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Notes and Comments

Elliot D. Samuelson, Editor

SLAVERY OR FREEDOM:
The Choice Is Yours

Two weeks after the most virulent and barbaric attack to our democracy that has ever taken place on American soil, I still find it difficult to comprehend the magnitude of this horrific act, or the fact that it even took place. Anger, remorse, fear, hatred, vengeance, retribution, resolve and courage are but a few of the words that have crept into our consciousness and onto the tongues of all Americans.

In thinking what positive measures could be taken by the organized bar and by the matrimonial bar in particular, I thought it was important for anyone in a position of leadership, whether in the government or not, to articulate what will be the challenges to all free thinking persons in democratic societies throughout the world, and the steps that must be taken in order to combat the evil that has pervaded our normal lives.

The choice is clear to me. Either we accept becoming enslaved by terrorists and terrorism, or we remain as free people. The slavery I speak of is the enslavement of one's mind, one's freedom of movement and, yes, the loss of a basic tenet of the Four Freedoms, articulated by Franklin Delano Roosevelt in a joint address to congress on January 6, 1941, some 60 years ago . . . the freedom from fear itself, as President Roosevelt earlier observed during the Depression.

Winston Churchill, in the depths of the London Blitz, rallied the British people, declaring that they would remain as free people and would not be overcome by the bombs that had devastated most of the city; that their spirits could not be broken; and that they would fight to the last man, albeit with only their fists and stones.

The road ahead will be difficult to traverse. At times, it will seem that, despite all of our efforts and despite the loss of lives that surely will occur, our goal to achieve freedom and avoid slavery will appear to be out of grasp. Such frustration will undoubtedly become another stark reality that may deter some from continuing the battle. Nonetheless, we must have the resolve to accept casualties, accept the fact that the battle continues to be waged without apparent immediate success, accept the fact that our economy has been damaged and may result in all of us adjusting our financial lives, yet

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always remember that freedom has its price. This price must never appear to be too dear, and whatever steps are necessary to prevail will be taken a week from now, a month from now, a year from now and, perhaps, even a decade from now.

Unfortunately, throughout the country, there has been a predictable backlash against foreign-born citizens of this country, including Muslims, Arabs and other Near Eastern people. We are at risk of becoming a xenophobic nation. Reports of brutal physical attacks on such persons must be rejected as examples of bigotry, hatred and a violation of the rule of law that we so cherish and must now pledge our lives to protect. These reactions are the fabric of hate, the cloth of terrorism. They too must be eradicated.

The question remains: what can matrimonial attorneys do to help in this effort, which will take on Herculean proportions in order for us to remain free people. The answer seems clear to me. We can counsel our clients to understand the gravity of the war on terrorism and know that, unless we all take an active part in a positive way to destroy this enemy, we will become enslaved—and the rule of law and justice will be forever lost to a free society.

Everyone can make a difference. We can no longer sit on the sidelines or pay lip service to these principles. What better way, apart from advocating a proactive response to terrorism, can we as attorneys participate to advance legislation that will provide more access to the courts, justice for its litigants, and a resolve that the defects in the courts will not be blinked at nor accepted.

We as matrimonial attorneys have viewed the suffering of many clients who, during divorce litigation, have experienced fear, frustration and many of the other emotions that most of us are feeling today.

Is not a spouse in a matrimonial litigation who refuses to obey the order of the court and wages a war of terror against his or her spouse, in an effort to achieve his or her goals, no different from a terrorist? Does a parent who seeks to brainwash his child with hatred toward his other parent act differently from a terrorist? Does an attorney who forgets principles of civility and honesty act differently from a terrorist? Does a judge who seeks to punish, rather than dispense justice, act differently from a terrorist? Does a society that abrogates the rule of law, and fails to provide justice for all, act differently from a terrorist?

September 11th was a national wake-up call, one that must not be ignored. If we are to continue to live as free men and women, in a free society, we all must do our part, and that can be as simple as obeying a court order, treating one's adversary with civility and respect, and advancing laws that will provide equal justice for all.

The legal profession should stand as a beacon of hope for democracy, freedom and our system of justice, to the end that no litigant will ever feel disadvantaged, and the words from our pledge of allegiance, "with liberty and justice for all," will take on new meaning.

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REQUEST FOR ARTICLES

The *Family Law Review* welcomes the submission of articles of timely interest to members, in addition to comments and suggestions for future issues. Please send to:

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Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

View from the Bench

By Hon. Leonard B. Austin

It took me nine (yes, nine!) tries to achieve ascension to the Supreme Court bench. I am not sure whether I deserve the award for tenacity or, as my wife has suggested, stubbornness. In either event, I finally made it. After the hoopla of my victory had died down, I set about the task of hiring my law secretary and secretary. That was easy.

Shortly after that, I attended OCA's Judges' School where I learned several important lessons about how to conduct myself as a judge, how to conduct trials, how to write decisions that were understandable and, perhaps most importantly, how to live within a bureaucracy (perhaps the hardest lesson of all). Upon my return from the week at Judges' School in early December, I met with my new law secretary and told him that I wanted to establish rules of procedure for my new matrimonial part. He was all for the idea.

"Winning must be viewed, in part, as allowing the family in dissolution to have the ability to go forward with life recognizing that there is, and will be, a dramatic change in its dynamic and configuration."

We met together at my law office a couple of weeks before Christmas to accomplish the task at hand. He was to have prepared a draft from the rules of various state and federal judges I had highlighted for him. He came in with nothing. When I asked why nothing had been prepared, he responded, "It would be easier if I knew what your judicial philosophy was." That threw me for a loop. My judicial philosophy? Up until that point, my only philosophy, if you can call it that, was to get elected. Now that I had accomplished that goal, he made me realize that there was much more to be done.

Understand that I welcomed and relished the opportunity to be assigned to the Matrimonial Part. As is the custom in the Tenth Judicial District (Nassau and Suffolk counties) as well as in some of the other districts, newly elected justices are generally assigned to the Matrimonial Part. For some, this assignment is viewed like an initiation into a fraternity or sorority. The matrimonial assignment was akin to a cruel hazing ritual, which was the prelude to becoming a full-fledged member of the court.

That was not the case with me. I had practiced matrimonial law for more than 20 years before I ascended the bench. So, to me, it was a welcome opportunity. After all, I had walked the walk and spoken the language. I understood CSSA and could do a child support calculation. I was no stranger to examining and cross-examining a forensic expert. I could even prepare a Net Worth Affidavit and Statement of Proposed Disposition so that neither would come back to haunt me at trial.

So now, here I was, panic-stricken that I was entering my new judicial career without a judicial philosophy.

The night before my first day on the bench was rather sleepless. I had developed a set of rules which was, to my chagrin, philosophy-less. Yet, there I was, conferencing cases and making rulings that affected the lives of people and their children. Then, it hit me. I realized in an instant what my judicial philosophy had to be. ***Children first and all else is secondary.*** It was short, sweet and, best of all, comfortable for me. It worked.

Having been a matrimonial practitioner for so many years, I realized that when we take on the representation of a husband or wife, we fight hard to assure the position of our client is vindicated. Our adversarial system encourages our efforts to "win." I submit that winning is not just a higher maintenance award or keeping equitable distribution as low as possible. Winning must be viewed, in part, as allowing the family in dissolution to have the ability to go forward with life recognizing that there is, and will be, a dramatic change in its dynamic and configuration. That is especially true with regard to the children of divorcing parents, who feel the shock waves of their parents' anger and contentiousness long after the divorce is final.

Thus, in the Preliminary Conference Order form I created, involvement in the PEACE Program was included, as were injunctions against denigration of the other parent or discussion of the divorce litigation to, or in the presence of, the children.

Finally, I had—and have—a judicial philosophy.

