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Family Law Review

A publication of the Family Law Section of the New York State Bar Association

In Memory of Stanley A. Rosen

By Brian J. Barney, Chair, Family Law Section

On November 27, 2002, the Family Law Section lost a tireless worker after a battle with cancer. Stan served our Section in many ways, including over twenty-five years as the Editorial Assistant of the *Family Law Review* and member of our Executive Committee. For all of us fortunate to have had the opportunity to have our lives touched by Stan, the spark his being added to our moments together will be truly missed.

A sentence from his obituary in the Albany *Times Union* of Thursday, November 28, 2002, provided me with the succinct statement to describe Stan to those of you who may not have been fortunate to know him: "He was a loyal friend and generous mentor to many, a consummate professional and loving family man."

Stan's surviving family includes his wife, Rosemarie Vairo Rosen; his mother, Rose G. Rosen; and his daughter, Victoria.

Stan was a principal in the law firm of McNamee, Lochner, Titus & Williams for over thirty years. Beginning in 1974, he limited his practice exclusively to Matrimonial and Family Law.

Stan volunteered many hours of service to enhancing the practice of Matrimonial and Family Law and served on the Unified Court System's Committee to Examine Lawyer Conduct in Matrimonial Matters (the "Milonas Committee") which implemented numerous changes to the practice of Matrimonial Law in 1993. In 1997, on recommendation of Appellate Division Presiding Justice Anthony V. Cardona, he was appointed by Governor Pataki to the Judicial Screening Committee for the Third Judicial Department. Stan also served as a member of the Unified Court System's Family Violence Task Force.

Stan was a frequent lecturer and author for continuing legal education programs sponsored by our Section and a quote which will live with his memory is the advice he gave lawyers on the topic of dealing with difficult adversaries: "Just bombard them with kindness, they won't know what to do."

Our Section is honored to be able to inspire future members of our profession to write on Family Law topics in memory of Stan. The Stanley A. Rosen Award is being established to be given annually for submission of an article on a Family Law topic by a law student. The award for said article, which is to be competitively chosen, is a $1,000 scholarship and publication in the *Family Law Review*.

Stan will be missed by us all, those who were fortunate to know him, those of us who were inspired and taught by his scholarly endeavors and all who practice our profession whose lives were made easier through his efforts. We will miss you, Stan.

Notes and Comments

Elliot D. Samuelson, Editor

Is It Time to Reverse *O'Brien*?

Soon after the blockbuster decision by the Court of Appeals in *O'Brien v. O'Brien*,[1] some 17 years ago, both bench and bar speculated whether the high Court would limit its holding to the fact pattern presented (the wife supported the husband during medical school and enabled him to obtain his medical license) or expand it to other persons enjoying enhanced earnings made possible by an advanced degree. At that time, few believed that the decision would become far-reaching and applied to exceptional wage earners without degrees or licenses who enjoyed enhanced earnings.[2]

The Court of Appeals had several chances to curtail the reach of *O'Brien*, but chose not to do so. Most recently, in *Grunfeld v. Grunfeld*,[3] the Court had the opportunity to revisit the merger doctrine (the professional license merged into a professional practice and, therefore, had no value), but once again failed to do so. Rather, the Court set limits on the award of maintenance when a valuation of a professional license was made, holding that the earning stream enjoyed by the professional could not be counted twice (a double dip, so to speak) and used as a basis to award maintenance when the projected income stream was used to compute the enhanced earnings that the license or degree would afford.

The *Grunfeld* case was remanded to the trial court for further computation. Justice Gish, in a well-reasoned decision, concluded that Mr. Grunfeld's law license had no residual value, since his business income stream was exhausted when maintenance was fixed for the wife. (Query: Would the same result be obtained if child support, and not maintenance, was at issue?)

Interestingly, at the time of oral argument of *Grunfeld* before the court, it was not suggested that the *O'Brien* decision had created a legal fiction that had caused severe economic hardship to a license holder, and should be reversed or modified. Rather the argument was limited to multi-tasking the income stream. Such argument, which actually rests in the constitutional rights to equal protection under the law (only a license holder is treated this way), will have to await another appeal to the high Court. Nonetheless, it is quite clear that many in the legal community believe that it is grossly unfair to value a license and a professional practice, as well as award maintenance and child support from the same income stream. No non-licensed businessman has the same economic burden placed upon him by the court. Why should a professional? It is just this unequal and unique treatment by the courts that might support a constitutional attack upon such application of the equitable distribution statute solely to professionals, and no other group of litigants.

In order to understand the grave injustice placed upon licensed professionals, consider the following hypothetical examples:

A college graduate begins a wholesale food distribution business during the parties' 30-year marriage. At the time of divorce, the business is valued at $300,000. The wife gave up her career to raise the children. Both parties are in their fifties. Here, only the business will be valued, and the wife is likely to obtain non-durational maintenance.

Another college graduate obtains a law license and starts a small general practice during the parties' 30-year marriage. At the time of divorce, the lawyer earns $300,000 a year. The parties are also age 55. The wife never worked, and raised the children. Here, both the license and practice will be valued, and the wife is also likely to receive non-durational maintenance.

The businessman, in our example, will be exposed to paying the wife in equitable distribution, one-half (or $150,000) of the appraised value of his business. Or he might elect to sell the business and pay the wife one-half of the net proceeds received. The lawyer has no such option. He will have a value placed on his license based upon his remaining work life of ten years, producing enhanced annual earnings of approximately $2,000,000 ($200,000 more than the average college graduate x 10 = $2,000,000), discounted to present value, yields a present value of about $900,000.) The license

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cannot be sold. In addition, the practice will generally be valued between one and one and one-half times net income, or—conservatively—$300,000. The lawyer cannot sell the practice, since no one would be willing to pay such a sum to take over a law practice that is based on personal contacts and rainmaking ability. He is faced with equitable distribution exposure of one-half the appraised value of his practice ($150,000) and one-half the appraised value of his license ($450,000), or a total payment due to the wife of $600,000, twice that of the businessman. His only viable remedy is to file a bankruptcy proceeding to wipe out his obligation. If, on the other hand, he is fortunate enough to have a deferred compensation plan of, say, $650,000, he would be compelled to transfer his life savings to his wife, leaving him with nothing for retirement.

By contrast, the businessman walks away virtually scot-free, when compared to the lawyer. His exposure is almost one-half million dollars less than the lawyer's. He has the option to continue his business or sell it, and only one-half of his savings, or pension funds, rather than 100 percent, will be at risk. Both will have maintenance obligations, but this is far more onerous to the lawyer than the businessman, since he will have no investment income to offset this expense. It is not difficult to realize the grave economic injustice caused to the professional who must pay his wife $450,000 more than the businessman, and lose all of his retirement assets, while the businessman will retain at least one-half of his remaining assets. The legal fiction imposed by the courts that the license has value and does not merge into a practice, has essentially caused the lawyer to lose his life savings, and should finally come to an end. The question then becomes: What can be done to alleviate this disparity? There are several solutions that come to mind.

The first would be to revisit the merger doctrine and consider merging the license into the practice, so only the practice has economic vitality for equitable distribution. Another would be to come to the grips with the fact that a professional practice cannot be sold, and therefore eliminate it from consideration, and only value the license. The courts could then consider the most equitable option, based upon the facts of the entire case. In this way, the professional will not be crushed with an economic burden that he cannot shoulder, and will eliminate the prospect of a bankruptcy. When the issue of maintenance and child support enters the equation, a remedial change by the courts, or a legislative amendment to Domestic Relations Law section 236B, becomes a quite compelling mandate. If the courts will not act, the legislature should.

Put another way, and paraphrasing the words of George Orwell, if all spouses are equal in the eyes of the law, why are some more equal than others?

Endnotes

1. 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985).
2. *See, e.g., Hougie v. Hougie,* 261 AD2d 161, 689 N.Y.S.2d 490 (1st Dep't 1999) (enhanced earnings capacity as investment banker was subject to equitable distribution despite lack of license); *Elkus v. Elkus*, 169 AD2d 134, 572 N.Y.S.2d 901 (1st Dep't 1991) (enhanced earnings of career as celebrity opera singer was subject to equitable distribution), *appeal dismissed without opinion,* 79 N.Y.2d 851, 580 N.Y.S.2d 201 (1992).
3. 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000).

Elliot Samuelson is the senior partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, LLP and is included in "The Best Lawyers of America" and the "Bar Registry of Preeminent Lawyers in America." He has appeared on both national and regional television and radio programs, including *Larry King Live*. Mr. Samuelson can be reached at (516) 294-6666 or Samuelson@SamuelsonHause.com.

In Memoriam
Stanley A. Rosen

As Editor of the *Family Law Review*, I had a close and warm relationship with Stanley Rosen that spans some twenty-five years. He was a caring, bright and energetic attorney who discharged his obligations as editorial assistant with great skill and dispatch. The *Family Law Review* owes a debt of gratitude for his unstinting efforts throughout the years that have made the publication one that the entire Section is quite proud of.

Stanley's passing is a great loss to the publication. He was singularly responsible for the idea to produce a twenty-five year retrospective of the *Review*. Whenever called upon, he was enthusiastic, caring and accommodating. He will be sorely missed by all of us.

Elliot D. Samuelson
Editor

Intake Processing for Domestic Violence Divorce Clients: A New Model

By Paloma A. Capanna

Abstract. Sufficient interest in domestic violence has arisen within the legal community that we can begin to develop new models for representation of the domestic violence (DV) client. The DV client is one who has suffered abuse, whether physical, mental, sexual, or financial. Typically female, she may have additional skills of processing non-verbal cues, reading voice tones and content, and hyper-imprinting of minutiae. She may use encoded language, a vocabulary to facilitate personal interaction without revealing her situation, to cover up what she cannot plainly say. And she may have little trust or hope, particularly in a stranger upon whom she must rely to conclude her marriage.

The question is: How can we help a DV client from the moment we answer her first call through the initial consultation? This moment will have an irrevocable impact upon the DV client's decision-making: if and when to leave the abusive relationship, how to leave, where to go, etc. It will impact her future safety. It is time to rethink and redesign our model for intake processing of this client population.

A. Trained Staff. The staffer for intake should record all information spontaneously offered by the DV client. While the staffer is restricted from giving legal information or from offering an opinion, she should be permitted to receive information and to identify her role in the law office.

The DV client is typically edgy and nervous when making this first call and, if she starts to talk, the data should be collected. The DV client may start to cry or express heightened safety concerns. Such emotional expressions are a positive indication that a victim is ready to break her silence and to start to act. The expression is typically self-limiting, and is typically one to three minutes in duration.

The staffer should have an office protocol to respond to this situation. Without putting the DV client on hold, the staffer should have domestic violence hotline numbers available to give to the DV client at her request.

The staffer should also have sufficient training and resources to handle this predictable situation. The staffer should attend seminars and continuing education programs, not only in law, but also in mental health. The more the staffer understands about domestic violence, the more success the DV client can achieve during interface with office staff from the first phone call. Sensitivity training has, perhaps, acquired a negative tint, as its genesis was punitive against employers. But, within the context of the domestic violence law office, it should be viewed as an opportunity to provide the best possible client services.

The staffer should be carefully selected. If you are interviewing new candidates for a staff position, you should ask them during the interviews whether they have any interest and/or training in domestic violence, conflict resolution, hotlines, medical or counseling settings, etc. You should also directly address the subject that you represent victims of domestic violence and elicit the candidate's comfort level with working in such an environment. Listen carefully if a candidate or staffer articulates uneasiness at speaking with such callers and clients. A positive candidate can be trained to respond appropriately on this type of case. A candidate with an aversion or unease cannot.

B. Flexible Scheduling. The staffer should have authority to schedule the DV client's initial consultation at the most reasonable day and time that the DV client self-determines she can get to the consultation. Most typically, this will mean the DV client making an appointment between 10:00 a.m. and 2:00 p.m. (the heart of the school day).

The DV client may be calling to schedule an initial consultation the same day because she perceives a window of opportunity to sneak to your office. You should make the opportunity for that to happen, if at all possible. She may not believe she will have another chance to get to you if the consultation is not scheduled at her request. This should not be misunderstood as a demanding client or a "prima donna" client who demands everything on her own terms. Keep in mind: this is an individual who is trying to find a way out of an unsafe relationship.

Schedule one and one-half to two times typical consultation time. If your typical consult is one hour, anticipate the DV client will take one and one-half hours. Also, plan an additional 30 minutes to re-read and clean up your notes and for you to decompress from the intensity of the consultation.

C. Give All Necessary Information. During this first call, the staffer should impart all necessary information regarding directions to the office, and how the client can change her appointment if necessary.

A DV client who engages in counseling will start to learn the importance of visualization techniques to

retrain the mind and to discern safety from risk. If the staffer can communicate a positive feeling about the office setting, it will help the DV client to make it to the appointment.

