding that it would be in the best interests of the children to alter the established custodial arrangement.

The current custody and time-sharing arrangement existing between the parents has been in place, without any major alterations, since stipulated to by the parents in their divorce proceedings in August 1995. For this reason alone, the Mother would have a heavy burden to show why a five-year existing custodial relationship should be changed.[5]

In opposing this motion for summary judgment, the Mother alleges in her complaint that the Father has engaged in uncivil behavior toward her consisting of phone hang-ups, caller ID screening and a failure to return telephone calls and letters. While the Mother may be able to prove a failure to communicate by the Father, her allegations are broad brushed without any reference to date, time or specific fact content. In addition, the Court's review of the record shows that these types of allegations have been consistently made by both parents over the last four years. Finally, the Mother does not claim that the failure of the Father to communicate in a civil manner prevented the parents from making important joint custodial decisions. Neither would her claims support any reduction in the Father's custodial time. One of the few specific allegations made by the Mother is that, in November and December 1999, the Father yelled at and belittled the Mother at the boys' basketball game at school. She also claims that, in January 2000, the Father yelled at their son in the hall at school. These three incidents, now almost a year past, would not, when aggregated with the Mother's other claims, support a change in custody.[6]

The Mother makes other allegations that the Father does not help the children with their homework, involve the children in church activities or take the children for routine medical and dental appointments and swimming lessons. Instead, the Mother states that she does these things. As noted above, however, there is no fact-specific content to the Mother's claims, so there is no way to determine if these claims constitute a change of circumstances from the previous order. Also, it is not in any way clear how a change in the custodial arrangement would change things for the better for the children. The Mother does not claim that the Father's joint custodial authority or parenting time prevented her from attending to the children's needs. The Mother also makes a broad-based claim that "the children's education is being compromised." However, that claim is unsupported by any facts, such as school reports.

The Mother also claims that the Father has not cooperated with the psychological counseling program arranged to treat the family. In this regard, the parents agreed, in July of 1999, to engage Karner Psychological Associates. Each parent would have his or her own counselor and the children would also have a counselor. On August 30, 2000, the children's counselor reported as follows:

> Both [boys] do not present with any behavioral pathology that would seem to benefit from any ongoing treatment. . . . In my contact with [the Father], I saw nothing to suggest that he couldn't adequately parent or care for his children. . . . The apparent hostility between [the Mother] and [the Father] seems to be the greatest negative factor effecting the children's psychological well being. . . . It is my impression that it is not possible to counsel effectively with these parents as they seem unable to work in a reasonable way with each other.

The Father's counselor reported the following:

> . . . I have not seen any reason why he should not continue to be very involved with his sons' upbringing. . . . Unless [the Mother] knows of some extreme suffered by the children due to their contact with their father (of which neither I nor the children's counselor is aware of) I do not see how these repeated attempts at changing the custody arrangement are of any significant benefit to anyone. At this point in time, my impression is that therapy has pretty much ended for this family. . . . *Therefore, it is perhaps time for the Court to strongly encourage/insist that these parents quit returning to court trying to change the custody arrangement. Perhaps if they did not see court modification of their agreement as a possibility, they might feel more motivated to try to make the best of the current arrangement.* Maybe at that point counseling could be of some use again—with a clearer focus for everyone that the purpose of the counseling is simply to make the best of the situation as it is, not to use it for leverage in changing the custody order. (Emphasis added)

The Mother's counselor reported as follows:

> [The Mother] presented with considerable anxiety relative to the well being and future of her children. . . . I can tell you that it is my impression that the greatest difficulties these children have, and will likely continue to have, is the fact that their parents cannot sit in the same room with each other, never mind discuss with civility and reasonableness

> decisions regarding the care and well being and logistics. Unfortunately, their youth is being squandered and defined by the hostility between their parents and this will ultimately effect their psychological well being.

These very recent reports provide no support for a change in custody in the Mother's favor.

The most serious claim for a change in custody is the representation made by the Mother that the children have expressed a desire to spend more time with her. This claim is supported and verified by the Law Guardian and the children's counselor. The boys are now 11 and 12 years old. They are at an age where the Court would give reasonable but not deciding weight to their wishes. However, complicating this issue is the Mother's intrusiveness into the children's free and unimpeded expression of their opinion on this issue.

The Mother privately retained an attorney to act as Law Guardian for the children. This *ersatz* Law Guardian interviewed the children, prepared an affidavit signed by the children, and presented it to the Court in support of an Order to Show Cause and Modification Petition, *brought by the children*, to restrict the Father's parenting time. This was all done after the Mother had filed her own modification petition and after the Court had assigned a panel-certified Law Guardian. It was also done without notice to, or consent of, the Father. The Court declined to sign the Order to Show Cause and dismissed the petition on the direct authority of *Fargnoli v. Faber* (105 A.D.2d 523, 3d Dep't, 1984). The Mother's actions were a direct violation of the Father's joint custodial rights and were clearly an attempt to steer the litigation in a direction favorable to her. The fundamental unfairness of the Mother's action, with the added intercession of her boyfriend who was paying for the *ersatz* Law Guardian, produces, in the Court's judgment, an undue influence on the children.[7] Under the circumstances, this improper action significantly dilutes the validity, genuineness and weight to be attached to the children's position. Even without this undue influence issue, and giving credence to the Mother's claims, the desires of the children at this point in time would not support changing a five-year existing custodial arrangement.

Based on the Court's independent review of the record, with the children's best interests foremost in mind, the Court finds that the Mother has not raised triable issues of fact which, if established, would support a change in custody. Summary judgment is granted for the Father and the Mother's petition is dismissed.

This constitutes the decision and order of the Court.

Endnotes

1. Fictitious names.
2. The Court is mindful of FCA § 165 which provides that, if the Family Court Act does not supply a procedure, the CPLR shall apply "to the extent . . . suitable to the proceeding involved." So, to the extent that this section applies, the Court is holding that the law of summary judgment that undergirds the procedure for summary judgment, in a typical civil case, is not suitable to *this* custody proceeding.
3. On the issue of the damaging effects of custody litigation, see, for example:

   The Vulnerable Child, Richard Weissbourd, Addison-Wesley Publishing Company, 1996. **Lost Boys, Why Our Sons Turn Violent and How We Can Save Them**, James Carrabino, Ph.D., Free Press, 1999. **The Violent Man, Single Men In Social Disorder From the Frontier to the Inner City**, David T. Cartwright, Harvard University Press, 1996. **Fatherless America, Confronting Our Most Urgent Social Problem**, David Blankenhorn, Basic Books, 1995. **Life Without Father**, David Popenoe, Free Press, 1996. **The Divorce Culture**, Barbara DeFoe Whitehead, Alfred A. Knopf, 1997. **Embattled Paradise, the American Family in the Age of Uncertainty,**" Arlene Skolnick, Basic Books, 1991. **Haven In a Heartless World, the Family Besieged**, Christopher Lasch, W. W. Norton & Company, 1977. **Children First**, Penelope Leach, Vintage Books, 1994. **Mom's House, Dad's House, Making Shared Custody Work**, Isolina Ricci, Ph.D., Collier Books, 1980. **Surviving the Breakup, How Children and Parents Cope With Divorce**, Judith S. Wallerstein, Jone Berlan Kelly, Basic Books, 1980. **In the Best Interest of the Child, Beyond the Best Interest of the Child, Before the Best Interest of the Child**, Goldstein, Freud, Solner, Free Press, 1986. **The Paternal Imperative**, David Guttman, The American Scholar, Winter 1998. **When the Bow Breaks, the Cost of Neglecting Our Children**, Sylvia Ann Hewlett, Harper Perennial Books, 1991. **Divided Family, What Happens to Children When Parents Part,** Frank F. Furstenberg, Jr., Andrew J. Cherlin, Harvard University Press, 1991. **Real Boys, Rescuing Our Sons From the Myths of Boyhood**, William Pollock, Ph.D., Henry Holt and Company, 1998. **The Wonder of Boys**, Michael Gurian, Putnam Books, 1997.
4. This review of the "expanded record standard" is not meant to be a convenient device for a Family Court Judge to dismiss a petition just because it is filed by a litigious parent. Every Family Court Judge has had the experience of wishing a case would go away because of the feeling: "Oh no, it's the Bickersons again, they'll never stop fighting." When dismissing a modification petition, the Court must be able to articulate specific and substantial reasons in the record to support its decision to allow for effective appellate review.
5. The Mother mistakes the burden of proof on this motion. The Father does not have to disprove her allegations. Her allegations, to the extent they have a factual basis, are, for the purposes of this motion, taken as true. Given that, the Father is then claiming that the Mother's best case would not support a change in circumstances finding. In short, this is essentially a CPLR 3211(a)(7) "failure to state a cause of action" motion being treated as a summary judgment motion. Also, saying that a petitioner has a "heavy" burden does not establish any new burden of proof. It just recognizes that long-established child custodial arrangements will not be lightly overturned (*Hessen v. Hessen*, 33 N.Y.2d 406).
6. The Mother's seven-page affidavit in opposition to the Father's motions is nearly all taken up with picking at the Father's claims that, in turn, were picking at hers. It sets forth few non-hearsay, facts-based averments to support her position as it exists at this point in time.

7. In ascribing an improper motive to the Mother, the Court notes that the Mother is currently under a 30-day suspended jail sentence for admitting that she willfully violated the Custodial Order in a manner which impaired the Father's parenting rights.

* * *

Matthew G. v. John J. G., Family Court, Onondaga County (Rao, Michael G., October 27, 2000)

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The instant proceedings were commenced on November 8, 1999 by the Petitioner/child filing a petition seeking modification of a contractual support obligation established by a 1985 Compromise Agreement, entered into by Respondent and Petitioner's mother. In an alternative prayer for relief, Petitioner seeks a de novo order of support against Respondent. The 1985 Compromise Agreement was executed and duly approved by the Court and Department of Social Services under Section 516 of the Family Court Act. An Order approving the Agreement was entered by the Court under file #P-___.