A Closer Look at Coverture: The Key to Equitable Division in Deferred Compensation Benefits

By Robert Preston

There are many variables that go into dividing qualified pension benefits and deferred compensation plans, as in all marital assets. Judge Tierney noted in the *Wendt v. Wendt*,[1] decision there are three determinations that must be made initially, before a court can apportion: "First whether the resource is property within § 46b-81 (Connecticut statute) to be equitably distributed (classification); second, what is the appropriate method for determining the value of the property (valuation); and third, what is the most equitable distribution of the property between the parties (distribution)." Actuarial assumptions and present value theory, plan provisions, all sorts of key trigger dates (employment, participation, marital status, age, divorce, vesting, etc.) deal with the second presumption. Frequently, one of the most important issues in both the second and third determinations gets shortchanged because of the attention placed on more minor variables. This major component in dividing retirement and related benefits for separation and divorce purposes is coverture—*i.e.*, the portion of the benefit earned during the marriage.

"Whether analyzing qualified or non-qualified retirement plans, stock options, restricted stock grants or other areas of non-salary compensation, dividing the portion earned during the marriage necessitates the application of fractions—applied to when the benefits were earned (past, present and future service), and then how much of said benefits were earned during the marriage."

Allocating marital service equitably in deferred compensation plans is a tricky exercise. Whether analyzing qualified or non-qualified retirement plans, stock options, restricted stock grants or other areas of non-salary compensation, dividing the portion earned during the marriage necessitates the application of fractions—applied to when the benefits were earned (past, present and future service), and then how much of said benefits were earned during the marriage.

Minor errors or adjustments in present value calculations (interest rates, mortality tables), the choice of retirement age or payout, and even COLAs may have less of an effect on the final results than errors or poor theory applied to the relevant ratios. Unfortunately, attorneys and the courts occasionally spend an inordinate amount of time on actuarial assumptions, retirement ages, early retirement subsidies, etc., and give the coverture area short shrift—this can result in inequitable distributions.

Since defined-benefit plans are one of the areas frequently subject to errors in coverture application, let us look at this type of program as an example of good and bad apportionment theory.

In a defined-benefit pension plan, benefits are projected at retirement based on service, a final average earnings formula and, occasionally, employee contributions. There are three methods to value the benefit as of date of dissolution:

- the benefit earned as of date of dissolution using service through the divorce;
- projecting the benefit to some date in the future (probable retirement date, early retirement date) and then allocating this value based on marital time; or
- the "tracing" approach, whereby the value of the pension is calculated at the date of marriage and the date of divorce, the difference in the benefit earned between the two dates is calculated, and this amount is divided between the parties.

Under the first two scenarios, the marital portion of the lump sum value calculated will generally be apportioned based on a fraction: the numerator is the marital period the participant was earning benefits while in the plan, and the denominator is the total period of participation being valued. Sounds relatively straightforward, but there's a rub.

Most defined-benefit plans use a final average salary at retirement for calculating the final benefit to be received. If the court uses the first scenario (which would seem logical, as it eliminates all service subsequent to date of divorce), the alternate payee forgoes all appreciation in benefits based on the actual salary used for the final calculation. Is this fair? Since a pension benefit is earned over an entire career, all service the participant accrues is applied to the final salary figures. Shouldn't the alternate payee benefit from the salary increases received, at least for service during the marriage? To ignore this results in a windfall for the participant. Let's look at an example:

Date of participation	7/1/78
Date of marriage	8/1/85
Date of divorce	9/1/00
Anticipated retirement	10/1/2010
Monthly benefit earned through divorce payable at retirement	$5,000
Benefit projected to retirement using anticipated salary increases	$8,500
Marital pension service—years	15.1
Total pension service as of date of divorce—years	22.19
Total pension service at projected retirement	32.27
Marital portion of benefit using benefit earned as of divorce	$3,402
Marital portion of benefit using benefit at retirement	$3,976
Difference	$574

To not give the non-participant spouse access to the projected final average salary gives the participant the benefit of the extra $574 monthly benefit; converted to a lump sum that could amount to almost $50,000 using GATT actuarial assumptions (GATT assumptions have replaced PBGC assumptions.)

The tracing method, while an acceptable actuarial method for valuing a defined-benefit plan's benefit accrued during a marriage, is rarely used in divorce work. There are no states that have adopted it as the approved, acceptable approach, while many states have either formally or informally adopted coverture (the time method) as acceptable for apportioning pension benefits (*e.g.*, Maryland in *Bangs v. Bangs*,[2] Ohio in *Hoyt v. Hoyt*[3] and New York in *Majauskas v. Majauskas*[4]). Applying the tracing method to the above example would give the following results:

Benefit accrued (earned) as of date of marriage	$1,800
Benefit accrued (earned) as of date of divorce	$5,000
Difference is benefit earned during marriage	$3,200

The tracing method, similar to the first approach using service only through date of divorce, takes no account of the actual salary used when benefits become payable. Also, it can be difficult to obtain the data to determine the benefit earned as of date of marriage. This approach can produce a benefit earned during marriage higher or lower than the coverture approach, and (from the author's experience) is generally used by attorneys when it produces results favorable to their client. However, when valuing defined-contribution plans (profit sharing, 401[k]) the tracing approach may make sense, assuming the requisite data can be obtained and earnings are granted through date of distribution. In contrast to the coverture method, in Connecticut there is little in case law concerning the tracing method, and few judges seem to have commented specifically on this approach, or compared the two in decision commentary.

As a point of information, an actuary should be consistent in the approach he or she uses, *i.e.*, tracing or coverture. Whatever methodology used to coverture the marital portion of a pension (tracing or time/fractional/service) shouldn't vary because of the client representation. Actuarial Standards of Practice Nos. 17 (currently under revision) and 34 (both promulgated by the American Academy of Actuaries) discuss some of these issues. An actuary shouldn't vacillate between approaches in expert work; doing so would be considered unprofessional and could be challenged (and probably should be) by opposing counsel. An actuary is expected to determine what approach he or she believes best represents the value of a pension earned during a marriage, and stick with that methodology, no matter which litigating side retains him or her for valuation purposes (this is reinforced in the Standards of Practice noted.) An actuary who vacillates with assumptions and approach can be found to lack credibility by smart counsel.

Another example where coverture is tricky involves apportioning stock option plans; this is a phenomena of the recent (past two decades) stock market's prowess and has no "bright line" tests for marital division (particularly in Connecticut). However, there is guidance on how to both value and apportion stock options through assorted state decisions (two key Connecticut decisions, *Wendt* and *Bornemann v. Bornemann*,[5] and many outside Connecticut.)

For actual valuation, Judge Tierney in *Wendt* used the intrinsic value method, which is simply the difference between market value and exercise price (other more exotic approaches are also available, *e.g.*, Black-Scholes, binomial and volatility trees). Using an offset approach might be desirable, but because there are so many variables present in options (tiered vesting, uncertainty as to date of exercise and the value of a security on future dates) there seems to be a trend towards the "if, as and when" deferred method of awarding options. Under this approach, the options are allocated by the court and exercised at some point in the future, the date of exercise determined by either or both parties. The value of the proceeds, whatever they

are when they are exercised, are split based on the court's percentage apportionment.

A complexity involving the division of options is determining what period of service is relevant for earning the option award—prior, present or future, that must be resolved before coverture can be applied. Case law in Connecticut is sparse (*Wendt* and *Bornemann* are exceptions), but outside Connecticut many cases may be cited, including *In re Marriage of Miller*,[6] *Dejesus v. Dejesus*,[7] *In re Marriage of Hug*[8] and *Hann v. Hann*.[9] Attorneys are advised to review the consortium of case law (in particular the *Wendt* decision), to understand the multiple approaches available. Since there are many dates involved with options (employment, grant, exercise, vesting, expiration) the coverture fraction can take many forms—having both sides agree on one can be challenging. The key is, after reviewing all the variables and data, to use a logical, equitable approach.

Defined benefit plans and stock options are two of the more complex areas where coverture is applied, but the concept arises in most non-salary benefits. The sophisticated attorney will make sure the approach being used to divvy up the assets is appropriate, fair and based on solid theory. This mandates a good understanding of the various approaches available, case law in and outside the attorney's jurisdiction and some computer skills to do the math. Anything less may shortchange the client.