All of the above having been said, the staffer must learn to communicate information efficiently to the DV client. The staffer will not know where the DV client is calling from, or how long they will be able to speak. The staffer will need to direct the flow of information during the phone call without cutting off or shutting down the flow of information from the DV client. This is a skill that is acquired over time, and the supervising Attorney should constantly supervise and review these phone calls with the staffer. The Attorney, too, will learn techniques that are successful or not in speaking with the prospective DV client.

D. Safe Communication Planning. During the intake call, your staffer should obtain essential information on how to safely contact the DV client. At the same time, the staffer must confidently communicate to the DV client that the only circumstance in which you would attempt to communicate to her is if she fails to show up for the consultation.

The staffer should also have a different office routine between the phone call and the consultation. If the staffer tries to use the typical office protocol of mailing ahead of consultation or rescheduling consultations, you may become a safety risk to the DV client.

When the DV client arrives for the consultation, she can read the Statement of Client's Rights and Responsibilities. It is not a requirement that the Statement of Client's Rights and Responsibilities be mailed out in advance, and it is not worth the risk to the victim that the spouse will find the mail. Your staffer can greet the DV client, offer tea or coffee, and allow her to sit near the staffer while she reads the form.

You will also need to graciously facilitate rescheduling of canceled or missed consultations. Again, the DV client is assessing her safety to come to your office and/or work through her self-doubt about the appropriateness of telling about the abuse. Do not send bills for no-shows. Do not charge an added fee. Simply reschedule the appointment and reaffirm your interest in meeting with her.

Staffer Communication. The staffer should invite the DV client to bring any paper documentation that she believes is helpful or relevant to explain her case. The staffer should have sufficient discretion to reassure the DV client that the attorney can discuss discovery techniques with her during the consultation and the attorney, pursuant to office policy, is most concerned with the personal meeting with the DV client rather than delay it for, for example, inability to obtain a copy of a police report.

The Initial Consultation. The consultation with the DV client should have different objectives than any other type of case. The primary objective should be validation of victim concerns and establishment of trust and confidence.

The DV client is the focal point of the consultation—not the attorney. If the attorney is fortunate, the DV client will utilize the consultation to begin to tell her story. If the attorney is very fortunate, the DV client will exemplify the Joycean technique of "stream of consciousness." Let the DV client talk. The concept of talking about what happened is new to her. Silence has kept her a victim. Let her exercise her First Amendment right to free speech.

If the DV client, through her telling, starts to disassociate and re-live an event, the attorney should be ready to ground her to the current time frame. This is not an interruption of the telling. "Grounding" is a psychology technique to provide cues or objects for the victim to remind her brain that she is currently in a safe place. Offer a soothing reassurance that she should keep talking, you are there, you understand her. Also, offer her the opportunity to take a break (e.g., you can ask your staffer to bring in fresh coffee). Offer tissues and a trashcan without talking about it or fussing. She will re-emerge when she is done or at a point she needs to.

The DV client may tell about the same event more than once during the consultation. This may be happening for a variety of reasons. The attorney must keep in mind that the victim's sense of helplessness is self-defined. This is not a reasonable-man standard. This is a question of why the victim feels afraid. Only she can define what was done to condition or program her to be afraid. It will be a series of events over time. It does take longer for this client to tell why she is seeking legal services during consultation. A retelling is an indication that you are being asked to bear witness to a wrong. Listen and validate.

The attorney can gently show her the style of testimony by asking her direct questions. Periodically ask questions to elicit specific information such as dates, times, places, full names of witnesses, full names of doctor's offices or counselors. It will become a rhythm similar to direct examination at the hearing for her Order of Protection.

The attorney must refrain from argumentative questions such as, "Why didn't you learn?" or, worse, judgmental remarks such as, "You should have had him arrested." The attorney must also refrain from non-ver-

bal cues of raised eyebrows, sighing, shuffling, looking away, etc.

Conclusion. If we can start to think about a consultation with a DV client as a gift, we can learn to return the gift. The DV client gives us trust after it has been violated and broken. She puts herself at risk just by seeking us out, and even more so by speaking. We and our staffers must learn how to conduct this first conversation with all available training and resources. At the very least, even if the DV client does not hire us, we should be left with the feeling that we contributed a positive voice to her eventual decision to leave the abusive relationship. If we have done well, we will stand out as a ray of hope amidst the otherwise negative influence of the abuser.

Lawyer Assistance Program Can Help Attorneys with Alcoholism and Substance Abuse Problems

Alcoholism and substance abuse are problems that can afflict any member of the bar at any time. Indeed, the percentage of lawyers and judges suffering from alcoholism and drug addiction is significantly greater than the general population. Because of the pervasiveness of the problem in the profession and the devastation suffered not only by the alcoholic or addict but also by their family members, partners and clients, the Bar Association formed the Committee on Lawyer Alcoholism and Drug Addiction in 1978. To help the Committee address the problem, the Lawyer Assistance Program (LAP), headed by Ray Lopez, was created in 1990. Under Ray's direction, the State Bar program is on the cutting edge of alcoholism and drug addiction education, intervention, treatment and is nationally respected as one of the leading programs in the field. Despite the great success of the program, over 5,000 referrals in twelve years, there are thousands of lawyers and judges who do not know about the program and what it can do for them. Recently, Patricia K. Bucklin, Executive Director of the New York State Bar Association, asked all Section and Committee Chairs to tell their members about the Committee and what it can do for any of their members who are struggling with alcohol or substance abuse problems.

Currently there are 68 Committee members and a vast network of volunteers. Most are attorneys and judges of Supreme Court, County Court, Family Court, and Civil Court. The Committee is aided by professional counselors, like Ray Lopez in Albany, and Eileen Travis in New York City, and many others serving local bar associations.

The primary functions of the Committee, with Ray Lopez's guidance and direction, are twofold: 1) to assist attorneys, judges, and law school students and their families who are suffering from alcoholism, drug abuse, depression and stress-related issues through abuse interventions and planning, sobriety monitoring for appellate courts and disciplinary committees, and participation in treatment programs and twelve-step groups with attorneys on a local level; and 2) to educate the profession as a whole to detect the warning signs by participation in presentations at law schools, judiciary conferences, disciplinary committees and bar association committees on a statewide and local basis.

One year ago, Chief Justice Judith S. Kaye formed the Lawyer Assistance Trust to study the problems of alcoholism and substance abuse in the legal profession and to provide assistance to groups addressing these problems. Eight of the Committee's 68 members serve as Trustees.

Information on outreach concerning attorneys' personal problems with alcohol and drug abuse and possible grants for efforts related to attorney wellness, in the areas of substance abuse, stress management and depression is available to all NYSBA Sections and Committees. Committee members would welcome the opportunity to speak at Committee or Section events regarding stress management issues, substance abuse, alcoholism and depression among attorneys.

All services provided by the LAP or Committee members are confidential and protected by Section 499 of the Judiciary Law.

For more information about the Committee, to arrange for a presentation by Committee members or for a confidential referral of an attorney who you believe has a problem with alcohol, substance abuse, stress management or depression, contact the Lawyer Assistance Program at 1-800-255-0569.

The Numbers Racket—Enhanced Earning Capacity

By Sandra W. Jacobson

"Thou shalt not sit
With statisticians nor commit
A social science."[1]

As matrimonial attorneys, we are experienced at creating exact numbers out of "guesstimates." Take the Statement of Net Worth in which we are instructed to find a weekly expenditure by dividing a monthly expenditure by 4.3. We make an educated guess that a party spends $500 a month for clothing. We put down $116.28 a week. That is an exact number. Does it have any meaning or accuracy?

There is a mathematical concept called surreal numbers, which this writer will not pretend to comprehend. Nonetheless, we in Family Law deal in surreal numbers daily as we attempt to measure what is undefinable as well as unmeasurable, increased earning capacity as evidenced by a degree or license.

One astute matrimonial attorney has written: "The time to lament the illogicality of the New York Court of Appeals decision in *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985), which held a medical license subject to distribution, has passed."[2] At the risk of appearing quixotic, still another attack on the underpinnings of this Dali-esque concept will be attempted.

"[W]e in Family Law deal in surreal numbers daily as we attempt to measure what is undefinable as well as unmeasurable, increased earning capacity as evidenced by a degree or license."

It is common knowledge that in valuing Dr. O'Brien's license, the forensic, Stanley Goodman, utilized the approach used in wrongful death actions. There are two very major differences, however, between wrongful death and equitable distribution actions.

As the name of the first demonstrates, in a wrongful death action, someone has committed a wrong and is made to pay for it. Arguably, Dr. O'Brien committed a "wrong" letting Loretta put him through school at the sacrifice of her own professional advancement. However, this has not been a requirement of any of the decisions based on O'Brien. Just as non-egregious fault does not enter into the division of this "marital asset," so, too, fault does not enter into finding it to be an asset.

The second difference is a *sub rosa* one. The wrongdoer in a wrongful death action is rarely the one who pays. Almost always, it is an insurance company or a large self-insured corporation. In almost every instance, there is a present pot to be distributed made up of premiums paid and reserves created for this very purpose.

To oversimplify the methodology used, assuming the licensed party had been graduated from college at marriage but had not yet started professional training and that he or she has been certificated in a medical specialty at the commencement of the action, we compare the median income of a college graduate and, say, a pediatrician, tax-impact, discount for time, factor in mortality and so forth. The question which I have not seen analyzed in the reported cases is how accurate the numbers are to begin with. That will depend on how they were reached.

We know how surveys or polls are taken. We determine the universe we are measuring. We construct a sample, whom we poll. If the sample does not accurately mirror the universe we are sampling, we get results such as predictions that Alf Landon or Thomas Dewey will be our next President. We get a certain number of responses. Again, are these responses an accurate sampling of the sample?

Stanley Goodman took his baseline earnings for Dr. O'Brien from the United States Census. He took his professional earnings from an issue of *Medical Economics*.

Statistically speaking, economic data derived from the Census are probably the most reliable we have. The sample that gets the long-form is large and chosen at random. There is follow-up to get as many responses as possible. Given that even the Census Bureau has difficulty in reaching the poor and undocumented, the income numbers may be a little under but they have a high measure of reliability.

There are numerous tables of the income of those in various professions and, within each profession, specialties. Some tables are broken down geographically. The better ones distinguish between male and female earnings. Some are put together by professional associations. Some are done by private enterprises. None has the breadth of the Census nor its ability to compel response.

For example, one of the most widely recognized studies of attorney's earnings is published by Altman & Weil, Inc. They are accepted as undisputed. Query: Have you ever supplied information to them?

In a case this writer recently tried, both parties' experts, experienced and recognized in the field, used survey data published by the Medical Group Management Association. Both testified that it was a highly respected source for compensation levels for physicians in various areas of practice. As baseline, each used United States government sources.

"The members of the Medical Group Management Association are managers of group practices, with some individual doctors. Surveys are sent only to members, a very limited group of people."

When I inquired of my expert what the Medical Group Management Association was and how it obtained its numbers, he did not know. He knew only that it was a standard source. Being curious, I followed up.

The members of the Medical Group Management Association are managers of group practices, with some individual doctors. Surveys are sent only to members, a very limited group of people. In rare sub-specialties, the income reported may be derived from less than 30 responses. In the specialty involved in that action, the responses represented some two to three percent of practitioners in the specialty. With a median income shown of about $239,000, the standard deviation was almost $188,000, making the median statistically meaningless, yet this is one of the most respected and utilized sources of income data for physicians.

"If thou must choose
Between the chances, choose the odd;
Read the New Yorker; trust in God;
And take short views."[3]

Endnotes

1. W.H. Auden, "Under Which Lyre."
2. David Aronson, Valuing Professional Practices and Licenses, ch. 34.
3. Auden, *supra* note 1.

Entitlements to Refunds of Transmuted Separate Property

By Elliott Scheinberg

Divorce law, to wit, the grounds therefor and all related incidental relief, is a creature of the legislature and may neither be abridged nor expanded in any manner other than via legislative fiat.[1] In Domestic Relations Law (DRL) section 236B the legislature created two categories of property: separate and marital. DRL § 236B(1)(c) defines marital property as "all property acquired by either or both spouses during the marriage and before . . . the commencement of a matrimonial action, regardless of the form in which title is held." It is settled law that marital property is to be broadly construed to include property acquired during the marriage and that separate property is to be narrowly construed; the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property[2] by adequately tracing the source of the funds.[3] Any property not specifically excepted by statute as separate is presumed marital.[4]

When a party possessed of separate property alters its status by adding the other's name to the asset or otherwise commingles the asset with marital property, that newly created property is, generally, although not absolutely, converted into marital property.[5] The issue, therefore, becomes to what extent, if any, is the newly endowed spouse entitled to share in that portion of the newly created marital asset which had formerly been separate property? The answer is that with some slim exceptions the answer is almost never. In *Sorrell v. Sorrell*[6] and *Angst v. Angst*,[7] the Second Department emphasized that the transfer of title to property during the marriage "is not determinative on the issue of whether the property is separate or marital in nature." Furthermore, since equitable distribution does not mean equal[8] a court is, thus, free to fashion a fair result which contemplates the origin of the asset.

