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Notes and Comments

Elliot D. Samuelson, Editor

Family Law Reform Desperately Needed or "*We made too many wrong mistakes*"—Yogi Berra

The practice of matrimonial law has become increasingly more difficult. There are a number of reasons for this state of affairs, the least of which has been a substantial number of new matters being filed with the courts, and the lack of sufficient jurists to deal with them.

Whether because of these increased filings, or an inefficient system to process these matters, calendar delays have reached epic proportions, and it is not unusual to wait three to six months for a decision on a motion, or six months or longer to obtain a trial date, after a note of issue has been filed. To observe that these statistics are unacceptable does nothing to alleviate their problem.

In writing this column for over 30 years, I have been witness to great changes in matrimonial practice. It is clear that it is as unacceptable to be a critic without solutions as are the calendar delays in the matrimonial parts. While nothing I can write can effect a global change of these problems, calling for the cooperation of the bench and bar, as well as the administrative judges who deal with the matrimonial sector, may well be the foundation to effect change that will do away with these deficiencies. In so doing, we may very well enter a new era of practice, which will preserve the best interests of matrimonial litigants and elevate the standards by which all practitioners should adhere.

Parenthetically, it should be observed that the judges assigned to the matrimonial parts are singularly overburdened with a caseload that cannot be processed within reasonable time constraints. What of course is needed is for the administrative judges to assign at least 25% more jurists to these parts to alleviate the delays in deciding motions and trying cases and reduce the staggering calendar congestion. Justice delayed is justice denied. If a system is in crisis, then extraordinary measures must be utilized to effect change. Enlarging the number of jurists dedicated to the matrimonial parts is a first step. Perhaps, even doing away with the matrimonial parts and allowing all domestic relations matters to be heard by the entire bench in each county would be a better choice. Whatever choice is made, it is clear that either action

Inside

NYSBA

would instantly spread out the caseload of the sitting matrimonial jurists. But one thing is clear. It is intolerable for a contested matrimonial case to languish in the courts for months and sometimes years on end without resolution. We should not stand idly by and do nothing, awaiting another exposé by the *New York Times*.[1]

What must be done in the meantime? The answer to this question is most complex and cannot be resolved without careful reflection and the exercise of prudent judgment. I have attempted to do just that, in arriving at a 10-point program that I feel may create an atmosphere of collaboration, cooperation, and conviviality, and reduce delays. In essence, this proposed solution can be articulated within the following aspirations.

1. All motions that are filed in a matrimonial part may be adjourned upon the consent of the parties by simply notifying the court in writing of the new court date selected.

2. All individual court rules should contain a provision that if a motion has not previously been adjourned, any contested application for such adjournment will be normally granted, except for extraordinary circumstances that would require the denial of the application.

3. Litigants will not be required to attend preliminary conferences nor at the return date of any motion that is made during the course of the litigation, except where one of the parties requests that both parties be present. In such instance, it will be incumbent upon the party who requests a personal appearance before the court to seek the consent of his or her spouse, before making such request to the judge assigned to the case. Such requests shall be made by telephone conference call by the attorneys representing the parties.

4. All motion calendars, shall be staggered throughout the day in one hour segments. For example, if there are 12 cases on a court's motion calendar that require the appearance of counsel or the parties, there shall be six one-hour segments beginning at 9:30 AM, recessing for lunch between 12:30 AM until 2:00 PM, so that two cases will be calendared in each segment. This will greatly reduce the cost to litigants for their attorneys having to bill for waiting time and the clients having to lose time from their profession, businesses or child care obligations when personal appearances are mandated.

5. The court will not require the submission of printed forms on the day counsel appear before the court. Instead, such forms will be completed prior to the return date of the appearance, and submitted to the court by e-mail. If counsel fails to comply with this rule, the matter shall be marked off the calendar and no access will be had to the judge assigned to the case, or his or her law secretary. If other forms are required to be submitted on the return day of the motion, the same rule will apply. For example, if it is required that the parties exchange net worth statements, such submission shall be made by e-mail at any time prior to the return date of the motion. If, however, one party fails to comply with this rule, the defaulting party will be penalized by imposing fines that will compensate the non-defaulting party for the wasted time in appearing before the court and finding that the case is not on the calendar because of the failure of one party to comply with these rules.

6. The court will set aside one hour of each day for telephone conferences with the attorneys for the parties. Counsel must communicate with the judge's chambers and obtain a time that these telephone conferences can be had. These telephone conferences, in order to be productive, must contain a written agenda of the points to be discussed and the arguments advanced by each side and must be submitted to the court at least three days prior to the conference.

7. Trials of contested cases shall be held from day to day until completed. On the days that a court is engaged on trial, the court's law secretary shall conduct all conferences in an attempt to resolve all such matters. No case that is on trial shall be adjourned to a later date without an extraordinary reason to do so.

8. All judgments and orders submitted to chambers shall be returned and signed no later than ten days following receipt.

9. No appeal shall be taken before a conference is had with the trial court, wherein it will be discussed if there is any possibility of resolving these issues and settling the matter. The time consumed in such settlement negotiations will be deducted from the 30 days that a notice of appeal must be served.

10. No oral arguments will be permitted on motions in the Supreme Court. Oral arguments in the appellate courts shall only be made upon the request of the court after receiving the briefs of counsel, and all arguments contained therein.

Whether any or all of these 10 points can be implemented remains to be seen. But one thing is certain, a collaboration between bench and bar to arrive at these economies of time will certainly improve the practice with the resultant benefits to litigants.

We ask our readers, both from bench and bar, to submit to us their reactions to this column and any suggestions they have that will result in an economy of effort that will aid in ending, or at least reducing, the unacceptable delays with processing matrimonial litigation.

The problems discussed in this article have been addressed within Nassau County by a special panel of experienced matrimonial practitioners, and they have submitted written recommendations to the administrative judge in an effort to alleviate congestion and enact necessary reforms. It is urged that every bar group throughout the State join these efforts, which may well create a cascading snowball of judicial reform.

After considering all of these initiatives, it may well be the best solution to eliminate the matrimonial part altogether. It really has been a dismal failure, especially viewed by the *raison d'etre* of reducing delay in divorce matters. A dedicated part seems an abject failure, especially when there are not enough judges to handle the increased caseload that population explosions have created. Being able to use all judges in each county, seems a reasonable solution.

Endnote

1. A recent dissenting opinion of Justice Leonard Austin in the Appellate Division, 2d Dept., in *York v. York*, 2012 Slip Op. 06212, 2012 WL 4094961 (2d Dept. 2012) is reflective of how far delays have traveled in matrimonial litigation.

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Finding Hidden Income in Divorce and Child Support Cases

By Tracy L. Coenen

Family law cases often focus heavily on financial issues. Whether the parties to a case are of modest means or great wealth, both sides want their own version of what is fair. Unfortunately, this can lead one or both parties to hide income and assets. With the help of a financial expert, counsel can identify income and assets that might otherwise go undiscovered, and hopefully reach an equitable end to a divorce or child support case.

Sources of income and assets owned can be identified with the right documentation. Attorneys need to be familiar with some of the most common financial documents so they know what to request. Attorneys with financial knowledge can also help identify issues that may need further analysis in a family law case.

Records Needed

When attempting to determine if there are hidden assets or undisclosed sources of income, the basic investigative process involves tracing funds. The income tax returns of an individual (and a business, if it is owned by one or both of the parties to the family law case) are the most basic documents needed to analyze the finances. While tax returns are not always accurate, they still give us a starting point, and may later be used to impeach the credibility of the opposing party if found to be inaccurate.

Further analysis of the financial situation requires statements from bank accounts, brokerage accounts, and credit cards. These third party records are generally deemed to be a reliable source of information. Barring any unusual opportunity to influence the recordkeeping process of banks or brokerage firms, these statements will be proof positive of the flow of funds.

If money is being hidden, how will you know if you have all the relevant account statements? The starting point will be all known accounts. Both parties should be asked to disclose all bank, brokerage, and credit card accounts. As those records are analyzed, other accounts may come to light. A transfer between accounts, a check written from one account to another, or other transaction could provide a clue that other accounts exist.

For example, a check written out to a municipality could point to real estate owned. A transaction with a marina or boat storage company suggests a boat is owned. Even when trying to hide income or assets, parties are not always careful and may engage in a transaction that helps identify a previously unknown bank account or valuable asset. The financial investigator must track down all of these leads to determine whether additional accounts exist.

Determining Income

There is a reasonable chance that one of the parties to a divorce or child support matter is going to obscure income through an intricate web of accounts, transactions, and misinformation. A forensic accountant is the logical choice to help reconstruct financial records, estimate earnings, and analyze fine details of financial documents to prove or disprove income claims.

Tracing money into and out of bank accounts and brokerage accounts helps determine the source and use of funds. This type of analysis may be called a cash analysis, a cash in / cash out analysis, a source and use of funds analysis, or a cash flow analysis. Whatever it is called, the attorney should be clear about what information is sought so the analysis is completed correctly.

During a cash analysis, we may become aware of additional sources of funds, and must analyze them to determine whether they constitute income or something else. We may also discover clues to assets that were previously undisclosed, such as real estate or vehicles. The details in a cash analysis can provide many clues to the larger financial picture, and that is why it is so important.

A closely related analysis is the lifestyle analysis, which is sometimes called the "expenditures method" for calculating income. This type of financial examination is used to prove an individual's income, particularly when there are allegations of unreported income. It focuses on a person's spending patterns relative to known sources of income. Differences between apparent living expenses and the person's known or reported income can be attributed to concealed income.

The basic methodology for a lifestyle analysis includes adding known expenses such as a mortgage, groceries, automobile expenses, insurance, dining out, income taxes, vacations, and the like. We carefully consider all spending, making reasonable estimates where documentation is not available.

The total spending is then compared to known sources of funds including wages, bonuses, interest, dividends, loan proceeds, gifts received, and the like. Again, we must carefully consider all sources of income, including estimates when hard numbers are not available.

If spending during the period under analysis exceeds known sources of funds, then it is likely that there is another source of income that has been concealed. The logic behind this analysis is simple. The money being spent has to come from somewhere. The forensic accountant may continue to search for documented sources of income that

could explain the difference. Any remaining unexplained difference likely represents unreported income.

Winning in Court

There are very often no winners in family law cases. It is usually more about limiting the pain or the perception of loss. Without a competent analysis it will be very difficult to know if a settlement in a family divorce matter is fair or in the best interest of the client.

As important as the analysis itself is the presentation of the findings. Non-accountants must be able to understand the numbers, so the financial investigator must tell a story that is easy to understand. It should include charts, graphs, and exhibits when they are helpful to understanding the conclusions. After all, a complex analysis and conclusion that is helpful to your case is not worth anything if the trier of fact can't understand the opinions and how they were reached.

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The Real Issue in *Gursky*: Timing of a Qualified Domestic Relations Order

Gursky v. Gursky, 941 N.Y.S.2d 760 (3d Dep't 2012)

By Raymond S. Dietrich

Introduction

The real issue in *Gursky* is the proper timing of a Qualified Domestic Relations Order ("QDRO"). Under most retirement plans, including ERISA, a former spouse losses his or her benefits at divorce by operation of law. Unfortunately, too many family law attorneys fail to recognize this basic principle. Importantly, it is a QDRO that secures benefits for a former spouse, not the decree or settlement agreement. Therefore, to properly protect a former spouse, a QDRO should be entered concurrently with the divorce decree. If a separate interest QDRO would have been entered during the proceeding, not post-decree pursuant to the "Majauskas Formula," there would be no controversy.

I. Background

On its face, *Gursky* involves the determination of the parties' intent under a divorce settlement agreement. Unfortunately, intent became an issue since the parties elected to have the wife's pension plan divided, post-decree, rather than incorporating a properly drafted QDRO into their agreement. As a result, the Court declined to recognize a separate interest QDRO that would benefit the former spouse. The Court held that a separate interest QDRO would conflict with their definition of the "Majauskas Formula."

II. Statement of the Case

Holding: The Appellate Court declined to permit entry, post-decree, of a separate interest QDRO.

Facts and Procedural History: At trial, the parties stipulated to the division of the Wife's pension plan "pursuant to the Majauskas formula." The stipulation was incorporated but not merged into the parties divorce decree. The Husband, post-decree, moved for entry of a QDRO. The Wife objected on the grounds that the QDRO exceeded the terms of their stipulation. The Supreme Court rejected the Wife's objections and entered the QDRO as prepared. The Wife appealed, and the Appellate Court reversed.

III. Analysis

The Appellate Court's reasoning is flawed. In *Gursky*, the Court relied on the plain meaning or four corners of the parties' agreement. The Appellate Court, however, misapplied the meaning of the term "Majauskas Formula" to an unrelated concept: *duration*. The term "Majauskas Formula" is a term of art in QDRO parlance; that and it refers to the *amount* of an alternate payee's award under a QDRO, not its *duration*. Importantly, a separate interest QDRO relates to the *duration* of an alternate payee's award. The concepts of *amount* and *duration* are not related. Therefore, the Appellate Court erred when it based its holding on the meaning of the term "Majauskas Formula" but applied that definition to the unrelated concept of *duration*.

A. Coverture: Amount of the Award

In New York, the term "Majauskas Formula" is synonymous with coverture.[1] Some states, such as Texas and Florida, prohibit the use of coverture, while others presume coverture but allow a participant to rebut the presumption at a later time if he can show that future enhancements have been caused by his own personal effort.[2] New York, like the majority of states, accepts coverture as being equitable.[3]

Coverture is a fractional formula that determines the *amount* of an alternate payee's award under a QDRO, not its *duration*.[4] Coverture is based on the principle that a participant accrues benefits under a defined benefit plan in equal increments throughout his career. The first few years of service during the marriage must be given just as much weight as the last few years since the pension is dependent on the total number of years of service. Therefore, the fractional formula is expressed as years in the marriage while in the plan as the numerator, divided by the total number of years in the plan, times the participant's accrued benefit at commencement date.

> Coverture Award as Expressed in a QDRO (Example):
>
> Amount of Alternate Payee's Benefit: This Order assigns to the Alternate Payee an amount equal to 50% of the Marital Share of the Participant's vested accrued benefit under the Plan as of the earlier of the termination of the Participant's employment or commencement of benefit payments to the Alternate Payee.
>
> The Marital Share shall be determined by multiplying the Participant's Accrued Benefit by a coverture fraction, the numerator of which is the number of months of the Participant's creditable service in the Plan earned during the marriage (from November 23, 1997 to November 5, 2004), and the denominator of which is the number of months of service credited

to the Participant under the terms of the Plan up to the earlier of the termination of the Participant's employment or commencement of benefit payments to the Alternate Payee.

Coverture enables an alternate payee to participate in the growth of a pension. Under coverture, an alternate payee's benefit is based on the ending accrued benefit of the participant, not the accrued benefit at the time of divorce. Depending on the facts of the case, the difference can be substantial. Note, however, that the benefit only continues to grow if the participant remains in the plan after divorce and continues to accrue benefits. If the participant has terminated from service or has entered into pay status (i.e. retired), then the issue of coverture is moot.

B. Separate or Shared Interest: Duration of the Award

A plan's governing law will determine if a separate interest approach is permitted. ERISA, for example, expressly permits a separate interest QDRO.[5] Most state and municipal plans, however, prohibit separate interest orders, as does the federal retirement system and military retired pay. Moreover, some states, like Virginia, prohibit a separate interest approach by statute.[6] The plan in *Gursky* is not identified, but there is no indication that the plan administrator objected to a separate interest QDRO.

A separate or shared interest approach for dividing a pension plan relates to the *duration* of the benefit, not its *amount*.[7] A separate interest QDRO allows a former spouse to commence benefits at the participant's earliest retirement age, typically age fifty-five (55) under most plans. Under a separate interest approach, a former spouse's benefit is actuarially adjusted to his or her life expectancy. That is, a separate interest QDRO provides a stream of income to the former spouse for the duration of his or her life. In contrast, benefits payable under a shared approach are based on the life expectancy of the participant, and may only begin upon the participant's commencement of benefits. Note, however, that a court may require a participant to make direct payments to a former spouse if he or she continues to work beyond the normal retirement age.[8] According to one Supreme Court, a former spouse should not be made an involuntary investor in the employee's pension plan.