At interim proceedings a Motion to Dismiss was brought by Respondent and considered by the Court. An Order thereupon was entered on February 16, 2000 denying Respondent's motion conditionally, upon a requirement that Petitioner immediately file a formal petition against Respondent seeking an Order of Filiation. Such a petition was filed under #P-___ on April 27, 2000. At an appearance held on May 2, 2000, the paternity petition was deemed to be an amendment/supplement to the November 1999 support petition. By consent and admission of Respondent, an Order of Filiation was entered, formally establishing Respondent's paternity of the subject child. The file #P-___ was then consolidated back into F-___ by the Court. The Order denying Respondent's Motion permitted Respondent to reassert all defenses after determination of paternity. Respondent did file formal Objections to this Court's order on the motion, which Objections are still pending with this Court.

A hearing was held at which the parties appeared, Respondent by counsel, Howard Woronov, Esq. and Petitioner with counsel, Richard Alderman, Esq. The proofs and testimony of the parties were taken. After due consideration of and deliberation upon same, the following findings of fact and conclusions of law are made:

1 . In 1984, under file P___, Petitioner's mother (Mary C.) filed a petition alleging that Respondent was the father of Petitioner and seeking support for him. Documents from that time in the Court's file indicate that Petitioner requested paternity blood testing, that such testing was completed, and that results were received by the Court assessing a probability of paternity of 96.4%. Contents of that file also clearly indicate that after much motion practice on discovery issues, there was an appearance by the parties and counsels before the Hon. Edward J. McLaughlin, Judge of this Court, on December 14, 1984. The Record of Proceeding from that date clearly indicates that Respondent waived a trial on the paternity issue and admitted the paternity allegations of the petition. The record of proceedings is clearly marked that filiation papers were to be filed with the Court. Issues of support were adjourned to January 15, 1985. The file also contains a "Notification of an Order of Filiation" to the N.Y.S. Department of Health, dated January 10, 1985, signed and certified by the Clerk of the Court, stating that, ". . . an order of filiation was made by the said court on the 14th day of December, 1984. . . . On January 28, 1985, the support trial commenced, and on its second day (1/30/85) the record of proceedings indicates that the trial was discontinued by stipulation of the parties. The record of proceedings also indicates, "(No Order of Fil-)". The file contains a letter dated February 4, 1985, by Judge McLaughlin's secretary to Petitioner's counsel, returning an unsigned proposed order of filiation in light of the parties' stipulation. On February 1, 1985, Judge McLaughlin signed and entered an Order Approving Compromise, which duly approved an FCA 516 agreement of the parties for the payment by Respondent to Petitioner's mother of $140,000 in various increments. The agreement was also duly approved by the Commissioner of Social Services. In addition to the financial settlement, the agreement also provided for payments by Respondent to Petitioner's attorney, and there was an express agreement that no order of filiation would be entered. The parties to the instant action stipulate that there were no procedural infirmities to this 1985 Agreement and Order, and that the provisions contained therein have been fully performed by the Respondent.

2. In 1997, Petitioner's mother filed a petition seeking to modify the 1985 agreement, and in the

alternative seeking a de novo order of support. Respondent moved to dismiss. Hearing Examiner Davies of this Court dismissed the petition by an Order dated November 19, 1997, stating that there was no subject matter jurisdiction with Family Court since the prior agreement was not an order of the Court. Petitioner's mother objected, Respondent rebutted, and by Decision and Order dated May 22, 1998, Judge Anthony Paris of this court determined that in fact the 1985 Order Approving Compromise did incorporate the parties' Agreement. Judge Paris further found that in light of the federal court ruling in *Williams v. Lambert*, 902 F. Supp. 460 (1995), the Petitioner's mother "may now seek to modify the Order Approving Compromise. Finally, Judge Paris vacated the dismissal order of the Hearing Examiner and remanded the matter for reconsideration of Respondent's motion for dismissal based upon the underlying petition's failure to state a cause of action. On remand, the petition was again dismissed by Hearing Examiner Davies by Order dated June 8, 1998 for failure to state a cause of action for modification.

3. Petitioner's mother filed a second petition to modify the 1985 Agreement on December 29, 1998. By Order dated February 19, 1999, Hearing Examiner Allen of this Court dismissed the petition, again stating that the written pleading insufficiently stated a cause of action to "reopen" the parties' 1985 Agreement. In his findings, Hearing Examiner Allen specified that if the preclusive effect of the language of FCA 516(c) were not dispositive, then Petitioner would have to more fully allege the exhaustion of the $140,000 stipulated payments by fully accounting for same, and for any interest which could have been earned thereupon by reasonable investment. Petitioner's mother objected, Respondent rebutted, and by Decision and Order dated April 16, 1999, Judge Leonard Bersani of this Court sustained Hearing Examiner Allen's decision. Judge Bersani appears to have disagreed with Judge Paris' determination that Judge McLaughlin's 1985 Order was a modifiable order of support. Judge Bersani further holds that the underlying petition did not state a claim for a de novo order of support, and that even if the 1985 Agreement were a modifiable order the petition's allegations were insufficient to warrant a hearing on such a claim.

4. In characterizing the instant petition of Matthew G., and with all due respect to Judge Paris, this Court finds itself in agreement with Judge Bersani that the 1985 Order of Judge McLaughlin may have been a court order, but that it was clearly not a modifiable "order of support." The 1985 Agreement of the parties is a contract between the parties thereto which stands on its own. Despite the incorporation language in Judge McLaughlin's order approving the contract as a suitable resolution to the then-pending proceeding, the order cannot legally be a valid order of support because there was no valid order of filiation in effect at the time. This view on the invalidity of an FCA 516 "order" as an order of support, in the absence of a legally requisite order of filiation, is supported by the holding of the Kings County Family Court in *Clara C. v. William L.*, 181 Misc. 2d 241, at 251, 692 N.Y.S.2d 569 (1999), wherein Judge Turbow held that since the entry of a formal order of filiation was a prerequisite to a court order of support, there cannot be a valid (and thus modifiable) order of support without the existence of an order of filiation determining parentage. As it is clearly viewed by Judge Turbow, FCA 516 exists to permit settlement of paternity/support claims without a finding as to paternity. To that extent it permissibly and constitutionally limits the further rights of the parties (FCA 516(c)) because the obligation springs entirely from the contract, and not from the responding party's status as a "parent" continuously liable for the adequate support of his child. Judge Turbow notes, consistent with the holding of the District Court in *Williams v. Lambert*, 902 F. Supp. 460 (S.D.N.Y. 1995), that FCA 516 cannot be read to allow a parent to contractually limit his or her obligation for the support of his or her child, or to bar a child from seeking to redress inadequate support from a parent under such an agreement, regardless of that child being born in or out of wedlock. However, FCA 516 can be read, and consistently has been read by the courts of this state, to permit a party who has not been determined to be a parent to contractually limit his obligations to the child named in the claim. *Clara C.*, 181 Misc. 2d at 249.

5. The Respondent in this matter has not, since at least the December 1984 appearance before Judge McLaughlin, denied the fact that he is the biological father of Petitioner, having expressly admitted his paternity both in court and in the terms of the Agreement made in 1985. Until May 2, 2000, however, there was no formal court order establishing Respondent as the legal and biological father of the Petitioner. On May 2, 2000, when such an Order was entered herein with Respondent's admission and consent, Respondent was transformed into the legal parent of Petitioner, and Petitioner into the filiated

son of Respondent. This entry of a formal order of paternity is not barred by FCA 516(c). *ABC v. XYZ,* 50 Misc. 2d 792; and *Marytherese M. v. Lee W.*, 213 A.D.2d 647 (1995 2d Dep't).

6. In the legal wake of *Williams v. Lambert* and *Clara C. v. William L.*, and having been legitimized herein by court order of filiation, Petitioner now is entitled, with a proper evidentiary showing, to collaterally attack his parents' 1985 support agreement as being inadequate. If successful, Petitioner would be entitled to a de novo order made pursuant to CSSA (FCA 413). Given modern legal principles eliminating distinctions between children born in and out of wedlock—so long as parentage is established—the now-blackletter rules permitting modification of support agreements entered between formerly married parents for the support of their marital children must be extended to apply to agreements of unmarried parents for the support of their out-of-wedlock children. *Clara C.* , 181 Misc. 2d at 249-250, citing *Boden v. Boden*, 42 N.Y.2d 210 (1977); *Brescia v. Fitts*, 56 N.Y.2d 132 (1982); and *Priolo v. Priolo*, 211 A.D.2d 627 (1995 2d Dep't). Given that the 1985 Agreement is a valid contract, but is not a valid court order of support, Petitioner is nonetheless not entitled to an immediate de novo CSSA order. Despite the apparent mandatory language of FCA 545(l), and for a whole host of legal reasons, including the normal sanctity of stipulations, and issues of privity, any claim by Petitioner must be viewed as a request by a non-party beneficiary to modify the preexisting contractual obligation based upon its insufficiency. To do otherwise would elevate form over substance, since indeed since 1985 there has existed a limited contractual obligation by Respondent to provide something for the support of Petitioner, and that contract was approved by the Court and the Commissioner of Social Services as adequate. This is consistent with the only established direct exception to the preclusive effect of FCA 516(c)—established in *Commissioner of Social Services (Adriana G.) v. Ruben O.,* 80 N.Y.2d 409 (1992)—where the subject child's status as a public charge provided a de jure showing of need, and created an exception to FCA 516(c) for a local Social Services agency to seek bring and pursue formal filiation and support proceedings under the CSSA as a modification of a FCA 516 compromise. The Court must balance the now-filiated child's right to adequate support from his now established father, against the father's right to receive the benefit of that 1985 contract. Based upon the Order of Filiation and the allegations of the petition (which are found more than sufficient to state the cause of action for modification), Petitioner's claim—to modify the 1985 Agreement based upon its inadequacy relative to his reasonable basic needs—is squarely and properly before this Court.