Endnotes

1. 45 Conn. Supp. 208, 706 A. 2d 1021 (Conn. Super. Ct., 1996).
2. 59 Md. App. 350, 475 A. 2d 1214 (Md. Ct. Spec. App. 1984).
3. 53 Ohio St. 3d 177, 559 N.E.2d 1292 (Ohio Sup. Ct., 1990).
4. 61 N.Y.2d 481, 474 N.Y.S.2d 699 (1984).
5. 245 Conn. 508, 752 A. 2d 978 (Conn. Sup. Ct., 1998).
6. 281 Ill. App. 3d 1123, 701 N.E.2d 832 (Ill. App. Ct., 1996).
7. 90 N.Y.2d 643, 665 N.Y.S.2d 36 (1997).
8. 154 Cal. App. 3d 780 (Cal. Ct. App., 1984).
9. 629 So. 2d 918 (Fla. Dist. Ct. App., 1993).

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Termination of Parental Rights

By Robert C. Mangi

In the absence of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances, a parent may not be denied custody.[1] The right of a parent to raise his or her own child is a fundamental right subject to the protection of the Due Process Clause of the Constitution. When a state moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[2]

In recognition of these principles, the New York State Legislature in a statement of findings and intent concerning the guardianship and custody of destitute or dependent children, found that:

> it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and the parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;
>
> [and]
>
> the state's first obligation is to help the family with services to prevent its breakup or to re-unite it if the child has already left home.[3]

"The termination of parental rights on the basis of permanent neglect can occur under New York law only by order of the Family Court under N.Y. Social Services Law (SSL) § 384-b(3)(d)."

The termination of parental rights proceeding usually is the final chapter of a protracted family, social and legal history. There has been at this point extensive interaction with a social services agency. Frequently the subject child is in foster care with foster care parents who are seeking adoption. Preliminary child protective hearings, including temporary removal hearings,[4] have been held. In many such cases, extensions of placement or foster care and review hearings have been completed. This legal history produces extensive records including mental health, social, court and medical reports and recommendations. The practitioner who enters a case at the "termination of parental rights" stage has a great deal of preparation to do, and should avail himself of the discovery devices permitted pursuant to Family Court Act § 1038.

"Termination of parental rights" is not, strictly speaking, a cause of action. It is rather the possible end result of disposition of a number of separate causes of action, to wit: abandonment, permanent neglect, termination based upon parental mental illness or retardation, and termination predicated upon severe or repeated child abuse. Each of these separate causes of action are defined by statute.[5]

The termination of parental rights on the basis of permanent neglect can occur under New York law only by order of the Family Court under N.Y. Social Services Law (SSL) § 384-b(3)(d). Due process requires that the state in such cases support its allegations by at least clear and convincing evidence.[6]

Diligent Efforts

The parent of a child in the care of an authorized agency who has failed for a period of more than one year following child's placement or repeatedly failed to substantially and continuously maintain contact with or plan for the future of the child, may permanently lose his or her parental rights.[7] However, the presentment agency in such cases must show that the respondent-parent was physically and financially able to maintain such contact, and that the parents' failure to maintain such contact occurred notwithstanding the *diligent efforts* of the agency to encourage and strengthen the parental relationship.[8] It is therefore incumbent upon the practitioner representing a respondent in such cases to exploit in his defense his inability financially or physically to maintain such contact. Additionally, where appropriate, respondent's attorney should challenge the diligence of the efforts made by the presentment agency. The term *diligent efforts* is defined in SSL § 384-b(7)(f). (In certain limited cases where a parent has failed to advise the social service agency of his or her whereabouts for six months, or has failed to cooperate with such agency during a period of incarceration, the presentment agency need not prove diligent efforts.)

The agency is required to establish diligent efforts to encourage and strengthen the parental relationship as a necessary condition precedent to establishing permanent neglect. The statutory duty of the Agency to exercise diligent efforts has been described by the Court of Appeals as being both "demonstrably paramount and pervasive."[9]

As set forth in the Social Services Law, "diligent efforts" shall mean reasonable attempts by authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for parents to visit the child;

(3) provision of services and other assistance to the parents . . . so that problems preventing the discharge of the child from care may be resolved or ameliorated; [and]

(4) informing the parents at appropriate intervals of the child's progress, development and health.[10]

"In an effort to protect children from abuse or neglect, the legal system must serve the interests of parent and child in a fashion which is fair to both."

Agency's Obligation

In *In re Philip S.*, Suffolk Family Court Judge Simeone characterized the agency's obligation as follows:

> While an Agency cannot be required to succeed in reunifying every parent and child, neither can the Agency effectively carry out its mandate by merely acting, as the record evidence herein demonstrates, as a resource for referrals to services and a clarion of warning that barriers preventing the return of the child must be overcome [see, *In re Jamie M.*, 63 N.Y. 2d 388, 482 N.Y.S. 2d 461 (1984); *In re Shelia G.*, 61 N.Y. 2d 368, 474 N.Y.S. 2d 421 (1984); and see, *DSS v. Kurt L.*, N. Y. Slip Op. 98, 669 (Genessee Co. Fam. Ct. 1998)].

Concomitant Duty to Plan

Respondent parent has a concomitant duty to plan for the future of the child.

Section 384-b(7)(c):

> [T]o plan for the future of the child shall mean to take steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstance available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative.

The court may consider parent's failure to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

In an effort to protect children from abuse or neglect, the legal system must serve the interests of parent and child in a fashion which is fair to both. Parent's fundamental right to raise their children without government interference must be balanced with the government's legitimate interest in insuring the safety of its minor citizens.

Endnotes

1. *In re adoption of Male Infant L.*, 61 N.Y.2d 420, 474, N.Y.S.2d 447 (1984); *Bennett v. Jeffreys,* 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976); SSL § 383(6).
2. *Santosky v. Kramer*, 455 U.S. 745 (1982); *on remand,* 89 AD2d 738, 453 N.Y.S.2d 942 (3d Dep't).
3. SSL § 384-b(1)(ii), (iii).
4. SSL §§ 384a, 392.
5. SSL § 384-b(5-7).
6. *Santosky v. Kramer, supra*.
7. SSL § 384-b(7)(a).
8. SSL § 384-b(7)(e).
9. *In re Shelia G.*, 61 N.Y.2d 368, 380, 474 N.Y.S.2d 421 (1984).
10. *Id.* citing SSL § 384-b(7)(f).

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Who's on First?
Or, the Second Is on First and the First Is on Second

By Elliott Scheinberg

A not oft-encountered scenario has been gaining increasing prominence in the judicial limelight: when two divorce actions have been started, which is the correct date for the valuation of actively appreciated assets? The answer depends on the Department in which the case is pending. Until February 2001, only the Second Department, in a fully evolved body of decisional authority, had addressed the issue, holding that the first date is the correct date provided the parties had not resumed living together, *i.e.*, that no further benefits were derived from the marital partnership. Recently, Supreme Court, New York County, in *McMahon v. McMahon*,[1] weighed in on this issue as a case of first impression in that Department and concluded differently. It is submitted that *McMahon* erroneously analyzed governing case law and, therefore, reached the wrong conclusion.

DRL § 236B(4) Directs a Court to Fix the Value of Each Asset as Soon as Practicable

Firstly, the statute and appellate authority encourage us to make an application as early as possible to determine the valuation dates of certain assets. DRL 236B(4) states:

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

Antenucci v. Antenucci,[2] an appeal transferred to the Third Department from the Second Department, involved a pretrial application to classify property wherein the court stated: "we encourage a pretrial classification of assets whenever possible."

The early fixing of a valuation date is significantly beneficial because extraordinary savings can be realized by obviating potentially needless costs associated with litigation, including but not limited to trial preparation, trial preparation of expert witnesses, court time for expert witnesses, trial time, duplicative costs in the event of a remand and judicial economy in the event of a remand.

The Bright Line for Determining the Valuation Date in Cases Where a Prior Action Was Commenced Is: Did the Parties Resume Living Together After the First Action?

It is settled law that a tolling of assets occurs once a prior action has been commenced and the parties did not resume living together. A party may not thereafter be unjustly enriched by converting what would have been separate property into marital property when neither party derived any benefits from the marital partnership. In determining the correct valuation date, a court must, therefore, first examine whether the parties had ever reconciled, as defined by decisional authority, subsequent to the commencement of the first action. If they did not so reconcile, then the first action must be fixed for valuation purposes.