C. Timing of a QDRO

The two most important issues when preparing for entry of a QDRO are timing and notice. Proper timing ensures that benefits are secured at divorce. Notice refers to placing the client and plan administrator on notice of a pending QDRO and its importance. Of the two issues, timing is the most problematic. Rather than incorporating the QDRO into the divorce decree, most attorneys advise their client's to obtain a QDRO after the case has concluded. That is dangerous advice. Remember, a former spouse loses his or her retirement benefits at divorce by operation of law.[9]

There are only two (2) exceptions to the operation of law rule: the plan documents rule and the vesting exception. The plan documents rule refers to a participant's designation of a beneficiary. The United States Supreme Court has recently bolstered the plan documents rule.[10] The rule now even trumps a waiver of benefits in divorce.[11] The vesting of survivor benefits is the second exception to the operation of law rule. Under the exception, once benefits vest in a current spouse, a subsequent divorce cannot take them away.[12]

Conclusion

The real issue in *Gursky* is timing. If a properly drafted QDRO would have been entered during the divorce, there would be no controversy. When timing is not an issue, it is much more difficult to object to a form of distribution by QDRO when that form is permitted by both the controlling law and the plan. As the former Wife learned, basing your objection on ambiguous language, post-decree, is much easier indeed.

Endnotes

1. *See* Dietrich, Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney, § 11.02 (2011 ed., Matthew Bender).
2. *See Gemma v. Gemma*, 778 P.2d 429 (Nev. 1989).
3. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 492 (1984).
4. *Id.*
5. ERISA § 206 (d)(3)(D).
6. Va. Code § 20-107.3(G)(1).
7. *See* Dietrich, Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney, § 10 (2011 ed., Matthew Bender).
8. *See Koelsch v. Koelsch*, 713 P.2d. 1234, 1240 (Ariz. 1986).
9. *See* ERISA § 206.
10. *See Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan*, 128 S. Ct. 1225 (U.S. 2009).
11. *Id.*
12. *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153, 155 (4th Cir. 1997) (holding that benefits vest in the current spouse upon election of a Qualified Joint and Survivor Annuity ("QJSA")); *see also Carmona v. Carmona*, 544 F.3d 988 (9th Cir. 2008); for further discussion of the vesting rule see Carmona Casenote at www.qdroadvisoryreport.net.

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Are You Absolutely Sure You Want to Get Married/Re-Married? Part One

By Anthony J. Enea

It has become common to hear of individuals being married or remarried late in life. Whether it is because we are living longer or because divorce has become more prevalent as individuals age, seeing 60- or 70-plus-year-olds tie the knot is no longer a novelty. Additionally, the legalization of same-sex marriage in New York with the passage of "The Marriage Equality Act" (June 24, 2011)[1] has also resulted in numerous late in life marriages. While those marrying late in life are often aware of the laws relevant to a potential dissolution of their marriage, and in many instances execute a pre-nuptial agreement, they often are less familiar with the rights and obligations if their spouse becomes ill and requires long-term care, and what rights does his or her spouse have upon his or her demise.

In this two part article, I will provide an overview of the issues and laws that will impact the estate planning and long term care issues of those marrying late in life. Being that long term care issues arise during one's lifetime, I will address them in the first part of this article.

Long-Term Care Issues

It has been my experience that those marrying late in life generally maintain their finances separately, with perhaps the exception of a joint checking account. What is often not realized, and results as a major surprise when one spouse requires long term care, is that irrespective of the fact they have maintained their finances separately during their marriage, for purposes of their spouse being eligible for either Medicaid nursing home or home care benefits, they are considered a "legally responsible relative." Thus, his or her assets and income will be counted and deemed available for Medicaid eligibility purposes.[2]

Shock and dismay are often part and parcel of a conversation where I have had to advise a spouse that the fact he or she separately maintained his or her finances for decades is of no importance for purposes of Medicaid eligibility, and that it will be necessary that his or her assets be disclosed to Medicaid. Their dismay upon learning of this is further compounded by the realization that in order for their spouse to qualify for Medicaid it may be necessary for the spouse requiring Medicaid to transfer his or her assets to them, and that he or she will then have to execute what is known as a "spousal refusal" statement. The "spousal refusal" states that he or she refuses to utilize his or her income and assets to pay the medical expenses of his or her spouse, and will allow an applicant who has a "legally responsible relative" to become eligible for Medicaid despite the fact the legally responsible relative (spouse) has income and assets above the Medicaid permitted eligibility levels.[3] The execution of a "spousal refusal" requires the Medicaid district to consider only the income and assets of the applicant without considering the income and assets of the refusing spouse. However, the spouse must legally provide information to Medicaid as to his or her assets and income. The spouse's failure to provide said information cannot be used in the initial determination of eligibility of the applicant. However, an ongoing refusal to provide the requisite financial information will result in a denial of the application.[4] In the event they were living separate and apart from each other at the time the applicant entered the nursing home, the failure of the non-applicant spouse to provide the requisite financial information will not impact the eligibility of the applicant.

With respect to the enactment of "The Marriage Equality Act"[5] and same-sex marriages, the New York State Department of Health has issued a memorandum to all Medicaid districts requiring them to recognize same-sex marriages if the couple was legally married in a jurisdiction (state or foreign country) that recognizes and performs same-sex marriages, and requires Medicaid to determine eligibility for same-sex couples in the same manner as for any other married couple.[6]

Once the refusing spouse has executed the "spousal refusal" statement, said spouse has now subjected him or herself to a liability to Medicaid and a potential action by Medicaid for recovery of the amounts actually paid by Medicaid for the nursing home or home care costs of his or her spouse. For Medicaid nursing home purposes, this amount is significantly less (often 40-60% less) than the amount it would have cost if the applicant and his or her spouse paid the nursing home at its private pay rate (average downstate $13,000–$15,000 per month).

When the Medicaid nursing home application is filed with a spousal refusal and the application has been approved by Medicaid, there remain many post-eligibility planning opportunities that can be implemented by the refusing spouse to limit his or her exposure to Medicaid's claims.

Because Medicaid can only seek recovery of the amounts it has actually paid, the execution of the "spousal refusal" is often a logical option. However, to a spouse who has no inkling that his or her late-in-life marriage

could result in this potentially significant financial exposure, it is a cause for great consternation, and sadly, in some cases leads to a discussion of the possibility of a divorce. It should be noted that in New York there are laws that provide that a separated or divorced spouse will still continue to have a continuing obligation to support a former spouse who has become a "public charge" or a victim of extreme hardship.[7]

As stated above there are potentially many complications that will arise from a spouse needing long-term care. For example, the spouse requiring nursing home care may need to have his or her assets transferred to the refusing spouse (spousal exempt transfer for eligibility purposes), so that he or she will have no more than $14,250 (the resource amount permitted for 2012) for purposes of Medicaid eligibility. Thus, where said applicant spouse has children from a prior marriage, the transfer of assets from one spouse to the other may have a significant impact on his or her estate plan vis-a-vis said children. Once the assets are transferred to the spouse so that Medicaid may be obtained, there is no assurance that said spouse will make any provisions for his or her spouse's children in his or her testamentary plans. There is also, of course, the separate issue as to what mechanism will be utilized to transfer the applicant spouse's assets. Is there a Durable General Power of Attorney in existence with broad gifting authority or are the finances and realty jointly held? These are issues that will need to be addressed if the Medicaid applicant spouse lacks the capacity to make the transfer, which in many instances is often the case.

Clearly, the decision to marry or remarry late in life is one that should always only be undertaken after consideration of all the potential consequences. However, because of the significant increase in the numbers of seniors suffering from debilitating illnesses such as Alzheimers and Parkinson's, particular attention should be paid to the potential financial consequences if a spouse requires long term care. The consequences financially can be devastating.

In the second part of this article I will address the estate planning issues relevant to the late-in-life marriages or remarriage.

Endnotes

1. NY CLS Dom. Rel. §10-a.
2. 18 New York Code of Rules and Regulations (NYCRR) §360-1.4(H).
3. Social Services Law (SSL) §366(3)(a); 18 NYCRR §360-4.3(f)(1)(i).
4. SSL §366(3)(a); 18 NYCRR §360-4.3(f)(1)(i).
5. NY CLS Dom. Rel. §10-a, *supra.*
6. GIS Memorandum 08MA / 023.
7. NY CLS Family Court Act §463; General Obligations Law §5-311.

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CORRECTION NOTICE

In Mark Sullivan's "The Missing Military Annuity—Case Continued," in the Spring 2012 issue of the NYSBA *Family Law Review*, the following language was proposed to give the former spouse coverage under Survivor Benefit Plan (SBP)—

> **Mary Doe, the plaintiff, shall also be awarded former spouse coverage under the Survivor Benefit Plan, with defendant's retired pay as the base amount.**

The author advises that, in light of a recent ruling by the Defense Finance and Accounting Service (DFAS) that denied SBP coverage to a former-spouse applicant due to unclear wording of the court order, **the following language** should be used to secure SBP coverage instead of the above clause:

> **John Doe, the defendant, shall immediately elect former-spouse coverage for Mary Doe, the plaintiff, under the Survivor Benefit Plan, with his full retired pay as the base amount.**

The Future of Maintenance: Waiting for the Other Shoe to Drop

By Robert J. Jenkins

There has been considerable controversy over the amendments to the maintenance statute, both the temporary formula and new permanent factors enacted in 2010. The Legislature, and most assuredly the bench and bar, eagerly await the final report of the Law Revision Commission, handed the difficult task of making recommendations to the Legislature to improve the effectiveness of this state's maintenance laws. I participated in a day-long roundtable discussion before the full Law Revision Commission in 2011. I want the bench and bar to know, as I now know, that the Commission is not some gigantic bureaucracy, but rather, the Commissioners themselves and two staff attorneys. When you go to the Commission's website and review the volume of high quality work, you should be impressed, as I am, that so much good work comes from so few people. My sense is that the Commission has been inundated with all forms of communications and proposals and that they are working to create a final report which will both accurately assess the effectiveness of current maintenance law and recommend meaningful changes.

I came away from the roundtable with the clear impression, visceral as well as intellectual (not, I want to stress, from the Commission, but from the more political participants), that there will be legislation creating a formula for both the amount and duration of maintenance of divorcing spouses and that the "cap" will remain where it is now, subject to indexed increases. The political power behind this is from within the parts of the State encompassed by the First and Second Departments and especially from those who represent the poor in those areas. Having a permanent formula with the current "cap" will be an immeasurably helpful tool in resolving thousands of downstate, and also upstate, divorces each year. Together with the "no-fault" divorce statute they will hopefully assist spouses of abusers to escape not only with their lives but also with appropriate financial provision.

That being said, I want to voice my concerns about what I find to be lacking in the Legislature's attempts to fashion a permanent formula. My concerns arise from what the Legislature has done, what it almost did and what it so far has not done.

When the Equitable Distribution Law was enacted there was a statutory link between maintenance and marital property distribution, and as amendments to both came in 1986 and 2009, that link was continued. However, that link has been attenuated in the 2010 maintenance amendments which added many new maintenance factors but made no similar changes to the marital property distribution portion of the EDL. A good argument can be made that we should be thankful that the new maintenance factors were not added to property distribution determinations. But what if the permanent presumptive formula for amount and duration had been enacted as drafted with no amendment to the marital property distribution part of the statute, particularly as that statute has been applied to intangible non-saleable income-producing assets?

When I was still working in the Court system in 2010 the Office of Court Administration sent out a memo about upcoming legislation, including the maintenance statute. Starting on page 11, under the Section VI "Matrimonial Matters," under the subheading B. "Passed Both Houses" and then to page 12 under sub-subheading 3—"Temporary and final post-marital maintenance (S 8390 / A 10984-b)," the memo began, "This measure establishes a formula for calculating presumptive guideline amounts for both temporary and permanent post-marital maintenance." (Emphasis added.) The memo got the bill number and the text references right, but this summary was wrong. I wanted to read the actual text of the bill and by mistake, when I went to the Legislature's website, I found myself reading the wrong (and so far, unenacted) bill, which bill did provide for a permanent maintenance formula for amount and duration. When I have given CLE presentations, I admit my research error and then tell the listeners that this mistake was a fortunate one. The bill I first read—A. 10984Ba (hereinafter designated as "A")—contained no presumptive temporary formula, instead continuing the prior law's verbal standard for temporary maintenance, but did contain a permanent formula for amount and duration. This bill was not enacted, but from this bill was, I suggest less than sharply, carved the law we now have—A. 10984B*b* (hereinafter designated as "B")—which provides a presumptive formula for temporary maintenance only. Both "A" and "B" also contain a slew of new factors, some of them brand new to the point of wonder. In the current law ("B") 19 factors are to be employed as reasons for applying the temporary formula in cases above the "cap" but only 17 for deviating from the presumptive amount. *Then*, the permanent maintenance determination is to be made using the prior law's preamble (marital standard of living and sufficiency of income and property) and *20* factors. "A," while containing no formula for temporary maintenance, for permanent maintenance has "B's" 19 factors for above "cap" cases and "B's" 17 factors for deviation, with the exception that "A's" "cap" factor "J" and deviation factor (viii): "Acts by one party against another that constitute egregious fault

likely to shock the conscience," is replaced in all of the current law-AB's factors by:

> acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law. [As an aside, to me this is a much better standard than is "egregious fault," as it is a more realistic standard and is linked to ability to fully support oneself]

First, in comparing "A" and "B," and whether or not the current reality of a temporary presumptive formula and no permanent formula is continued, or if we have a presumptive formula for both temporary and permanent maintenance, or some other method, any and all factors should model the Child Support Standards Act in that all the factors should be the same, in both text and numeration, for pity's sake.

Further, after reading "A" and "B" it is sobering to see just how close we came to having a permanent maintenance formula providing for both amount and duration, which formula failed to take into consideration the over thirty-year connection between equitable distribution and maintenance, particularly as it relates to the developed jurisprudence of intangible non-saleable assets such as degrees, licenses and certifications. If "A's" permanent formula was passed, with no change to marital property distribution, what would happen to *O'Brien v. O'Brien*?[1] And then, what of *McSparron v. McSparron*?[2] Would *O'Brien* no longer be good law, with the application of *McSparron's* prohibition against "double counting" working in reverse and thus render *O'Brien* meaningless, i.e., if all income is used in determining maintenance, none is left to capitalize into an asset? Or would *O'Brien* continue and *McSparron* be rendered meaningless given that a legislative change to maintenance devoid of a change to property distribution would be interpreted as a rejection of the judicial prohibition of "double counting" of income? Without legislative direction, and on this aspect there is no indication so far that one is forthcoming, all of these possibilities will depend upon the courts, who would be faced with a permanent legislative maintenance formula which did not by its terms expressly amend the equitable distribution law to eliminate these intangible assets as assets subject to distribution. Would a court consider the Legislature's failure to so amend the equitable distribution law as a statement that *O'Brien* should continue and that *McSparron* is no longer good law?

I submit that a clue is found in *Holterman v. Holterman*,[3] which stands for the proposition that when courts are faced with an established line of judicially created law and a later enacted conflicting statute, legal analysis dictates that you have to start with the statute, not the case law, and that where there is a conflict, the statute wins. In *Holterman*, the titled spouse asked the court to apply the "double counting" prohibition contained in *McSparro*n, as applied in *Grunfeld v. Grunfeld*,[4] to the determination of child support and in so doing deduct his yearly distributive award payment in determining his income available for child support. However, there is no express statutory imprimatur for *McSparron* (nor for that matter *O'Brien* and its progeny), but the CSSA directs the exact method for calculating presumptive child support, and that method does not permit a deduction from income for payment of a distributive award.[5] Statute wins. Applying that template, and mindful that "B's" current presumptive temporary maintenance calculation and "A's" un-enacted permanent maintenance formula both direct the courts to apply the formula to income as "defined in the Child Support Standards Act" (with the superfluous addition of income from distributed income producing property), courts will obliged to apply the Court of Appeals' reasoning in *Holterman*. As a result, statute wins, and *McSparron* will be history.