7. Petitioner, born July 23, 198_), is now 17 years old. He resides in the State of Nevada with his mother, stepfather, and younger half-brother. He is in 11th grade in a Catholic high school there, pursuing the usual college preparatory subjects. Petitioner testified specifically as to the costs of his education, and the costs of his various athletic extracurricular activities, including tennis (the costs of country club membership, lessons, equipment and clothing purchases and maintenance), basketball, snowboarding, skateboarding, golf, rock climbing, and scuba diving (all with similar types and amounts of expenses as tennis). Petitioner also testified to health care needs for physical therapy for his knees, orthodonture and medications. Under cross-examination, Petitioner admitted that the information contained in his financial affidavit was derived from his mother and stepfather, and that he knew little of the finances associated with his basic needs for shelter, food, clothing, etc. Petitioner further admitted that his only knowledge of the disposition of the funds derived from the 1985 Agreement were his mother's statements to him that the funds had been exhausted. He had no actual knowledge of his own as to the status or disposition of those funds.

8. Petitioner also presented his mother, Mary C., as his witness. Ms. C. testified that she is not presently employed. Petitioner had testified that she had not worked since the birth of the younger half-brother eight years ago. Ms. C. "gave up" her nursing license in 1991. Ms. C's husband is a self-employed physician. She testified that her husband is presently an independent contractor with two hospitals in their area, and that while his income has dropped from approximately $175,000 in 1995 to $30,000 last year, she expected that he would earn approximately $100,000 this year. Ms. C. testified that the Petitioner is the only one of her children (two older than Petitioner and the younger half-brother) to attend private schools. It seems that the two older children may be over the age of majority, but Ms. C. testified that their father is in arrears of child support for them in the approximate amount of $80,000 and that she is pursuing enforcement of same by legal means. Ms. C. testified that the funds received from Respondent under the 1985 Agreement were never segregat-

ed into any separate account for the exclusive purpose of supporting the Petitioner. She testified that in the years after the Agreement she used upwards of $40,000 of the funds to finance child care for Petitioner while she worked and pursued further education in her nursing career. In 1985, she used approximately $31,000 to purchase a house in Dewitt which housed herself, Petitioner and one of her older children. She sold that residence in 1986 and moved to California, where the family lived in rental housing until after her December 1990 marriage to her husband. In 1992 the family moved to Indiana and purchased a home. Their present home is rented. Ms. C. testified that she did invest an unspecified amount of the 1985 Agreement funds by purchasing stocks in Petitioner's name. Some $5,000 value of those investments were lost due to a fraudulent offering. Funds from the 1985 Agreement were used to purchase a piano that has since been sold. Otherwise, Ms. C. testified in very general terms to the use of the Agreement funds to supplement her income and to provide for the needs of her entire family prior to and after her 1990 marriage. Ms. C. testified with some specificity to the family's present expenses (including a cleaning lady), to the Petitioner's health care including orthodonture, and to her conclusion that her present husband is financing all current expenses of the family because she has no income or assets of her own except furniture and a 1993 Mercedes automobile. Most glaringly she testified that she really doesn't "know" that the funds received from Respondent under the 1985 Agreement are exhausted.

9. Respondent did not appear physically, except by counsel, and did not present this Court with any statutory financial disclosure or proofs as to his ability to pay support for Petitioner.

10. Based upon the testimony and proofs that have been presented to this Court, it is found and concluded that Petitioner failed to carry his evidentiary burden of showing that the fully performed provisions of the 1985 Compromise Agreement were inadequate relative to the past, present and continuing support of Petitioner, or his burden of showing that the he can reasonably be cast as being in a true state of financial need analogous to the factual circumstances in *Ruben O.*, *supra*. The Court finds Petitioner to be an obviously intelligent, well-mannered, talented, and honorable young man, genuinely possessed of a desire to provide financial assistance to his family and himself by pursuing what might in other circumstances be his rightful due from the man who is his father. But in light of the legal posture of this matter before this Court (i.e., in light of the statutory and case law authority supporting the sanctity of FCA 516 agreements), our crucial determination must be that Petitioner is nowhere near becoming a public charge, and that it has not been sufficiently shown that he truly has any unmet basic needs. Indeed it has been demonstrated that Petitioner's standard of living is maintained at a level well above a substantial number of the individuals who present themselves before this Court. The arguments of Petitioner's counsel—that Petitioner's state of "need" must be measured according to his father's standard of living, or the standard of living that would have been enjoyed by Petitioner had his mother and father's relationship remained intact—are found not applicable herein, where first there was no proof that the relationship between Petitioner's parents ever constituted an intact family, and second where there were no proof of Respondent's standard of living—past or present. This Court further concludes the proofs herein fail to sufficiently illustrate a causal relationship between the alleged inadequacy of the 1985 Agreement and any financial "tight squeezes" Petitioner's household may now be experiencing. Rather, the proofs do indicate that much of the cause of same may perhaps be placed upon the failure of the father of Petitioner's older siblings to pay child support for his children, upon the recent vagaries of the income of Petitioner's stepfather, and most clearly upon Petitioner's mother's volitional decision not to maintain employment and income commensurate with her capacity (and thus her failure since 1991 to make her own continuing reasonable contributions towards Petitioner's basic needs). Still further, as in the proceedings before Hearing Examiner Allen in 1999, Petitioner's proofs fail to fully and specifically account for the use of the funds derived from the 1985 Agreement or to show that those funds were indeed inadequate and exhausted for reasons exclusively associated with the support of Petitioner. Indeed, the proofs show that substantial portions of the funds have been expended for purposes that addressed Petitioner's needs as well as at the same time those of other persons for whom Respondent was not responsible, such as Petitioner's mother and siblings. There has not herein been a sufficient showing that the provisions of the 1985 Agreement requiring payment of $140,000, fully performed years ago, have not been an adequate contribution by Respondent towards the support of his son's basic needs.

NOW, UPON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS

ORDERED, that Petitioner's instant claim (including the claim for counsel fees) is dismissed with prejudice after consideration on its merits, except for the Order of Filiation entered herein which stands and continues. Petitioner may have other claims based upon that Order of Filiation, established other than under Article 4 and 5 of the Family Court Act.

* * *

Ronald G. R. v. Nora R., Family Court, Richmond County (McElrath, Terrence J., October 10, 2000)

Attorney for Petitioner:	Norman J. Rosen, Esq. Previte Farbe & Rosen 97-77 Queens Boulevard Rego Park, N.Y. 11374
Attorney *pro se* for Respondent:	Nora R., Esq. Staten Island, N.Y. 10304
Law Guardian:	Richard D. Katz, Esq. 1282 Richmond Road Staten Island, N.Y. 10304

This proceeding involves Ronald R.'s petitions, dated February 22, 1999, seeking custody of the parties' two children, Dante R., born August 31, 1984, and Christina R., born October 16, 1986.

Facts and Procedural History

The Court heard testimony from six witnesses: Ronald R., the Petitioner; Dr. Michael DeSimone, a treating psychotherapist; Dr. Robert J. Kaplan, a psychiatrist who conducted a Court-ordered forensic evaluation; Dr. Paul Smetko, a clinical psychologist, Wendy Hernandez, a caseworker; and Eugene Johnson, a probation officer. Testimony was taken on July 12, 1999, July 13, 1999, August 4, 1999, August 6, 1999, December 22, 1999, February 16, 2000, and March 24, 2000. The Respondent, Nora R., did not testify. As there was no request for an in camera interview of the children, their testimony was not taken. The Court also received two Court exhibits (Court Exhibits 1 and 2), three exhibits from the Petitioner (Petitioner's Exhibits 1, 2, and 3) and one exhibit from the Respondent (Respondent's Exhibit D). The Court was in the unique position to observe the demeanor of the witnesses, hear their testimony and assess their credibility. The Court also reviewed all submitted exhibits. Based upon its review of the testimony, evidence and court records, the Court finds that the following facts and procedural history were established by a fair preponderance of the evidence:

The Petitioner, Ronald R., was born in Kenosha, Wisconsin, on June 28, 1947. He received a B.A. from the University of Wisconsin. He presently resides in Yardley, Pennsylvania, with his wife, Karen Q. He is self-employed as a freelance writer. He denies any history of alcoholism or substance abuse.

The Respondent, Nora R., was born in Waukegan, Illinois, on May 25, 1949. She received her baccalaureate degree from the University of Wisconsin, her master's degree in Latin American Studies from N.Y.U., and her law degree from New York Law School. She resides, alone, on Staten Island, N.Y. She is employed as an attorney by the N.Y.S. Office of Mental Hygiene. She denies any history of alcoholism or substance abuse.

The parties met at the University of Wisconsin in March 1972. They were married in August 1974, after living together for approximately eight months before their marriage. Two children were born of their marriage, Dante R., on August 31, 1984, and Christina R., on October 16, 1986. The parties separated in 1990, with both children remaining with Ms. R. An action for divorce was initiated in March 1994. During the pendency of the matrimonial action, the children continued to reside with Ms. R. When the marriage was ultimately dissolved, the parties' Judgment of Divorce, dated December 23, 1996, their Supplemental Judgment of Divorce, dated March 25, 1997, and their Amended Supplemental Judgment of Divorce, dated June 25, 1997, did not include a formal award of custody. Notwithstanding the absence of a judicial grant of custody, the children continued to reside with Ms. R. and Mr. R. visited with them regularly.

On February 22, 1999, Mr. R. filed the instant petitions, seeking modification of the custody provisions of the parties' Judgment of Divorce. He alleged that both children wanted to reside with him, that they were not doing well in school, that Dante was a disciplinary problem, that both children were in counseling, and that the children's psychologist had recommended that the children reside with him. Process was issued, returnable on March 15, 1999.