In *Lamba v. Lamba*,[3] the Second Department repeated the bright line to be applied in cases where two actions have been commenced, to wit, "whether after the commencement of the [first] action the parties reconciled and continued to receive the benefits of the marital relationship."

> The Supreme Court erred in granting the plaintiff's motion to have the defendant's pension valued as of July 6, 1994, the date the instant action was commenced, as opposed to the date that a previous, discontinued, divorce action between the parties was commenced in or about May 1989, since her moving papers contained no evidence that the parties reconciled and continued to receive the benefits of the marital relationship. The court compounded that error when it subsequently denied the plaintiff the opportunity to present such evidence at trial. Inasmuch as the plaintiff was required to make such a showing before the court could grant her motion (see, *Gonzalez v. Gonzalez*, 240 AD2d 630, 659 N.Y.S.2d 499; *Thomas v. Thomas*, 221 AD2d 621, 634 N.Y.S.2d 496; *Marcus v. Marcus*, 137 AD2d 131, 525 N.Y.S.2d 238).

In *Gonzalez v. Gonzalez*,[4] the Appellate Division held:

> Domestic Relations Law § 236(B)(1)(c) defines "marital property" as "all property acquired by either or both spouses during the marriage and before . . . the commencement of a matrimonial action." It is well settled that "the trial courts possess the discretion to select valuation dates for the parties' marital assets which are appropriate and fair under the particular . . . circumstances" (*Cohn v. Cohn*, 155 AD2d 412, 413, 547 N.Y.S.2d 85; *Kirshenbaum v. Kirshenbaum*, 203 AD2d 534, 611 N.Y.S.2d 228). Here, in considering what valuation date should be applied, the trial court must determine whether after the commencement of the 1982 action the parties reconciled and continued to receive the benefits of the marital relationship (see, *Thomas v. Thomas*, 221 632 AD2d 621, 634 N.Y.S.2d 496; *Marcus v. Marcus*, 137 AD2d 131, 525 N.Y.S.2d 238).

Fuegel v. Fuegel,[5] a relatively recent, however, sparsely worded opinion by the Second Department, continues the chain of decisional authority regarding the causal relationship between resumption of living together and continued derivation of benefits as the exclusive criteria for the fixing of valuation dates. The relevant language in *Fuegel* is set forth below in its entirety:

> Contrary to the defendant's contention, the court properly determined that the appropriate date for the valuation of the marital property was the commencement date of the instant action rather than the commencement of a prior dismissed divorce action (see, *Nicit v. Nicit*, 217 AD2d 1006, 631 N.Y.S.2d 271; *Sullivan v. Sullivan*, 201 AD2d 417, 607 N.Y.S.2d 937; *Marcus v. Marcus*, 135 AD2d 216, 525 N.Y.S.2d 238).

Firstly, although devoid of any facts or details behind the case, the underlying facts in *Fuegel* strongly support the conclusion. The author of this article gratefully acknowledges the assistance of Perry Satz, Esq., counsel for Mr. Fuegel, who explained that the record on appeal evidenced that the parties had attempted a reconciliation for approximately one year which included: (1) living in the same house; (2) joint counseling; and (3) the purchase of flowers and chocolates.

Furthermore, the cases cited within *Fuegel* are didactic in that they underscore the Second Department's steadfast commitment to the selection of the earlier date where there has been no resumption of living together, thus making it consistent with the string of cases preceding it.

In *Thomas v. Thomas*,[6] the Second Department affirmed the lower court's ruling which fixed the first summons and complaint as the valuation date. *Thomas* emphasized that there had been no reconciliation after the commencement of the first action and refused to allow the wife to "enlarge the pot to be distributed during the period between the commencement of the first and second actions as a marital asset."

> Domestic Relations Law § 236(B)(1)(c) excludes from marital property those assets acquired after the commencement of a divorce action. This court has previously held that such property may become marital property again where, for example, the action is discontinued and the parties either reconcile or continue the marital relationship and continue to receive the benefits of the relationship (see, *e.g.*, *Marcus v. Marcus, supra*).

Marcus v. Marcus,[7] the seminal decision to squarely address this issue, is cited in many of the decisions including *Fuegel*. *Marcus*, grounded on legislative intent, found actual reconciliation and a continued derivation of benefits by the husband and designated the second action as the cutoff date.

> Most significantly, however, the commencement of the first action did not signal the end of the parties' marital relationship; rather, the defendant continued to reside with the plaintiff and accepted the care of the plaintiff and the benefits of their marital relationship until 1982 when the plaintiff commenced the instant action.

Accordingly, the rule of law with respect to cases involving more than one commencement date is settled: The sole and exclusive criteria behind the fixing of a valuation date is whether the parties continued to reap the benefits of the marital partnership after the commencement of the first action. If the answer is no, then it is the first date which must be used.

Reconciliation Must Be Established Via "Unequivocal Acts" Including an Actual Resumption of the Marital Relationship; Intent to Reconcile or Mere Cohabitation Is Insufficient

Reconciliation must be proved via "unequivocal acts"—mere cohabitation, standing alone, is insufficient.

Rudansky v. Rudansky,[8] established the requisite criteria necessary to prove that an expression of intent to reconcile was not merely precatory but rather unequivocally actualized—nothing less satisfies the test.

> (1) a resumption of the marital relationship must be established via unequivocal acts (see, *Lippman v. Lippman*, 192 AD2d 1060, 1061, 596 N.Y.S.2d 241), (2) including living together and resuming marital relations, (3) their selling of their separate apartments and purchase of a new apartment, (4) plaintiff's quitting her job, (5) resuming a role as a housewife such as by traveling with and attending defendant's social and business gatherings, (6) defendant's giving plaintiff a weekly allowance to pay for their joint household expenses, and (7) their filing of joint tax returns and stating thereon that they were married (*Pasquale v. Pasquale*, 210 AD2d 387, 620 N.Y.S.2d 95).

In *Shatz v. Shatz*,[9] the Appellate Division held that reliance on representations of future reconciliation is unreasonable. Accordingly, talk of reconciliation, without concomitant unequivocal acts of reconciliation, does not vitiate the first service date as the cutoff point for valuation purposes.

In *Lippman v. Lippman*,[10] the Fourth Department held that "mere cohabitation" or "sporadic cohabitation and the intermittent resumption of sexual relations do not constitute a reconciliation." *Lippman* held that it is settled law that mere cohabitation is insufficient to constitute a reconciliation.

> it is clearly established that "[m]ere cohabitation following the execution of a separation agreement does not by itself destroy the validity of a separation agreement" (*Rosenhaus v. Rosenhaus*, 121 AD2d 707, 708, 503 N.Y.S.2d 892, lv. denied 68 N.Y.2d 997, 510 N.Y.S.2d 1028, 503 N.E.2d 125). It follows that "sporadic" cohabitation and the intermittent resumption of sexual relations will not vitiate a separation agreement (*Lotz v. Lotz*, *supra*; *Lapidus v. Lapidus, supra; Stim v. Stim*, 65 AD2d 790, 410 N.Y.S.2d 318).

In sum, nothing short of an actual resumption of living together constitutes reconciliation.

A Motion for Summary Judgment Is Appropriate Where There Has Been No Resumption of the Marital Relationship, thus Compelling the Other Party to Lay Bare His or Her Case in Evidentiary Fashion

Where there has been no reconciliation, the party seeking to fix the earlier date may be advised to make a motion for summary judgment for the aforementioned relief. This motion is an inexpensive and expedient method which forces the other party's hand at disclosing the strengths and weaknesses of his or her case while potentially pruning litigation costs.

CPLR 3212 addresses the issue of an application for summary judgment. It provides the nature of the evidence to be submitted in support of the respective arguments:

> CPLR 3212 (b) *Supporting proof; grounds; relief to either party* . . . The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

In *Lamba*, the Second Department held that the plaintiff had not established her case for the later date because she had not presented any evidence at the motion stage "that the parties reconciled and continued to receive the benefits of the marital relationship" (and was, thereafter, denied the opportunity to produce any such "evidence" at the time of trial).