The titled spouse could make a discretionary factors argument in favor of deviation, assuming that factor is part of any permanent maintenance formula. However the CSSA factors did not help Mr. Holterman in his attempt to lower his child support obligation, as the Court of Appeals held that the denial of a deviation was not an abuse of discretion. As we all know, an argument seeking a downward deviation is always an uphill challenge.

Further, given the more recent judicial history of drastic reduction in percentages awarded non-titled spouses in such cases,[6] why wouldn't that be a reasonable result, giving the non-titled spouse a very small share of the asset and then a percentage of annual income for a period of years? That would provide a solution for the new Mrs. O'Briens of the world.

My sense from some of the participants at the roundtable is that they are not concerned with whether the new statute deals with this overlap and as long as any maintenance calculation "cap" takes care of the 95% of downstate cases that are below the "cap," then we can figure the rest of it out for ourselves. We can do that when the Legislature finally enacts a permanent presumptive maintenance formula for both amount and duration with the following clarification made to the definition of property, effective the same date and under the same conditions as the coming permanent maintenance formula:

> Excluded from the definition of property are intangible non-saleable income producing assets, specifically licenses, degrees and certifications.

But if that is done, and maintenance is set on an amount based upon income and duration is based upon number of years in the marriage, what of the new Mrs.

O'Briens? One plus to having a permanent maintenance formula is that maintenance is subject to modification; equitable distribution is not. But if these assets taken out of consideration in fashioning economic relief, is that fair to the new Mrs. O'Briens of the world? How can this be dealt with?

There are states that have a set term of compensatory maintenance for a case such as Mrs. O'Brien's, another for short-term marriages to assist in rehabilitation to pre-marital financial status and another for longer term marriages.[7] Time will tell how this ends up in New York.

It will be very interesting to read the Commission's final report, which I expect to be scholarly, thorough and respectful of the input received. It will be even more interesting to see how the Legislature and then the Governor address the politics, for which I have no similar expectation. After all, the Legislature is the same crowd that brought us DRL § 177.

Endnotes

1. 66 NY2d 576.
2. 87 NY2d 275.
3. 3 NY3d 1.
4. 94 NY2d 696.
5. 3 NY3d at 11.
6. See, e.g., *Esposito-Shea v. Shea*, 94 AD3d 1215—10%; *Sadaghiani v. Ghayoori*, 83 AD3d 1309—10%; *Farrell v. Cleary-Farrell*, 306 AD2d 597—7.5%; *Nidositko v. Nidositko*, 92 AD3d 653—5%.
7. http://www.malegislature.gov/Laws/SessionLaws/Acts/2011/Chapter124; Maine Revised Statutes, Title 19-A, Part 2, ch. 29, subch. 2, Sec 951-A; New Jersey Annot. Stats. Title 2A, Subtitle 6, ch. 34, Art. 6, Sec 2A:34-23. See also the 2010 and 2011 reports of the New York Law Revision Commission, who provided these statutory citations from other jurisdictions.

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'Til Death Do Us Part? What Every Legal Practitioner Should Know About Premarital Agreements: A Law Student's Perspective

By Lauren Ludvigsen

It is rare that a couple will enter into a marriage expecting to divorce each other. It may be the romance or the excitement of the impending nuptials, but couples do not include an expiration date on their marriage certificate. However, not all marriages last until "death do us part." The United States Census Bureau conducted its first survey into marriages, divorces, and widowhood in America in 2009, finding that 9.2 of every 1,000 men and 9.7 of every 1,000 women over the age of fifteen reported being divorced.[1] Despite these rates, research suggests that only one-fourth of Americans believe that premarital agreements (also known as prenuptial agreements or a "prenup") are financially smart for those contemplating marriage.[2] As a legal practioner, it is imperative to be able to draft a valid, all-encompassing premarital agreement while navigating state law and the ethical considerations involved in the process.[3] This guide will provide you with the necessary resources to draft a solid, comprehensive premarital agreement for your love-struck clients.

A premarital agreement is a written stipulation between prospective spouses in contemplation of marriage that sets forth each party's rights and responsibilities with respect to the division of assets and property upon dissolution of the marriage, separation, or death.[4] It is made before the marriage and must be in writing, signed by the parties, and acknowledged in the same manner required for a deed to be recorded in order to be valid and enforceable.[5] A prenup may include a stipulation to allow for the testamentary provision of any right in a will, the waiver of any right to a testamentary provision of a will, or even for the ownership, division, and distribution of separate and marital property.[6] It may also provide for spousal support and maintenance, or the waiver of such.[7] Provisions for the custody, care, education, and maintenance of the parties' children may be included in a prenup, but they are subject to the state statute governing custody, visitation, and child support.[8] However, a marrying couple cannot contract within a prenup to dissolve or alter their marriage or to relieve their obligation to support each other in such a manner that he or she will be incapable of self-support and likely to become a public charge.[9]

Historically, prenups were a way to protect a decedent's estate rights and to protect women, who could not legally contract, by spelling out the financial obligations of her new husband and to establish her dowry.[10] In modern times, New York's adoption of equitable distribution of marital property, combined with the increase of multiple marriages and their resulting children, has given rise to both men and women seeking prenups in order to protect their personal assets.[11] Individuals who have children from a previous relationship, are entering a second or subsequent marriage, own a business, or have acquired substantial assets or wealth should especially consider a prenup in order to protect their economic future.[12] Modern women are also increasingly interested in safeguarding tangible assets with a prenup as due to their rising participation in the workforce as well as the likelihood of them marrying at a later age than in previous eras, they are bringing more into their marriages.[13] Furthermore, prenups can also be written to safeguard the property rights of children from previous relationships and can limit, at least to a certain extent, the liability for spousal maintenance in the event of a divorce.[14] Those who are making a significant lifestyle change or are relocating for the marriage should also consider a prenup in exchange for giving up those rights.[15] The prevalence of divorce and remarriage has prompted many marrying couples to consider prenups in order to realistically plan for and protect their economic futures.[16]

Although this is a logical perspective on marriage and divorce, it may be difficult for your clients to shake their romantic notions of love long enough to sign a prenup. One study found that despite couples' knowledge of the near fifty-percent divorce rate in the United States, participants believed their own chance of divorce was only 11%.[17] Approximately 62% of those same participants felt that asking their partner to sign a prenup was a sign of uncertainty in the success of the impending marriage.[18] However, discussing the provisions of a prenup promotes financial planning and discussion of the variety of issues and obligations that a couple may confront during their marriage.[19] Encouraging honest and open communication regarding the personal and financial terms of a prenup and each other's emotional expectations of the marriage can strengthen the relationship between the marrying couple.[20] Not only can these discussions increase the chances of a peaceful and successful marriage, but also in the event of a divorce, a prenup can help a divorce to run more smoothly.[21] These points may be helpful to tell your clients to quell their fears about discussing a prenup with their future spouse.

Once your client has asked you to draft a prenup for them, the hard work begins. Here is where your law library and Westlaw or LexisNexis accounts come in handy. Chapter 6 of the *New York Practice Series: New York Law of Domestic Relations* should become your best friend.[22] Written by Alan D. Scheinkman, the current Administrative Judge for the 9th Judicial District of New York, Chapter 6 covers almost everything you need to know

about drafting and executing a prenup in New York. It even includes a handy "Practice Checklist" that lists all the important details and issues to address in a prenup.[23] There are references galore to pertinent statutes, particularly Domestic Relations Law § 236 and General Obligations Law §§ 5-303 and 5-311, as well as to important New York case law that is directly on point for each provision. I also highly recommend Chapter 4 of *Matrimonial and Family Law (West's McKinney's Forms for New York),* which provides additional references and forms, such as the child support guidelines clause and provisions for certain waivers, to help get you started.[24] We can thank Judge Scheinkman for *Matrimonial and Family Law (West's Mc Kinney's Forms for New York)* as well.

In New York, prenups that address the ownership, division and / or distribution of property must be read in conjunction with Domestic Relations Law § 236(B).[25] Now is the time to pull up Domestic Relations Law § 236(B), because prenups live and die by this New York statute. Take plenty of time to read through the entire statute and then read it again, because this statute is going to be your second best friend during the prenup drafting and execution process. Domestic Relations Law § 236(B) provides for the equitable distribution of marital property while keeping separate property remaining separate at the dissolution of a marriage unless the parties have executed a valid prenuptial agreement.[26] The intent of the parties to override equitable distribution under the statute—whether by keeping as separate property that would otherwise have been deemed marital property or by expressly waiving equitable distribution—must be clearly indicated by the provisions of the prenup.[27] Courts may enforce provisions of the agreement so long as they are not against the law or against public policy.[28] Section 4.7 of *Matrimonial and Family Law (West's McKinney's Forms for New York)* provides excellent background on Domestic Relations Law § 236(B) for those who would like more information on the statute and relevant case law.[29]

Fortunate for New York practioners, there is a wealth of case law that has helped to define the powers and limitations of prenups. Our fine state has a strong public policy favoring validly executed prenups for the simple fact that it allows individuals to bargain between each other and decide their own interests.[30] Prenups are treated like a legal contract—as long as it is clear on its face, a prenup is construed in accordance with the parties' intent as gleaned from the four corners of the document as a whole.[31] This practical interpretation is utilized in order to meet the parties' reasonable expectations of the language within the prenup.[32] The prenup should not be interpreted as to leave one of its provisions without substantial effect and force, as such would frustrate the intent of the document.[33] It is proper for the court to consider the circumstances under which the prenup was executed and the obligations and relationship between the parties.[34] However, extrinsic evidence will only be considered in determining the intent of the parties if the court finds the prenup to be ambiguous.[35]

One area in which there has been great difficulty in drafting a sufficient prenup provision is the waiver of retirement and pension benefits.[36] Now is the time to call your friend who is a trusts and estates attorney. Don't have one? Grab your copy of *New York Practice Series: New York Law of Domestic Relations* or go to Westlaw's version and turn / click to §§ 6.12 and 6.13 for a superb discussion of Estates, Powers, and Trusts Law and how that fits in with Domestic Relations Law § 236(B), plus the case law you need to keep from drowning in the stormy sea of retirement waiver provisions.[37] The reason retirement and pension benefit waivers are so difficult to perfectly craft is because these provisions are subject to not only state laws involving the validity of a prenup but also to federal law involving retirement and pension benefits.[38] The Retirement Equity Act of 1984 (REA), which amended the Employee Retirement Income Security Act of 1974 (ERISA), provides that qualified retirement plans must pay certain benefits to a married plan beneficiary and his / her spouse.[39] Under the REA, the plan beneficiary and / or his / her spouse will receive either a Qualified Joint and Survivor Annuity (QJSA) or a Qualified Preretirement Survivor Annuity (QPSA), depending on whether the plan beneficiary dies before or after retirement.[40] Although REA does not prohibit the waiver of these benefits through a validly executed prenup, the provision in the prenup waiving those benefits must conform to strict waiver requirements provided for in the ERISA.[41]

If your client does not have a retirement or pension to worry about, consider yourself lucky. Regardless, drafting a prenup should not be taken lightly, as the lawyer must play the dual roles of advocating for the client's wishes while reflecting his / her expectations for the marriage and of protecting him / herself from any malpractice landmines that may pose a threat.[42] As always, document everything and maintain complete records of all correspondence with your client and with opposing counsel and follow up with your client after the marriage to handle any outstanding issues and postnuptial obligations.[43] It may be helpful to consult other attorneys, such as a trusts and estates attorney or a commercial attorney, or any other professional who specializes in any subject matter your client would like to include in the prenup.[44] Not only is this important when you are unfamiliar with the subject matter at hand (for example, if your client owns his own business and wants to protect those interests), but it also will help reduce your liability by asking for advice from these other professionals or by recommending that your client consult with them.[45]

Volume 45 of *New York Jurisprudence 2d* is another great resource for all family and matrimonial law practioners who wish to better understand prenups.[46] *New York Jurisprudence 2d* goes quite in-depth with all aspects of prenups and provides a wealth of case law, statutes, and other resources that will hone your prenup-writing skills. The "Antenuptial and Postnuptial" section is organized into numbered categories and subcategories for easy searching and referencing.[47] I highly recommend check-

ing out Chapter 11 of *New York Matrimonial Practice*, which will be of great help when drafting a prenup.[48] Not only is there a form for each of your heart's desires, there are also four appendices containing the full text of frequently cited statutes and case law. If you are a family and matrimonial law practioner, you should already have this binder and sleep with it under your pillow every night. It is also available on Westlaw if you would rather not wake up with a stiff neck.

The most important safeguard is to consistently and thoroughly inform your client throughout the drafting and execution of the prenup. Educate your client about the law, about his / her rights with or without an agreement, and weigh the pros and cons of each provision your client wishes to include in the prenup.[49] Just keep reminding yourself that your client most likely will not have the same knowledge and understanding of the legal mechanisms of what you do, so nothing should be thought of as self-explanatory.[50]

In sum, every engaged couple should consider signing a prenup before getting married. Whether they have a million dollars in the bank or they are swimming in debt, no one knows what their financial future holds. Romance and the fear of upsetting his / her partner should not stop someone from protecting their economic rights from a potentially messy divorce. Although no one gets married expecting to one day have to disentangle their lives from their spouse, it is an unfortunate reality that divorce is prevalent in this country. Use the plentiful resources available to draft and execute a valid, all-encompassing prenup for your clients that will protect them even after the romance is gone.

Endnotes

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3. Paul S. Leinoff & Natalie S. Lemos, *The Perils of A Prenup: First Do No Harm—to Your Client or Yourself*, 33 FAM ADVOC., no.3, 2011, at 8, 9.
4. Melvyn B. Frumkes, *Why A Prenuptial Agreement?*, 33 FAM. ADVOC., no. 3, 2011, at 7.
5. N.Y. DOM. REL. LAW § 236(B)(3) (McKinney 2010).
6. *Id.*
7. *Id.*
8. 45 N.Y. JUR.2D *Domestic Relations* § 193 (2012).
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10. Willard H. DaSilva, *Changing Population Trends Spur New Interest in Prenup Agreements for Love, Money and Security*, 74 N.Y. ST. B. ASSOC. J., no. 2, 2002, at 8.
11. *Id.*
12. Frumkes, *supra* note 4, at 7.
13. Poliacoff, *supra* note 2, at 13.
14. DaSilva, *supra* note 10, at 8.
15. Frumkes, *supra* note 4, at 7.
16. Poliacoff, *supra* note 2, at 13.
17. *Id.*
18. *Id.*
19. Frumkes, *supra* note 4, at 7.
20. Poliacoff, *supra* note 2, at 15.
21. *Id.*
22. Alan D. Scheinkman, New York Practice Series: New York Law of Domestic Relations § 6 (2nd ed. 2011). *See also id.*§§ 6.1-6.26.
23. *Id* at § 6.26.
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25. Strong v. Dubin, 901 N.Y.S.2d 214, 217 (App. Div. 2012). *See also* Van Kipnis v. Van Kipnis, 900 N.E.2d 977, 979-80 (N.Y. 2008).
26. Strong v. Dubin, 901 N.Y.S.2d at 214.
27. *Id.*
28. Avitzur v. Avitzur, 446 N.E.2d 136 (N.Y. 1983).
29. Scheinkman, Matrimonial and Family Law, *supra* note 24, § 4.7.
30. *See* Katsaros v. Katsaros, 914 N.Y.S.2d 910 (App. Div. 2011). *See also Van Kipnis*, 900 N.E.2d 977 (N.Y. 2008); Bloomfield v. Bloomfield, 764 N.E.2d 950 (N.Y. 2001).
31. Katsaros v. Katsaros, 914 N.Y.S.2d at 910; *see also*, Genovese v. Axel, 835 N.Y.S.2d 684 (App. Div. 2007); Strong v. Dubin, 901 N.Y.S.2d at 214.
32. Katsaros v. Katsaros, 914 N.Y.S.2d at 910.
33. Strong v. Dubin, 901 N.Y.S.2d at 217.
34. Genovese v. Axel, 835 N.Y.S.2d at 685-86.
35. Van Kipnis v. Van Kipnis, 900 N.E.2d at 979.
36. Anne Pachciarek & Julie Laeace, *Can Prenups Waive Pension Benefits?*, 24 FAM. ADVOC., no. 3, 2001, at 41.
37. Scheinkman, New York Law of Domestic Relations, *supra* note 22, § 6.12-3.
38. *Id.*
39. *Id. See also* 29 U.S.C. § 1055 (2006).
40. *Id.*
41. Pachciarek & Laeace, *supra* note 36, at 41-2. *See also Strong*, 901 N.Y.S.2d at 219.
42. Leinoff & Lemos, *supra* note 3, at 8.
43. *Id.* at 19.
44. *Id.* at 8.
45. *Id.* at 19.
46. 45 N.Y. JUR.2D *Domestic Relations* §§ 155-98 (2012).
47. *Id.* at §§ 155-60.
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50. *Id.*

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The Missing Military Survivor Annuity—Case Concluded

By Mark E. Sullivan

Overview

The first two parts of this trilogy about the SBP (Survivor Benefit Plan) explained the disaster that befell Mae Lydick in 1986 when she divorced her husband, a military retiree. The judge failed to grant her protection for her pension share in the form of a death benefit, the Survivor Benefit Plan.[1] Thus she was left with no death benefit should her former husband predecease her. His military pension share payments to her would end with his death, since no survivor annuity was in her settlement.