On March 15, 1999, Mr. R. appeared with counsel, Ms. R. appeared *pro se* and waived counsel, and the Court assigned a Law Guardian to represent the subject children. Since the parties' Judgment of Divorce was silent as to custody, the Court indicated that it was deeming Mr. R.'s petition to be an application to modify their Judgment of Divorce so as to include a Order of Custody. The matter was adjourned to April 14, 1999 for a Law Guardian report.

On April 14, 1999, Mr. R. appeared with counsel, Ms. R. appeared *pro se*, and the Law Guardian appeared. The Law Guardian recommended and requested that the Court immediately award Mr. R. a temporary Order of Custody. The Court declined to do so, ordered the Administration for Children's Services to conduct an immediate investigation to determine whether the children would be at risk if left with Ms. R. during the pendency of these proceedings, ordered an investigation and report (I&R) by the Department of Probation, and granted the Law Guardian's request for an independent forensic evaluation. The matter was then adjourned to May 18, 1999 for control.

On May 4, 1999, Ms. R. went to the Department of Probation to initiate a Person in Need of Supervision (PINS) proceeding against Dante. She alleged that Dante was beyond her control, incorrigible, verbally abusive towards her, had been destroying household property, and threatening physical harm against her and Christina. The matter was not referred to Court but was held by Probation at the Intake level.

On May 18, 1999, Mr. R. appeared with counsel, Ms. R. appeared *pro se*, and the Law Guardian appeared. The Court and all parties received and reviewed the previously ordered reports. The ACS report (Court Exhibit #2) indicated that, while Ms. R. appeared capable of providing a safe environment for the children, the children were unhappy about the situation at home, did not get along with their mother, and wanted to live with their father. The Probation report (Court Exhibit #1) recommended that custody be granted to Mr. R. The independent forensic report submitted by Robert J. Kaplan, M.D. (Petitioner Exhibit #3), similarly recommended that both children reside with Mr. R. As there was no resolution, notwithstanding the unanimity of the reports, the matter was scheduled for hearings on July 12 and 13, 1999 and adjourned.

Ms. R. subsequently retained counsel who, on June 14, 1999, appeared and applied, by order to show cause, for dismissal of the petitions on the ground that Family Court lacked jurisdiction.

On July 1, 1999, all counsel appeared and argued the application. The Court found that Family Court had jurisdiction and denied the application to dismiss. The matter was then adjourned to July 12, 1999 for the previously scheduled hearing.

On July l2, 1999, the Court heard the testimony of Dr. Michael DeSimone, a Doctor of Clinical Social Work who had been the children's psychotherapist until December 1998, and the partial testimony of Mr. R. Dr. DeSimone felt that Dante was possibly dangerous to Ms. R. and that there was the potential for him to harm her. Dr. DeSimone felt that Dante should be given the opportunity to live with his father.

On July 13, 1999, the Court heard the testimony of Dr. Robert J. Kaplan, M.D. Dr. Kaplan testified that he felt that it would be harmful to Dante's emotional health if he were to remain with Ms. R., and recommended that Mr. R. be given full custody of Dante and Christina. The matter was then adjourned until August 4, 1999 and August 6, 1999 for continued hearing.

On August 4, 1999 and August 6, l999, the Court heard the testimony of Mr. R. which completed his case. The Law Guardian then renewed his application for an immediate change in custody. Given the fact that all the reports and testimony thus far had recommended a change in custody and the fact that school was to begin before the hearing could be concluded, the Court granted the Law Guardian's application, and awarded Mr. R. a temporary Order of Custody and granted Ms. R. a temporary Order of Visitation. The matter was then adjourned until October 5, 1999 and October 8, 1999 for continued hearing.

On October 5, 1999, Mr. R. appeared with counsel, Ms. R. appeared with different counsel, and the Law Guardian appeared. Ms. R.'s new counsel indicated that previous counsel had been discharged and he had just been retained, wasn't ready to proceed, and needed an adjournment. Mr. R.'s counsel and the Law Guardian did not oppose the application. The Court then vacated the October 8, 1999 date and adjourned the matter until December 22, 1999 for continued hearing.

On December 22, 1999, Mr. R. appeared with counsel Ms. R., having again discharged her counsel, appeared *pro se*. The Law Guardian also appeared. The Court heard the partial direct examination of Dr. Paul Smetko, Ph.D., who was called by Ms. R. While testifying that he felt that Dante and Christina were experiencing significant parental alienation and that the family was in need of a reconciliation, Dr. Smetko clearly indicated that Dante had emotional problems, that it would be dangerous for Dante to return to Ms. R. at that time, and that Dante should remain with Mr. R. The matter was then adjourned until February 16, 2000 for continued hearing.

On February 16, 2000, Mr. R. appeared with counsel, Ms. R. appeared *pro se*, and the Law Guardian appeared. The testimony of Dr. Smetko was completed. Dr. Smetko reiterated his belief that it would be dangerous, both for Dante and Ms. R., for Dante to return to her. Dr. Smetko also indicated that he would prefer Mr. R. as the custodial parent for Dante. The matter was adjourned until March 24, 2000 for continued hearing.

At an undetermined point during these proceedings, Ms. R. applied in the Supreme Court for an order removing these proceedings to that court. On March 22, 2000, the application was denied.

On March 23, 2000, Ms. R. moved in the Supreme Court for a Writ of Prohibition, alleging that this Court was wrongfully exercising jurisdiction over the instant proceeding. An Order to Show Cause was signed which, *inter alia*, stayed these proceedings.

On March 24, 2000, Mr. R. appeared with counsel, Ms. R. appeared *pro se*, and the Law Guardian appeared. The Court heard the testimony of Wendy Hernandez, a caseworker at Seamen's Society, and the testimony of Eugene Johnson, a probation officer, both of whom were called by Ms. R. Following their testimony, and the selection of an adjourned date for the continued hearing, Ms. R. served the Court with notice that the proceeding had been stayed by the Supreme Court one day earlier. The matter was then adjourned until April 1 8, 2000 for control.

On April 18, 2000, only the Law Guardian appeared. The Court was advised that the Article 78 proceeding was still pending in Supreme Court. As the stay was still in effect, this matter was adjourned until May 19, 2000 for contort.

On May 19, 2000, the Court ascertained that the Article 78 proceeding was still pending in Supreme Court and the stay was still in effect. The matter was adjourned until June 27, 2000 for contort.

On May 31, 2000, the Supreme Court denied Ms. R.'s request for a Writ of Prohibition, finding *inter alia*, that the Family Court had jurisdiction over the proceeding, and lifted the stay. *See R. v. McElrath*, 2000 WL 1056035.

On June 27, 2000, Mr. R. appeared with counsel, Ms. R. appeared *pro se*, and the Law Guardian appeared. Ms. R. made several oral applications and attempted to file her own affidavit. The matter was adjourned until July 3 l, 2000 for Ms. R. to make written motions and to August 9, 2000 for continued hearing.

At an undetermined point during these proceedings, Ms. R. returned to Supreme Court and moved, by Order to Show Cause, for an order awarding her custody *nunc pro tunc* to September 18, 1996. On July 14, 2000, Supreme Court adjudged that, despite there having been no written order to that effect, Ms. R. had been awarded custody of the children as of September 18, 1996.

On July 31, 2000, Mr. R. appeared with counsel, Ms. R. appeared *pro se*, and the Law Guardian appeared. The Court denied Ms. R.'s application to consolidate the pending child support proceeding with the instant proceeding. The Court also denied Ms. R.'s application for an independent, court-ordered forensic evaluation on the issue of parental alienation and its impact upon the case pending before the Court, without prejudice to Ms. R.'s right to renew the application upon adducing testimony and/or submitting evidence regarding the methodology and/or procedures to be utilized, and their relevance and utility to resolution of the issue of whether it would be in the best interests of the children to either remain with Mr. R. or be returned to Ms. R. The matter was adjourned to August 8, 2000 for continued hearing.

On August 8, 2000, Mr. R. appeared with counsel, Ms. R. appeared *pro se*, and the Law Guardian appeared. Both Ms. R. and the Law Guardian rested. All parties summed up, and the Court reserved decision. The matter was adjourned until September 27, 2000 for decision.

On September 27, 2000 the Court rendered an oral decision, granting Mr. R. custody of the children and awarding Ms. R. visitation.

Reports

In a report typed on May 24, 1999 (Court Exhibit #1), the New York City Department of Probation recommended that custody of the subject children be granted to the father Ronald R., and that appropriate visitation be provided to the mother, Nora R., as agreed upon.

In a report dated May 18, 1999 (Petitioner's Exhibit #2), the Administration for Children's Services indicated that the children wished to reside with their father, that the children stated that they do not get along with their mother, that the mother appeared capable of providing a safe environment for the children, and that the children were unhappy about the situation at home due to arguments, yelling and disrespect to each other.

In a report dated May 16, 1999 (Petitioner's Exhibit #3), Dr. Robert J. Kaplan, M.D. indicated that there was no choice but to allow the children to reside with their father, and recommended that both Dante and Christina reside with their father in Pennsylvania, that he have full custody of them, and that Nora R. have every-other-weekend visitations with both children along with reasonable vacation time.

Law Guardian's Recommendation

The Law Guardian recommends that custody of Dante and Christina be awarded to Mr. R.