The Doctrine of Separate Property Origination —Traceability of Assets— and the Principle of Dollar-for-Dollar Credit

Since the early 1980s, in a rare instance of statewide judicial unanimity, appellate courts began to carve out exceptions from the formerly perceived inviolable notion that transmutations of separate property into joint names irretrievably converted the transferred/commingled property into marital property subject to equitable distribution, thereby, having, thus, imbued the formerly non-titled spouse with an interest in the asset including that portion which was formerly held as separate property. It has since been uniform and consistent judicial policy in all the Appellate Departments to credit the spouse who transmuted his/her separate property with a dollar-for-dollar credit, without any interest, as and for the original value of the separate asset.[9] Courts have generally rejected a theory of compensation to the original owner which would have converted the value of the initial contribution into a percentage of the entire asset (as of the date of its creation) and would have subsequently distributed the asset along those percentage lines.

As discussed below, a spouse is entitled to recoup the initial contribution of separate property into the marital fisc provided that: (1) the origin of the asset can be traced, *even if by presumption*, and (2) the asset was not commingled with other existing marital assets sufficient to mask its separate identity.[10] Furthermore, not only have courts refunded the original value of the separate property, credit is given for any separate property used to repay marital loans or debts.[11]

Coffey v. Coffey and *Duffy v. Duffy*

Duffy,[12] and *Coffey, supra (fn. 5)*, were among the landmark decisions which awarded the recoupment of the full value of the separate property which had been transmuted into the marital asset. In *Coffey* the husband had inherited a home which he conveyed to himself and to his wife as tenants by the entirety. Six years later the home was destroyed by fire. From funds realized from an insurance settlement and the sale of the land, six $10,000 certificates of deposit were purchased in the names of both parties. The Appellate Division held that the wife was not entitled to any distribution of the assets realized from the formerly held separate property and awarded the husband a credit for the contribution of his separate property toward the creation of the marital asset:

> With respect to the six certificates of deposit, while they were purchased with funds derived from marital property (the former residence of the husband's mother which the husband conveyed to himself and his wife as tenants by the entirety), the husband must be credited with creation of the marital asset (cites omitted) and must also, therefore, receive a 100% credit for the acquisition of the certificates of deposit. Thus, the wife is entitled to none of the principal from the certificates.

Coffey further underscored that it affirmed the lower court's award to the wife of 50 percent of the interest realized from the aforementioned certificates because the parties had "customarily" used those proceeds for household and other expenses. The Appellate Division emphasized three guiding principles in the distribution of property:

> that the distribution of each item of marital property need not be on an equal basis;
>
> that property acquired during a marriage should be distributed "in a manner which reflects the individual needs and circumstances of the parties," and
>
> that courts possess the flexibility to tailor decrees appropriate to a given situation, **with fairness being the ultimate goal.**

Monks v. Monks

In *Monks,*[13] the parties owned two homes that had been purchased by the husband prior to the marriage. After two months of marriage the husband transferred the homes to himself and his wife as tenants by the entirety. The husband testified that the transfer was not intended as a gift but rather to facilitate the transfer of property to the wife in the event of his death. Citing *Coffey*, the Appellate Division reversed an award of a nearly equal division of the properties for failure to credit the husband for "the contribution of his separate property toward the creation of the marital assets."

Dunn v. Dunn

In *Dunn,*[14] the wife had brought $63,000 of separate property into the marriage which was used to fund an intricate and complex chain of purchases and sales of various properties. The Third Department held that the money eventually lost its separate identity and became a marital asset.

> The $63,000 was first used by the parties in the purchase of a home in the State of Washington for $105,000, which the parties held jointly. When the Washington home was sold, the parties invested the proceeds in a house and acreage in Georgia, which was also held jointly. Sale of the Georgia property resulted in a substantial profit, which included a net cash payment of $250,000, whereby the parties recouped their initial investment, including the $63,000 of plaintiff's separate property.
>
> The $250,000 was deposited in a joint bank account and cash from the account apparently was subsequently used in the purchase of two separate jointly held parcels of real property in New York.

Dunn further found that the parties "jointly expended a substantial sum of money in the purchase of antiques and other personal property," concluding that it was the intent of the parties to treat their assets indistinguishably as assets of the economic partnership created by their marriage. The Third Department did not, however, offer any further facts behind its decision, such as: (a) the husband's contributions, if any, to assist the wife in the purchase, development, or management of the properties in Washington and Georgia, (b) the source of funds used to buy the various antiques and personal property, (c) were the moneys derived from the joint account that was initially created by the wife's $63,000 or from some other account, (d) how long did the money stay in the joint account before being shifted, i.e., was the money in that account for convenience purposes, was it an active marital account, etc.

It had been argued that *Dunn* augured a possible departure from the progressive judicial trend of refunding separate property in the Third Department. It is, nevertheless, clear from subsequent Third Department holdings, to wit, *Maczek (see, fn. 13)* and *Myers*[15] that such was never the Third Department's intention.

Significantly, *Myers* stressed that *Dunn* was not to be applied broadly but rather was to be limited to its facts.

> We further conclude that Supreme Court properly credited defendant for her separate property in the amount of $10,000 representing the money she invested in the parties' cash purchase of their first marital dwelling . . . In our view, defendant's investment did not lose its character as separate and traceable funds when the marital residence was subsequently mortgaged and the proceeds of the mortgage invested in the parties' purchase of the Jackson Avenue investment property in 1974 . . . Plaintiff's reliance on our holding in *Dunn v. Dunn*, 224 AD2d 888, 638 N.Y.S.2d 238, is unavailing; there, unlike here, the proceeds of the sale of the second marital residence were deposited in a joint bank account, thereby losing their separate identity.

Traceability of the Separate Property Even if by Presumption

To secure the originator of an asset with a proper credit for his/her contribution, courts presently conduct

fine-tuned analyses and reviews in order to carefully track the origin of formerly held separate property, including the application of a lesser evidentiary threshold which allows the acceptance of a mere showing that *there may be a greater likelihood than not* that an asset's existence is attributable to a party's separate property—notwithstanding any subsequent multiple transmutations or rollovers since the original transfer of the asset into joint names.[16] This is so notwithstanding the caselaw which stands for the proposition that a failure to submit proof of one's claim to "separate property" constitutes a waiver of the claim.[17]

Carney v. Carney

In *Carney*[18] the Appellate Division awarded the husband 100 percent of a building and its appreciation where he was able to specifically prove that the building had been his separate property. The court, however, denied the husband any further origination of asset credits regarding the remaining assets because:

(i) "because the husband could not **specifically** trace the source of the funds" used to make the purchase of another property; and

(ii) because the husband had "commingled" his separate property "with assets in a joint account."

The requirement in *Carney* of a specific tracing of funds is a greater degree of proof than "the greater likelihood than not" test, *supra*.

Sarafian v. Sarafian[19]

If ever there was a case where the non-titled spouse (the wife) was tortured and victimized by the husband, ever-deserving of pity and of every available form of equitable relief that a court could bestow, including an award of some percentage of the husband's separate property, *Sarafian* was it. *The court, nevertheless, did not grant her any portion of any assets which were clearly traceable to the husband's separate property.*

The parties began dating when the husband was 64 and the wife 16. The husband used to take her to his abandoned chicken farm where he would have sexual relations with her. The wife's parents were induced into giving their blessings to the marriage due to the husband's purchase of a home for them. Thereafter, four children were born of the marriage.

At the time of the marriage the defendant husband owned: (1) his family's 67-acre chicken farm, (2) two apartment buildings, and (3) a two-family dwelling. Subsequent to the marriage, the husband sold both apartment buildings along with his jewelry business and purchased $400,000 in Treasury bonds. Thereafter, he sold his two-family house and bought an additional $100,000 Treasury bond.

The husband had renovated a "chicken coop" building that he had on his family-owned farm into the marital residence. The husband continued to receive $40,000 a year from his Treasury bonds plus monthly social security payments of $548 for himself and $516 for his children. He also obtained additional cash by selling jewelry that he retained from the sale of his liquidated jewelry business. In 1983 he purchased J.D.'s Dairy Bar for $175,000—$75,000 in cash and the balance in the form of a purchase money mortgage.

During the wife's pregnancy with their last child the husband began to drink heavily because the wife would not abort the child. He called her his slave, threatened to kill her, and forced her to withdraw from two college classes. After the plaintiff injured himself, thus precluding him from operating the business, the wife operated the business and cared for the new baby.

The wife eventually moved out with the children.

The *Sarafian* Ruling

The court characterized the husband as a "depraved," "dishonest," and "deceitful" older man who committed "heinous" acts of statutory rape against his wife, "thus violating all our standards of morality and tolerable conduct" and who, after having dated and "rented" the plaintiff, "bought" and married her. The court also described the wife as a "victim of her parents and the defendant" and found her to be "a loving caring, devoted and competent mother."

It is critical that during the trial "in any relevant conflict in testimony, the court credited plaintiff's [wife] account." The court further stated "that these characterizations of the parties affected equitable distribution to a 'tangential degree.'" Notwithstanding the vile and repulsive nature of this case, the appellate court began its analysis by reciting some of the underlying fundamentals of equitable distribution:

(1) that "'marital property" is to be construed broadly in order to give effect to the 'economic partnership' concept of the marriage relationship";

(2) that "'separate property' should be construed narrowly"; and

(3) that "the distribution, based on the factors enumerated in the statute (Domestic Relations Law § 236 [B] [5] [d]), must be equitable, not merely a 50/50 split of assets."

Mr. Sarafian's Traceability of Assets

Accordingly, the Appellate Division reversed *nisi prius'* award of a portion of the Treasury bonds to the wife, underscoring that the conclusion was inescapable that the purchase of the bonds could not have come

from any other source but from the sale of the husband's various assets, thereby rebutting the presumption that they were marital property merely because of their acquisition after the marriage. The husband was also given a credit for the value of the marital residence at the time of the marriage, granting the wife a portion of the appreciation due to her efforts in the reconstruction of the "chicken coop" into the marital residence.

In *Galachiuk*,[20] the Third Department repeated its reasoning behind *Serafian:*

> In Sarafian, although defendant failed to trace specifically the source of funds for the purchase of Treasury bonds, he proved that, prior to purchasing the bonds, he had sold specific assets that were his separate property. The court held that the conclusion was inescapable that the current assets were purchased with funds obtained from the sales of separate property.

Heine v. Heine

In *Heine*,[21] a marriage of 20-plus years, the parties purchased a townhouse six months after their marriage which was financed by two mortgages totaling $213,000 and a down payment of $54,500 originating from the husband's separate property. The court applied a *Serafian*-like analysis to reimburse Mr. Heine's original $54,500 down payment, notwithstanding the fact that his testimony was uncorroborated. The court observed that although the husband could not remember nor prove, via brokerage records, how many shares of stock he had sold twenty years prior to fund the aforementioned down payment, Mr. Heine had been possessed of substantial assets while the wife had none, leading to the inference that "this circumstance fairly compels the conclusion that the down payment came from his premarital assets."[22]

Feldman v. Feldman

At issue in *Feldman*,[23] a marriage of over 40 years duration, was whether the lower court had properly determined that certain property acquired by the husband through gifts and bequests remained his separate property, even though some separate funds were commingled with marital funds or used for the support of both parties. Complex and multiple commingling of separate property notwithstanding, *Feldman* specifically looked to the source of funds as the predicate for its characterization as either separate or marital. Nor did Mr. Feldman's poor record-keeping divest him of his original separate assets. The Appellate Division noted that since the funds could not have been attributable to a source other than the husband, the money was, thus, awarded him as his separate property. Again, a *Serafian*-like evidentiary standard.

Separate property credits are disallowed only after commingling which results in the loss of its separate identity.[24] The holdings in *Heine* and *Feldman* are further noteworthy because of the pervasive rule that although courts are not bound by a party's own representation of one's own assets[25] they accepted uncorroborated testimony.

Lolli-Ghetti v. Lolli-Ghetti

In *Lolli-Ghetti v. Lolli-Ghetti*,[26] the husband made a $67,840 contribution of separate property toward the purchase of the first marital residence. The court held that the wife, through her active efforts, had contributed toward the appreciation of the husband's separate property and had *thereby acquired an interest in the separate property which interest was rolled over and continued to grow as the parties continued to buy and sell subsequent residences.* Notwithstanding the rollover of the sale proceeds into subsequent residences, the Appellate Division also held that the original $67,840 had never lost its characteristics or identity of separate property and refunded the entire amount to the husband.