The first parts of this series explained:

- what the Survivor Benefit plan is and how it works
- cost, death benefit, termination and changing of coverage
- SBP coverage and issues for members of the National Guard and Reserves
- benefits and disadvantages of SBP coverage
- deadlines for elections and remedies for the wronged spouse, and
- use of a court-ordered "deemed election" when the SM (service member) or retiree cannot or will not cooperate.

This final part will explain arguments used to advocate or block SBP coverage, deciding how much coverage to obtain, and how to argue the case for a separated spouse to convince the court that she or he should have received SBP former-spouse coverage. Finally, we'll also explain how to shift the premium to the former spouse (since the SM will receive NO benefit from SBP coverage and must be dead for it to take effect).

Strategies for the Service Member

The best option for the SM who wants to avoid SBP obligations is usually *silence*. If no one says anything about SBP, then John Doe, our hypothetical service member, will not have to elect coverage for Mary Doe, his soon-to-be ex-wife. This will save him money since there will be no deduction for coverage from his retired pay. And, since there is no way of dividing the SBP between successive spouses, it is to his advantage to hold on to available coverage for a remarriage and a new wife, if that is in his future.

If there is a discussion about SBP, then his attorney should deflect the conversation into *death benefits in general*, of which life insurance is the most obvious choice. Life insurance for Mrs. Doe may be cheaper than SBP, since former-spouse coverage under the SBP costs 6.5% of his pay. It also has the advantage for Mary Doe of paying her in a lump-sum cash amount at his death, rather than doling out monthly payments to her.

As a way of sweetening the deal, if that is necessary, John Doe and his attorney could offer to split the cost of life insurance with Mrs. Doe, with each paying half the premium. Another alternative is to make the life insurance premium payable entirely by John Doe but to treat it as tax-deductible alimony for him (which would mean that the premium is treated as taxable alimony for Mary Doe).

Mirror Benefit

If John cannot dissuade the other side from SBP, then he and his attorney might try a different approach. Especially where the parties have not been married during the entire term of the SM's military service, it is wise to step back and *compare the benefit* that Mary Doe will receive while her ex-husband is alive with the SBP death benefit she will receive, which will be 55% of the base amount selected. Often there is a great (and irrational) disparity between these two amounts

Suppose that the parties were married for sixteen years at the time of divorce and that John Doe had twenty-four years of service at that time. Then Mrs. Doe should be entitled to 50% of 16/24, or 33% of the military pension if John Doe retired on his date of divorce. But if John elects SBP coverage for her at the full base rate, that is, his entire retired pay, she would receive 55% of the pension starting at the date of his death. This is a good example of someone being worth more dead than alive!

John Doe probably feels that his ex-wife should receive the same amount whether he is alive or dead—the death benefit should mirror the lifetime benefit.[2] He might well be appalled that she should profit by his death. Yet this is exactly what would happen if he unknowingly agrees that she receive 55% of his retired pay, which can be done explicitly ("Wife shall be SBP beneficiary of husband with his retired pay selected as the base amount") or implicitly ("Wife shall be husband's SBP beneficiary," which DFAS will interpret in the same way as the preceding example).[3] The right way for John Doe to handle this is to adjust the base amount downward to reflect the lesser share to which Mary Doe should be entitled if her "life share" of the pension is intended to be equivalent to her "death share."

While this sounds absolutely fair (from the standpoint of either party), there are major problems with attaining this goal. Here's the analysis:

1. To determine Mary's death share, we have to know her "life share."

2. We cannot know what Mary's life share is until John is retired or just about to retire (i.e., a few months away from the retirement).

    a. This is because, in an active-duty case, we will not know what final retirement rank John attains, how many years of service he will have at retirement, and what the pay scale will be when he retires.

    b. In a Guard / Reserve case, no one knows what the member will be paid until he reaches age 60; only then will we know the applicable active-duty pay for his rank and years of service, so we can apply it in the formula for Guard / Reserve retired pay.

3. Without knowing John's retired pay, we can't determine Mary's share of it in dollars, and we must *know the dollar amount* to select the proper "base amount" for John to choose in order to give Mary the "right SBP payment" that mirrors her lifetime share.

4. Furthermore, John can only select the base amount when he retires (if he's an active-duty SM) or at the 20-year mark (if he's in the Guard / Reserve), and for many cases that's several years from now. And yet DFAS requires that the SBP election for a former spouse be accomplished within two specific windows of time (one year from divorce for John's election, one year from the SBP order for Mary's "deemed election"). If we stray outside these windows, we lose coverage completely.

5. Thus, the mirror share can only be done if the selection of the SBP base amount is done at the same time as the division of the pension. Even the few states (e.g., Florida, Texas, Kentucky, Tennessee and Oklahoma) where the pension is divided according to the rank and years of service at the date of divorce, separation, etc., it's still impossible to fix the dollar amount of Mary's share (for purposes of choosing the SBP base amount). This is because the pay scale which is used for John's retired pay is **not** in existence at divorce or separation. It's the actual pay scale at the time he retires. **No state** requires that the pay scale be frozen as of the date of divorce, separation, etc. For example, if the divorce court splits John Doe's military retired pay in 2008 as a major (0-4) with 16 years of service (which was his rank and years of service at divorce), the order should still reflect that Mary's payment will be based on a 16-year major's pay according to the pay tables for a "major over 16" at the time that John Doe retires.

When can a mirror share be accomplished? In an active-duty case, it can be done when the pension division is done at the same time as the SM retires, or at most a few months before the retirement. If John Doe is retiring in June, for example, and the pension division (whether or not at the time of divorce) is in January of the same year, there will probably be enough information about John's retired pay to determine the dollar amount for Mary's share, which in turn will allow the calculation of a proper SBP base amount for John to select at retirement.

In a Guard / Reserve case, it is possible to do a mirror share calculation if John is at the age (usually 60) when he starts receiving retired pay, and if he selected Option A, which defers the decision on SBP coverage and base amount to age 60, on DD Form 2656-5. This choice was made at the 20-year mark when John received his "Notice of Eligibility" in regard to retirement.

How Much Coverage?

If these obstacles can be overcome, let's see how it's done. Assume that the gross retired pay of John Doe is $4,000 a month. Assume further that he retired in the grade of colonel on the date of divorce, they were married for 166 months during his military service, and he has served 332 months in the Army. Some states mandate this result by "fixing" the benefit as of the date of separation or divorce. With these facts known, the maximum SBP payment for Mrs. Doe at the full base rate would be $2,200 a month (55% of the retired pay). The premium would be about $260 (6.5 % of retired pay).

Now we calculate the "proper share" (according to John Doe) of the pension for Mary Doe. This would be one-half of the marital share of the pension. The marital share is 166 ÷ 332, or 50%, of retired pay. Half of this is 25% of retired pay.

DFAS doesn't apportion gross retired pay; it divides "disposable retired pay," which means—for the purposes of this exercise—gross pay less the SBP premium. The SBP premium is 6.5% of the base amount, or .065 x $4,000, which equals $260. Subtract this from $4,000 to get disposable retired pay of $3,740, and 25% of this is *$935 a month*. This lifetime pension share is a far cry from the "death share" of $2,200 ($4,000 x 55%) that she would receive if there were no adjustment of the base amount.

To adjust the base amount, we have to ask, "What base multiplied by 55% results in $935?" To put it in mathematical terms, we would write the equation as follows, using B as the number for the base amount: B x 55%=$935. Solving for B means dividing $935 by .55, and $935 ÷ .55=$1,700. Thus John Doe should choose $1,700 as his base amount to provide a "mirror benefit" for Mrs. Doe—a death benefit that is equal to her lifetime share of the pension. She receives $935 as the lifetime share of the pension, and—if John Doe dies before her—she receives $935 a month upon his death (for the rest of her life). These figures are, of course, not static. The Defense De-

partment adjusts the death benefit annually for inflation through COLAs (cost-of-living adjustments).

In general, when the retired pay is known (which means when the SM is already retired or is about to retire), or when state law otherwise fixes the retirement benefit of the non-military spouse, the way to do the calculation is first to figure the amount that the spouse should receive as a lifetime pension share. Then, one needs to divide that figure by .55. This yields the proper base amount to effect a "mirror share" for the spouse or former spouse.

Below is a table which can be used to do the calculations for a new "target base amount." The base amount is placed into the settlement document (or trial court order) so that Mary Doe receives the same amount at John Doe's death that she was getting as her lifetime share of the pension. If the settlement is being done before divorce and at about the time that John Doe is retiring, he will need to select the lower base amount at retirement and she will have to provide written consent for this change. Then, upon divorce, the decree or separate court order will have to state that she receives "former spouse coverage" and recite the lower base amount that they have chosen in compliance with the settlement agreement.

Note that there is no mathematical formula that will yield this result if the SM is just about to retire or if the state law, as in the majority of the states, does not fix the spouse's benefit but rather applies a formula (with an unknown denominator, total years of military service) to the final retired pay of the SM (which is also unknown). "Double unknowns" means that—in the majority of the states—it is impossible to know the SM's retired pay or the spouse's fixed benefit (when retirement is not imminent), since that depends on the SM's grade at retirement and the applicable pay tables at that time. This makes it impossible in these circumstances to compute the future SBP payment as above since the final retired pay is not known. And if the SM has already retired, then his base amount was fixed at the date of retirement and cannot be changed (although the court order could specify that the former spouse must turn over any "surplus payment" that exceeds the "life share" to the estate or heirs of the SM).

The best one can do, if John Doe is approaching retirement, is for him to use *an estimate of his retired pay* as of the date of divorce (or the date of settlement) to figure his base amount in the above calculations. You can still "fix" the spouse's share by agreement or stipulation. So long as it is not disputed by Mrs. Doe or her attorney, this will yield a "fair" result for her (in the eyes of John Doe) and

Explanation	Calculations
1. Determine the dollar amount which the FS (former spouse) will receive each month as a share of the pension. This is usually the spouse's percentage times disposable retired pay (DRP).	
2. Divide that amount by .55 (SBP is always 55% of base amount chosen for former spouse coverage).	
3. The result is the "target base amount" to be chosen by the SM upon retirement (with written spouse concurrence).	

When using the numbers shown above for John and Mary Doe, here is what the table would look like:

Explanation	Calculations
1. Determine the dollar amount which the FS (former spouse) will receive each month as a share of the pension. This is usually the spouse's percentage times disposable retired pay (DRP).	$4,000 - $260 (SBP premium) = $3,740 (DRP) $3,740 x 25% (spousal share) = $935 per month
2. Divide that amount by .55 (SBP is always 55% of base amount chosen for former spouse coverage).	$935 ÷ .55 = $1,700
3. The result is the "target base amount" to be chosen by the SM upon retirement (with written spouse concurrence).	$1,700 = Target Base Amount

will save him some money in premiums. Using the examples above, the premium for a base amount of $1,700 is about $110, a savings of $150 each month over the premium ($260) for a base amount of $4,000.

Who Pays the Premium?

Perhaps John Doe will say, "Why should I pay for SBP at all? Why doesn't my ex-wife have to pay for it? After all, she wants it. I'll be dead and gone by the time she gets it. She should have to pay the premium!" Unfortunately for him, it does not work that way with DFAS. His attorney can send DFAS as many orders as he wants—signed by judges, certified by clerks, and affixed with ribbons and sealing wax—and DFAS will still refuse to approve any order that tries to shift the premium to Mary Doe's share of the pension. This is because the SBP premium, according to the Uniformed Services Former Spouses' Protection Act, or USFSPA[4] comes "off the top" before determining disposable retired pay. The definition of "disposable retired pay" excludes SBP premiums.[5] This results in the parties *both* paying the SBP premium in the same ratio as the pension division.

However, even if the front door is closed for John Doe, there are two back doors which he may use. One involves direct payment, and the other involves changing the pension percentage of the former spouse.

First, John Doe may negotiate for an agreement, or seek a court order, which requires Mrs. Doe to be responsible for the premium payments and to reimburse him for some portion, or all, of the premium each month. This would require, of course, her continued interaction with her former husband through the process of writing a check or approving a direct debit from her bank account. This is probably something that John Doe would not want, since it involves the ongoing duty to monitor and enforce payments. It is worth mentioning, however, inasmuch as a premium-allocation order made in advance of John Doe's retirement cannot state with specificity what the SBP payment to his former spouse will be and how much it will cost. Such a clause might read:

> **The former spouse will reimburse and indemnify the SM/retiree for the cost of the SBP premium by paying to him each month the full cost thereof by [certified check] [money order] [automatic bank debit from her account to his at XYZ Bank, Apex, North Carolina, Acct. #12345] no later than the fifth day of each month.**

Pension Share Adjustment

A second option, which would accomplish the same thing, is to adjust the pension percentage that Mrs. Doe receives from DFAS. As an example, assume that the parties were married for half the length of John Doe's military service and John Doe retires from active duty on the date of divorce. Mrs. Doe is entitled to 25% of the military pension of John Doe. His retired pay is $4,000. To shift the SBP premium to her, follow these steps:

- First, calculate the amount of the total SBP premium. In an active-duty case, one which doesn't involve RCSBP (Reserve Component SBP), the formula is generally 6.5% times the base amount of coverage selected for former spouse coverage. In John Doe's case, his full retired pay is the selected base amount. Thus, the SBP premium for coverage for Mrs. Doe is $260 ($4,000 x 6.5% = $260).
- Determine the amount Mrs. Doe would receive from DFAS each month as her share of the pension.
  - Remember that DFAS only pays a percentage of DRP, or *disposable retired pay*, which is gross pay less certain deductions, the most important of which are the SBP premium and disability pay. For this example, assume there is *no disability deduction*.
  - Mrs. Doe is to receive 25% of John Doe's DRP. His DRP is $3740 ($4000 - $260 = $3740). Mrs. Doe's share of that is $935 (25% x $3740 = $935).
  - This amount, $935, is what DFAS would pay to Mrs. Doe if the court order simply required Mrs. Doe to receive 25% of John Doe's retired pay without any adjustment for the SBP premium. DFAS would deduct the premium from his gross pension, which means that each party shares in the cost of the SBP premium proportionate to the percentage share of the pension each receives. In this example, with the SBP premium coming "off the top," Mrs. Doe is paying 25% of the premium and John Doe is paying 75%.
- We need Mrs. Doe to pay John Doe's 75% of the SBP premium. To calculate this in dollars, multiply the full premium by John Doe's percentage of the pension. This yields $195 ($260 x 75% = $195).
- Next, subtract this figure from Mrs. Doe's share of the pension. The result is $740 ($935 - $195 = $740). This is her net share after shifting the full SBP premium to her.
- Finally, divide Mrs. Doe's new pension share by the total disposable retired pay (which is his retired pay less SBP premiums) to arrive at Mrs. Doe's new percentage of the retired pay ($740 ÷ $3740 = 19.79%).