Applicable Law

It is well established that the primary concern in child custody matters is the best interests of the children and what will promote the children's welfare and happiness (*See In re Castillo v. Hernandez,* 220 A.D.2d 746; *Eschbach v. Eschbach*, 56 N.Y.2d 167; *In re Jaeger v. Jaeger*, 207 A.D.2d 448). Neither parent has a *prima facie* right to the custody of the children (*See* Domestic Rela-

tions Law § 70 and § 240; *Bluemke v. Bluemke*, 155 A.D.2d 574) and custody determinations must be born of gender-neutral precepts in both result and expression (*Linda R. v. Richard E.*, 162 A.D.2d 48). There are many factors to be considered in determining what custodial arrangement would be in the children's best interests. Domestic Relations Law § 240(l) requires the court, in determining custody or visitation, to consider the effect of domestic violence upon the best interests of the children when allegations of domestic violence have been proven by a preponderance of the evidence. Additional factors which may be considered by the court in determining custody are, among other things,

> (1) the original placement of the child, (2) the length of that placement (3) the child's desires, (4) the relative fitness of the parents, (5) the quality of the home environment, (6) the parental guidance given to the child, (7) the parent's financial status, and (8) his or her ability to provide for the child's emotional and intellectual development.

Santoro v. Santoro, 224 A.D.2d 510. (*See also, In re Canazon v. Canazon*, 215 A.D.2d 652, *Fanelli v. Fanelli*, 215 A.D.2d 718, *In re Lobo v. Muttee*, 196 A.D.2d 585, *In re Kresbach v. Gallagher*, 181 A.D.2d 363.) Priority in custody disputes should usually be given to the parent who was first awarded custody by the court or by voluntary agreement because of the stability it assures in the children's lives (*See Alanna M. v. Duncan M.*, 204 A.D.2d 409; *Eschbach, supra*). While no agreement can bind the court to a particular disposition, the parties own agreement as to who should have custody is entitled to great consideration, and it should be accorded priority absent extraordinary circumstances (*See In re Diaz v. Diaz*, 224 A.D.2d 614; *see also Alanna M., supra; In re Carl J.B. v. Dorothy T.*, 186 A.D.2d 736). No one factor, however, is determinative of whether there should, in the exercise of sound judicial discretion, be a change of custody (*See Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89). Rather, it is the totality of the circumstances (*See Eschbach, supra*).

The Court should carefully consider and give appropriate weight to the reports submitted by the evaluators (*See In re Prete v. Prete*, 193 A.D.2d 804, *Bluemke, supra; Asher v. Asher*, 79 A.D.2d 904; *Guzzo v. Guzzo*, 66 A.D.2d 833), recognizing, of course, that the recommendations of experts are but one factor and are not determinative.

Finally, the Court should also carefully consider and give appropriate weight to the recommendation of the Law Guardian. (*See Kresbach, supra; In re Severo E. v. Lizzette C.*, 157 A.D.2d 726; *Keating v. Keating*, 147 A.D.2d 675; *In re Burke v. White*, 126 A.D.2d 838; *In re Harvey v. Share*, 119 A.D.2d 823).

Jurisdiction

Family Court is a court of specialized limited jurisdiction and cannot exercise powers beyond those granted by statute. *Borkowski v. Borkowski*, 38 A.D.2d 752. The issue of Family Court's authority to determine the instant custody dispute, together with Ms. R.'s efforts to have this case removed from Family Court, have persisted throughout this proceeding. All application to dismiss the proceedings on jurisdictional grounds was made on June 14, 1999 and denied on July l, 1999. An appeal of that order and a motion to stay the proceedings pending hearing and determination of the appeal were thereupon filed. On July 22, 1999, the Appellate Division denied the motion and dismissed the appeal. After Mr. R. completed his case and Ms. R. adduced the testimony of two witnesses, Ms. R. then went to the Supreme Court, Richmond County seeking to have this matter removed to Supreme Court. That application was denied on March 22, 2000. Ms. R. then went to Supreme Court, Richmond County, seeking a Writ of Prohibition, arguing, *inter alia*, that Family Court did not have jurisdiction. That application was denied on May 31, 2000.

Determination of the issue of whether Family Court has jurisdiction over this proceeding is complicated by the fact that, while the proceeding was pending before this Court, Supreme Court indirectly intervened and altered the infield on which this matter was being litigated. When this matter was initially filed in February 1999, there clearly had been no Order of Custody entered by Supreme Court. This was the position of Ms. R.'s counsel in June 1999 when the application to dismiss on jurisdictional grounds was made. This was also the position of the Court when it found that it had jurisdiction under Family Court Act § 651(b). This, of course, changed on July 14, 2000, when Supreme Court issued its order adjudging, *nunc pro tunc*, that Ms. R. had been awarded custody of the children as of September 18, 1996. As a result, this Court must now revisit the jurisdictional issue as of February 1999, when the petitions were originally filed, and as of July 2000, when Supreme Court adjudged that Ms. R. had been awarded custody.

Since Family Court is a court of specialized limited jurisdiction and cannot exercise powers beyond those granted by statute, the Court must look at the statutes granting it jurisdiction.

Family Court Act § 651(a) provides that:

> When referred from the supreme court or county court to the family court, the family court has jurisdiction to determine, in accordance with subdivision one of section two hundred forty of the domestic relations law and with the

> same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody or visitation of minors.

Similarly, Family Court Act § 652(a) provides that:

> When referred from the supreme court to the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court, applications to fix temporary or permanent custody and applications to modify judgments and orders of custody or visitation in actions and proceedings for marital separation, divorce, annulment of marriage and dissolution of marriage. Applications to modify judgments and orders of custody may be granted by the family court under this section only upon the showing to the family court that there has been a subsequent change of circumstances and that modification is required.

These sections apply when Supreme Court refers the issue of custody to Family Court either for an initial determination or for a modification. It is clear and uncontested that Supreme Court did not refer the instant proceeding to Family Court. These sections therefore do not confer jurisdiction upon Family Court.

Another ground for jurisdiction can be found in Family Court Act § 652(b) which provides that:

> In the event that no such referral has been made and unless the supreme court provides in the order or judgment awarding custody or visitation in an action for divorce, separation or annulment, that it may be enforced or modified only in the supreme court, the family court may: (i) determine an application to enforce the order or judgment awarding custody or visitation, or (ii) determine an application to modify the order or judgment awarding custody or visitation upon a showing that there has been a subsequent change in circumstances and modification is required.

This section is applicable when Supreme Court has entered an order or judgment and an application is then made in Family Court to modify or enforce it. The section gives Family Court jurisdiction to modify or enforce a Supreme Court order or judgment unless Supreme Court explicitly retains jurisdiction. It was this section which Mr. R. implicitly invoked when he filed his petitions in February 1999. Opposing this, Ms. R., in paragraph 4 of the affirmation submitted by her counsel, dated June 14, 1999, in support of the Order to Show Cause seeking dismissal, argued that the section did not provide a basis for jurisdiction.

One argument advanced by Ms. R. was that Family Court did not have jurisdiction because Supreme Court had explicitly retained it. In support of that position, Ms. R. pointed to language in the original Judgment of Divorce, dated December 23, 1996, indicating that it was "ORDERED, ADJUDGED AND DECREED in accordance with an inquest held in open Court on April 18, 1996, all other issues other than the divorce are reserved for further hearing."

The Court found this argument unavailing however, because the December 23, 1996 judgment was not the final judgment. This clause on its face envisioned further proceedings which were, in fact, held before J.H.O. Radin. Following those proceedings J.H.O. Radin rendered his final decision, dated January 31, 1997. He subsequently signed a Supplemental Judgment of Divorce, dated March 25, 1997, and an Amended Supplemental Judgment of Divorce, dated June 25, 1997. These later judgments did not include language retaining jurisdiction. It is therefore clear to this Court that J.H.O. Radin only retained jurisdiction until the further hearings could be held, and that once those hearings were held Supreme Court did not retain exclusive jurisdiction.

Ms. R.'s other argument was that the section was not applicable because there was no order of custody or visitation in the parties' Judgment of Divorce to be enforced or modified. It is uncontested that, at the time of the initial filing in February 1999, there had been no formal order granting Ms. R. custody of the subject children. While Judicial Hearing Officer Royal S. Radin had recognized that custody was not at issue, had recognized that Ms. R. was the custodial parent, and had, in fact, awarded her child support and exclusive use and occupancy of the marital residence, he never signed an order granting her legal custody. This Court cannot and does not reach the issue of whether this was done by design or was an oversight. This Court believes that, as a court of limited jurisdiction, it cannot look beyond the four corners of the judgment before it. It is sufficient, therefore, for purposes of these proceedings, to recognize that there was no written order for this court to modify.

While rejecting Ms. R.'s argument that Supreme Court had retained exclusive jurisdiction, it was, and is, the ruling of this Court that, in the absence of a written order of custody or visitation, Family Court Acts § 652(b) cannot be used as the predicate for jurisdiction.

Since the above-mentioned sections did not confer jurisdiction upon the Family Court, the Court was then compelled to look farther to see if jurisdiction could be found in any other section. In so doing it found Family Court Act § 651(b) which indicates that:

> When initiated in the family court, the family court has jurisdiction to determine, in accordance with subdivision one of section two hundred forty of the domestic relations law and with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody or visitation of minors. . . .

Since the Court found that there had been no earlier judgments or orders of custody, the Court denied Mr. R.'s petitions to be an initial petition for the determination of the custody or visitation of minors. Accordingly, the Court found that, as of the time of the filing of the petition in February 1999, it had jurisdiction pursuant to Family Court Act § 651(b).

Insofar as Supreme Court, in its *nunc pro tunc* order, dated July 14, 2000, adjudged that Ms. R. had been awarded custody as of September 18, 1996, Family Court Act § 652(b) then became applicable. As the Court again finds that Supreme Court did not retain exclusive jurisdiction, it finds, pursuant to Family Court Act § 652(b) that it has jurisdiction to entertain Mr. R.'s petitions for custody.

In either event, whether this Court entertains jurisdiction pursuant to Family Court Act § 651(b) or § 652(b), it is clear that Family Court has jurisdiction over this proceeding.

Burden of Proof/Showing

To the extent that this Court originally found that it had jurisdiction pursuant to Family Court Act § 651(b), the Petitioner was required to show, by a fair preponderance of the evidence, that it was in the best interests of the children that he be awarded custody of the two children. To the extent this Court finds that, as a result of Supreme Court's order, dated July 14, 2000, that it has jurisdiction pursuant to family Court Act § 652(b), the petitioner is required to show, by a fair preponderance of the evidence, that a change of circumstances has occurred and that a modification of the order is in the best interests of the children.