The conundrum in this decision is that the Appellate Division held that the wife's acquired interest in the separate property "was rolled over and continued to grow as the parties continued to buy and sell subsequent residences." Thus, what had happened was that while the contributor of the separate property was limited to an exact dollar-for-dollar credit for its original value, irrespective of the number of times the houses were rolled over, the wife's newly acquired interest in the separate property was awarded to her in a manner where it continued to appreciate, not dollar-for-dollar, thus, effectively penalizing the husband.

Verrilli v. Verrilli

In *Verrilli*,[27] the Appellate Division denied the husband any credit for alleged contributions of separate property because:

a. it appeared that the source of funds used to acquire the various properties was from the pooling of separate funds into a joint account and that such commingling of assets justified characterizing the property as marital with no credit to either party for individual contributions of separate property; and

b. in addition to delivering vague and inconsistent answers during the trial, the husband was unable to provide any documentary evidence in support of his assertions regarding the funding sources.

Verrilli did, however, note that had the husband substantiated his allegations regarding the origins of separate property he would have received a credit for his contributions.

In *Karounos*[28] the Appellate Division reduced from 50 percent to 15 percent the distributive award to the wife of the marital residence which had been the husband's separate property. The analysis behind the decision is a bit troubling:

> The husband purchased this house for $26,000 in 1963, six years before the marriage. Upon their marriage, the wife moved into this house. In the house, the husband had a beauty shop, where the wife worked as a hairdresser for the first year of the marriage, contributing her earnings to the household. The parties lived in the house for at least three years before they moved to the most recent marital residence. In 1983, the husband sold the house for $120,000, and gave an $81,000 purchase money mortgage to the buyer. The husband used $18,000 from these proceeds to satisfy the outstanding balance on the mortgage he had on the marital residence. The husband testified that he used part of the proceeds to renovate the bathroom in the most recent marital residence and placed the remaining proceeds in his [bank account] [sic].

Karounos noted that after their marriage the wife worked for three years in a beauty business operated out of the marital residence. Citing *Price*, the Appellate Division held that the wife was entitled to some award from the appreciated value of the husband's separate property resulting from her contributions to the husband's separate property across a three-year period. (This writer is not entirely certain if and how the Appellate Division considered the wife's three years of employment in the husband's business as a hairdresser, albeit that it was out of the home, as a basis for having acquired an ownership interest in the separate property because she would have been entitled to receive a portion of the EEC in the business as her enhanced compensation.)

> At bar, the record sufficiently demonstrates that the wife's monetary and nonmonetary contributions to the marriage and household justified awarding her a portion of the appreciation value (see, Robinson v. Robinson, 166 AD2d 428, 429-430, 560 N.Y.S.2d 665). However, since the wife only demonstrated that she contributed to the value of the house during the first three years of her marriage, her share in the appreciation of the value of the house should be limited to 15%, i.e., 3 years out of the 20 years that the husband owned the house. Additionally, the husband should be credited for $15,300 ($18,000 that he used from the proceeds of this sale to satisfy the mortgage on the marital residence less 15% [i.e. $2,700] representing the wife's share of the $18,000) (see, Lobotsky v. Lobotsky, 122 AD2d 253, 254, 505 N.Y.S.2d 444; Monks v. Monks, 134 AD2d 334, 336, 520 N.Y.S.2d 810).
>
> The husband also contends that the court erred in finding that his Manufacturers Hanover Trust account was marital property because he claimed that the balance in that account represented the proceeds from the sale of the house. This contention is without merit, because the husband clearly commingled the proceeds from the sale of the house with the marital funds that he put into this account (see, Di Nardo v. Di Nardo, 144 AD2d 906, 907, 534 N.Y.S.2d 25; Feldman v. Feldman, 194 AD2d 207, 215-216, *supra*, 605 N.Y.S.2d 777). This is demonstrated by the fact that the balance in this account fluctuated from approximately $20,000 in March 1987 to approximately $49,000 in July 1987, to approximately $70,000 in June 1991.

Gifts from a Spouse's Parents—a Judicially Created Presumption

Courts apply the doctrine of reimbursement of separate property to include any category of separate property including gifts originating from the parents of one spouse. The "presumption" is that the gift had been intended for the benefit of their child because, absent the filial relationship, the donor-parent would not have independently given a gift to the son- or daughter-in-law for which reason the child is credited if that property is transmuted into marital property.

Vogel v. Vogel

In *Vogel*,[29] the Second Department reprimanded the trial court for having refused to receive testimony regarding the intent of the donor-parent who gave $42,800 to be applied towards the purchase of a house. Referring to this gift as "arguably separate property," the case was remanded for further testimony specifically on this issue. The message was clear as to what the Appellate Division expected the trial court to do on remand.

In *McSparron,*[30] the wife challenged the trial court's distribution of assets because many of them originated from the wife's mother. Fatal to her claim was her having commingled the money in their joint account:

> . . . although there was ample testimony that plaintiff's mother did contribute large sums of money to purchase various marital assets, almost all of this money was either commingled in the parties' joint account or used to purchase jointly held property. This use of the moneys evidences plaintiff's mother's "clear intention to share it equally with [defendant]" (Brown v. Brown, 148 AD2d 377, 381, 538 N.Y.S.2d 945), which warrants treating the money and assets bought with it as marital property.

Banking Law § 675(b) and the Doctrine of Convenience

Banking Law § 675(b) gives rise to the rebuttable presumption that parties to a joint bank account are entitled to equal shares of the account. The burden of refuting the presumption rests with the party challenging it—who must, then, establish that the joint account was opened for convenience purposes only.[31] "The presumption of joint tenancy [of Banking Law § 675 (b)] may only be refuted by direct proof or substantial circumstantial proof, clear and convincing, and sufficient to support an inference that the joint account had been opened in that form as a matter of convenience."[32]

Lagnena v. Lagnena

In *Lagnena,*[33] the Second Department began its analysis by highlighting the rebuttable presumption in the Banking Law §675(a), to wit, that each named account holder holds an undivided half interest in moneys deposited into joint accounts. Citing *Krinski* and *Brezinski, infra*, the Appellate Division stated: "That presumption may be refuted by direct proof or substantial circumstantial proof, which is clear and convincing and sufficient to support an inference that the joint account had been opened in that form as a matter of convenience."

Lagnena found that the wife had successfully rebutted the presumption of joint tenancy by establishing that: (1) all of the moneys in the joint savings accounts originated with the wife, (2) the wife maintained sole control over the accounts, and (3) that the accounts were created for her exclusive convenience. Accordingly, since the moneys in the joint accounts were deemed her separate property, the marital home, which had been acquired from the wife's separate property was, therefore, not subject to equitable distribution.

Brugge v. Brugge

In *Brugge,*[34] the Fourth Department, citing *McGarrity* and *Feldman,* affirmed the lower court's finding that the money deposited by the defendant in the parties' joint checking account was her separate property. *Brugge* held that the defendant had successfully rebutted the presumption that deposits into joint accounts were transmuted into marital property by proving that the joint account "was used only as a conduit for the transfer of her capital interest from one business owned by her family to another."

The presumption of gift may also be defeated where convenience can be inferred.[35]

Gundlach v. Gundlach

In *Gundlach,*[36] the husband had received a $208,198 personal injury award which he deposited into a newly opened joint account. *Gundlach* emphasized that the failure to credit the husband for his initial contribution was attributable to his failure to prove that the joint account had been opened for convenience purposes only: "The evidence of various transfers from the joint account into and out of other accounts confirmed the plaintiff's testimony that all of the parties' money was handled jointly, regardless of the source."

Giuffre v. Giuffre

In *Giuffre, supra (fn. 32)*, the husband deposited his separate property funds into joint accounts to maximize the FDIC insurance deposit coverage. The court held that the husband had rebutted the presumption of transmutation from separate to marital.

McGarrity v. McGarrity

In *McGarrity, supra (fn. 5),* the husband deposited inherited monies into a joint account after the physical separation of the parties primarily because the bank was conveniently located just across the street from his office. The court held: (1) that there was no donative intent despite the wife's continued access, and (2) the separate property retained its characteristic as such and was not transmuted into marital property as a result of a mere deposit.

Wiercinsky v. Wiercinsky

Similarly, in *Wiercinsky*, *supra* (*fn. 31),* a case involving a 30-plus year marriage, the Appellate Division disallowed the claim for separate property only after the husband admitted that the account was intended for the whole family and had allowed the wife to withdraw money from the account. Critically, *Wiercinsky* held that the husband had failed "the convenience test" (unlike *McGarrity* where the wife's continued access to the account was not a dispositive factor of the issue):

> Defendant further maintains that his Social Security disability payments were the equivalent of "compensation for personal injuries" and thus properly classified as separate property not subject to equitable distribution (Domestic Relations Law § 236[B][1][d][2]). We recognize that to the extent disability payments constitute compensation for personal injuries, as opposed to deferred compensation, such payments are treatable as separate property (see, West v. West, 101 AD2d 834, 475 N.Y.S.2d 493). Assuming, without deciding, that defendant is correct in his characterization of these funds, we find that the funds became marital property when placed in the joint "pacemaker account". Banking Law § 675(b) gives rise to a presumption that the parties to a joint bank account are entitled to equal shares of that account (see, Matter of Phelps v. Kramer, 102 AD2d 908, 477 N.Y.S.2d 743; Alwell v. Alwell, 98 AD2d 549, 552, 471 N.Y.S.2d 899; McGill v. Booth, 94 AD2d 928, 463 N.Y.S.2d 333). The burden of refuting this presumption rests on the one challenging it (McGill v. Booth, supra, p. 929, 463 N.Y.S.2d 333). Here, no evidence was presented to establish that the "pacemaker account" was simply one of convenience (cf. Matter of Phelps v. Kramer, supra, 102 AD2d p. 909, 477 N.Y.S.2d 743). To the contrary, defendant testified that the funds were "meant for the whole family" and were occasionally used to cover certain household expenses. Moreover, plaintiff was allowed to make at least one withdrawal. In our view, defendant failed to rebut the presumption that a gift of these funds was made (cf. Alwell v. Alwell, supra, 98 AD2d p. 552, 471 N.Y.S.2d 899). Accordingly, the funds became marital property subject to equitable distribution.

Geisel v. Geisel

In *Geisel*,[37] the husband deposited money from his separate account into a joint account with rights of survivorship. The court held that such deposits defeated any arguments with respect to convenience because the nature of the transfer evidenced his intent to transform the property into joint property.

In *Lynch v. King*, *supra (fn. 37),* the court concluded that the husband's conveyance of the property to himself and his wife as tenants by the entireties evinced an intent that the wife acquire an ownership interest in the property: "By placing the home in both parties' names, the defendant changed the character of the property to marital property (see, Diaco v. Diaco, 278 AD2d 358, 717 N.Y.S.2d 635; Schmidlapp v. Schmidlapp, 220 AD2d 571, 632 N.Y.S.2d 593; Monks v. Monks, 134 AD2d 334, 520 N.Y.S.2d 810)."

The husband was nevertheless credited with his $350,000 contribution of separate property.

Conclusion

The conclusions to be drawn from the existing body of decisional authority is that the appellate courts, statewide, have universally adopted the following policies:

a. transmutation of separate assets into jointly held property is dangerous but not fatal to the recovery of the full value of the original property where the asset can be traced to separate property even if by likelihood, presumption, or circumstantial proof, and, as such, it does not irretrievably convert the initial contribution into marital property;

b. a spouse is credited on a dollar-for-dollar basis for the initial contribution of separate property which led to the creation of the marital asset unless the funds were so commingled so as to lose their separate characteristics and identity; and

c. that Banking Law § 675(b)'s presumption of donative intent is not insurmountable and can be rebutted via logical rational explanations.

This appears to be part of a trend, having evolved along parallel lines, which circumvents the potential injustices of the statute regarding property distribution which, if strictly applied, would offend our notion of equity and fair play.[38]

Endnotes

1. *Pajak v. Pajak*, 56 N.Y.2d 394, 396, 452 N.Y.S.2d 381 (1982); *Brady v. Brady*, 64 N.Y.2d 339, 346, 486 N.Y.S.2d 891 (1985).
2. *Judson v. Judson* 255 AD2d 656, 679 N.Y.S.2d 465 (3d Dep't 1998); *Seidman v. Seidman*, 226 AD2d 1011, 641 N.Y.S.2d 431 (3d Dep't 1996); *Walasek v. Walasek*, 243 AD2d 851, 664 N.Y.S.2d 626 (3d Dep't 1997); *Gotsky v. Gotsky,* 208 AD2d 676, 617 N.Y.S.2d 517 (2d Dep't 1994); *Sarafian v. Sarafian,* 140 AD2d 801, 528 N.Y.S.2d 192 (3d Dep't 1988); *Galachiuk v. Galachiuk*, 262 AD2d 1026, 691 N.Y.S.2d 828 (4th Dep't 1999); *Leroy v. Leroy*, 274 AD2d 362, 712 N.Y.S.2d 33 (1st Dep't 2000).
3. *Heine v. Heine*, 176 AD2d 77, 580 N.Y.S.2d 231 (1st Dep't 1992), *lv. denied* 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632.