Rudansky established "unequivocal proof" as the seeming evidentiary threshold required to prove reconciliation. The question, however, is did the Appellate Division carve out a new evidentiary standard regarding proof of reconciliation which is different from the standard in other civil cases?[11] Furthermore, where exactly "unequivocal proof" falls along the evidentiary

scale remains unclear: (1) is it the same, greater or less than clear and convincing; (2) is it the same, greater or less than a preponderance of the evidence; or, (3) is it somewhere in between both of them? Must the party opposing the motion for summary judgment meet the "unequivocal proof" test at the motion level as well, or does "unequivocal proof" apply only to the trial?

If the standard remains as before with respect to defeating a motion for summary judgment, then the McKinney Practice Commentary by Professor David Siegel is instructive regarding the nature and degree of evidence which a party opposing a motion for summary judgment *must lay bare* in the answering papers.[12]

> The summary judgment motion is not the occasion for the opposing party to pick and choose between the items of evidence to submit in opposition to the motion . . . When the movant's papers make out a prima facie basis for a grant of the motion, the opposing party must "come forward and lay bare his proofs of *evidentiary facts* showing that there is a bona fide issue requiring a trial . . . [He] cannot defeat this motion by general conclusory allegations which contain no specific factual references." *Hanson v. Ontario Milk Producers Coop., Income*, 58 Misc. 2d 138, 294 N.Y.S.2d 936 (1968).
>
> If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it. *Laye v. Shepard*, 48 Misc. 2d 478, 265 N.Y.S.2d 142 (1965), aff'd 25 AD2d 498, 267 N.Y.S.2d 477 (1st Dep't 1966).
>
> * * *
>
> Evasiveness in an opposing affidavit—indirect reference to the key facts, undue accent on immaterial points, and any other mode of behavior suggesting that the opposing party really can't deny the movant's evidence—will give it an aura of sham and increase the prospects of a grant of the motion.

Professor Siegel observes that the party opposing a motion for summary judgment will, as an anticipated perfunctory knee-jerk reaction, deny the facts set forth by the moving party. He, therefore, cautions against denying the motion merely because a denial was interposed.[13]

Professor Siegel further underscores that:

> Evasiveness in an opposing affidavit—indirect reference to the key facts, undue accent on immaterial points, and any other mode of behavior suggesting that the opposing party really can't deny the movant's evidence—will give it an aura of sham and increase the prospects of a grant of the motion.[14]

A party opposing a motion for summary judgment must present as much hard evidence as possible to oppose the motion for summary judgment, *e.g.*, joint tax returns, photo albums and other evidence typically available to a family living together.

The Underlying Principle Herein Is Founded in Prejudice, a Notion Which Evolved in a Body of Case Law Regarding Efforts to Voluntarily Discontinue a Divorce Action

That a court may not simply look toward the chronology of the marriage and blindly apply a durational test irrespective of whether any benefits were derived from the partnership, has been settled by *Marcus*, *et al*. The reason is prejudice and fairness: the avoidance of the inequitable result of allowing a party to share in an economic partnership where the party seeking distribution did not contribute to the partnership.

The current rule of law is, however, not novel. It is part of an ongoing process which has evolved parallel to another area of law, arising from divorce actions involving applications for leave to discontinue. Appellate courts statewide have held that the discontinuance of an existing action could not be permitted if it would lead to the inequitable result of allowing a party to realize an unjustifiable windfall. This corpus of authority bolsters the principle in *Marcus*, *et al*.

In *Tucker v. Tucker*,[16] the Court of Appeals held that "improper consequences flowing from a discontinuance" may make a denial of a discontinuance "obligatory."

> [O]rdinarily a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted (4 Weinstein-Korn-Miller, N.Y.Civ.Prac., paragraph. 3217.06). Particular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of discontinuance permissible or, as the Appellate Division correctly held in this case, obligatory.

In *Cappa v. Cappa*,[17] the Fourth Department aligned with the Second Department in disallowing the discon-

tinuance of an action where the filing of a subsequent action "would result in converting what has otherwise been separate property into marital property upon the commencement of any new proceeding":

> Supreme Court properly denied plaintiff's motion for a discontinuance of the divorce action. "[D]iscontinuance would work particular prejudice against defendant in that it would result in converting what has otherwise been separate property into marital property upon the commencement of any new proceeding" (*Ruppert v. Ruppert*, 192 AD2d 925, 926, 597 N.Y.S.2d 196; see also, *Tucker v. Tucker*, 55 N.Y.2d 378, 383-384, 449 N.Y.S.2d 683, 434 N.E.2d 1050.

In *Ruppert v. Ruppert*,[18] an appeal transferred to the Third Department by order of the Second Department, the Appellate Division affirmed the denial of a discontinuance where "the parties [had] no intention of effecting a reconciliation," and the "discontinuance would work particular prejudice against defendant in that it would result in converting what has otherwise been separate property into marital property upon the commencement of any new proceeding":

> Having determined that defendant demonstrated a reasonable excuse for his default and that he should be permitted to re-serve his answer, Supreme Court was then governed by the rather well-defined premise that once an answer has been served, discontinuance is a matter of discretion (see, *Winans v. Winans*, 124 N.Y. 140, 26 N.E. 293). Two factors exist here that persuade us that Supreme Court did not abuse its discretion. First, the interposition of a counterclaim by defendant militates against discontinuance (see, *e.g.*, *Matter of Lasak*, 131 N.Y. 624, 30 N.E. 112). Second, discontinuance would work particular prejudice against defendant in that it would result in converting what has otherwise been separate property into marital property upon the commencement of any new proceeding (see, *Majauskas v. Majauskas*, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15; *Tucker v. Tucker*, 55 N.Y.2d 378, 449 N.Y.S.2d 683, 434 N.E.2d 1050). It is apparent from a review of the record here that the parties have no intention of effecting a reconciliation, nor was that the reason for plaintiff's failure to diligently pursue prosecution of this action.

In *Kane v. Kane*,[19] the Second Department held that a court "must consider whether substantial rights have accrued or [the] adversary's rights would be prejudiced" before allowing a discontinuance of a prior action. That undue prejudice to the other side warrants a denial of such an application.

> Neither CPLR 104 nor CPLR 3217(b) supports the grant of a discontinuance by the court if unfair prejudice results to the adversary (see, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3217:12). The court must consider whether substantial rights have accrued or his adversary's rights would be prejudiced thereby as well as the stage that litigation has reached; the later the stage, the greater should be the court's scrutiny of the plaintiff's motives. (see, *Tucker v. Tucker*, 55 N.Y.2d 378, 449 N.Y.S.2d 683, 434 N.E.2d 1050).

In *Giambrone v. Giambrone*,[15] the husband sought to discontinue an action which had been started by service of a summons with notice only. No complaint had been served. The First Department reversed the lower court which had denied the husband permission to discontinue voluntarily pursuant to 3217(a)(1). The Appellate Division held that a court may not prevent a party from exercising his statutory right to voluntarily discontinue within the permissible time frames except where equitable estoppel must intervene to prevent a discontinuance sought for "unfair or devious reasons." The Appellate Division further emphasized that, in other instances involving substantial litigation, a court must consider prejudice as a factor before granting such relief:

> It is only when litigation has progressed to the point of requiring a court order pursuant to CPLR 3217(b) that an application for discontinuance must be addressed to the court's discretion and may be denied where substantial rights have accrued or the adversary's rights would be prejudiced thereby [cites omitted].

In sum, the prejudice to the party whose separate property is sought to be divided is of primary and paramount concern, clearly, falling under the rubric of "unfair." Since divorce courts sit in equity, "unfairness" is the central focus of the determination.

McMahon v. McMahon

McMahon is a case of first impression within the First Department. The wife commenced the first action of divorce in March 1998 via service of a summons with notice only. No complaint was ever served and none was demanded. The action proceeded to a preliminary conference and full discovery. A firm trial date was, thereafter, set by the court.