Discussion

After carefully considering all of the evidence adduced at this hearing, the Court finds that the Petitioner has established, by a fair preponderance of the evidence, that there has been a substantial change in circumstances and that it would be in the best interests of the children, Dante and Christina R., for custody to be awarded to Ronald R.

In reaching this difficult decision the Court is well aware that both parties love their children and wish the best for them. The Court has considered the severe and deep-rooted estrangement between Dante and Ms. R. The Court has considered Dante's behavior, both in school and at home, as well as Ms. R.'s use of public humiliation as a means to control Dante's behavior. The Court has also considered the fact that during the pendency of these proceedings things deteriorated to the point that Ms. R. felt compelled to go to the Probation Department to file a PINS petition against Dante, thus acknowledging that he was beyond her control. The Court has considered the fact that all of the forensics ordered by the Court have recommended that Mr. R. be given custody. The Court has similarly considered the fact that even Ms. R.'s witness recommended against Dante being returned to her. The Court has also considered the fact that both children have expressed their preference to live with their father, and the potential detriment to them were they to be separated. Finally, the Court has considered the fact that the Law Guardian has recommended that the children reside with their father.

While none of these factors are dispositive in and of themselves, they cumulatively make an overwhelming case for awarding Mr. R. custody.

Decision and Order

For all the reasons stated above, the Court finds that it would be in the best interests of the subject children that custody be awarded to their father, Ronald R.

Accordingly, it is hereby

ORDERED that the custody provision of the parties' Amended Supplemental Judgment of Divorce, dated June 25, 1997 (Supreme Court, Richmond County, Index No. 5338/93) as adjudged by the subsequent order of that Court, dated July 14, 2000, be and hereby is modified to award custody of the children Dante R. and Christina R. to Ronald R.; and it is further

ORDERED that Nora R. shall have the following visitation with Dante and Christina:

Alternate weekends, Friday (6:00 P.M.) until Sunday (7:30 P.M.), effective October 6, 2000. In the event that visitation falls on a three-day weekend, then visitation will extend through Monday (7:00 P.M.). Nora R. is to pick the children up in Yardley, PA at the beginning of the visitation period and Ronald R. is to pick the chil-

dren up in Staten Island, N.Y. at the end of the visitation period; and

Every Wednesday evening, from 6:00 P.M. to 8:00 P.M. Ms. R. is to pick up and return the children; and

Every August 31th in odd-numbered years, from 6:00 P.M. until 8:00 P.M. Ms. R. is to pick up and return the children; and

Every October 16th in even-numbered years, from 6:00 P.M. until 8:00 P.M. Ms. R. is to pick up and return the children; and

Every Thanksgiving in odd-numbered years, from Wednesday (6:00 P.M.) until Sunday (7:30 P.M.) Nora R. is to pick the children up in Yardley, PA at the beginning of the visitation period and Ronald R. is to pick the children up in Staten Island, N.Y. at the end of the visitation period; and

Every Christmas recess in even-numbered years, from 6:00 P.M. on the last day of school until 7:30 P.M. on the evening prior to the resumption of school. Nora R. is to pick the children up in Yardley, PA at the beginning of the visitation period and Ronald R. is to pick the children up in Staten Island, N.Y. at the end of the visitation period; and

Every Easter/Spring recess in even-numbered years, from 6:00 P.M. on the last day of school until 7:30 P.M. on the evening prior to the resumption of school. Nora R. is to pick the children up in Yardley, PA at the beginning of the visitation period and Donald R. is to pick the children up in Staten Island, N.Y. at the end of the visitation period; and

Every Mother's Day, from 9:00 A.M. until 7:30 P.M. Nora R. is to pick the children up in Yardley, PA at the beginning of the visitation period and Ronald R. is to pick the children up in Staten Island, N.Y. at the end of the visitation period; and

In the event that Father's Day falls on a weekend when the children are scheduled to be with Nora R., then Ronald R. may pick the children up on the preceding Saturday evening, at 7:30 P.M.; and

Four consecutive weeks during each summer, with written notice being given by April 15th of each year. Nora R. is to pick the children up in Yardley, PA at the beginning of the visitation period and Ronald R. is to pick the children up in Staten Island, N.Y. at the end of the visitation period; and it is further

ORDERED, that neither party may remove the children from the United States without written permission from the opposing party, or, failing that, permission of the Court, and it is further

ORDERED that Ronald R. shall not move more than seventy-five (75) miles from Nora R.'s present residence in Staten Island, New York without written permission from Nora R. or, failing that, Court authorization.

Recent Decisions, Legislation and Trends

By Joel R. Brandes

Child Custody—Hague Convention—Psychological Harm Defense

***Blondin v. Dubois*, __F.2d__, Decided Jan. 4, 2001 QDS:04119706 ("*Blondin IV*").**

The purpose of the Hague Convention on the Civil Aspects of International Child Abduction is to deter international child abduction and to provide a mechanism for the prompt[1] return of abducted children to their home country where the courts there can resolve the custody issue on the merits. The convention is available only when a child is wrongfully removed from a signatory country and retained in another signatory country.

The United States and other countries which have acceded to the Convention have agreed that a child who is habitually resident in a country that is a party to the Convention, who is removed to or retained in another country that is a party to the convention, in breach of a parent's "rights of custody," shall, subject to certain exceptions, be promptly returned to the child's country of habitual residence.

The Convention applies only to children under 16 who have been "habitually residing" in a contracting country immediately before the breach of custody or access rights and ceases to apply on the day when the child attains the age of 16. It only applies to the wrongful removal or retention of a child in the responding jurisdiction. The procedure, which is summary, does not contemplate a custody hearing on the merits in the responding jurisdiction.

Limited defenses are available at the responding country. If the proceeding for return of the child is commenced in the responding state more than one year after the wrongful removal or retention, a demonstration that "the child is now settled in its new environment" may preclude a return of the child. Other defenses which may be raised to returning the child to the demanding country are that the party now seeking return of the child was not actually exercising custodial rights at the time of the wrongful removal or retention of the child; that there was consent to the removal or retention; *that return of the child would expose him/her to physical or psychological harm "or otherwise place the child in an intolerable situation;"* that the child objects to being returned and is of such age and maturity that it is appropriate to take account of his views; and that human rights and fundamental freedom would be abridged if the return were permitted.

In *Blondin v. Dubois*[2] the Court of Appeals expanded the factors, which may be considered in the "grave risk of harm defense." Marie-Eline, age 7, and Francois, age 2, were the children of petitioner Felix Blondin and respondent Merlyne Marthe Dubois. In August 1997 Dubois removed them from their home in France and brought them to the United States, without their father's knowledge or consent. Blondin, a French national, petitioned the District Court for the return of his children to France pursuant to the Hague Convention. After a hearing the District Court found that a defense had been established under Article 13(b) in that there was a "grave risk" that return of the children to France would "expose" them to "physical or psychological harm or otherwise place them in an intolerable situation," and denied the petition.

The District Court found that, in the years that he lived with Dubois, Blondin repeatedly beat her, often in the presence of the children. He also beat Marie-Eline. Blondin repeatedly hit Dubois with a belt, spit on her with their daughter watching and twisted an electrical cord around Marie-Eline's neck. The situation became so intolerable in 1993 that Dubois left Blondin's home with Marie-Eline and Crispin and lived in shelters for almost a year. After a reconciliation, the beatings continued. Blondin beat Dubois even when she was pregnant. The situation deteriorated to the point again in 1997 when Dubois felt she had no choice but to leave France altogether. Blondin denied under oath ever having abused Dubois or his children, but the court was convinced that he was not telling the truth, finding that his testimony was incredible.

The Second Circuit Court of Appeals[3] vacated the order and remanded the matter to the District Court, holding that the evidence supported the District Court's factual determination but that remand was required for further consideration of a range of remedies that might allow both the return of the children to their home country and their protection from harm, pending a custody determination by a French court with proper jurisdiction. It raised the question whether the District Court could have protected the children from the "grave risk" of harm that it found, while still honoring the important treaty commitment to allow custodial determinations to be made if at all possible by the court of the child's home country. It held that it is important that a court considering an exception under Article 13(b) take into account any ameliorative measures that can reduce whatever risk might otherwise be associated with a child's repatriation. The reason for this is because the aim of the Convention is to ensure the "prompt return" of abducted children.

On remand, the District Court found that if Dubois and the children returned to France, they would be eligible for social services, and Dubois would receive free

legal assistance in the pending custody proceedings; that Blondin would assist her and the children financially in moving back to France, and would agree not to attempt to make contact with them prior to the judicial determination of custodial rights; and that the French government would not prosecute Dubois for the abduction or the forgery.[4] However, the District Court found that any arrangements at all would fail to mitigate the grave risk of harm to the children, because returning to France under any circumstances would cause them psychological harm. The Court based this determination on uncontested expert testimony that the children would suffer from post-traumatic stress disorder upon repatriation.

On the second appeal to the Court of Appeals[5] it noted that Dubois originally sought to make out only the grave risk of harm defense under Article 13(b), which the District Court considered in *Blondin I*, and the Court of Appeals reviewed in *Blondin II*. Following the decision in *Blondin II*, Dubois asked the District Court to expand its inquiry specifically to take into account "whether Marie-Eline had become so deeply rooted in the United States that returning her to France would expose her to a grave risk of psychological harm," arguing that the Second Circuit had left this issue open to consideration on remand.

The District Court noted that, ordinarily, the issue of whether a child is "settled" in a new environment arises under Article 12 of the Convention, which applies only if the petitioning parent commences proceedings more than one year after the abduction. Since Blondin filed his petition within a year, Article 12 did not apply in this case. Expressly recognizing this, the District Court granted Dubois's request and took into account whether both children were settled in their new environment as one factor in its "grave risk" analysis under Article 13(b).