To verify your calculations, do a double-check. Multiply John Doe's disposable retired pay by Mrs. Doe's new percentage share. The result should be equivalent to $740 [$3740 x 19.79% = $740.15].

A third way to check the math is to take the gross amount of the pension ($4,000) and figure the monetary value of Mrs. Doe's 25% share ($1,000). Deduct from her share the full SBP premium ($1000 - $260). Again, the result is $740.

Thus, Mrs. Doe's share of the pension would be reduced from 25% to 19.79%, and she is responsible for the full cost of the SBP premium. This is a savings of $195 per month for John Doe. A worksheet for premium-shifting is at **APPENDIX A**.

Putting this into a formula for the separation agreement or court decree involving a military retiree might be accomplished as below:

> **Calculate the monetary amount due to the former spouse by multiplying her share times the "disposable retired pay." Subtract from this the retiree's percentage of the SBP premium (in dollars). Divide the remainder by the disposable retired pay to get her adjusted percentage of the pension, thus allocating payment of the entire SBP premium to her.**

The Best of Both Worlds

Sometimes the client, John Doe, wants it both ways. He wants both a shifting of the premium to Mrs. Doe *and* the selection of a "mirror benefit." While ordinarily his counsel will advise him that—so long as *she* is paying for it—the amount of the SBP benefit should not matter, sometimes he'll put his foot down, usually "on principle." In this situation, the following chart which explains how to determine the mirror share *and* shift the entire SBP premium to the former spouse:

Strategies for the Spouse

If there is a discussion about SBP and the conversation turns to *death benefits in general*, Mrs. Doe should decide whether she wants to discuss alternatives. The best approach is to let the John Doe and his attorney explain their proposal and then reiterate that she is interested in SBP, but she is willing to consider life insurance as an alternative death benefit if the cost and benefits are satisfactory. She should realize that John Doe might have his own reasons to eliminate SBP coverage from the discussion, either because of the cost to him or because he wishes to preserve the benefit for a future wife. Mrs. Doe might be able to use this to her advantage in the negotiations by making John Doe prove to her that his alternative is not just as good as SBP, but actually superior to it.

Life Insurance Issues

If Mrs. Doe is interested in life insurance, she should insist on private life insurance and should avoid using Servicemen's Group Life Insurance (SGLI). According to a 1981 Supreme Court decision, *Ridgway v. Ridgway*,[6] a judge cannot enforce a court order or separation agreement that provides for SGLI to secure the payment of a divorce settlement when the SM has chosen someone else to be his or her beneficiary.

Another tip regarding private life insurance is to be sure to transfer ownership of the policy to the client who is to be protected. Such provisions for life insurance are commonly funded or secured by "owned" policies which belong to the premium payor and build up cash value or equity (*e.g.*, whole life, variable life or universal life policies), ones which belong to the payor but build up no cash value (term life insurance), and ones which have no

Explanation	Calculations
Figure out what dollar amount the FS (former spouse) would get each month as a share of the pension—in a percentage award case, take the spouse's percentage times gross retired pay of the member / retiree.	
Next, divide that amount by .55 (SBP is always 55% of base amount chosen for former spouse coverage) for target base amount.	
Then figure out the dollar amount for the total SBP premium (6.5% for spouse or former spouse coverage).	
Then subtract the premium from the dollar amount for FS; this yields her spousal share less the SBP premium.	
Finally, divide this net figure by the disposable retired pay (gross pay less SBP premium in non-disability cases) and multiply the result by 100.	
This yields the reduced percentage share of the pension which the FS should receive where the death benefit is to mirror the life benefit and the FS pays the full premium.	

equity / cash value and do not belong to the person who pays the premiums (group life policies).

Remember this when drafting a clause that attempts to ensure that the premium payor will not inadvertently (or intentionally) change the beneficiary to a new spouse, for example, in lieu of the beneficiary stated in the agreement. How will the other party ever know whether the intended beneficiary remains as such when the policy and all incidents of ownership remain elsewhere—with the payor or his employer? How can one prevent the payor from signing an agreement containing a life insurance clause with intentions of immediately breaching it by designating a new beneficiary?

The answer is through policy ownership. Most insurance companies allow the assignment of ownership of the policy to a person other than the premium payor. The policy owner is the one who designates the current beneficiary and who must consent to any proposed change in beneficiary. The owner must be informed by the company of any attempts to cancel the policy, and must also be advised as to non-payment of premiums that would have the effect of canceling coverage. Finally the owner is the only one who, with life insurance that has cash value, can borrow against the policy. Since these are the very things which ought to be withdrawn from the premium payor—the power to borrow against the policy, cancel it or change the beneficiary—it makes sense to agree on transfer of ownership of the insurance policy.

Ownership of the policies can revert back to the original owner after the support terms have been satisfied. A transfer of ownership has the effect of protecting each party, preserving their promises and putting temptation out of the way.

Other SBP Issues

If Mrs. Doe is interested only in SBP coverage, then her attorney should be aware of the arguments *pro* and *con* about allocating the premium to her, as discussed above. Her initial position might be skeptical, reflecting the position that USFSPA will not allow DFAS to subtract the premium cost from her share of retired pay.

She may argue that there is no good reason for shifting the cost to her. With *no* SBP, only John Doe receives a survivorship benefit. After all, the military pension plan is only divisible using the "sharing method," which gives her a share of her husband's pension (rather than the "dividing method," which gives her a share in her own right). Because of this, there is a no-cost survivor benefit for John Doe, since upon his wife's death her lifetime share reverts to him. It costs him nothing, and he gets *100 % of his pension* restored to him.

The survivor benefit for her, however, is a maximum of only 55% of the base amount, not 100% of the pension or 100 % of the base amount. She only receives this if the premium is paid, which is 6.5% of the base amount. This means that she receives less during his retired lifetime. Since she receives less during life and less after his death, Mrs. Doe should argue that John Doe should bear the cost of "equalizing" the parties' survivorship benefits by paying for the only part of survivor benefits that has a cost associated with it.

She may, on the other hand, decide that it makes sense for her to share in some or all of the cost or that it is not worth the time and money to contest her husband's arguments. If John Doe is successful in negotiating his base amount downward, as shown in the example above, Mrs. Doe should realize that she will still obtain a slight increase in her present pension payment. This is due to the fact that a lower base amount means a lower premium for SBP. The lower SBP premium means a higher amount of DRP, which is what DFAS divides with her. Thus she receives a smaller share (due to SBP premium-shifting) of a larger amount of DRP.

The End of Premiums

Mrs. Doe's attorney should also be aware that SBP premiums do not last forever. Ever since October 1, 2008, there has been a change in the world of "shifting premiums." After that date, retirees who have paid at least 360 premiums for Survivor Benefit Plan coverage and who are at least 70 years old will be considered "paid up" and need not pay any further premiums. Payments through DFAS are stopped automatically; no application is necessary. The change was made in Section 641 of the National Defense Authorization Act for Fiscal Year 1999, Public Law 105-261.

This means that, in an order containing a premium shift to the former spouse, there needs to be a clause which does a "reverse-shift" to restore the pension share to its original value. The attorney for the former spouse should be sure to include provisions that increase the percentage back to the original percentage after the above period of time. The order should also state that the court will enter a supplementary order, if necessary, to effectuate that increase. This is needed in case the retired pay center doesn't honor the "reverse-shift" clause, or it doesn't have the ability to track the order and "remember" to increase that percentage thirty or more years down the road. In addition to stating what the previous, unshifted percentage is, the order needs to state that, at the end of 360 months of premium payments and when the retiree is at least 70 years old, the percentage of the former spouse will revert to the original percentage. A very basic clause to do this might read:

> **After the defendant has attained age 70 and SBP premiums have been paid for 360 months, the percentage awarded to plaintiff (to accomplish a shift of the SBP premium) shall increase to ___%,**

the original percentage to which she would have been entitled.

Counsel for the former spouse should also be aware that SBP premiums may also be terminated if the former spouse, who previously was covered, is ineligible because she has remarried before age 55. This is not automatic; one of the parties must notify DFAS. A clause to provide for both this and the previously mentioned contingency would state:

> **The adjustment herein of the military pension division share for the non-military spouse/former spouse, to shift the premium payment for SBP, shall end upon the happening of either of the following two events, either of which would result in no premium payable for SBP: 1) that party's remarriage before age 55 (which ends SBP coverage for her/him), or 2) the continuous payment of SBP premiums for thirty years (which results in paid-up SBP). Upon the happening of either event, the adjustment herein shall stop, the non-military party shall be entitled immediately to her/his full, unadjusted share of the pension (without regard to shifting payment of the SBP premium), and she/he may apply to the court for reversion of the pension share to the original, unadjusted portion. That original share is __%.**

In conclusion, when a case involves deferred division of the pension, the attorney for the non-military spouse should insist on SBP coverage (or some acceptable alternative) to provide for the continued financial security of the former spouse should he or she survive the SM. Death planning is an important part of advising the spouse, since "the pension dies when the member dies." There may be substitutes for the SBP coverage or ways to reduce the cost to the retiree, but these will take the time and expertise of competent counsel and will require an understanding of the costs, the calculations, and the available alternatives at each step of the negotiations.

Endnotes

1. *Lydick v. Lydick*, 130 A.D. 2d 915, 516 N.Y.S. 2d 326 (1987).
2. For cases supporting this proposition, see *Matthews v. Matthews*, 336 Md. 241, 647 A.2d 812 (1994), *In re Marriage of Payne*, 897 P.3d 888 (Colo. App. 1995), *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001), *In re Marriage of Kiser*, 176 Or. App. 627, 32 P.3d 244 (2001), *Workman v. Workman*, 418 S.E.2d 269 (N.C.App. 1992) (trial judge ruled that survivor annuity may not exceed lifetime pension share benefit; appellate court upheld this as part of 50% cap rule for pension division).
3. *See, e.g., Schneider v. Schneider*, 5 S.W. 3d 925 (Tex. App. 1999), affirming trial court's denial of motion for constructive trust on rest of SBP over ex-wife's share of pension; SM-retiree argued against her expected receipt of 55% of his retired pay when her portion of the pension was only 32%).
4. 10 U.S.C. § 1408.
5. 10 U.S.C. § 1408(a)(4).
6. 454 U.S. 46, 102 S. Ct. 49, 70 L.Ed. 2d 39 (1981).

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Appendix A

Shifting of SBP premium to former spouse, % method [retirement from active duty]		
Instructions [*=input items]	**Amt./ Number**	**Comments**
Calculate Disposable Retired Pay (DRP)		DFAS bases pay calculations on disposable retired pay; see 10 U.S.C. 1408 (a)(4) and (c)(1)
*Gross retired pay	$4,000.00	See annual Retiree Account Statement (RAS) if SM[1] already retired; otherwise make estimate based on years of service
*SBP premium	$260.00	@6.5% of selected base amount
*Disability compensation	$0.00	Unknown until retirement; see RAS
Disposable Retired Pay	$3,740.00	DRP = gross retired pay - SBP premium - disability compensation
Calculate % for Retiree, for FS[2]		
*Marital pension service months	166	From marriage or start of military service, whichever is later, until separation, divorce or other date, per state law
*Total pension service months	332	Months from start of military service to retirement
Marital/comm. property % of pension	50.00%	Months of marital pension service ÷ total months of pension service
FS % of pension	25.00%	Half of above % (presumed equal division)
SM/retiree % of pension	75.00%	100% - FS %
Calculate FS Share of DRP		
DRP from above	$3,740.00	
Spouse % from above	25.00%	
FS share of DRP	$935.00	DRP X FS %
SBP premium from above	$260.00	
SM/retiree share of premium	$195.00	Retiree % X SBP premium
FS net share of pension	$740.00	FS share of DRP less retiree share of SBP premium[3]
Calculate New Spouse %		Based on shift of SBP premium to FS
DRP from above	$3,740.00	
FS net share of pension from above	$740.00	
New FS % with premium shift	19.79%	Divide FS net share by DRP

[1]SM = service member

[2]FS = former spouse

[3]This is necessary because SBP "comes off the top" in arriving at DRP, which means that each party pays his or her own percentage of the SBP premium. Thus the spouse's share of DRP has only had her / his share of SBP withheld from it. To get the remainder paid by the spouse, subtract the amount of SBP paid by the SM / retiree, which is his / her percentage times the SBP premium. The result should be the same net dollar amount for the spouse as in the first part of this table.

Divorce ≠ Deportation

By Catharine M. Venzon and William Z. Reich

Introduction

Matrimonial lawyers must know fundamental immigration law when representing Foreign Nationals (FN) in divorce proceedings. Non-immigrant visas allow FNs to enter the United States for a variety of reasons, such as business, education, or pleasure. A FN's family may accompany the principal applicant depending on the purpose and duration of the trip. The FN and accompanying dependents are issued a record of entry (Form I-94) at the United States Port of Entry.

The derivative status of a FN family member, particularly a FN spouse of the principal applicant, relies on the continued marital relationship. Simply speaking, in order to maintain derivative status, a FN spouse must remain married to the principal applicant.

A strategy must be in place during the divorce proceedings to protect the FN's United States immigration status. An approach that blends both immigration and matrimonial law is needed to provide the client with an opportunity to obtain alternative derivative status.

This article is intended to alert matrimonial lawyers of issues that may arise in protecting a FN's immigration status in an Action for Divorce. It is recommended that matrimonial practitioners work in conjunction with an immigration lawyer because this article will not outline all the statutory requirements for non-immigrant and immigrant options. This article illustrates examples and offers solutions on protecting a FN's immigration status in the event of divorce.

Record of Admission (Form I-94)

The matrimonial lawyer must begin by asking the FN for his or her Form I-94. The Form I-94 contains the client's specific non-immigrant status and authorized period of stay in the United States.

The FN seeking entry into the United States must have a valid visa issued by a Consulate or Embassy abroad (unless visa exempt). However, the visa is simply permission to apply for admission at a United States port of entry. United States Custom and Border Protection Officials (U.S. CBP) determine whether to admit the FN and if so, for what duration and status. This admission is documented by the issuance of Form I-94.

A sample Form I-94 indicating a FN's non-immigrant status—"TN" (see scenario 5 *infra*)—the authorized date of entry (March 4, 2010), and the expiration of authorized status (March 3, 2013), is attached for reference. Form I-94 can also be attached to Approval Notices issued to extend / change a FN's status.

New York State "No-Fault" Divorce Provision

On August 13, 2010, New York State Senate bill S3890A was signed into law amending the Domestic Relations Law by adding a "No-Fault" provision. This allows judgments of divorce to be granted without a finding of fault after the following ancillary issues are resolved: "the equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and expert fees and expenses, and custody and visitation with the infant children of the marriage."[1]

This "No Fault" provision is a useful tool to protect a FN client's derivative status. The language provides five ancillary issues that must be resolved before the divorce can be granted. It is suggested that derivative status is another major ancillary issue that must be addressed. It should be argued that deportation (i.e., in some cases, the involuntary separation of a parent from a child) is an important ancillary issue that cannot be ignored.