Subsequent to the first action for divorce, the husband's employer, Goldman Sachs, made an IPO in May 1999. In the first action for divorce, the wife notified husband that she intended to assert a claim for equitable distribution of the IPO benefits. The husband argued that the rights only came into existence after the divorce action had been commenced and that she, therefore, had no such right.

In October 1999, just prior to trial, the wife served a notice to discontinue the first action for divorce. The court denied the husband's motion to vacate the notice of discontinuance. The husband protested that the discontinuance was only to obtain equitable distribution of the IPO in a divorce action that was surely to be subsequently commenced. The First Department affirmed the trial court's ruling that under CPLR 3217(a)(1) the wife had a right to discontinue her action, without court order, because no complaint had been served.

On appeal, the First Department: (1) rejected the husband's argument that there were equitable reasons to estop her from doing so; and (2) left the issue open whether the trial court could, in a subsequently commenced divorce action, utilize the commencement date of the first action for divorce in determining the extent of marital property.

McMahon Misinterpreted All the Governing Law on this Issue

For the reasons discussed below, *McMahon's* analysis of the decisional authority within the Second Department as well as the Court of Appeals' ruling in *Anglin v. Anglin*[20] is saturated with errors. Most significantly, *McMahon* erroneously paraphrased *Anglin*: "In general, the matrimonial action referred to in the statute is the action in which claims of equitable distribution are actually determined."[21]

The fact is that no such statement or proposition is to be found anywhere in *Anglin*, not even as *dicta*.

The Facts and Issues in *Anglin*

In 1982, the wife brought a contested *separation* action against her husband, which went to trial in January 1988. At times, after the separation action was commenced, the parties continued to live in the marital residence together and filed joint tax returns. As long as two years after the separation action was commenced, they also traveled to Tennessee together. Upon conclusion of the trial of the separation action, the wife was granted, *inter alia*, a judgment of separation.

In 1989, the wife commenced an action for divorce. The husband sought an order declaring that assets acquired after the commencement of the 1982 separation action were not marital property.

The Supreme Court took note of the divided views between the various Departments and fixed the commencement date of the divorce action as the marital asset accrual cutoff date. The Third Department affirmed:[22] "The dispositive issue on this appeal is whether plaintiff's prior separation action is 'a matrimonial action' for purposes of the foregoing statutory definition, the commencement of which would then have become the cut-off point for classification of spousal assets as marital property subject to equitable distribution."

The Court of Appeals affirmed:

> The appellant . . . presents a single statutory interpretation question for this Court to settle—whether a separation action ends the period for the accrual of marital property as prescribed by Domestic Relations Law § 236(B)(1)(c). The Appellate Division, agreeing with Supreme Court, held that the start of the separation action did not effect that end. We, too, conclude that a separation action does not, ipso facto, terminate the marital economic partnership and, therefore, does not preclude the subsequent accrual of marital property.[23]

Anglin Is Irrelevant in *McMahon*, Because the Issue in *Anglin* Was: Is an Earlier Action for a Separation "a Matrimonial Action," Where Property Distribution Is an Available Remedy?

Anglin is completely irrelevant to *McMahon*. The thrust behind *Anglin* devolved over whether the definition of "a matrimonial action," as set forth in the DRL, also included an action for separation. The Court of Appeals held that, under the DRL, "a matrimonial action" does not include an action for separation and, therefore, the commencement of an action for separation would not terminate the period for accrual of "marital property."

It was in response to this question, and to this question only, that the Court of Appeals held that "the economic partnership should be considered dissolved when "a matrimonial action" is commenced which

seeks divorce, dissolution, annulment or declaration of nullity of marriage, *i.e.*, an action in which equitable distribution is *available*."[24] The Court of Appeals was not confronted with the question of which of two divorce actions should be used in circumstances where the parties have not lived together subsequent to the commencement of the first action. The Second Department's rulings in *Marcus, Gonzalez, Thomas, Lamba* and *Fuegel*, all involved actions for divorce wherein equitable distribution was an available ancillary remedy.

In none of the cases cited in *McMahon* does the Second Department deviate from the Court of Appeals' ruling in *Anglin*. In fact, to assure that a party is not the beneficiary of an undeserved windfall, the Second Department applies an implicit two-prong test (which incorporates *Anglin*) which delves into the equity of the case: (1) was the first action "a matrimonial action" which allows for a distribution of property (pursuant to *Anglin*); and (2) did the parties live separately after the commencement of the first action?

(A) The only permutation which results in the fixing of the earlier commencement date is a "yes" to both (1) and (2).

(B) A "no" to either part will result in the fixing of the later date.

Accordingly, *Fuegel, Lamba, Thomas, Gonzalez* and *Marcus* are all consistent with *Anglin*.

It is also noteworthy that *Anglin* found that the parties had continued to live together, travel together, and had filed joint tax returns—all elements of *Rudansky, Shatz,* and *Lippman.* It is, therefore, doubtful that the first commencement date would have been used in *Anglin*, even if there had been two divorce actions.

McMahon Completely Miscomprehended the Second Department

Another fundamental error in *McMahon* lies within its declaration that "in the Second Department, utilizing an earlier action commencement date to classify marital property is the exception, not the norm." That is absolutely incorrect. The rule of law challenged by *McMahon* has been universally and consistently applied in each and every case in the Second Department, as demonstrated above. Not only is what *McMahon* erroneously declared as not being "the norm" within the Second Department, in fact, the settled law in the Second Department, but it is also the present rule of law of the state absent a contrary pronouncement by another appellate court or the Court of Appeals:[25]

> In urging this court to accept the earlier action commencement date, husband relies upon a line of cases decided in the Appellate Division, Second Department. Thus, in *Thomas v. Thomas* (221 AD2d 621 [2d Dep't 1995]) and *Lamba v. Lamba* (266 AD2d 515 [2d Dep't 1999]), the Second Department held that a prior discontinued action was the proper calculation date to value a pension in each respective action because to hold otherwise would confer a windfall on the other spouse. Significantly, even in the Second Department, utilizing an earlier action commencement date to classify marital property is the exception, not the norm. (*Fuegel v. Fuegel*, 271 AD2d 404 [2d Dep't 2000]; *Marcus v. Marcus*, 135 AD2d 216 [2d Dep't 1988]; see also, *Matter of Nicit v. Nicit*, 217 AD2d 1006 [4th Dep't 1995].)[26]

McMahon's misreading of *Fuegel* is, however, understandable due to the Second Department's failure to lay out any of the underlying facts therein. *McMahon* could not have known that the underlying facts were actually consistent with the string of cases in the Second Department.

McMahon Also Misread *Sullivan*, a First Department Case, and *Nicit*: In *Sullivan* and *Nicit*, the First Action Was a Foreign Divorce Action

McMahon also misread *Sullivan v. Sullivan*[27] and *Nicit v. Nicit*.[28]

In *Nicit,* the Appellate Division held that the later of the actions was to be applied because the proceeding seeking the distribution of marital property followed a foreign divorce action where equitable distribution was not available.

> In this proceeding to obtain a distribution of marital property following a foreign divorce judgment, Supreme Court properly determined that the appropriate date for the valuation of marital property was the commencement date of the instant proceeding rather than the commencement date of the prior unsuccessful divorce action (see, *Sullivan v. Sullivan*, 201 AD2d 417, 607 N.Y.S.2d 937; see also, *Marcus v. Marcus*, 135 AD2d 216, 220-221, 137 AD2d 131, 525 N.Y.S.2d 238.

In *Sullivan,* (cited in *Fuegel* and *Nicit),* the First Department, in a briefly worded opinion, addressed the exclusive issue of the selection of valuation dates where a foreign divorce judgment had been obtained. In *Sullivan,* as in *Nicit*, the Appellate Division held that it was the commencement of the New York action which governed the valuation date rather than the date of the

commencement of the foreign divorce. The reasoning in *Sullivan* is consistent with *Anglin*.