4. *Price v. Price*, *69* N.Y.2d 8, 511 N.Y.S.2d 219 (1986); *McSparron*, 190 AD2d 74, 597 N.Y.S.2d 743 (3d Dep't 1993).

5. DRL § 236B(1)[c]; *Coffey v. Coffey*, 119 AD2d 620, 501 N.Y.S.2d 74 (2d Dep't 1986); *Cunningham v. Cunningham*, 105 AD2d 997, 482 N.Y.S.2d 148 (3d Dep't 1984); *Lisetza v. Lisetza*, 135 AD2d 20, 523 N.Y.S.2d 632 (3d Dep't 1988); *Judson, supra*, fn. 2; *McGarrity v. McGarrity*, 211 AD2d 669, 622 N.Y.S.2d 521 (2d Dep't 1995); *Lauricella v. Lauricella*, 143 AD2d 642, 532 N.Y.S.2d 907 (2d Dep't 1988); *Askew v. Askew*, 268 AD2d 635, 700 N.Y.S.2d 594 (3d Dep't 2000).

6. 233 AD2d 387, 650 N.Y.S.2d 237 (2d Dep't 1996).

7. 273 AD2d 423, 710 N.Y.S.2d 105 (2d Dep't 2000).

8. *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 489 N.Y.S.2d 58; *Coffey, supra*, fn. 5; *Butler v. Butler*, 171 AD2d 89, 574 N.Y.S.2d 387 (2d Dep't 1991).

9. *McAlpine v. McAlpine*, 176 AD2d 285, 574 N.Y.S.2d 385 (2d Dep't 1991); *Lauricella v. Lauricella*, 143 AD2d 642, 532 N.Y.S.2d 907 (2d Dep't 1988); *Coffey, supra*, fn. 5; *Parsons v. Parsons*, 101 AD2d 1017, 476 N.Y.S.2d 708 (4th Dep't 1984); the only exception that this writer was able to find was in a recent Second Department decision, *Klein v. Klein*, __ AD2d __, 745 N.Y.S.2d 569 (2d Dep't 2002), where the Appellate Division inexplicably held that the appreciation of shares of stock gifted prior to the marriage were marital property.

10. *Corasanti v. Corasanti*, 744 N.Y.S.2d 614 (4th Dep't 2002); *Jones v. Jones*, 289 AD2d 983, 734 N.Y.S.2d 796 (4th Dep't 2001).

11. *MacDonald v. MacDonald*, 226 AD2d 596, 641 N.Y.S.2d 349 (2d Dep't 1996); *Burns v. Burns*, 193 AD2d 1104, 598 N.Y.S.2d 888, *mod.* 84 N.Y.2d 369, 618 N.Y.S.2d 761; *Robertson v. Robertson*, 186 AD2d 124, 125, 588 N.Y.S.2d 43; *Litman v. Litman*, 280 AD2d 520, 721 N.Y.S.2d 84 (2d Dep't 2001); *Beece v. Beece*, 734 N.Y.S.2d 606, 289 AD2d 352 (2d Dep't 2001).

12. 94 AD2d 711, 462 N.Y.S.2d 240 (2d Dep't 1983).

13. 134 AD2d 334, 520 N.Y.S.2d 810 (2d Dep't 1987); *Maczek v. Maczek*, 248 AD2d 835, 669 N.Y.S.2d 749 (3d Dep't 1998).

14. 224 AD2d 888, 638 N.Y.S.2d 238 (3d Dep't 1996).

15. 255 AD2d 711, 680 N.Y.S.2d 690 (3d Dep't 1998).

16. *Heine, supra*, fn. 3; *Sarafian v. Sarafian*, 140 AD2d 801, 528 N.Y.S.2d 192 (3d Dep't 1988); *Feldman v. Feldman*, 194 AD2d 207, 605 N.Y.S.2d 777 (2d Dep't 1993).

17. *Greenley v. Greenley*, 175 AD2d 824, 573 N.Y.S.2d 300 (2d Dep't 1991); *Fabricius v. Fabricius*, 199 AD2d 695, 605 N.Y.S.2d 415 (3d Dep't 1993); *Kosovsky v. Zahl*, 257 AD2d 522, 684 N.Y.S.2d 524 (1st Dep't 1999).

18. *Carney v. Carney*, 202 AD2d 907, 609 N.Y.S.2d 425 (3d Dep't 1994).

19. *Sarafian, supra*, fn. 2.

20. *Galachiuk v. Galachiuk*, 262 AD2d 1026, 691 N.Y.S.2d 828 (4th Dep't 1999).

21. *Heine v. Heine*, 176 AD2d 77, 580 N.Y.S.2d 231 (1st Dep't 1992), *lv. denied* 80 N.Y.2d 753, 587 N.Y.S.2d 905, 600 N.E.2d 632.

22. *Id.* at 84.

23. *Feldman v. Feldman,* 194 AD2d 207, 605 N.Y.S.2d 777 (2d Dep't 1993).

24. *DiNardo v. DiNardo*, 144 AD2d 906, 534 N.Y.S.2d 25 (4th Dep't 1988); *Glazer v. Glazer*, 190 AD2d 951, 593 N.Y.S.2d 905 (3d Dep't 1993).

25. *Saasto v. Saasto*, 211 AD2d 708, 621 N.Y.S.2d 660 (2d Dep't 1995).

26. 165 AD2d 426, 568 N.Y.S.2d 29 (1st Dep't 1991).

27. 172 AD2d 990, 568 N.Y.S.2d 495 (3d Dep't 1991), *lv. denied* 78 N.Y.2d 863, 578 N.Y.S.2d 878, 586 N.E.2d 61.

28. *Karounos v. Karounos*, 206 AD2d 407, 614 N.Y.S.2d 535 (2d Dep't 1994).

29. 156 AD2d 671, 549 N.Y.S.2d 438 (2d Dep't 1989).

30. *McSparron v. McSparron*, 190 AD2d 74, 597 N.Y.S.2d 743 (3d Dep't 1993).

31. *Wiercinski v. Wiercinski*, 116 AD2d 789, 497 N.Y.S.2d 179 (3d Dep't 1986); *DiNardo, supra,* fn. 24*; Pauk v. Pauk*, 232 AD2d 386, 648 N.Y.S.2d 621 (2d Dep't 1996); *Brezinski v. Brezinski*, 94 AD2d 969, 463 N.Y.S.2d 975 (4th Dep't 1983); *Haas v. Haas*, 265 AD2d 887, 695 N.Y.S.2d 644 (4th Dep't 1999); *Jones v. Jones*, 289 AD2d 983, 734 N.Y.S.2d 796 (4th Dep't 2001).

32. *Rosenkranse v. Rosenkranse*, 290 AD2d 685, 736 N.Y.S.2d 453 (3d Dep't 2002); *Brezinski v. Brezinski*, 94 AD2d 969, 463 N.Y.S.2d 975 (4th Dep't 1983); *Krinsky v. Krinsky*, 208 AD2d 599, 618 N.Y.S.2d 36 (2d Dep't 1994); *Gundlach v. Gundlach*, 223 AD2d 942, 636 N.Y.S.2d 914 (3d Dep't 1996); *McCanna v. McCanna*, 274 AD2d 949, 711 N.Y.S.2d 822 (4th Dep't 2000); *FDIC v. Koffman*, 849 F. Supp. 176; *see also, Giuffre v. Giuffre*, 204 AD2d 684, 612 N.Y.S.2d 439 (2d Dep't 1994); *Anderson v. Anderson*, 286 AD2d 967, 731 N.Y.S.2d 108 (4th Dep't 2001); *Koehler v. Koehler*, 182 Misc. 2d 436, 697 N.Y.S.2d 478 (N.Y. Sup., 1999); *Lagnena v. Lagnena*, 215 AD2d 445, 626 N.Y.S.2d 542 (2d Dep't 1995).

33. 215 AD2d 445, 626 N.Y.S.2d 542 (2d Dep't 1995).

34. 245 AD2d 1113, 667 N.Y.S.2d 180 (4th Dep't 1997); *Anderson v. Anderson*, 286 AD2d 967, 731 N.Y.S.2d 108 (4th Dep't 2001); *McCanna v. McCanna*, 274 AD2d 949, 711 N.Y.S.2d 822 (4th Dep't 2000).

35. *In re Bobeck*, 143 AD2d 90, 531 N.Y.S.2d 340 (2d Dep't 1988); *Brezinsky, supra*, fn. 32; *Chambers v. Chambers*, 259 AD2d 807, 686 N.Y.S.2d 199 (3d Dep't 1999); *Brugge, supra*, fn. 34; *Kosovsky, supra*, fn. 17.

36. *Gundlach v. Gundlach*, 223 AD2d 942, 636 N.Y.S.2d 914 (3d Dep't 1996) *lv. to appeal denied,* 88 N.Y.2d 802, 645 N.Y.S.2d 445 (1996).

37. 241 AD2d 442, 659 N.Y.S.2d 511 (2d Dep't 1997); *Schmidlapp v. Schmidlapp,* 220 AD2d 571, 632 N.Y.S.2d 593 (2d Dep't 1995) ("Although the unimproved lot was the wife's separate property prior to the marriage, she transferred title to the property to herself and the husband as tenants in the entirety after they were married. Thus, the character of the property was changed from separate to marital property."); *Diaco v. Diaco*, 278 AD2d 358, 717 N.Y.S.2d 635 (2d Dep't 2000); *Lynch v. King*, 284 AD2d 309, 725 N.Y.S.2d 391 (2d Dep't 2001).

38. *Musumeci v. Musumeci*, 133 Misc. 2d 139, 506 N.Y.S.2d 629 (N.Y. Sup., 1986); *Anglin v. Anglin*, 80 N.Y.2d 553, 592 N.Y.S.2d 630 (1992); *Lamba v. Lamba*, 266 AD2d 515, 698 N.Y.S.2d 715 (2d Dep't 1999); *Gonzalez v. Gonzalez*, 240 AD2d 630, 659 N.Y.S.2d 499 (2d Dep't 1997); *Thomas v. Thomas*, 221 AD2d 621, 634 N.Y.S.2d 496 (2d Dep't 1995); *Tucker v. Tucker*, 55 N.Y.2d 378, 449 N.Y.S.2d 683 (1982); *Cappa v. Cappa*, 212 AD2d 1056, 624 N.Y.S.2d 1012 (4th Dep't 1995); *Kane v. Kane*, 163 AD2d 568, 558 N.Y.S.2d 627 (2d Dep't 1990); also, see the conclusion of the court in *McMahon v. McMahon*, 187 Misc. 2d 364, 722 N.Y.S.2d 723 (N.Y. Sup., 2001); *O'Connell v. O'Connell*, 290 AD2d 774, 736 N.Y.S.2d 728 (3d Dep't 2002).

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.*, Fall/Winter 2002) 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.

Note: This decision has been substantially edited so it can be published in the* Review. *The insertion of asterisks indicates deleted portions. It is far lengthier and deals with other issues relevant to matrimonial practitioners. It is recommended that you obtain a full decision.

M. Y. Botte v. L. G. Botte, Supreme Court, Suffolk County (Loughlin, Daniel J., March 19, 2002)

For the Plaintiff: Goldstein, Rubinton, Goldstein & Di Fazio, P.C.
18 W. Carver Street, Suite 3
Huntington, NY 11743

For the Defendant: Harry Raptakis, Esq.
88 Second Street
Mineola, NY 11501

This is an action commenced by the plaintiff on October 1, 1999, in which she sought a Judgment of Divorce, with ancillary relief. The action was started by service of a Summons with Action for Divorce printed in bold letters on the face thereof, setting forth the grounds as adultery, cruel and inhuman treatment, and constructive abandonment. Defendant's attorney accepted service of the Summons on behalf of his client.

A Verified Complaint was thereafter served on June 28, 2000, alleging the grounds for divorce as constructive abandonment. The defendant interposed an Answer in which he neither denied or admitted the allegations of plaintiff's Verified Complaint.

The trial of this matter commenced on March 21, 2001, and continued on various dates.