Custody and visitation are affected if the FN loses his or her derivative status after a divorce. DRL § 170 was amended in part requiring that "custody and visitation with the infant children of the marriage [to] have been resolved by the parties" before a divorce is granted. It should be argued that the court must consider the derivative parent's access to his or her child and the child's access to the parent. This ensures that the derivative status child and / or United States citizen child has a continuing parent / child relationship. In some cases, a derivative child could be in the United States for several years depending on the duration of the primary applicant's visa in the United States.

Strategies to Preserve or Change Status

The following examples illustrate how a FN could lose his or her derivative status in divorce. There is no one strategy that can be used for any particular situation; rather, the matrimonial lawyer in conjunction with an immigration attorney must decide what works best. Following are strategies to consider:

Scenario 1: Plans to Become a Lawful Permanent Resident (LPR)

One approach is for a FN to apply for a "green card" to become a Lawful Permanent Resident ("LPR"). Once the client is a LPR, he or she is no longer dependent on the status of his or her spouse.

There are two options for attaining LPR status: family-based and employment-based. Family-based options include applying through relatives of United States citizens or legal permanent residents. Employment-based

options include applicants who are individuals at the top of their field, international managers or executives, and those who obtained approved labor certifications. Thus, one option if the parties are agreeable would be to defer the divorce until after the FN client becomes a Lawful Permanent Resident.

Scenario 2: H-1B Professional Worker

Temporary foreign workers in specialty occupations may seek to be classified by their United States employer for H-1B status. A "specialty occupation" requires theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor including, but not limited to: architecture, engineering, mathematics, physical sciences, social sciences, biotechnology, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requires the attainment of a bachelor's degree or its equivalent at a minimum. H-1B status is accorded to the principal applicant, while H-4 status is accorded to the derivative spouse or child under age 21.

As an example: Alexander is an exceptional architect for a multinational corporation. His company obtained a contract with the City of Buffalo to restructure the waterfront, and his employer would like Alexander to design the buildings and oversee the construction. Alexander is a Russian citizen who requires the company to obtain an H-1B visa on his behalf. This will allow him to live and work in the United States. Alexander is married to Maria, who is also a Russian citizen and architect. Maria is eligible to accompany Alexander to the United States on an H-4 visa based on Alexander's H-1B visa.

The parties lawfully enter the United States and Alexander is issued an I-94 based on an H-1B visa. Maria is issued an I-94 based on an H-4 visa for three years. After two years, the parties separate and wish to file for divorce. Maria wants to remain in the United States.

Can Maria change her status and remain in the United States after a divorce?

Maria can apply for a job in her specialty occupation because she entered the United States lawfully on an H-4 derivative status visa, and her H-4 has not expired. Her employer can petition for her as an H-1B. The H-4 derivative, however, is subject to the same requirements of any other H-1B applicant. Thus, an applicant still needs to satisfy the same qualifications by having: (1) the requisite education; (2) a profession that qualifies as a specialty occupation; (3) a company willing to sponsor employment; and, (4) file an application to change nonimmigrant status.

A word of caution: H-1B visas are only issued by United States Consulates. The approval notice for the change of status in this case will likely include an I-94, extending Maria's status throughout the H-1B approval period. This would allow Maria to lawfully remain in the U.S. However, should Maria wish to leave the United States for a brief trip, she would need to apply (and obtain) an H-1B visa from a United States Consulate in Russia before being allowed to return to the United States. Canadian and otherwise visa-exempt citizens are an exception to this requirement as long as the trip outside of the United States is less than 30 days. The I-94 from the approval notice is not sufficient to allow reentry into the United States.

Scenario 3: F-1 Student

An F-1 Visa may be issued to foreign national students "temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States."

Example: Ilham is a Turkish citizen who has been accepted for enrollment at a prominent university in Ithaca, New York to pursue a Master's degree in public administration. She is 24 years old and has been married for three years to her Turkish-citizen husband, Mahir. Ilham believes that an American degree will qualify her for a high-level Turkish government administrative job.

The parties lawfully enter the United States and Mahir receives an F-2 visa, the derivative of Ilham's F-1 visa. However, the marriage deteriorates, and a divorce is sought. Mahir wants to remain in the United States.

Can Mahir change his status and remain in the United States after a divorce?

Mahir can apply for his own F-1 student or work visa because he lawfully entered the United States on a derivative F-1 visa. The F-1 derivative is subject to the same requirements of any other F-1 applicant. Thus, if a person enters the United States with a spouse on a derivative visa (e.g., H-4, L-2, F-2, TD) and already has a Bachelor's degree, he or she could consider attaining a Master's degree. The attainment of a Master's degree will extend the applicant's time in the United States. After graduation, the applicant may qualify for an additional year in optional practical training which will allow him or her to work and gain experience in their chosen field. Also, by continuing his or her education, opportunities may be available for future employment-based temporary and permanent visa opportunities. The applicant may also consider applying for an H-1B visa if he or she meet the credentials for employment.

Scenario 4: L-1: Intra Company Transferee Overview

An employee with an L-1 visa may work the United States as a manager / executive or as a staff member with specialized knowledge. A FN may receive L-1 status within three years preceding his application for admission providing he has been employed abroad continuously for one year by a parent, branch, affiliate, or subsidiary of the

United States-based petitioning company. The applicant must enter the United States to continue providing services for this same employer, affiliate, or subsidiary. Family members may be accorded L-2 derivative status.

Example: MegaCorp is an international accounting firm headquartered in Hamburg, Germany. MegaCorp has opened a branch in Syracuse, New York. Hans has been working as a senior manager in the Hamburg, Germany office for the past eight years and has been asked to work in the United States office. The United State office is only in the developmental stage. MegaCorp believes that Hans' unique managerial style will allow the United States office to be successful.

Hans, his wife Gertrude and three children lawfully enter the United States. Hans receives an L-1 visa, and his family is issued L-2 derivative visas. The marriage deteriorates and a divorce is sought. The wife and children want to remain in the United States.

Can Gertrude change her status and remain in the United States after a divorce?

Gertrude may lawfully remain in the United States if she qualifies for another visa. In this scenario we do not know if she has the necessary education or professional experience to qualify for an H-1B visa as an employee in a "specialty occupation." In any event, if she got accepted and attended an American university she would then be eligible for an F-1 student visa.

Scenario 5: TN Status: Trade NAFTA Professional

Canadian and Mexican professionals may apply for TN status. This category is similar to an H-1B visa except there is no statutory limitation on stay, and covers the numerous positions listed in 8 CFR § 214.6. For a list of qualifying professions, please see NAFTA TN Lawyer at http://www.naftanlawyer.com/nafta-tn-status-visa-regulati/.

Example: Rafel is a Mexican citizen and graphic design artist. He graduated from a major university in Mexico City, Mexico with a bachelor's degree in graphic design and computer science. He is married to Mia, who is also a Mexican citizen with a bachelor's degree in biology.

E-tron Arts, with offices located in Hollywood, California, was impressed by Rafel's creativity in graphic design for video games and offered him a position in the United States, which Rafel accepted. The parties lawfully entered the United States and Rafel was issued a TN Trade NAFTA professional visa and his wife received TD status, which allowed her to join him. The marriage deteriorates and they wish to separate.

Can Mia change her status and remain in the United States after a legal separation?

Derivative status can be protected in the event of a legal separation. Also, if the parties sign a Separation Agreement and do not convert it into a divorce, they may be legally separated indefinitely. In this arrangement, as long as the divorce is not finalized, either party may move out of the house and move on with their lives. A Property Settlement Agreement signed by both parties will allow the spouse to maintain derivative status. In this scenario, Mia would retain her status.

However, Mia may change her status and apply for a TN visa, as a biologist, or she may file for an H-1B Visa if she meets the requirements.

Scenario 6: Marriage to a United States Citizen (USC)

The scenarios to this point have discussed options that allow a person to remain in the United States in temporary status if that temporary status is threatened by divorce or separation. Marriage to a USC can lead to lawful permanent residence in the United States and eventually United States citizenship.

If a person's derivative status is lost because of divorce, that person will be residing in the United States "out of status" until he or she marries a USC. Living in the United States while being "out of status" is a hardship and not recommended. However, as long as this person remains unnoticed and under the radar of the Department of Homeland Security, a marriage will put him or her back on track toward lawful status.

Scenario 7: EB-5 Immigrant Investor

A high net-worth individual may remain in the United States permanently by becoming an EB-5 immigrant investor. To become an immigrant investor you must establish: (1) that you have or are in the process of investing the required amount of capital ($1,000,000 USD or $500,000 USD) to a USCIS designated Regional Center (A Regional Center is a private enterprise or corporation or a regional governmental agency with a targeted investment program within a defined geographic region), or Targeted Employment Area; (2) the funds have been lawfully acquired; (3) the investment will directly (or indirectly, if using Regional Center) create or save ten (10) full-time jobs in the United States; (4) he or she will have at least a policy making role in the enterprise (not required for Regional Centers); and (5) he or she was a participant in creating the enterprise (not required for Regional Centers).

Scenario 8: Violence Against Woman Act (VAWA)

VAWA provides protection for women who obtained their lawful status through engagement or marriage. Many FN battered spouses remained in abusive relationships because they feared losing their immigration status. Today, the Violence Against Women Act (VAWA) allows a battered spouse to leave a relationship and independently pursue immigration options.

VAWA Example 1:

A fiancée enters the United States on a K visa (a fiancée's visa) to marry a USC. However, after the marriage the USC spouse abuses his wife and refuses to file the appropriate paperwork for her to maintain legal status. In this case, the battered spouse may self-petition for adjustment of status by filing a Form I-360 demonstrating that she: (1) resided with the USC spouse, and (2) was battered or subject to extreme cruelty during the marriage. In this scenario the abused spouse is a female but a battered male spouse is also eligible for the same relief.

VAWA Example 2:

Again, a fiancée enters the United States on a K visa (a fiancée's visa) to marry a USC. However, after the marriage the USC spouse abuses his wife and refuses to file the appropriate paperwork for her to maintain legal status. This battered spouse falls "out of status" by exceeding the period of time allotted under her non-immigrant visa. Immigration becomes aware of the situation and places her in removal proceedings.

The battered spouse has two options to adjust her status once in removal proceedings. In the first option, the battered spouse may self-petition for adjustment of status under VAWA. The battered spouse may self-petition for cancellation under VAWA by filing Form I-360 with USCIS and then, upon approval of Form I-360, apply for adjustment of status before an Immigration Judge. In the event that the requirements of VAWA cannot be met, a battered spouse may seek cancellation under option two.

In the second option, the abused wife may seek under a special rule cancellation of removal for battered spouses. Option two requires the following: (i) a person to have been battered or subjected to extreme cruelty by a spouse who is or was a citizen or landed permanent resident, (ii) that the person has been physically residing in the United States for a continuous period of not less than 3 years immediately preceding the date of the application; (iii) the person is of good moral character during those three years; (iv) the person is not inadmissible, deportable, or has been convicted of an aggravated felony, and (v) the removal would result in extreme hardship. Special rule cancellation of removal is also available to battered children. In this scenario we stated the abused spouse was female but a battered male spouse is also eligible for the same relief.

VAWA Example 3:

A FN marries a USC abroad and then completes the immigrant visa process through a United States Consulate within one year of marriage. The immigrating spouse is granted conditional residency upon entering the United States. Conditional residency is a 2-year probationary period to ensure that the marriage is bona fide. The next step in the process is unconditional lawful permanent residency (LPR), but this status cannot be granted until conditional residency is lifted. To lift the conditional residency the citizen or landed permanent resident spouse must file a Form I-751. The marriage is abusive and the USC spouse refuses to file Form I-751 for his wife to maintain status. Under VAWA, the conditional/resident/battered spouse can file Form I-751 on her own, requesting a waiver of the joint filing requirement based upon spousal abuse. Again, in this scenario we stated the abused spouse was female but a battered male spouse is eligible for the same relief.

Conclusion

New York State's Domestic Relations Law no fault provision provides some protection for FNs because, arguably, derivative status must be dealt with prior to the issuance of divorce. Derivative status is a major ancillary issue and cannot be ignored. The disruption of the family unit affects the future of the dependent spouse and children's derivative status.

The matrimonial lawyer, working in tandem with an immigration professional, must assist the FN to identify another status to lawfully remain in the United States.

Endnote

1. DRL § 170.

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Departure Number

114922922 20

MAR 9 6 2010

Department of
Homeland Security

TN

CBP I-94A (11/04)
Departure Record

Mar 03 2013

Family Name

First (Given) Name

Birth Date (Day Mo Yr)
19 04 69

Country of Citizenship

US-VISIT MULTIPLE

Warning. A nonimmigrant who accepts unauthorized employment is subject to deportation.
Important. Retain this permit in your possession; ***you must surrender it when you leave the U.S.*** Failure to do so may delay your entry into the U.S. in the future.
You are authorized to stay in the U.S. only until the date written on this form. To remain past this date, without permission from Department of Homeland Security authorities, is a violation of the law.
Surrender this permit when you leave the U.S.:
- By sea or air, to the transportation line;
- Across the Canadian border, to a Canadian Official;
- Across the Mexican border, to a U.S. Official.

Students planning to reenter the U.S. within 30 days to return to the same school, see "Arrival-Departure" on page 2 of Form I-20 **prior to surrendering this permit.**

Record of Changes

Agent Constitutional Exempt

Port: **Departure Record**

Date:

Carrier:

Flight # / Ship Name:

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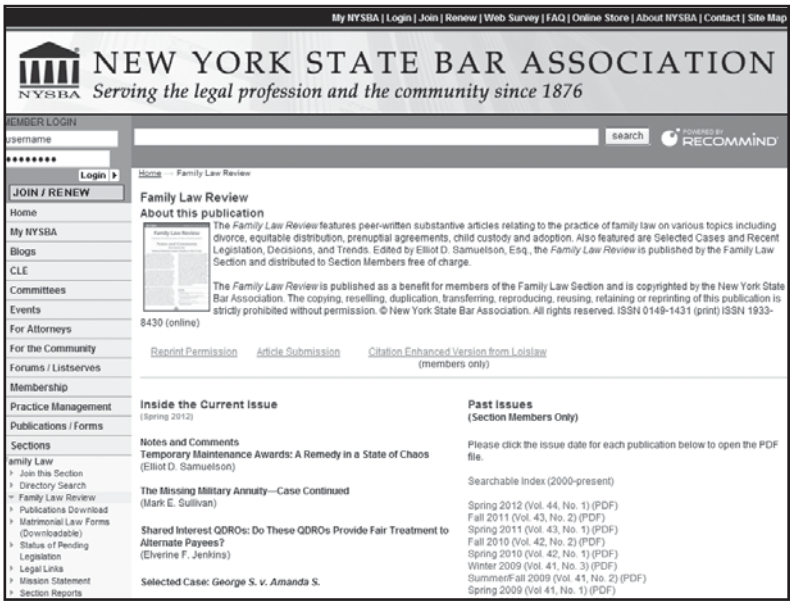

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Recent Legislation, Decisions and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages

In November, the states of Maine, Maryland and Washington passed the freedom to marry for gay couples, the first time in history that gay marriage was passed by ballot. Therefore, a total of nine states now permit gay marriage, plus D.C.

The other states that permit same-sex marriage include New York (as of July 24, 2011 when it passed the Marriage Equality Act) (new DRL § 210-a, 210-b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia.

Two states officially pledge to honor out-of-state same-sex marriages: New Mexico and Rhode Island. Eleven foreign countries also grant full marriage rights: Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, Spain, South Africa, Sweden, as well as Mexico City, Mexico.

As discussed in my prior column, in February, 2012, the New Jersey State Legislature passed legislation permitting same-sex marriage. However, Governor Chris Christie, as expected, did in fact veto the bill. The legislature can override the veto between now and January 2014.

Civil unions are recognized in the following states: Delaware, Hawaii, Illinois, New Jersey, and Rhode Island.