> The instant proceeding seeking, inter alia, equitable distribution, is the first time that the matter of allocation of the marital property has ever come before a court. The Supreme Court appropriately concluded that the cutoff date for equitable distribution in this case was the commencement of this proceeding and not the divorce action in Illinois, since Domestic Relations Law § 236(B)(1)(c) defines "marital property" as all property acquired during the marriage and before the commencement of a matrimonial action, and § 236(B)(2) defines a matrimonial action to include "proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce." The validity of this approach is confirmed in *Anglin v. Anglin*, 80 N.Y.2d 553, 592 N.Y.S.2d 630, 607 N.E.2d 777, wherein the Court of Appeals deemed the availability of equitable distribution to be the critical factor in determining whether the commencement of a particular type of matrimonial action will act as the cutoff date.

Accordingly, *Nicit* and *Sullivan* are irrelevant to *McMahon*.

Awards Have Been Fashioned So As Not to Reward a Party Who Has Not Contributed to the Marital Partnership, Notwithstanding an Ongoing Chronological Marriage

In *Musumeci v. Musumeci*,[29] the court addressed the following issues: (1) how to fix the valuation date of the husband's pension plan where the parties had lived separate and apart for approximately four years while, nevertheless, being mindful of the directive in DRL § 236B(4) that the commencement of the action is the earliest date as of which an asset may valued; and (2) to do it in a manner where the application of a strict reading of DRL § 236B(4) does not work an injustice. The court pondered:

> Shall the computation of the marital portion of the pension which began on the date of the marriage be adjusted so as to equitably reflect the unfairness in terminating it on the date of the commencement of this action, rather than on the date of the abandonment. Obviously the use of twenty-nine months or seventy-five months as the numerator of the fraction will constitute a considerable difference in the final amount that the Wife will realize as her share of the pension.

Musumeci analyzed the intent and purpose behind the Equitable Distribution Law. The court then noted that, sitting in equity, it must do what is fair "as justice commands" because "to do otherwise would violate the spirit of the law."

The court further observed that to apply DRL § 236 B(4) with a broad stroke in every case, without considering the circumstances of each case, would result in a significant injustice. Significantly, *Musumeci* observed that the underlying principle of a marital partnership and the contribution by each party could be lost if the selection of the valuation dates were blindly applied without equity to temper the result.

> The purpose of equitable distribution is to allow the parties to keep a share of what they mutually earned during the marriage. There is no doubt that if during the period of time that the parties lived together there was a joining of resources and the sharing of the benefits, then the non-pensioned party should share in the pension for that period. However, during the latter forty-six months when the parties were not living together, it is obvious that the Wife did nothing to contribute to the appreciation of the pension other than to be married to the defendant in name only.[30]

Musumeci then turned for guidance to three different sources: (1) DRL 236B(5)(c); (2) *Coffey v. Coffey*, 119 AD2d 620, 622, 501 N.Y.S.2d 74; and (3) the Memorandum of Governor Carey to the Equitable Distribution Law, 1980 McKinney's Session Laws of N.Y., p. 1863, and concluded that "courts possess the flexibility required to mold a decree appropriate to a given situation, with fairness being the ultimate goal."[31]

> The solution to this dilemma can be found in the proper application of Section 236B(5)(c): "Marital property shall be distributed equitably between the parties, considering the circumstances of the case and the respective parties." The philosophy of the law is perhaps better set forth in *Coffey v. Coffey*, 119 AD2d 620, 622, 501 N.Y.S.2d 74: "At the outset, it is important to note that there

> is no requirement that the distribution of each item of marital property be on an equal basis (see *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 1034, 489 N.Y.S.2d 58, 478 N.E.2d 199; *Parsons v. Parsons* [101 AD2d 1017, 476 N.Y.S.2d 708] *supra*; *Ackley v. Ackley* [100 AD2d 153, 472 N.Y.S.2d 804] *supra*; *Rodgers v. Rodgers*, 98 AD2d 386, 390-391, 470 N.Y.S.2d 401, *appeal dismissed* 62 N.Y.2d 646). *Rather, property acquired during the marriage should be distributed 'in a manner which reflects the individual needs and circumstances of the parties'* (Memorandum of Governor Carey, 1980 McKinney's Session Laws of N.Y., p. 1863). *To this end, courts possess the flexibility required to mold a decree appropriate to a given situation, with fairness being the ultimate goal*" (see, *Rodgers v. Rodgers, supra*, at p. 391, 470 N.Y.S.2d 401). [emphasis added]

So as not to run afoul of DRL § 236B(4), the court then fixed the date of valuation as of the date of the commencement of the action. However, *Musumeci*, then divided the length of the marriage into two periods: (1) the period when the parties lived together, and (2) the period of separation just prior to the commencement of the action. The court awarded the wife 50 percent of that portion of the pension which accrued during the time they lived together—when the husband was still enjoying the benefits of the marriage, and 0 percent to the wife for the nearly four-year period during which they lived apart. Thereafter the court added the sum of the wife's contributions during the two different periods and arrived at its conclusion. Otherwise stated, the whole was equal to the sum of its parts.

McMahon, nevertheless, hinted at a possible *Musumeci*-like resolution upon the conclusion of a trial.

> Notably, the harm claimed is not as great as husband perceives. The court's right to exercise discretion in marital distribution cases does not lie in the statutory definitions which control classification of martial assets. The discretion lies in the court's power to determine a percentage of distribution that it considers equitable, depending upon the factors of each particular case. If husband succeeds in convincing this court that wife's contributions in obtaining the IPO benefits were negligible, then this court may take it into consideration when distributing this asset.[32]

Anglin Sounds a Tacit Approval of *Musumeci*

The language in *Anglin* more than suggests that, had the Court of Appeals reviewed the question of the selection of dates, where more than one divorce action had been commenced, the issue would have been resolved along the lines of the lines of the Second Department. The following language suggests a tacit endorsement of *Musumeci*[33]:

> Notably, the Legislature has given the courts significant flexibility in fashioning the appropriate remedy of equitable distribution of marital property. The commencement of a separation action may be considered as a factor by courts, among other relevant factors, as they attempt to calibrate the ultimate equitable distribution of marital economic partnership property acquired after the start of such an action by either spouse.

Conclusion

Pursuant to *stare decisis*, and absent a contrary pronouncement from another Department or the Court of Appeals, the current rule of law of the state of New York with respect to this issue is the one set forth in the line of cases in the Second Department.

Endnotes

1. 187 Misc. 2d 364, 722 N.Y.S.2d 723 (2001).
2. *Antenucci v. Antenucci*, 597 N.Y.S.2d 805, 806, 193 AD2d 948, 949 (3d Dep't 1993).
3. 266 AD2d 515, 698 N.Y.S.2d 715 (2d Dep't 1999).
4. 240 AD2d 630, 659 N.Y.S.2d 499 (2d Dep't 1997).
5. 271 AD2d 404, 705 N.Y.S.2d 400 (2d Dep't 2000).
6. 221 AD2d 621, 634 N.Y.S.2d 496 (2d Dep't 1995).
7. 135 AD2d 216, 137 AD2d 131, 525 N.Y.S.2d 238 (2d Dep't 1988).
8. 223 AD2d 500, 637 N.Y.S.2d 97 (1st Dep't 1996).
9. 84 AD2d 833, 444 N.Y.S.2d 186 (2d Dep't 1981).
10. 192 AD2d 1060, 596 N.Y.S.2d 241 (4th Dep't 1993).
11. Courts have viewed divorce actions with greater scrutiny than other cases:

    Christian v. Christian, 42 N.Y.2d 63, 396 N.Y.S.2d 817 (1977):

    > "Marriage being a status with which the State is deeply concerned, separation agreements subjected to attack are tested carefully. 'A court of equity does not limits inquiry to the ascertainment of the fact whether what had taken place would, as between other persons, have constituted a contract, and give relief, as a matter of course, if a formal contract be established, but it further inquires whether the contract (between husband and wife) was just and fair, and equitably ought to be

enforced, and administers relief where both the contract and the circumstances require it' (cites omitted)." 42 N.Y.2d 63, 65, 851, 396 N.Y.S.2d 817, 819.

* * *

"There is a strict surveillance of all transactions between married persons, especially separation agreements. Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract. These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity." 42 N.Y.2d 63, 72, 855, 396 N.Y.S.2d 817, 823.