At the conclusion of the trial, counsel for the parties requested time to submit Memorandums of Law, closing arguments, and Affidavits as to a claim of legal fees by the plaintiff. As required by the Suffolk County Supreme Court Dedicated Matrimonial Parts Rules, Trials, Section 10 (Post Trial Submissions) the parties were to submit a post trial memorandum of proposed Findings of Fact and Conclusions of Law. Post trial Memorandums of Law were submitted and the Court did not receive any Findings of Facts and Conclusions of Law.

* * *

At this time, the Court makes the following findings of the essential facts which it deems established by the testimony and reaches its conclusions of law which follow from the testimony and the evidence submitted.

Findings of Fact

1. I find the plaintiff, M. Y. Botte, and the defendant, L. G. Botte, were both over the age of eighteen when this action was commenced.
2. The plaintiff had been a resident of the State of New York for a continuous period of one (1) year prior to the commencement of this action.
3. The plaintiff and the defendant were married in a religious ceremony in the County of Suffolk, State of New York on November 16, 1963.
4. There are no infant children of the marriage. Two (2) children were born of the marriage and they are emancipated.
5. There is no other action pending between the parties with respect to this marriage in this State or any other jurisdiction.
6. Commencing on September 1, 1998, and continuing at least to the date the summons was served, the defendant has refused to engage in sexual relations with the plaintiff, although plaintiff had requested sexual relations, and both parties were physically and mentally capable of doing so, and which refusal had been without any just cause or provocation.
7. Plaintiff has stated she will take all steps within her power to remove all barriers to defendant's re-marriage.

History of the Marriage

The parties were married on the 16th day of November, 1963, in a religious ceremony held in Suffolk County, New York. The plaintiff was born on May 31, 1940 and the defendant was born on January 5, 1940. At present, the plaintiff is 61 years old and the defendant is 62 years old. Both parties are in relatively good health.

The parties agree that the defendant was continuously employed on a full-time basis since the date of the marriage to and through the date of the trial. In 1971 the defendant became an employee of the New York Telephone Company and after a series of telecommunications reorganizations and mergers, the defendant ultimately became employed by Verizon, where he is still employed.

Defendant holds a Bachelor of Science degree in electrical engineering and during the marriage he acquired a Masters Degree in electrical engineering and a Masters of Business Administration. He also acquired a Professional Engineer's License during the marriage.

He was promoted to Director of Finance in 1990 and in 1999 he earned an income of $120,368.00. His position also entitled him to a series of benefits, i.e. five (5) week vacations, medical insurance, dental insurance, vision care, life and disability insurance as well as numerous stock options and bonuses. Defendant enjoys good health.

The plaintiff was employed from November 1963 to October 1964, when she left her employment as she prepared to give birth to their first child due in March 1965. A second child was born in 1968. After the plaintiff ceased working in October 1964 she did not resume work until 1990, some 26 years later.

Throughout the 26 years the plaintiff was a stay-at-home mom, at first caring only for the needs of their first-born child, M., who was diagnosed as being deaf in 1967, at two (2) years of age. One (1) year later a second child was born. Mrs. Botte, the plaintiff, performed all of the duties and responsibilities of a mother, wife, homemaker, etc. for the next twenty-six (26) years. Those normal duties were also coupled with the responsibility to take M. to speech therapy three (3) times a week, and perform the additional responsibilities of a parent with a child that is so afflicted. When M. became a full-time student at the Cleary School for the Deaf, the plaintiff became active in the programs of that school to foster M.'s progress.

The plaintiff testified, at length, as to the homemaking services and child rearing services she performed throughout the marriage. She purchased and prepared all of the food for the family and also purchased the children's clothing. She was responsible to clean the house each day. She did the laundry and ironing for the family, including her husband's dress shirts. She cleaned carpets, waxed the floor, hung wallpaper, painted, and also worked outside in the yard. She testified that she cut the grass each week so that her husband would be relieved of that responsibility on the weekends. She also planted flowers in the yard in the Spring and raked leaves in the Fall. She was intricately involved in all of the children's activities. She drove them to after-school functions, sports activities and to visit friends. She got both children up for school every morning and prepared breakfast and lunch for them. The plaintiff put her son on the bus in the morning and was at home to take him off the bus in the afternoon. She was involved in the PTA at her son's school and served as secretary in that organization. She chaired/co-chaired several fund-raising functions at the school, including a Chinese Auction and the Annual Fund Raising Dinner Dance. In addition, she was also co-editor of the school's monthly newsletter. She volunteered as a lunch and recess aide at the school. In order to better communicate with her son, she learned sign language. She continued to be involved in the activities of their children throughout their school years.

Besides attending to their children's school needs, she was also responsible to take the children to the doctor for checkups and sick visits, dental appointments, religion classes, and orthodontist appointments for braces for their daughter, visits to the audiologist to track their son's hearing loss and to the hearing aid dealer to maintain ear molds and hearing aids.

Mrs. Botte attended to the shopping for the children's clothes, of birthday and holiday gifts, as well as those for family members and kids birthday parties. She was the person responsible for the children seven (7) days a week.

In July 1990, Mr. Botte left the family home and established a separate residence. This abandonment continued for six (6) months, at which time Mr. Botte returned to the marital home in late 1990. Other than that brief period of abandonment, the defendant and plaintiff resided together from August 1963 to August 1999, a period of thirty-six (36) years. Just about a month before the commencement of this action, the defendant again left the marital home and took residence with another woman. Defendant, with an inheritance received from his father, purchased a new home where he continues to reside with a younger woman and her children. Up to the time of the trial, the defendant was still employed as a Director of Finance with Verizon, a position he attained prior to the first abandonment of Mrs. Botte in 1990. Apparently, after receiving that promotion he decided that his economic partnership with the plaintiff was no longer necessary and he adopted his theory of a unilateral termination of their economic partnership.

* * *

Issues

1. The defendant contends that the economic partnership terminated in 1990, following his first abandonment of Mrs. Botte, inasmuch as the parties thereafter maintained separate banking accounts and covered their own living expenses, even though Mr. Botte subsequently returned to the marital residence. He contends these acts cut off any claim to an equitable distribution award to Mrs. Botte as to property acquired by the parties after 1990. He also contends that should the Court conclude otherwise, then any award made should involve the post-1990 property of both parties.

2. The defendant also contends that due to the assets from the pre-1990 marital property, which will be distributed to Mrs. Botte, there is no need for a maintenance award, but if the Court determines an award should be made, it must consider her income and should be of a short duration as the parties are approaching retirement age.

3. The defendant further contends that an award of attorneys fees to plaintiff's counsel would not be appropriate in light of the significant amount of assets which would be awarded to Mrs. Botte from the pre-1990 marital property.

Equitable Distribution

The plaintiff asserts that all property acquired by the parties during the period of the marriage, to wit: 1963 to October 1, 1999 (the commencement date of the divorce action) was marital property and it should be distributed equally. A list of that property is hereafter set forth.

The plaintiff claims the concept of marital assets includes all property acquired during the course of the marriage up to the date of the commencement of this action, other than property acquired by gift or inheritance. The defendant agrees with that principal for the period 1963 to 1990, but then claims that such awards are based on marriage being an economic partnership and he claims that the economic partnership between these parties terminated in 1990. Accordingly, all property acquired by the parties after that date is the sole property of the person who acquired that property.

This action was commenced on October 1, 1999, and the Court must determine if the fact that the parties financial and living arrangements implemented in 1990, after the defendant abandoned Mrs. Botte when he left the marital residence in 1990 for a six (6) month period and then returned, constituted in law, the termination of the economic partnership. Defendant contends that it did terminate the economic partnership so as to preclude Mrs. Botte from sharing in property he acquired since that date.

* * *

The parties have also stipulated that the marital house at 42 Adrienne Lane, Hauppauge, New York, is valued at $275,000.00. It is also stipulated that the plaintiff-wife is to remain at that residence as part of her distributive award and other marital assets will be adjusted to account for that distribution.

Position of the Parties

There can be no dispute that Section 236(B)(5)(d) of the Domestic Relations Law reflects the awareness that marriage is, among other things, an economic partnership, the success of which depends not only on the respective economic contributions of the parties, but also on a wide range of unremunerated services to the joint enterprise, such as homemaking, raising children, and providing the emotional and moral support necessary to sustain the other spouse in coping with life outside the home (***Price v. Price***, 69 NY2d 8, 511 NYS2d 279; ***Mele v. Mele***, 152 AD2d 685, 544 NYS2d 25).

Under equitable distribution, all property acquired during a marriage is presumed marital *(**Lischynsky v. Lischynsky***, 120 AD2d 824, 501 NYS2d 938) and in long-term marriages such as this one (36 years), marital property is generally divided 50-50 *(**Bisca v. Bisca***, 108AD2d 773, 485 NYS2d 302).

It is defendant's position that such presumption applies up to 1990, but after that date it does not. Mr. Botte left the marital home in 1990 and returned some six (6) months later. He contends that when he returned, the parties lived together as roommates and no longer as a financial entity. He alleges that during his absence Mrs. Botte returned to the work force after a twenty-six (26) year absence. During Mr. Botte's six (6) month absence, Mrs. Botte established her own individual bank accounts, deposited her checks into her accounts, and paid her own bills, as did Mr. Botte. This continued when Mr. Botte returned to the marital home in late through 1990 and all the way through 1999.

The facts show that the parties continued to reside together in the same residence up until one (1) month prior to the commencement of this action. The defendant received the benefit of all of the plaintiff's economic and non-economic contributions, up until the commencement of this action. Since 1990 the defendant never requested or commenced a divorce action, nor a separation agreement, both which would have served as a cut-off date to the accumulation of marital assets.

* * *

Discussion

Mr. Botte's counsel advances a concept of a marital partnership, the economics of which any party may terminate by the simple device of unilaterally changing title to instruments of financial value, which were marital in nature until moments before that change was unilaterally initiated. If so, such a theory disregards, the present state of the Domestic Relations Law in this jurisdiction and appears to be a reverter to the pre-1980 status of titled instruments.

When the legislature advanced the marriage partnership model, it deliberately distanced itself from the old title theories of property. Under such a titled concept, the spouse who legally owned or acquired property did not have to share it with his or her spouse. It substituted equality for title, initially in recognition of women's increasing expanding role in business, society and home.

That legislation, in one moment of time, removed the titled spouse from the dominant position in the marriage to a concept of a partnership with an acknowledgment that all resources acquired during the marriage are part of a shared unit, giving recognition to the fact that each partner contributes equally to the success of a marriage partnership, whether at home or in the work place. The tasks each performs are dependent upon the success of each other and the knowledge that without each person's support, the marriage cannot succeed. Its purpose was to create a marriage of equals, where each spouse contributes to the marriage in different but equally valuable ways. It recognizes that the work a wife performs under the nature of a homemaker are parallel to the work a husband performs in seeking financial gain.

The defendant claims that such economic partnership was terminated in late 1990 when he returned to the marital home after his first abandonment of Mrs. Botte. He bases that termination not upon any recognized lawful process, but upon the fact that following his abandoning the marital home in 1990, Mrs. Botte returned to the work force and opened her own banking accounts. She continued that practice when Mr. Botte returned to the house, and for the next nine (9) years, as did Mr Botte. It is his contention that because the parties maintained separate bank accounts after 1990 and covered their own expenses; they had by those acts entered into an agreement terminating their economic partnership.

Such a conclusion cannot be reached in this State where our courts have continually held that only a written Separation Agreement or a Divorce Decree can terminate a marital partnership.

Justice Bellacosa, writing the majority decision for the Court of Appeals in ***Anglin v. Anglin***, 80 NYS2d 553, 592 NYS2d 360, in a case which involved a separation action, set the following standard as to what objectively signifies when and how a marital economic partnership should be considered dissolved when he stated the following:

> "The economic partnership should be considered dissolved when a matrimonial action is commenced which seeks divorce, or the dissolution, annulment: or declaration of the nullity of a marriage, i.e., an action in which equitable distribution is available *(see,* Domestic Relations Law '236[B][5]). That provides internal consistency and compatibility and objective verification, as opposed to uneven, ephemeral, personal interpretations as to when economic marital partnerships end. This Court has said that the 'winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets'—a winding up consistent with the termination of a partnership—is to be carried out *"upon dissolution of the marriage" (**O'Brien v. O'Brien**,* 66 NY2d 576, 585, 498 NYS2d 743, 489 N.E.2d 712 [emphasis added]). All separation actions do not actually or realistically constitute the functional or cognizable equivalent of the dissolution of a marital economic partnership or ***633 [607 N.E.2d** 780] of the marriage itself. Indeed, a separation decree, using somewhat Victorian terms, serves only to "separat[e] the parties *from bed and board, forever, or for a limited time"* (Domestic Relations Law § 200 [emphasis added]). Moreover, while a separation judgment may be used as a predicate for divorce *(see,* Domestic Relations Law § 170[5], *the law requires another definitive act bar a party—a discrete action at law—to legally effectuate the divorce objective and terminate the marriage*." [emphasis supplied]
>
> "It is pertinent that the Legislature has expressly allowed a *separation agreement* to fix the cutoff date for accrual and control the distribution of the economic fruits of the marital economic partnership. In effect, the Legislature has allowed parties to contract out of th[e] system of marital property and maintenance *(see* Member of Assembly Mem., 1980 N.Y. Legis. Ann., at 130). Because a

> separation agreement constitutes a voluntary bilateral mechanism allowing parties to opt out of the statutory equitable distribution regime, the statute places the agreement on a par of materiality and legal effect with the commencement of a qualifying matrimonial action that would legally terminate the marital economic partnership. As Justice Levine aptly noted, because the spouses have the power to provide for the entire disposition of marital assets in a separation agreement, and commonly do so, it was appropriate and consistent to designate the execution of a separation agreement as an alternative *terminating event* in [80 NYS2d 558] defining marital property for equitable distribution purposes in Domestic Relations Law § 236(B)(1)(c) *(**Anglin v. Anglin**, 173* AD2d 133, 136, 577 NYS2d 963, ***supra*** [emphasis added])."