Federal action on same-sex marriage

Respect for Marriage Act re-introduced

On March 16, 2011, the Respect for Marriage Act (an act to overturn DOMA) was re-introduced in the Senate by Senator Dianne Feinstein and in the House by representative Jerrold Nadler, after President Obama announced that he would no longer defend DOMA. In November, 2011, the Senate Judiciary Committee debated the bill, and voted 10-8 of advancing the vote to the Senate floor where it would require 60 votes to pass. Senator Feinstein noted that DOMA denies same-sex couples more than 1,100 federal rights and benefits that are provided to all other legally married couples, including rights to Social Security spousal benefits, protection from estate taxes when a spouse dies, and the ability to file taxes jointly and claim certain deductions. The vote has not yet taken place as of this writing.

House Democratic Leader Pelosi and 132 others file an amicus brief to overturn DOMA

On July 10, 2012, 132 members of the House of Representatives, including Democratic Leader Nancy Pelosi, Democratic Whip Steny Hoyer, and Assistant Democratic Leader James E. Clyburn, filed an amicus brief in *Karen Golinski v. Office of Personnel Management*. Golinski is one of the key cases related to the Defense of Marriage Act (DOMA), which prohibits the federal government from recognizing same-sex marriage. This case is currently awaiting a hearing in the Ninth Circuit Court of Appeals. A February 22, 2012 ruling in the case found that DOMA's Section 3, which defines marriage as a union between a man and a woman, is unconstitutional. Also, the Department of Justice filed a writ of certiorari requesting that the U.S. Supreme Court hear *Golinski*. President Obama is the first sitting president to openly support gay marriage.

***Windsor v. United States*, No. 10 Civ. 8435, 2011 WL 3422841 (S.D.N.Y. July 28, 2011)** was filed by the law firm of Paul Weiss Rifkind in conjunction with the ACLU on behalf of a surviving same-sex spouse whose inheritance from her deceased spouse had been subject to more than $360,000 of federal tax as if they were unmarried, whereas a heterosexual married couple would pay no taxes. (Since New York recognized their marriage, there was no New York estate tax.) The lawsuit challenges Section 3 of DOMA which defines "marriage" as a legal union between a man and a woman. The plaintiff brought a motion for summary judgment, claiming that DOMA is unconstitutional and the defendant brought a cross-motion to dismiss the case.

As of my last column, no decision had been rendered. In June, 2012, the U.S. District Court of the Southern District of New York ruled that DOMA's Section 3 is unconstitutional, and that the plaintiff be refunded the amount she paid in taxes**.** On October 18, 2012, the United States Court of Appeals for the Second Circuit in New York upheld the ruling.

In July, 2012, New York City Mayor Michael Bloomberg and City Council Speaker Christine Quinn (who is openly gay) filed a brief asking the Supreme Court to review the constitutionality of the Defense of Marriage Act. The U.S. Supreme Court must determine whether it will hear the case.

Update on *Commonwealth of Massachusetts v. Health and Human Services* and *Gill v. Office of Personnel Management*

On July 8, 2010, Judge Joseph Tauro of the U.S. District Court in Boston ruled in two separate lawsuits that a critical part of DOMA is unconstitutional. In one lawsuit, *Commonwealth of Massachusetts v. Health and Human Services*, the court ruled that DOMA violated the Tenth Amendment to the U.S. Constitution by taking from the states powers that the Constitution gave to them, including the power to regulate marriage. In the other lawsuit, *Gill v. Of-*

fice of Personnel Management, he ruled that DOMA violates the equal protection clause of the Fifth Amendment. Both of the lawsuits targeted Section 3 of DOMA which states that, for federal government purposes, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. Neither lawsuit challenged the section of DOMA that enables any state to ignore valid marriage licenses issued to a same-sex couple in other states.

On October 11, 2010, the U.S. Department of Justice filed notices of appeal to the U.S. Court of Appeals in these two cases. On January 14, 2011, the Department of Justice filed a single brief in the First Circuit Court of Appeals that defended DOMA in both these cases, but later the Department of Justice notified the Court that it will cease to defend both cases. On May 20, 2011, the Bipartisan Legal Advisory Group (BLAG), an arm of the U.S. House of Representatives, filed a motion asking to be allowed to intervene to defend DOMA Section 3. The Department of Justice did not oppose the request, but Massachusetts did and plans to file a response. The appellate briefs have been submitted as of December 2011, and as of my last column, no decision has been rendered.

On May 31, 2012, the First Circuit unanimously found section 3 of DOMA unconstitutional, but rejected Tauro's rationale in this case that it violated the Tenth Amendment and the Spending Clause. The Court stayed enforcement of its decision in anticipation of an appeal to the Supreme Court. The Department of Justice filed its petition in July, 2012, and BLAG filed a response. The U.S. Supreme Court will determine whether to hear the case on November 20th.

Update on California's Proposition 8: Court of Appeals, 9th Circuit overturns Proposition 8 in California as unconstitutional

In May 2008, the California Supreme Court, in its decision *In re Marriage Cases,* granted same-sex couples the right to marry. However, in November 2008, Proposition 8, a constitutional amendment designed to supersede the court's decision, narrowly passed, and gay couples could no longer marry in California. The two powerhouse attorneys who were opposite each other in *Bush v. Gore*, Ted Olson and David Boies, joined forces to overturn Proposition 8 in *Perry v. Schwarzenegger*. On August 4, 2010, District Court Chief Judge Vaughn Walker, in a landmark decision, ruled that the amendment to the California Constitution barring marriage for same-sex couples violates the U.S. Constitution's guarantees of equal protection and due process.

The merits were heard by a different 3-judge panel from the Ninth Circuit on December 6, 2010. The high court upheld Judge Walker's decision by 2-1, and determined that Proposition 8 is unconstitutional. Judge Reinhardt wrote, "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples." The decision was limited in scope in that it only determined that California residents had the right to same-sex marriage, and did not determine the constitutionality of same-sex marriage on a national level. The defendants, i.e. the proponents of Proposition 8, requested an en banc rehearing by the 11-judge panel of the Ninth Circuit, which was denied on June 5, 2012. The decision has a 90-day stay to allow an appeal to the U.S. Supreme Court, and briefs have been filed as of late August, 2012.

Pedersen et al. v. Office of Personnel Mgmt. et al., No 3:10-cv-1750 (Mass. U.S. Dist. Ct.) (July 31, 2012)

Yet another court ruled that DOMA violates the equal protection under the Fifth Amendment of the United States Constitution, based on two standards of review: the heightened scrutiny standard of review and the lower standard of rational basis review. The Gay and Lesbian Adviocate Defenders and the Department of Justice filed a *writ of certiorari*. The U.S. Supreme Court must decide whether to hear the case.

It should be noted that after the Supreme Court returns from its summer recess, it will decide which cases it will review next year. In addition to the Proposition 8 case, four different challenges to the Defense of Marriage Act have also been flagged for Supreme Court review, three of which were described above at length.

Recent Legislation

Since my last column, there has been no new legislation affecting Family Law, the NYCRR, or the CPLR. As a reminder, as of January 31, 2012, the combined parental income to be used for purposes of the CSSA changed from $130,000 to $136,000 in accordance with Social Services Law 111-i(2)(b) in consideration of the Consumer Price Index. Agreements should reflect the new amounts. The CSSA chart for unrepresented parties will change to reflect that amount as well. In addition, the threshold amount for temporary maintenance is now $524,000 rather than $500,000.

Update on the Commission's Report on the temporary maintenance statute

State legislators continue to wait for a non-binding report from the independent Law Revision Commission before making any adjustments to the newly enacted temporary maintenance statute. The report was originally due in December of 2011 and has been delayed at least 3 times. It has missed the latest deadline of May 31, 2012. Officials at the Commission explain that they are still analyzing a sample of 7,302 divorce proceedings during 2011-12 with a short staff and small budget.

New check-in procedures in the Nassau County Family Court

Starting July 9, 2012, attorneys must electronically check in prior to their court appearances in the Nassau County Family Court. The link for the Attorney Electronic Check-In is: www.nycourts.gov/familycourtcheckin/ Attorneys can begin the check-in process at noon on the day prior to the scheduled appearance. This procedure is only to inform the court that the attorney will be appearing on the day of the appearance. If the attorney is not appearing, then the attorney must contact the court in person, or by fax or e-mail to the judge's court attorney. If, after the attorney checks in, the attorney cannot appear because of an emergency, the check-in record may be deleted, and an emergency e-mail can be sent to the e-mail address on the webpage.

Court of Appeals Round-up

No do-over for Madoff funds

Simkin v. Blank, 19 NY3d 46, 945 NYS2d 222 (2012)

In the Winter 2010-2011 issue of the *Family Law Review*, I reported on the First Department's decision in *Simkin v. Blank*, 80 AD3d 401(1st Dep't 2011), where the order denying the ex-wife's motion to dismiss the ex-husband's complaint requesting reformation of contract based on mutual mistake was affirmed (3-2). In that case, the husband alleged that $2.7 million of the $6.25 million that he paid to his former wife under their divorce settlement agreement was attributable to the former wife's half-share of what the parties believed was their investment account with Bernard Madoff Investment Securities, which account the parties later discovered did not, in fact, exist because of the notorious Ponzi scheme.

Recently, the Court of Appeals heard this case, and reversed the appellate court and dismissed the action. The high court held that the former husband's complaint did not state a cause of action for mutual mistake because the mistake did not exist at the time the agreement was entered into between the parties. The Court of Appeals also relied upon the fact that the agreement itself did not mention the Madoff account, nor did it set forth the parties' intent to divide this account equally. The court reasoned that the Madoff scheme was unveiled more than two years after the parties entered into their agreement, and, therefore, it would have been possible for the husband to redeem his investment during this time period. This was evidenced by the fact that the husband withdrew some funds after the settlement agreement was entered into by the parties to pay a portion of the former wife's distributive award. For these same reasons, the Court of Appeals held that the husband's unjust enrichment claim must also fail.

No continuing contact after termination of parental rights

In the Matter of Hailey ZZ., 19 NY3d 422, 948 NY2d 846 (2012)

This case resolved the conflict between the departments on the issue of whether a court may direct continuing contact between a parent and child once the parent's parental rights have been terminated. The Court of Appeals held that a court lacks such authority.

Other Cases of Interest

Child support

Cost of transporting child to other parent

Matter of Jasmine L. v. Ely G., 95 AD3d 698, 945 NYS2d 57 (1st Dep't 2012)

The petitioner-mother brought a proceeding to modify the parties' judgment of divorce to allow her to pick up and drop-off the child, who resided with the respondent-father at a more convenient location, because she lived in lower Manhattan and did not have a car, and was forced to travel by public transportation to Yonkers, where the respondent lived, which cost twice as much as her child support obligation. The order granting the petition was affirmed. The requirement in the judgment of divorce that the petitioner was to bear the full inconvenience and cost of the exchange of the subject child did not have a sound and substantial basis, given petitioner's financial status. Therefore, the court directed the parties to exchange the child in the Bronx subway station, which was only a few miles and a short drive from the father's house.

College expenses

Tishman v. Bogatin, 94 AD3d 621, 942 NYS2d 516 (1st Dep,t 2012), *lv. app. den.*, 19 NY3d 810 (2012)

The order directing the defendant-husband to pay 40% of the child's private college tuition was affirmed. The imposition of the "SUNY cap" is on a case-by-case basis and subject to the provisions of DRL 240 (1-b)(c)(7). The court found that the child attended an elite public high school, his reasons for preferring private college over a SUNY school were "sound," both parties attended private college and private law school, and both parties had resources to pay tuition at the private college.

L.L. v. R.L., 36 Misc.3d 777, 949 NYS2d 863 (Monroe County, Sup. Ct. 2012) (Dollinger, J.)

The parties' divorce settlement agreement provided that they are to contribute to their children's college education expenses in accordance with "their respective means." *Id.* at 865. The parties two eldest children were of college age. The eldest child was attending Penn State University. The middle child was accepted to Hofstra University and St. John's University, and was awarded scholarships to both schools. The court interpreted the

term "means" to be "an amount of contribution by each parent that will support the child's college education, but not unduly overburden either parent while maintaining a reasonable lifestyle." *Id.* at 868. The court then went on to analyze each party's income, expenses and assets, but not their retirement assets. The father's 2010 gross income was $51,288 and his 2011 gross income was $64,464. His child support obligation to the mother was $14,349 in 2010, and $13,804 in 2011. The father did not have any assets to apply towards college education expenses. After reviewing the father's expenses, the court determined that he did not have the "means" to contribute to his son's college education in 2010, but in 2011, the father had $6,500 available in disposable income after paying his expenses and child support obligation, and therefore, directed him to contribute $3,500 towards the children's educations. The mother's 2010 gross income was $33,000 and her 2011 gross income was $44,670. The court also considered the amounts she received from the father in child support in each year. Similar to the father, she did not have any assets to apply towards the payment of college expenses. It was apparent to the court that she had more resources available than the father in 2010 and 2011, and directed her to pay $5,000 in 2010 and in 2011 towards her children's college educations. The court also directed that in the event the children's out-of-pocket college expenses exceed the total award of $8,500 in combined payments by each parent, then the father should pay 41% and the mother should pay 59% of the expenses.

The court did not apply the *Rohrs* room and board credit against the father's child support payments since the agreement did not state he was entitled to such a credit. Since the mother violated the joint consultation clause of the parties' agreement, by enrolling the oldest child in college without consulting with the father, the court did not require the father to contribute to the first year of expenses. However, the court required the father to pay for the second year, because to refuse to do so would unjustifiably penalize the child.

Also, the court did not determine each parent's future college expense obligation and directed them to use this "net available resources" analysis in the future. *Id.* at 875. Interestingly, the court mentioned that the parties' agreement makes no mention of paying college expenses beyond any child turning 21, but recognized that courts have increasingly held that in the absence of specifying an age in the agreement, parents who have agreed to pay such expenses must do so until the completion of college even if after age 21. Therefore, the court held that "the parties intended the college contributions to continue for a period of up to four years after the children graduate high school." *Id.* at 875.

Author's note: When drafting divorce agreements, rather than using a vague term such as "respective means" it would be prudent to define it, and state whether the court should consider the parties' respective incomes, assets or financial responsibilities for future children.

Custody and Visitation

Paternity

***Starla D. v. Jeremy E.*, 95 AD3d 1605, 945 NYS2d 779 (3d Dep't 2012), *lv. app. den.*, 2012 WL 3930661, 2012 NY Slip op. 83565 (Sep. 11, 2012)**

The mother, a resident of Alabama, commenced a proceeding pursuant to the Uniform Interstate Family Support Act (UIFSA) against the putative father, seeking a DNA test to establish that he was her child's biological father and an award of child support. The Family Court, Saratoga County, dismissed the father's equitable estoppel defense. The appellate division affirmed, and held that the child would not suffer irreparable loss of status, destruction of his family image, or other harm to his physical or emotional well-being if the paternity proceeding were permitted to go forward even where the mother has acquiesced in the development of a close relationship between the child and another father figure, but where the child did not justifiably rely on a representation of paternity. The child asked the mother if he could call her boyfriend "dad" and obviously knew that he was not his biological father.

Relocation

In my prior column, I reported on ***Shaw v. Miller***, 91 AD3d 879, 938 NYS2d 107 (2d Dep't 2012), which after publication of the column, leave to appeal was denied, 19 NY3d 802, 946 NYS2d 105 (2012). This case permitted the father to relocate with the parties' son to Virginia, and determined that an expanded schedule of visitation during the summer and school breaks would be sufficient to maintain the close relationship the mother had with the child.