In addition, the District Court considered Marie-Eline's objections to returning to France, which ordinarily arises under an unnumbered provision of Article 13, as another factor in the "grave risk" analysis under Article 13(b).

The Court of Appeals held that the applicable standard of review in Hague cases is a *de novo* review and, in cases arising under the Convention, a District Court's factual determinations are reviewed for clear error.

The Court of Appeals noted that the District Court accepted the experts conclusions which, as the only expert testimony presented on the risk of psychological harm to the children, stood uncontroverted. He concluded that Marie-Eline and Francois were "recovering from the sustained, repeated traumatic state created in France by their father's physically and emotionally abusive treatment" and that "if the children were returned to France with or without their mother and even if they could avoid being in the same domicile as their father they would almost certainly suffer a recurrence of their traumatic stress disorder (i.e. post-traumatic stress disorder) that would impair their physical, emotional, intellectual and social development."

Blondin did not present any evidence as to the psychological impact that a return to France would have on the children. Reviewing the District Court's application of Article 13(b) to this factual determination, the Court of Appeals affirmed its decision to deny repatriation.

The Court of Appeals concluded that the District Court properly considered whether the children were settled in their new environment as one factor in the "grave risk" analysis under Article 13(b). It noted that to the extent that Article 12 permits the courts of a party to the Convention to deny repatriation on this basis, it effectively allows them to reach the underlying custody dispute, a matter which is generally outside the scope of the Convention. It pointed out that it had suggested in *Blondin II* that a District Court may consider it as part of an analysis under Article 13(b) as long as that factor is not the sole basis for a finding that there is clear and convincing evidence that a grave risk of harm exists. Here, the District Court considered the evidence that the children were settled in their new environment as one factor in its grave risk analysis, and was careful to establish the connection between the fact that they were settled and the grave risk of harm the Court had found a return to France would create. The District Court explicitly rejected considering it as a defense under Article 12 of the Convention.

In declining to order the return of the children, the District Court also took into account Marie-Eline's objections to returning to France and explained that it considered her views as only one factor under its Article 13(b) analysis.

The Court of Appeals held that the unnumbered provision of Article 13 provides a separate ground for repatriation and that, under this provision, a court may refuse repatriation solely on the basis of a considered objection to returning by a sufficiently mature child. It also held that a court may consider a younger child's testimony as part of a broader analysis under Article 13(b), taking into account the child's age and degree of maturity in considering how much weight to give its views. If a child's testimony is germane to the question of whether a grave risk of harm exists upon repatriation, a court may take it into account. It concluded that the District Court properly considered Marie-Eline's views as part of its "grave risk" analysis under Article 13(b).

Marie-Eline stated that she did not wish to return to France because she was afraid of her father, and she described various instances of abuse and its effects on her, including her father's spitting on and hitting her mother at least once with a belt buckle; his putting something around Marie-Eline's neck and threatening to kill

her; and Marie-Eline's own fear, nightmares and inability to eat. On the basis of these interviews, the District Court found that "Marie-Eline objects to being returned to France," noting that she "explicitly stated that she does not want to return to France because she does not want to be subjected to further physical and emotional abuse at the hands of her father."

Blondin questioned whether any eight-year-old is old enough for its views to be considered. The Court of Appeals found that this argument lacked merit because to accept it would have to conclude that under the Convention, as a matter of law, an eight-year-old is too young for her views to be taken into account. It declined to do so, as this would read into the Convention an age limit that its own framers were unwilling to articulate as a general rule. It concluded that the District Court did not clearly err in finding that Marie-Eline was old enough and mature enough for her views to be taken into account, and that it properly considered them as one factor in a broader "grave risk" analysis under Article 13(b).

Maintenance—Award—Duration

***Allen v. Allen*, __A.D.2d__, __N.Y.S.2d__ (1st Dep't 2001).**

The First Department revisited the issue of durational maintenance awards in *Allen v. Allen*, where it modified a judgment of divorce which denied plaintiff wife maintenance, to award plaintiff maintenance of $5,000 per month for five years and $3,500 per month for the remainder of her life. The parties were married on January 4, 1994. They had known each other for 35 years and had a grown son together. Plaintiff was 55 years of age and an employee of Consumers Union, where she had risen to the position of executive editor of Consumer Reports Books, with a salary of $83,589 in 1993. She owned no property. Defendant was the passive beneficiary of income from various family trusts valued at between $20 million and $25 million. His income in 1997 was reported at $703,368. The couple resided in defendants' Manhattan townhouse, which was valued at $1,850,000. Two days after the wedding, plaintiff resigned from her job, and the couple celebrated their honeymoon in Mexico. Thereafter, they traveled extensively, living away from home for periods ranging from three weeks to five months. In addition to financing this lifestyle, defendant gave plaintiff an allowance of $5,000 a month. He had begun giving her an allowance six months before they were married, because, in his words, "she asked for it, she needed it, she had debts." In May 1996, plaintiff began divorce proceedings and in February 1999 the marriage was dissolved.

The trial court held that plaintiff was not entitled to maintenance because she refused to entertain any job that would pay less than she was earning when she left Consumers Union and that maintenance should not be awarded "simply because the parties led a luxurious lifestyle during the marriage." The Appellate Division found that the court's decision was erroneous.

Plaintiff testified at trial that, after the parties' separation, she sent "probably 50 resumes" to her former colleagues in publishing, answered blind ads in the *New York Times* and *Publishers Weekly* and on the Internet, and consulted a headhunter, but that "there really is nothing." Two employment experts testified that plaintiff would have difficulty finding employment comparable to the job she had left and would have to start at a lower level "with the hope," as defendant's expert phrased it, "of working her way up again." The referee found that, if she desired, plaintiff could obtain employment at a salary of $60,000. The Appellate Division held that, in accepting this figure, which was the high end of the potential re-entry salary ranges quoted by the experts, the trial court ignored the realities of job hunting at the age of 59, when employment prospects have grown "dimmer." It found that the trial court overstated plaintiff's ability to provide for her reasonable needs and placed too much weight on the short duration of the marriage. It pointed out that it had recently upheld a trial court's increase of maintenance recommended by a referee "despite the relatively short duration of the marriage and [the wife's] good health, in light of the marked disparity between the parties' income and earning capacity."

The Appellate Division focused on the fact that the referee discredited plaintiffs' testimony that defendant encouraged her to leave her job because they had no need of the money she earned and because her long work week interfered with their time together and their travel. The Appellate Division distinguished its decision in *Daniels v. Daniels*,[6] in which the absence of support in the record for the wife's assertion that she gave up her career in real estate at her husband's insistence was detrimental to her claims on appeal, noting that the issue it decided in *Daniels* was not whether the wife should have been awarded maintenance, but whether the maintenance she was awarded should have been of longer duration. It pointed out that in *Daniels* it had declined to increase the duration on the additional ground that the wife was employable. It held that *Daniels* provides no authority for denying maintenance to a wife who is not so clearly employable while her husband is independently wealthy. It held an award of maintenance would sustain the income of $5,000 per month that defendant provided plaintiff in addition to underwriting their lavish lifestyle.

Editor's Note: *This is an important holding and a possible departure from past precedents. It appears that where there is a sharp disparity between the parties' incomes and earning*

capacities, lifetime maintenance may be awarded despite a marriage of short duration.

Equitable Distribution—Discontinuance

***McMahon v. McMahon*, __A.D.2d__, 718 N.Y.S.2d 353 (1st Dep't, 2001).**

In *McMahon v. McMahon*, the First Department affirmed an Order of the Supreme Court which, *inter alia*, denied defendant-husband's motion to vacate the plaintiff-wife's notice of discontinuance of the action. The wife commenced an action for divorce by service on the husband of a summons, but no complaint, on April 1, 1998. Although the husband acknowledged service of the summons, and served a Notice of Appearance directing that a copy of all papers be served on his attorneys, he never demanded a complaint, nor did he serve an answer, intending to negotiate the financial aspects of the divorce prior to the service of the pleadings and their allegations of fault. On May 7, 1999, Goldman Sachs, the husband's employer, made an Initial Public Offering (IPO) to take the firm from private partnership to public ownership. The husband's shares of stock and his stock options appreciated considerably, apparently to the amount of some $30 million. On October 29, 1999, the wife served a notice of discontinuance of the action. The Appellate Division held that the wife had a right to discontinue the action pursuant to CPLR 3217(a), at any time before a responsive pleading was served or within 20 days after service of the pleading asserting the claim, notwithstanding the substantial discovery and the scheduling of trial dates, and thus, as a practical matter, retain a marital interest in the benefits accruing to the husband from the IPO.

Editor's Note: *A correct decision. The better question is what part of the marital assets should be awarded to a separated spouse.*

Agreements—Child Support—CSSA—Validity

***Lepore v. Lepore*, 276 A.D.2d 677, 714 N.Y.S.2d 343 (2d Dep't, 2000).**

Recent decisions from the Second Department demonstrate that the validity of a child support agreement will be called into question when counsel fails to comply with the obvious as well as the not-so-clear requirements of the CSSA.

In *Lepore v. Lepore*, *supra*, the parties' stipulation of settlement, set forth on the record at a hearing on July 28, 1999, did not recite that the parties had been made aware of the Child Support Standards Act, that they were aware that application of the CSSA guidelines would result in the calculation of the presumptively correct amount of support, the amount of the presumptively correct support that would have been calculated pursuant to the CSSA and the parties' reasons for their departure from the guidelines. The Supreme Court denied the plaintiff's motion to set aside its provisions, because it was of the opinion that she was well aware of the provisions of the CSSA at the time she entered into the stipulation. The Second Department held that while there appeared to be a factual basis for the Supreme Court's conclusion, a party's awareness of the requirements of the CSSA is not the dispositive consideration under the statute. Domestic Relations Law § 240(1-b)(h) requires specific recitals which were not included in the parties' stipulation. It held that the child support provisions of the stipulation were not enforceable and had to be vacated. It also vacated the provisions in the stipulation regarding maintenance and the parties' financial obligations for college and automobile expenses, since these provisions are closely intertwined with the child support provisions.