It is interesting to note that the ***Anglin*** case involved a separation action which was held not to constitute a terminating event for a marital partnership, although admittedly, a more public acknowledgment incident than the highly subjective scenario relied upon by the defendant in this case.

Prior to the ***Anglin*** case **(*supra*),** the Appellate Division, 2nd Department, was the lone dissenter as to whether or not a separation action can serve as a cut-off point for the accrual of marital assets. Since that case, all Appellate decisions recognize that the termination points for marital asset accruals are limited to a divorce action or the execution of a valid written marital agreement. Section 236(b)(3) or the Domestic Relations Law states that "(a)n agreement by the parties made before or during the marriage shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in a manner required to entitle a deed to be recorded."

The Court zealously recognized that outside of such a marital agreement the cut-off date to terminate an economic partnership is the commencement of an action for divorce.

It is interesting to note that the Court's adherence to such a strict approach is noted even when a marital agreement is executed, which agreement has not met the rigid acknowledgment requirements. In such a case, the agreement of the parties is not recognized as the Court of Appeals has characterized the formalities of subscription and acknowledgment of a written agreement as a "bright-line rule" *(**Matisoff v. Dobi**,* 90 NY2d 127, 659 NYS2d 209; ***Rubenfeld v. Rubenfeld**,* 279 AD2d 153, 720 NYS2d 29).

Departures from a strict appliance of Section 236(B)(3) of the Domestic Relations Law are only permitted with the greatest scrutiny. Such departures follow a pattern of reasoning away from acts which occur prior to the commencement of a matrimonial action. In post-commencement issues, the courts have carefully and guidingly limited the enforceability of any oral agreement to terminate an economic partnership to those instances where a stipulation is "placed on the record in open court," where counsel and the parties are present and participating. They have held the need for a writing is a hollow formality at such times *(**Nordgren v. Nordgren**,* 264 AD2d 825, 695 NYS2d 588; ***Natole v. Natole**,* 256 AD2d 558, 682 NYS2d 864).

* * *

Marital parties may agree that property they acquire during the marriage will be divided in a particular manner, but that agreement must be in writing (See DRL § 236[B](3); ***James v. James**,* 202 AD2d 1006, 609 NYS2d 485; ***Cooper v. Cooper,*** 217 AD2d 904, 630 NYS2d 158) or be part of an oral stipulation placed upon the record in open court *(**Ashcraft v. Ashcraft,*** 195 AD2d 903).

The informal financial agreement urged by Mr. Botte as a terminating event falls far short of the procedural and statutory requirements of the Appellate Courts of this State.

Absenting a statutory permissible event, the property acquired by both parties from 1963 to 1999, other than by gift or inheritance, is marital and then must be distributed based upon equitable considerations and the thirteen (13) enumerated factors found in Domestic Relations Law § 236 [B][5][C][D] and more particularly to those to which specific reference is hereafter made herein.

The Court has examined the cases cited by the defendant's counsel in support of his argument that the economic partnership was terminated by the parties in 1990. While those cases deal with the issues of a termination of a marital partnership, they involve marriages where the parties actually physically separated for more than a considerable period of time.

In this case, the parties resided together for some 35½ years of a 36-year marriage. Furthermore, those cases are more concerned with the issue of determining a percentage of distribution rather than a defendant contends a finding that the economic partnership had terminated and there would be no question of equitable distribution remaining.

* * *

While the record demonstrates that the defendant was responsible for the major share of the economic contributions to this marriage, the Court concludes that this 36-year marriage has been one of equal contributions to the marriage. The efforts of Mrs. Botte prior to the children being emancipated and since the 1990 initial abandonment of her by the defendant, show an overwhelming participation in this marriage. This overparticipation occurs because she assumed the full responsibility for the home and the children and when they left, she returned to the work force after twenty-six (26) years, where she then used her own income to cover her personal expenses and household day-to-day expenses, all of which permitted the defendant to apply a greater portion of his salary to his savings plan.

* * *

The thirty-six (36) year marital investment which Mrs. Botte made in Mr. Botte, gives her a right to expect that her time at home and work entitled her to an equal division of all property acquired during the marriage to the commencement date of this action, except that acquired by gift or inheritance.

* * *

The defendant was unable to offer any testimony that such options, or in fact, any options were for future services, which would make them separate property, but his testimony tended to prove the options were awarded solely based on past services rendered. Those options evaporate if the husband terminates his employment.

It is well settled law that where there is a long term marriage and both parties contribute to the economic and non-economic aspects of the marriage, a 50-50 split or equal distribution of the marital assets is appropriate "although equitable distribution is not necessarily equal distribution" (***Rodgers v. Rodgers***, 98 AD2d 386, 470 NYS2d 401). Where as here both sides contribute to a marriage that is of long duration, a division of the marital assets should be made that is as equal as possible (***Ahrend v. Ahrend***, 123 AD2d 731, 507 NYS2d 202; ***Bisca v. Bisca***, 108 AD2d 773, 485 NYS2d 302; ***Miller v. Miller***, 128, AD2d 844, 513 NYS2d 764).

In the instant case, the parties, as of October 1, 1999, were married six (6) weeks shy of thirty-six (36) years. In accordance with Appellate case law, the marital assets should be divided equally. The parties are directed to cooperate with each other (***Chivara v. Chivara***, NYLJ, 5/22/97 - Kings County).

* * *

The Court determines all of the options to be marital property and to be distributed on a 50-50 basis when exercised if Mrs. Botte tenders her portion of the exercise price, after due notice.

The Court recognizes that equitable does not necessarily have to be on an equal or a 50-50 basis (***Ackley v. Ackley***, *100* AD2d 153, 472 NYS2d 804; ***Rodgers v. Rodgers***, 48 AD2d 386, 470 NYS2d 401; ***Wand v. Wand***, 94 AD2d 908, 463 NYS2d 634; ***Arvantides v. Arvantides***, 64 NY2d 1033, 489 NYS2d 58).

It is also aware that it is the Court's responsibility to "mold an appropriate decree because what is fair and just in one circumstance may not be in another" (***Rodgers, supra*** at 391).

* * *

Accordingly, the Court finds that the facts and circumstances of this case warrant an equal division of the marital property.

Maintenance

Plaintiff is requesting lifetime maintenance in the sum of $35,000.00 per year. The defendant contends that plaintiff's needs do not warrant any award for maintenance. He points out that the Court must consider the assets awarded to her by way of equitable distribution and her income from such assets, as well as her present salary, and claims all of which would be more than sufficient to cover the needs of Mrs. Botte.

It is interesting to note that Mr. Botte's salary is $120,000.00 and Mrs. Botte's salary is $34,000.00. Mr. Botte's salary may increase during his work years while Mrs. Botte's position has no growth potential other than some token salary increases.

* * *

Where the Court is dealing with a long-term marriage (36 years), which is being terminated after the child-caring years and societal needs have been completed, it must acknowledge that a loss of a living standard is usually experienced by the spouse whose duties and sacrifices during the marriage insured that his or her own wealth and earning capacity would be considerable less than those experienced by the primary wage earner.

It is the awareness of such a realty that urges a court to approach the issue of a maintenance award by calculating the needs and compensation of such spouse for the loss attendant to the dissolution of along-term marriage.

That awareness must also acknowledge that any maintenance award is not solely based on need, but also in recognition of entitlement for a lifetime of caring, nurturing, relinquishment of an economic future, all mandated to attend to the needs of a growing family and an upward moving spouse.

It is only by giving the stay-at-home spouse recognition for the enormity of his or her role in the economic partnership that we give credence to the toil and effort of such a spouse who anchors a marital partnership by those activities.

* * *

Based on the length of this marriage (36 years), the age of the plaintiff (61 at trial), the limited prospects of financial growth from her employment, plaintiff's contributions to the economic success of the defendant, the major disparity between the income of the plaintiff and defendant (3½ times greater), this Court concludes that lifetime maintenance is warranted.

In light of the evidence addressed at trial, and based on all the facts considered by the Court, including the distributive award, the age of the parties, the reasonable needs of the plaintiff, the limited opportunity for employment enhancement for the plaintiff, the educational and employment background of the defendant, the disparity between the parties' income, the Court hereby awards the plaintiff/wife the sum of $400.00 per week in maintenance and support. The Award of maintenance herein will terminate by operation of law, upon the death of either party or upon plaintiff's valid or invalid subsequent marriage, or upon modification of the award pursuant to Section 236(b) of the DRL or Section 248, thereof.

* * *

In making an award of maintenance herein, the Court deliberately did not make an allowance for an adjustment in support when and if the plaintiff starts receiving social security benefits. Based on her limited income, it is unlikely such an award would be substantial and with a reduction in her work income, she may suffer dire financial needs. Should her social security benefits be in a sum which would substantially increase her income, the defendant may move to modify any judgment accordingly *(**Cameron v. Cameron**,* 238 AD2d 925, 661 NYS2d 153).

* * *

Interest

The plaintiff requests that the Court, in making a distribution award, should have the same bear interest at the rate of nine (9%) percent per annum. The award of interest on a Judgment is discretionary under Section 5001 (a).

The Court declines to award pre-judgment interest due to the sizeable nature of the award being made herein and the economic package available to plaintiff *(**Schanback v. Schanback**,* 159 AD2d 498, 552 NYS2d 37 0). The Court is mindful that the economic conditions which have prevailed in this country during the period this matter moved through the courts do not support imposing a nine (9%) percent interest award. The Court feels such an award could only be assumed to be punitive in nature and not warranted by the facts herein *(**Selinger v. Selinger**,* 250 AD2d 752, 672 NYS2d *913; **Lipsky v. Lipsky**,* 276 AD2d 753, 715 NYS2d 427 - 2nd Dept. 2000).

Post-judgment interest will be awarded at nine (9%) percent commencing thirty (30) days after the entry of a Judgment in which the assets awarded under equitable distribution are to be distributed and will continue until said assets are in fact distributed. The stock option award will not bear interest until thirty (30) days after it is distributed under the Verizon plan, and then only after the plaintiff completes any procedures required to attain her one-half (½) of said stock options.

* * *

Conclusion

The Court cannot help but note that all of defendant's economic and job achievements were put in place during the first 26 years of the parties' marriage, which occurred prior to the defendant's abandonment of the plaintiff in mid-1990.

It is those same achievements which provided defendant with his current income level and plaintiff's homemaking contributions during those 26 years were the catalyst which qualified Mr. Botte to attain his position as a Director of Finance.

From 1990 to 1999, the plaintiff not only continued to provide her services as a homemaker, but she returned to the work force and used her independent income to pay her personal expenses, as well as for food and household expenses. As a result of those financial actions, Mr. Botte was able to deposit in his employer savings plan an even greater sum of his wages and in turn, qualify for a greater matching contribution from his employer. The contributions of Mrs. Botte over a 36-year period mandate a 50/50 division of assets acquired during the marriage. This Court, guided by reason, conscience, and law must do so to attain a just resort.

As to maintenance, the Court must recognize that this is a 36-year marriage, that Mrs. Botte gave up 26 years of her potential economic development opportunity in the labor market, that she lacks sufficient resource; as a result of her career as a parent and homemaker for those 26 years to ever be self-supporting, that she is now 61 years of age and non-durational maintenance must be awarded.