A more recent case, however, ***Raffa v. Raffa***, 96 AD3d 855, 945 NYS2d 766 (2d Dept 2012) denied the mother's request to relocate with the parties' child to Virginia, where her current husband was offered employment. The father, who has visitation on alternate weekends, Tuesday and Thursday evenings and alternate holidays and vacations, has never missed weekend visitation since the parties' divorce six years ago, and had only missed weekday visitation twice, including once when the child was sick and once when he was delayed on flight returning to town . The father attended parent-teacher meetings and is involved in the child's extracurricular and school activities. Therefore, the mother failed to show that her reasons for uprooting the child, who is thriving academically and socially, from the only area the child has ever known was in the child's best interests.

Grandparents and parent awarded joint custody

Ruiz-Thomas v. Ruiz, 96 AD3d 859, 946 NYS2d 606 (2d Dept 2012)

The Family Court properly determined that the maternal grandmother sustained her burden of establishing extraordinary circumstances by showing that the mother surrendered the child to the maternal grandmother shortly after the birth of the child, and that the grandparents provided a home for the child that met all of his financial, educational, and emotional needs, with no contribution from the mother. The court below properly determined that it is in the child's best interest to award joint legal custody to the mother and maternal grandmother, while awarding sole physical custody to the maternal grandmother. No explanation was provided in the decision as to why joint legal custody was appropriate under the circumstances.

Temporary custody

Matter of Rodger W v. Smantha W, 95 AD3d 743, 945 NYS2d 90 (1st Dept 2012)

The petitioner-father brought a proceeding to enforce his visitation rights pursuant to the parties' agreement. When the motion was heard, the petitioner, requested temporary physical custody on the ground that the respondent-mother was diagnosed with a brain tumor. The Family Court *sua sponte* converted the petition into one for temporary custody and granted it without a hearing.

The order was reversed and vacated. Although temporary custody may be awarded where there is an emergency, the petitioner did not establish that the respondent's medical condition constituted an emergency. Even if the petitioner came forward with adequate proof, the Family Court abused its authority by failing to conduct a hearing. The limited information presented in the home evaluation reports indicated that there were significant factual disputes as to whether the child was subjected to a stressful situation in respondent's home, or as to what effect, if any, respondent's illness had on the child's schooling.

Discovery

Spoilation of electronic evidence and adverse inference sanction

VOOM HD Holdings LLC v. EchoStar Satellite LLC, 93 AD3d 33, 939 NYS2d 321 (1st Dept 2012)

The satellite television provider's conduct, in not implementing a "litigation hold" to prevent routine destruction of relevant information once it could "reasonably anticipate litigation" with a company whose television programming it was contractually obligated to distribute, was at least grossly negligent, if not in bad faith. *Id.* at 39-41. The defendant waited four months after the plaintiff company had filed a lawsuit (and one year after it was on notice of potential litigation by a letter from corporate counsel indicating the breach, a demand, and an explicit reservation of rights) to implement any hold. Even when this alleged hold was implemented, the defendant failed to suspend the automatic deletion of e-mails, and instead relied on its employees, acting without benefit of legal counsel, to identify which documents and e-mails were potentially responsive to litigation. The court found that the relevance of destroyed e-mails could be presumed, for purposes of determining the defendant's liability for spoliation sanctions, where gross negligence was shown. The court relied on the standard for preservation set forth in the federal case *Zubulak v. UBS Warburg LLC*, 220 FRD 212 (SDNY 2003): "Once a party reasonably anticipates litigation, it must suspend its routine document retention / destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Id.* at 36. The court ruled that a negative, or adverse, inference against EchoStar at trial was an appropriate sanction, rather than striking EchoStar's answer, since other evidence remained available to Voom, including the business records of EchoStar and the testimony of its employees, to prove the plaintiff's claims.

Equitable distribution

Bluth v. Bluth, 97 AD3d 772, 949 NYS2d 121 (2d Dept 2012)

The Supreme Court appointed a neutral appraiser to value the defendant husband's enhanced earnings capacity resulting from his medical license, certifications and additional professional training, and the plaintiff wife's enhanced earning capacity resulting from her teaching degrees and certification. The order denying defendant's motion to vacate the appointment of a neutral appraiser was affirmed. The parties' professional training and licenses constitute marital assets which may be valued, in the discretion of the court, by a neutral court-appointed appraiser.

Campfield v. Campfield, 95 AD3d 1429, 944 NYS2d 339 (3d Dept 2012)

The wife inherited a 203-acre farm from her father, which she deeded to herself and her husband as tenants by the entirety, and which they then used as their marital residence. The order awarding plaintiff-husband 50% of the marital residence was affirmed. The wife's conveyance created a presumption that the property was marital and she failed to show that she did not intend her husband to have an ownership interest in the property, but that she merely placed his name on the deed for purposes of convenience in the event of her death. The wife failed to contradict her husband's testimony that she told him that the property would provide for their retirement. The court did not find that the wife was entitled to a separate property credit to the acquisition of a marital asset. "There was no such acquisition here. Rather, she transmuted her separate property into marital property by

virtue of the deed giving an undivided one-half interest to plaintiff." *Id.* at 1430.

Author's note: It seems that the court was splitting hairs in determining that the wife didn't "acquire" the asset, and could have given her a credit for the value of the home at the time of her inheritance.

Iarocci v. Iarocci, 2012 NY Slip op. 06191, 2012 WL 4094837 (2d Dept 2012)

The appellate court held that the trial court abused its discretion in awarding the wife a money judgment for her lump-sum distributive award of $591,832, and should have allowed the husband to pay the award in installments over a 10-year period together with interest at a rate of 9% per annum due to the non-liquidity of the husband's assets. However, in the event the husband sold any of his real estate holdings during the payment period, he was directed to apply the proceeds towards payment of the wife's distributive award.

In addition, the court below properly directed the husband to pay his pro rata share of private school expenses and the nanny's expenses.

Grounds

The new no fault statute, **DRL 170(7),** effective October 12, 2010, has created divergent opinions on whether and to what extent "no fault" requires factual allegations and a trial. In my previous columns, I contrasted the "trial" opinion of the Dutchess County Supreme Court in ***Schiffer v. Schiffer***, 33 Misc.3d 795, 930 NYS2d 827 (Dutchess County Sup Ct 2011) (Wood, J.), with the "no trial" opinions of the Nassau County Supreme Court in ***Vahey v. Vahey***, 35 Misc.3d 691, 940 NYS2d 824 (Nassau County Sup Ct 2012), (Palmeri, J) and ***A.C. v. D.R.,*** 32 Misc. 293, 927 NYS2d 496 (Nassau Co. Sup Ct 2011) (Falanga, J).

Now, the Third Department, in dicta, opined that "no fault" means no trial. In ***Rinzler v. Rinzler,*** 97 AD3d 215, 947 NYS2d 844 (3d Dept 2012), the main issue of first impression was whether a plaintiff who brought an action for divorce on grounds prior to the effective date of the no-fault statute can bring a second action on no fault. The Third Department said yes.

The plaintiff husband brought an action for divorce in June 2009 based on cruel and inhuman treatment and abandonment. The wife answered with a denial. While that action was still pending 2 years and 3 months later, plaintiff husband brought another action for divorce based on the newly enacted no-fault statute. The defendant wife moved to dismiss the second action based on another action pending, CPLR 3211(a)(4). The lower court dismissed the action, but the appellate division reversed.

Although DRL 170(7) is to be applied prospectively and not retroactively, the appellate court, in a case of first impression, appears to be allowing it to be applied retroactively. The court held that the causes of action for cruel and inhuman treatment and abandonment are different than no fault. In addition, "...it is more likely to lessen the burden on both parties and promote judicial economy by obviating the necessity of a trial on the issue of fault." *Id.* at 217. The court did not agree that the Legislature's intent regarding the statute's effective date would be contravened, and instead reasoned that the change in the law simply provides for a new ground for divorce, but does not alter the economic rights of the parties. The appellate court declined plaintiff's invitation to order consolidation or joinder of the two actions, although Supreme Court may, if it deems it appropriate, exercise its discretion to do so

Author's note: While the court opined that the new no-fault action does not alter the economic status of the parties, if the new action was brought two years later, and the court does not consolidate the action, then the wife's economic status may be altered because the parties' marital assets may have decreased in value over the two year period of the two different actions, and her request for retroactive maintenance may be diminished by two years.

A Monroe county judge permitted a party to amend his complaint to include a cause of action for no fault divorce even though he commenced the action prior to the effective date of the no fault statute. *G.C. v. G.C.*, 35 Misc.3d 1211(A), 2012 WL 1292729 (Monroe County Sup Ct Apr 16, 2012) (Dollinger, J).

In ***Townes v. Coker***, Judge Bruno declared "the entire purpose of the statute was to permit the Court to grant a divorce without requiring a trial." 35 Misc.3d 543, 548, 943 NYS2d 823 (Nassau County Sup Ct Feb. 8, 2012) (Bruno, J.).

Filstein v. Bromberg, 36 Misc.3d 404, 944 NYS2d 692 (NY County Sup Ct Apr. 9, 2012) (Cooper, J).

The parties' separation agreement's clause prohibiting either party from obtaining a divorce until the parties' New York city apartment is sold was found void as against public policy that did not favor interference with married couple's right to seek divorce in order to extricate themselves from a perpetual state of marital limbo and finally end a long-dead and irretrievably broken marriage. This was especially so where the parties' residence remained unsold for over four years after the separation agreement was executed, and the husband lived in the marital residence with another woman and their three-year-old son. The court also mentioned in dicta that the no-fault divorce statute means no trial.

Dayanoff v. Dayanoff, 96 AD3d 895, 946 NYS2d 624 (2d Dept 2012) also held that a cause of action for divorce on grounds is distinct from a no-fault divorce. The husband's 2008 action for divorce on the grounds of constructive abandonment was dismissed based on his failure to make a prima facia case. Three years later, the husband brought a new action for divorce based on the

newly enacted no-fault statute. The wife moved to dismiss, claiming that the action was barred by res judicata and collateral estoppel, CPLR 3211(a)(5). The court below denied the motion, which was affirmed on appeal

***Tuper v. Tuper*, 98 AD3d 55, 946 NYS2d 719 (4th Dept 2012)**

It appears that the Fourth Department may be the first department to rule that a no fault divorce cause of action may be alleged in conclusory fashion that the marriage is broken down irretrievably rather than state specific facts.

Maintenance

***Fecteau v. Fecteau*, 97 AD3d 999, 949 NYS2d 511 (3d Dept 2012)**

The defendant-husband moved to terminate a prior award of spousal support on the ground that one of four termination events contained in the parties' separation agreement had occurred, to wit: the plaintiff was "living habitually with another person over the age of 18 years in a spousal type of relationship." *Id.* at 1000. The order denying the defendant's motion, after a hearing, was affirmed. The court determined that the provision was ambiguous because "spousal type of relationship" was undefined in the contract, and therefore permitted the admission of extrinsic evidence. *Id.* The plaintiff-wife testified that she understood the clause to mean "being married in every way other than that legal piece of paper," and claimed that although she was in a romantic relationship with a man with whom she and her daughter were sharing a household, it was not a "spousal" type of relationship because their finances remained separate and she intended to move out with her daughter as soon as she could regain her financial independence. *Id.* at 1001.

***Khan v. Ahmed*, 98 AD3d 471, 949 NYS2d 428 (2d Dept 2012)**

Maintenance is retroactive to the date when the defendant requested maintenance, not when the plaintiff brought an action for divorce. In this case, the defendant's request for maintenance was not until she filed her statement of proposed disposition for trial.

Author's note: If you are representing the defendant in a divorce action, always remember to serve a demand for support in the notice of appearance and demand for complaint.

Temporary maintenance

***Charasz v. Rozenblum*, 95 AD3d 1057, 945 NYS2d 117 (2d Dept 2012)**

The parties were entitled to commence separate actions for divorce, and therefore the trial court properly applied a new statutory formula to determine an appropriate award of temporary maintenance pursuant to the wife's application for *pendente lite* relief, which was made in her separate divorce action, commenced after the effective date of the new statutory formula.

Prenuptial agreements

***Barocas v. Barocas*, 94 AD3d 551, 942 NYS2d 491 (1st Dept 2012)**

The parties were married for 15 years and had two children, ages 7 and 14. The wife was 50 years old, had no college degree, and was unemployed throughout the marriage and at the time of the parties' divorce action. Pursuant to the parties' prenuptial agreement, the husband would retain $4.6 million in assets and the wife would only retain $30,550. In connection with the wife's summary judgment motion, the First Department disagreed with the wife's claim that the property divisions contained in the parties' prenuptial agreement are unconscionable (2 justices dissented). The court reasoned that the parties' assets were fully disclosed to one another and each party was represented by independent counsel in the negotiations. Although the husband recommended the wife's attorney to her, and paid the fee, such facts were insufficient to show overreaching or duress. Notably, the wife's attorney advised her against signing the agreement as completely unfair. The court also determined that there was no duress or overreaching simply because the wife believed the wedding would be canceled two weeks prior to the wedding date. However, with respect to that portion of the agreement which related to the wife's waiver of spousal support, the appellate court held that although the waiver was not unfair or unreasonable at the time she entered into the agreement, factual issues existed as to whether the waiver is unconscionable in consideration of the present facts.

Counsel fees

Account stated

***Daniele v. Puntillo*, 97 AD3d 512, 949 NYS2d 36 (1st Dept 2012)**

Counsel was awarded his full $106,048 fee from his client on the grounds of an account stated where the client never objected to the bills. The court found that block billing (totaling the hours for the entire day's work) rather than task billing was permissible, and it was not necessary to produce the time sheets where the attorney testified that he entered his time slips into the computer. The court found that the attorney substantially complied with NYCRR by filing his retainer agreement with the client's updated statement of net worth as opposed to 10 days after its execution.

In the wake of Prichep v. Prichep, 52 AD3d 61 (2d Dept 2008) and the amended DRL § 237(a) and (b) and § 238, effective October 12, 2010

Appellate courts continue to grant substantial counsel fee awards to non-monied spouses in matrimonial litigation. The Second Department, in ***Chesner v. Chesner***, 95 AD3d 1252, 945 NYS2d 409 (2d Dept 2012), upheld the trial court's award of $193,500 in counsel and expert fees to the wife. The husband was a cardiologist earning an annual income of between $750,000 to $1 million, and the wife was a housewife. In that case, the trial court directed the husband to pay this award in either one lump sum, or in annual installments over a 12-year period. The appellate court reversed that portion of the trial court's order and directed the husband to pay the award in one lump sum.

In ***Moore v. Moore***, 93 AD3d 827, 940 NYS2d 875 (2d Dept 2012), the Second Department upheld the trial court's award of $75,000 in counsel fees to the wife in consideration of the fact that the husband engaged in "unnecessary litigation" (*Id.* at 876) and the husband was adjudicated in contempt for his failure to pay child support arrears.

In ***Vinik v. Lee***, 96 AD3d 522, 947 NYS2d 424 (1st Dept 2012), the appellate court upheld the trial court's award of a total of $50,000 in interim counsel fees to the wife. In that case, the trial court initially awarded the wife $25,000 in *pendente lite* counsel fees but then awarded her an additional $25,000 in connection with denying the husband's application to renew the wife's counsel fee application. The appellate court reasoned that the "court properly considered the fees necessitated by defendant's litigation tactics to ensure that the litigation was not 'shaped…by the power of the bankroll.'" *Id.* at 523. The appellate court did not state any facts relating to the financial circumstances of the parties.

Similarly, in ***Nacos v. Nacos***, 96 AD3d 579, 947 NYS2d 89 (1st Dept 2012), the trial court made an initial award to the wife of interim counsel fees of $50,000, and subsequently, in connection with the wife's application for renewal, awarded her an additional $50,000, thereby making the total *pendente lite* counsel fee award $100,000. The First Department, in upholding the trial court's award, reasoned that "given the large discrepancy in the parties' respective incomes, the nature of the issues in dispute, and the plaintiff's lack of sufficient funds of her own with which to compensate counsel, the court properly increased the award..." *Id.* at 579. The appellate court did not set forth the respective incomes and assets of the parties

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