Editor's Note: *Without requisite compliance with the CSSA, the provision will be void.*

***Schaller v. Schaller*, 719 N.Y.S.2d 278, 2001 N.Y. Slip Op. 00325 (2d Dep't 2001).**

In *Schaller v. Schaller*, *supra*, a support proceeding, the parties' separation agreement provided that the father's child support obligation was to be computed "in accordance with the Child Support Standards Act." The agreement, as modified on November 27, 1996, stated that the father's earnings were $62,000 in 1995, and that his basic child support obligation under the CSSA was equal to $328 per week for the parties' three children. On August 18, 1997, the parties modified the agreement to provide that the father's earnings were $62,374, and his basic child support obligation was $347.85 per week. They agreed to deviate from the CSSA in that the father would pay only $328 a week, instead of $347.85, for four years because he would be paying the mother maintenance during that same period. The agreement, as modified, was incorporated but not merged in the judgment of divorce entered in September 1997. In October 1998, the mother brought a proceeding for an upward modification of child support. The evidence adduced at the hearing revealed that the father's gross income for 1995 was actually about $90,000 including overtime, and that he earned approximately the same amount every year thereafter.

The Hearing Examiner concluded that the child support provision of the parties' agreement was unfair, granted the petition and found that the father's child support obligation under the CSSA guidelines was $465 a week, retroactive to October 20, 1998. The Family Court overruled the Hearing Examiner on the ground that the mother's remedy was to move in the Supreme Court to

vacate the separation agreement on the ground of fraud. However, the mother's petition sought only an upward modification of support.

The Appellate Division held that the father's child support obligation set forth in the agreement did not comply with the CSSA guidelines since his obligation should have been calculated based upon his "gross (total) income as should have been or should be reported in the most recent Federal income tax return." Therefore, the parties' children were not receiving the presumptively correct amount of child support. It stated that parties are permitted to "opt out" of the provisions of the CSSA provided the decision is made knowingly. Where the agreement deviates from the basic child support obligation, the agreement must specify what the basic child support obligation would have been under the CSSA, and the reason the agreement does not provide for payment of that amount. The father failed to establish that the mother was aware of the correct amount of child support, based on his income of about $90,000, and that she knowingly agreed to a lesser amount. Moreover, the agreement did not set forth what the CSSA result would have been if it was calculated based on the father's true income in accordance with the statute. As the "opt out" provision of the statute was intended to protect the interest of the children who are the intended beneficiaries of the CSSA, the father's contention that the children's needs were being met under the terms of the parties' agreement was unpersuasive.

The Appellate Division held that, since the child support provision of the parties' agreement violated the CSSA, it was unenforceable, and that the Hearing Examiner properly granted the mother's petition for an upward modification based on the CSSA guidelines. Thus, a separation agreement or stipulation which contains incorrect income information and, therefore, does not set forth what the CSSA formula amount would be based on the party's actual incomes, in accordance with the statutory requirements, will be held to be void. Care must be exercised in doing these calculations.

Editor's Note: *Another case to hold the provisions void for failure to comply with the CSSA.*

Equitable Distribution—Retirement Benefits—VSF

***DeLuca v. DeLuca*, __A.D.2d__, __N.Y.S.2d__ (2d Dep't 2001).**

In *DeLuca v. DeLuca*, *supra*, the Appellate Division, Second Department, held that payments from the New York City Police Department Police Superior Officers Variable Supplement Fund (VSF), which are made to eligible retired police officers, are not marital assets subject to equitable distribution. It rejected the holdings of two lower court that they are deferred compensation subject to equitable distribution.[7] This determination apparently ignores the comprehensive meaning given to "property" by the legislature as construed by the Court of Appeals.

Upon his retirement, plaintiff was entitled to receive from the New York City Police Officers' Pension Fund the retirement pension benefits which he had accrued over his nearly 30 years of service. At the time of trial, he was receiving $46,737 annually in pension benefits. He also possessed an annuity fund, which was maintained by the Detectives ' Endowment Association, with a value of approximately $33,000. Plaintiff was a detective at the time he retired and pursuant to Administrative Code of the City of New York 11 13-23 2(a)(16) and 13-278(4) he was also entitled to receive benefits valued at approximately $110,000 from the Police Superior Officers' VSF.

The Court noted that Police Superior Officers' VSF was created by the Legislature. The Fund consists of "such monies as may be paid" from the "contingent reserve fund" of the Police Officers' Pension Fund. The contingent reserve fund consists of the accumulated contributions necessary to pay all the pensions and benefits directly associated with the Police Officers' Pension Fund. The amount contributed from the contingent reserve fund to VSFs annually is determined pursuant to a formula which compares that portion of the Pension Fund's investment earnings derived from assets invested in equity investment funds with a hypothetical earnings figure which would have been derived if the assets had been invested in fixed earnings securities. Upon calculating the difference between the actual and hypothetical earnings, that difference is transferred to two variable supplements funds: the Police Officers' VSF and the Police Superior Officers' VSF. The transferred earnings are apportioned between the two VSFs in accordance with a statutory formula which apportions the earnings between the Police Officers' VSF and the Police Superior Officers' VSF in the same ratio that the active superior officers' total contributions to the Pension Fund bear to the active patrolmen's total contributions in the year that the transferable earnings were generated. For a police superior officer or a police officer to be eligible for benefits from either the Police Superior Officers' VSF or the Police Officers' VSF, he or she must have been in service as a member of the pension fund, and retire after 20 or more years in service.

The Second Department concluded that the benefits derived from the Police Superior Officers' VSF and the Police Officers' VSF may not be characterized as part of a police officer's pension benefits, and were therefore, not marital property. It noted that in the context of marital property, pensions have been described as "contract rights of value, received in lieu of higher compensation which would otherwise have enhanced either marital assets or the marital standard of living"[8] and that

Majauskas held that even though a worker's access to pension benefits does not occur until retirement, his or her right to receive the benefits upon retirement accrues incrementally during the years of employment. It found that the Court of Appeals therefore, has concluded that a pension fund is a type of "deferred compensation," which, to the extent it accrues during the marriage, is properly considered a marital asset subject to equitable distribution. It disagreed with the Supreme Court, as well as other courts which concluded that VSFs—which are initially derived from the reserves of the Police Officers' Pension Fund—are deferred compensation subject to equitable distribution. The court pointed out that in several sections of the law the legislature specifically declared that the VSF " shall not be and shall not be construed to constitute, a pension or retirement system or fund, and that it shall function as a means whereby payments, not constituting a pension or retirement allowance shall be made in accordance with the provisions of this subchapter, to eligible pension fund beneficiaries as a supplement to benefits received by them under subchapter one or two [i.e., police department pension funds]." It noted that in reliance upon this explicit language, some New York courts had concluded that VSFs cannot be construed as pension or retirement allowances. It also pointed out that a review of the statutory formula unquestionably indicated that the VSF payments are not calculated on the basis of credits earned through a police officer 's employment. The sole requirement for eligibility for such benefits is the completion of 20 years of service, but entitlement matures only upon retirement. The Appellate Division stated that if the plaintiff retired prior to the completion of 20 years of service, or if he had become disabled and accepted disability retirement benefits before the completion of 20 years of service, he would not have been entitled to collect the Police Superior Officers' VSF payments. The Appellate Division noted that in *Lazarus v. Lazarus*[9] the Supreme Court determined that a combined reading of *Majauskas v. Majauskas* and its progeny offered a set of criteria which included (1) whether the benefit is a form of deferred compensation, (2) whether the specific right at issue is a contractual right received in lieu of higher compensation which would have otherwise enhanced marital assets or the marital standard of living, (3) whether the contract right varied depending on the number of years employed, and (4) whether the employee 's right to it accrued incrementally during his or her years of employment. Applying the criteria delineated in *Lazarus*, it held that benefits paid by the Police Superior Officers' VSF are not a marital asset subject to equitable distribution because:

> To conclude otherwise abrogates the efficacy of the legislative intent. The plaintiff 's right to receive Police Superior Officers' VSF benefits did not accrue incrementally during his years of service. He became entitled to receive the benefit only upon the completion of 20 years of service. The payment of benefits to him, which is dictated by a prescribed statutory formula (see, Administrative Code of City of NY 1 13-281), does not change regardless of the number of years of service in excess of 20 years.

Author's Note: *This determination ignores the fact that the VSF is "property," was acquired during the marriage and does not come within one of the statutory exceptions.*

Endnotes

1. *See* Article 1.
2. 19 F. Supp. 2d 123, 124-26 (S.D.N.Y. 1998) ("*Blondin I*").
3. 189 F.3d 240 (Ct. App. 2d Cir. 1999) ("*Blondin II*").
4. *See Blondin v. Dubois*, 78 F. Supp. 2d 283, 288-93 (S.D.N.Y. 2000) ("*Blondin III*").
5. __F.2d__, decided Jan. 4, 2001. QDS:04119706 ("*Blondin IV*").
6. 243 AD2d 254.
7. *See Torriente v. Torriente*, 184 Misc. 2d 785; *DeGennaro v. DeGennaro*, 181 Misc. 2d 928.
8. Quoting *Majauskas v. Majauskas*, 61 N.Y.2d 481, 491-492.
9. *See Lazarus v. Lazarus*, N.Y.L.J., May 6, 1996, at 35, col. 6 (Sup. Ct., Queens Co.).

Joel R. Brandes has law offices in Garden City and New York City.

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar. Authors interested in submitting an article should do so on a 3½" floppy disk (preferably in WordPerfect), which includes the word processing program and version used, along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

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