Recent Decisions and Trends

By Wendy B. Samuelson

Parental Alienation and Family Therapy

***Zafran v. Zafran*, N.Y.L.J., Oct. 21, 2002, p. 26, col. 2 (Nassau Co.) (J. Ross)**

The parties stipulated for the court to appoint a neutral forensic psychologist to evaluate the parties and their children in order to address the allegations of parental alienation, custody and visitation, (i.e., a *Frye* hearing). They stipulated to waive a hearing and submit affidavits instead. In addition, the court relied on, *inter alia*, the prior proceedings and court orders from the Family Court and the prior judge in the Supreme Court, the forensic evaluations of the parties' independent forensic psychologists, the law guardian's recommendations and the *in camera* interview with the children.

During the parties' three-year embroiled divorce litigation, despite a Family Court award of custody of the parties' three children to the mother, the parties' older sons resided with the father, and the parties' five-year-old daughter resided with the mother. The communication between the sons and daughter was strained and infrequent, and their contact with the respective non-custodial parents was practically non-existent.

The court deviated from the specific recommendations of the court-appointed neutral expert who recommended that the father have custody of the daughter. The court found that this assessment was contrary to the recommendations of the child's law guardian, the forensic reports of the previous experts, the MCMI-III results, and the court's own observations that parental alienation was a result of the father's behavior and not the mother's.

During the *in camera* interview with the boys, the court found that they viewed their mother as "the enemy" and "revered" their father as their "savior who persevered . . . in the face of their repressive mother." The court found that they had "extraordinary hostility" toward their mother, including verbal abuse and even physical altercations. They "seemed to be parroting their father's concerns about the outcome of (the) litigation." By contrast, the daughter, pursuant to the neutral forensic report, loved and desired a relationship with her mother and her brothers and father. Furthermore, the MCMI-III report concluded that the father had "histrionic disorder with anti-social and sadistic features," and was "unlikely to admit responsibility for personal and family disorders."

The court decided that it did not want to disrupt the children's present living arrangements, including uprooting a five-year-old child who had lived with her mother all of her life. In addition, the mother had safety concerns if the boys were to live with her. The court acknowledged, as in *Eschbach*, that the general rule is that, whenever possible, the children should reside together, and took exception in this case based on the best interests of the children, including their original parental placement and their emotional and intellectual needs.

The court determined as follows:

> The defendant-mother has been beset with emotional exhaustion in protecting her daughter from the alienation of her husband, and the very real and hurtful effects of this alienation on her two sons, whom she painfully observes to be perpetrators, as well. The alienation of these boys was not a neurotic or flustered observation on this defendant's part, it is a struggle that no parent should endure and one which this Court felt compelled to act upon.

The court found that visitation was the most difficult dilemma because of the boys' strained relations with their mother, the need for the children to see one another, and the father's alienation. The court acknowledged that it does not have the authority to order a parent to undergo psychological therapy as a condition for awarding visitation. The court also considered issuing a *sua sponte* protective order compelling therapy, but then decided that to do so would circumvent the Appellate Division's *stare decisis.* Therefore, the court held a final determination of visitation in abeyance, and issued a temporary visitation order, and directed family therapy by appointing a psychologist as a case manager to conduct family therapy, monitor treatment responses and assess progress. The court directed the psychologist to:

1) meet with the children together on a weekly basis to promote reintegration;

2) meet with the parents separately to reduce the alienating behavior of the father and to reduce the conflict of the parties;

3) select a psychotherapist for the father to have individual sessions to reduce his anger toward the mother and his alienating behavior; and

4) meet with the parents together once a month to discuss the children's progress.

In addition, the court ordered the father to have supervised visitation until the court is satisfied that the father is able to eliminate the alienating behavior. Also, if the boys continue to promote their sister's alienation, the court directed the mother to make an application to determine if the daughter's contact with the brothers should be restricted or eliminated. The court admonished that if the parties did not comply with its orders, that he would refer the matter to the Nassau County Attorney's office with directions that they should consider neglect proceedings.

The court reasoned that, "It will only be with the attention to details that the sordid effects of the plaintiff's alienation of these children can be addressed."

Author's note: *Kudos to Justice Ross for taking a bold and creative stance toward ameliorating severe family dysfunction.*

Visitation and Smoking

***DeMatteo v. DeMatteo*, N.Y.L.J., Oct. 21, 2002, p. 27, col. 6 (Oneida Co.) (J. Julian)**

This author's previous column reviewed *MD v. DD*, 191 Misc. 2d 301, 740 N.Y.S.2d 811 (Oneida County 2002), where, as result of a teenage boy's letter to the judge complaining that his mother smoked in the house and car during his overnight visitations with her, the court issued a *pendente lite* order restraining the mother from smoking in the house 24 hours prior to visitation and from smoking in the car while the child is present.

The court held that it would take judicial notice of certain scientific articles as the basis for holding that environmental tobacco smoke poses a significant health risk to children, and second-hand smoke significantly increases his risks of developing asthma, coronary artery disease, lung cancer and certain chronic respiratory disorders unless there were stated objections. The mother objected.

The court took judicial notice of the facts in the 1986 Report of the Surgeon General that was relied upon by the state legislature and the governor in adopting the 1989 Public Health Law Section 1399 which bans smoking in public places, as follows:

> . . . second hand smoke causes lung cancer in otherwise healthy non-smokers, that the children of smoking parents suffer a higher incidence of respiratory infections and smaller rates of increase in lung functions, and that the separation of smoker and non-smokers in the same air space reduces, but does not eliminate, exposure to second hand smoke.

The mother presented one peer-reviewed study published a decade later which was contrary to the generally accepted proposition that second-hand smoke is a carcinogen and health risk, and therefore the court permitted the mother to challenge the finding, but admonished that she has the burden of proof of demonstrating so by a preponderance of the evidence. The court also required an evidentiary hearing as to how much time must elapse between the mother's indoor smoking and the child's presence to eliminate the health concerns of the child and the law guardian. The court continued its restrictions on smoking in the presence of the child until the final determination of the issue.

Author's note: *This case will be closely watched. It will be interesting to see if any constitutional challenges result. Since smoking is banned in public places, it seems to follow that it would be in the child's best interest that the mother be restrained from smoking in the child's presence. However, this may raise the issue of whether banning a divorcing parent from smoking in front of the children violates the Equal Protection clause.*

Grandparent Visitation

***Toney v. Rendace Toney*, N.Y.L.J., Sept. 30, 2002, p. 35, col. 6 (Nassau Co.) (J. Stack)**

Pursuant to Domestic Relations Law (DRL) section 72, the court granted the paternal grandfather visitation with his five-year-old grandson once a month over the mother's objections and despite the case law that requires the court to give special weight to the parents' wishes. The court determined that it was in the child's best interests to have a "continuing relationship with his grandfather."

When the grandson was born, the grandfather was present at the hospital, and thereafter participated in caring for the child, diapering and feeding him, and spending quality weekend time with him. The parents of the grandson were divorced in September 2001, and the judgment of divorce provided that whenever the father was in New York, he was to have visitation with his son. The father lived far away and only visited approximately once per year. The grandfather wanted to spend quality time with his grandson without waiting for his son's return to New York, and did so for a few months.

Thereafter, the mother objected to the grandfather's visiting with the child despite his repeated requests. The mother testified that the grandfather never acted inappropriately with the child, the child and grandfather had pleasant visits during the litigation, and she and her former father-in-law had an amicable and non-volatile relationship. The mother objected because she wanted quality time with her son on the weekends, the only time she had to spend with him as a result of her

work schedule. She stated that even if she did not work those hours she would still object to the visitation without any reason. In addition, the court determined that the mother's explanation that the child may be "confused" was contradicted by the record. The fact that she had a new fiancee should not deter the child's relationship with his grandfather.

The court awarded grandparent visitation, and reasoned as follows:

> The Petitioner (grandfather) provides the child with an additional opportunity for love, affection and attention. While it is true that the child's life is full and that he has a multitude of maternal relatives who also showered him with affection, the additional attention from his paternal grandfather can only add to his growth and development. If, while he is with his grandfather he learns about his natural father, that factor shall not be considered a negative. . . .

The court commented in *dicta* that although there have been challenges in New York to the DRL § 72 grandparent statute after the United States Supreme Court declared that the Washington statute on nonparental visitation was overly broad and unconstitutional in *Troxel v. Granville,* 503 U.S. 47 (2000), DRL § 72 is still good law, particularly since it is narrowly drafted and only confers rights to grandparents.

Author's note: *This was an "easy" case because the paternal grandfather and the mother had an amicable relationship, and the grandfather had a previously established close relationship with the child. What would be the result where the parent and grandparent are not on good terms and he/she prevented the grandparent from establishing any relationship with the child?*

Domestic Violence as a Factor in Custody Determinations

Wissink v. Wissink, N.Y.L.J., Nov. 14, 2002, p.18, col. 1 (2d Dep't 2002)

The court remanded a custody determination for further proceedings because the Orange County Family Court (J. Bivona) failed to adequately consider the effects of the husband's long history of domestic violence against the mother, i.e., "battered wife syndrome," although he did not directly physically harm his daughter.

DRL § 240(1) mandates the court to consider the effect of domestic violence upon the best interest of the child when determining visitation and custody, and the Second Department determined that although the Family Court considered this, it was "sorely inadequate." The court-ordered mental health evaluation consisted of a social worker's interview of the child on two occasions for 45 minutes, and of each parent for an hour. The social worker concluded that the daughter was far more comfortable and involved with her father than her mother, and that she did not relate well to her mother.

The child expressed her preference to live with the abusive father, and denied witnessing various incidences of domestic violence. The appellate court determined that the court should have ordered a comprehensive psychological evaluation, including a clinical evaluation, psychological testing, and review of records and information, and should have considered the following pertinent factors:

> . . . the nature of the psychopathology of the abuser and the victim, whether the child might be in danger of becoming a future victim, or a witness to the abuse of some other victim; the child's developmental needs given the fact that she has lived in the polluted environment of domestic violence all of her life and the remedial efforts that should be undertaken in regard to all parties concerned.

The court reasoned as follows:

> The devastating consequences of domestic violence have been recognized by our courts, by law enforcement, and by society as a whole. The effect of such violence on children exposed to it has also been established. There is overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury.
>
> Moreover, that child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded.

In addition, the court below erred by failing to consider the father's failure to abide by the child support order (including terminating the electrical and phone service to the marital residence where he was ordered to stay away) as a factor in determining custody pursuant to DRL § 240(1)(a)(4).

Equitable Distribution and Wasteful Dissipation of Assets

***Bodolato v. Bodolato*, N.Y.L.J., Oct. 25, 2002, p. 24, col. 3 (Queens Co.) (J. Mills)**

The parties were married 17 years, were both age 47, and have two daughters ages 13 and 19. The parties stipulated that the wife shall have sole custody. The husband abandoned the wife three years prior to the commencement of the divorce action.

After trial, the court determined that the wife's allegation of domestic violence was not "so egregious it is likely to shock the conscience of the Court," and therefore did not consider the marital fault factor in determining equitable distribution. The court distinguished the case at bar from *Havell v. Islam*, 186 Misc. 2d 727 (Kings County 2000) where the defendant pled guilty to criminal charges of assault in the first degree (by hitting his wife in the head with a barbell). In the case at bar, the court did not state the facts surrounding the domestic violence allegations, but merely acknowledged that the parties obtained mutual orders of protection against each other from the Queens County Family Court, and since then, there have been no further altercations.

The husband borrowed $50,000 against his pension after the commencement of the action and just prior to trial. He argued, without any proof, that he used half of the loan to pay off marital debts, and therefore the wife should be responsible for one half of the debt. However, the court stated: "Defendant did not submit any bills, receipts, statements or other documents, evidencing payments of marital debt, nor does he cite any references to such documentation," and that he may have used some portion of the proceeds to buy a new car or go on vacations. Therefore, the court found that the loan was a wasteful dissipation of marital assets, and ordered the husband to return the remaining funds he took from the pension and to repay the loan amount of $50,000.

In addition, both parties cashed in their life insurance policies prior to trial. The husband alleged that he used the proceeds to pay marital debt, without any supporting evidence, and without making an application for plaintiff to pay back any part of the debt she may be responsible for. The court therefore equalized the cash surrender value of the two policies.

The wife was awarded one half of the value of the husband's New York Police Department pension, deferred compensation and annuity. Since the husband was retired and the pension was in pay status, the court determined that it should be valued as of the commencement of the action and in accordance with the *Majaukas* formula.

The court directed the husband to maintain a life insurance policy, naming the wife and children as beneficiaries to secure his maintenance and child support obligations in the event of his death. The court noted that its decision is grounded in case law rather than statute since DRL § 236(B)(8) merely allows the court to consider "the probably future financial circumstances of each party" and instead found support from the Court of Appeals' case of *Hartog v. Hartog*, and the Second Department cases of *Gold v. Gold* and *Miness v. Miness*.

Author's note: *If you want your client to receive credit for paying marital debts, you must be prepared with the evidence.*

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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 or Microsoft Word), 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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