Battaglia v. Battaglia, 90 AD2d 930, 931. "Because of the public interest, the court has been invested with a wider discretion in the control of the course of procedure in matrimonial actions than in others."

12. Siegel, McKinney Practice Commentary, CPLR 3212, C:3212:4 (1992) (reminding the courts that, in reviewing a motion for summary judgment, judges need to fall back on their common sense experience as attorneys, or, simply stated, their gut instinct. "Judges confronted with a motion for summary judgment must depend more on their experience as lawyers and jurists than on the law. They must examine the moving and opposing papers carefully and determine whether they present any issue of fact material enough to warrant a trial.").
13. *Id.* "Almost invariably, the opposing side will, in the answering papers, deny a material fact that the movant has offered proof of. That does not mandate a denial of the motion. How strong is the denial? Does the opposing side unequivocally dispute the fact, claiming first-hand knowledge and swearing that the fact is otherwise? Does that side deny only half-heartedly, or is it hedging in some way? Is there an aura of evasiveness in the opposing papers? These are the kinds of things the judge is faced with, and it is not the law but rather the judge's own experience and talent as a lawyer and jurist that must be relied on."
14. Siegel, McKinney Practice Commentary, CPLR 3212, C:3212:16 (1992).
15. 140 AD2d 206, 528 N.Y.S.2d 58 (1st Dep't 1988).
16. 55 N.Y.2d 378, 449 N.Y.S.2d 683 (1982).
17. 212 AD2d 1056, 624 N.Y.S.2d 1012 (4th Dep't 1995).
18. 192 AD2d 925, 597 N.Y.S.2d 196 (3d Dep't 1993).
19. 163 AD2d 568, 558 N.Y.S.2d 627 (2d Dep't 1990).
20. 80 N.Y.2d 553, 592 N.Y.S.2d 630 (1992).
21. *Anglin v. Anglin*, 80 N.Y.2d 553 (1992). Excerpt from *McMahon v. McMahon*, 187 Misc. 2d 364, 366.
22. 173 AD2d 133, 134, 577 N.Y.S.2d 963, 964 (3d Dep't 1992).
23. *Anglin v. Anglin*, 80 N.Y.2d 553, 554, 592 N.Y.S.2d 630, 631.
24. *Anglin v. Anglin*, 80 N.Y.2d 553, 557, 592 N.Y.S.2d 630, 632.
25. "The doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule (see, e.g., Kirby v. Rouselle Corp., 108 Misc. 2d 291, 296, 437 N.Y.S.2d 512; Matter of Bonesteel, 38 Misc. 2d 219, 222, 238 N.Y.S.2d 164, affd. 16 AD2d 324, 228 N.Y.S.2d 301; 1 Carmody-Wait 2d, N.Y.Prac., § 2:63, p. 75). This is a general principle of appellate procedure (see, e.g., Auto Equity Sales v. Superior Court of Santa Clara County, 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937; Chapman v. Pinellas County, 423 So.2d 578, 580 [Fla.App.]; People v. Foote, 104 Ill.App.3d 581, 60 Ill.Dec. 355, 432 N.E.2d 1254), necessary to maintain uniformity and consistency (see Lee v. Consolidated Edison Co. of N.Y., 98 Misc. 2d 304, 306, 413 N.Y.S.2d 826), and, consequently, any cases holding to the contrary (see, e.g., People v. Waterman, 122 Misc. 2d 489, 495, n.2, 471 N.Y.S.2d 968) are disapproved. Such considerations do not, of course, pertain to this court. While we should accept the decisions of sister departments as persuasive (see, e.g., Sheridan v. Tucker, 145 App.Div. 145, 147, 129 N.Y.S. 18; 1 Carmody-Wait 2d, N.Y.Prac., § 2:62; cf. Matter of Ruth H., 26 Cal.App.3d 77, 86, 102 Cal.Rptr. 534), we are free to reach a contrary result (*see, e.g., Matter of Johnson*, 93 AD2d 1, 16, 460 N.Y.S.2d 932, revd. on other grounds, 59 N.Y.2d 461, 465 N.Y.S.2d 900, 452 N.E.2d 1228; State v. Hayes, 333 So.2d 51, 53 [Fla.App.]; Glasco Elec. Co. v. Department of Revenue, 87 Ill.App.3d 1070, 42 Ill.Dec. 896, 409 N.E.2d 511, affd., 86 Ill.2d 346, 56 Ill.Dec. 10, 427 N.E.2d 90)." *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663, 664, 476 N.Y.S.2d 918, 920 (2d Dep't 1984).
26. 187 Misc. 2d 364, 367, 722 N.Y.S.2d 723, 726.
27. 201 AD2d 417, 607 N.Y.S.2d 937 (1st Dep't 1994).
28. 217 AD2d 1006, 631 N.Y.S.2d 271 (4th Dep't 1995).
29. 133 Misc. 2d 139, 506 N.Y.S.2d 629 (1986); cited in *Mylett v. Mylett*, 163 AD2d 463, 558 N.Y.S.2d 160 (2d Dep't 1990).
30. 133 Misc. 2d 139, 142, 506 N.Y.S.2d 629, 631 (1986).
31. *Id.*
32. 187 Misc. 2d 364, 368.
33. *Anglin v. Anglin*, 80 N.Y.2d 553, 558; *Match v. Match*, 179 AD2d 124, 583 N.Y.S.2d 224 (1st Dep't 1992), indicated its tacit approval of *Musumeci* and a possible application of the principles set forth therein had they been applicable to the facts therein.

Stranger Than Fact: Deconstructing *O'Brien*

By Sandra Jacobson

"I don't think necessity is the mother of invention—
invention, in my opinion, arises directly from idleness,
possibly also from laziness. To save oneself trouble."

Agatha Christie

It has often been said that *O'Brien v. O'Brien*[1] was invented because a court perceived an injustice about which it could do nothing under the law as written. Loretta O'Brien had worked to put her husband through medical school. During his residency, Dr. O'Brien brought an action for divorce. Loretta O'Brien was self-supporting so that maintenance was not a solution. Dr. O'Brien had not reached the point of having a practice nor had the parties accumulated assets to be divided. Absent this invention peculiar to New York law, Loretta would receive nothing from the marriage while Dr. O'Brien would presumably be left with the ability to earn in the six figures.

Stanley Goodman, the creator of this marital asset, agreed with and then argued away the fact that his valuation of Dr. O'Brien's enhanced earnings was based on assumptions which were highly speculative. However, the underpinning of the valuation, basically that used in wrongful death actions, was clear. It required knowledge of the "average" income (the "average" used being the median rather than the mean or the mode) of someone with that party's educational attainments at the time of the marriage and the "average" income of someone with that party's attainments at the date of commencement.

By definition, the party in question was unlikely to earn exactly the "average" because the median is simply a number which one-half of the members of a category under consideration earn below and one-half above. The wider the spread between the top and the bottom earnings, the less likely that any given party is near the "average."

In adopting this formula, courts overlooked the major difference between a wrongful death action and a marital dissolution. By definition, the defendant who must pay wrongful death damages is a tortfeasor. Equitable dissolution does not turn on fault, absent egregious fault. Moreover, the true defendant in a wrongful death action is usually an insurance company with deep pockets, something a newly fledged doctor or lawyer lacks.

After a period of confusion, the courts invented the concept of merger, *i.e.*, at some time the degree or license merged into the practice or career and was no more. The Bar will remember what was known as Marcus I which was recalled and reissued in what we referred to as Marcus II.[2]

Whatever logic courts later held merger lacked, it dealt with some of the problems *O'Brien* could not. There was something other jurisdictions recognized as a marital asset: a practice. Moreover, by the time the practice was established, it was probable that other marital assets had been acquired.

"[T]he true defendant in a wrongful death action is usually an insurance company with deep pockets, something a newly fledged doctor or lawyer lacks."

The doctrine of merger did not solve all problems. There was the question of just when merger occurred. There were cases which resurrected licenses.[3] If the license had merged into a salaried career, there was nothing to divide.[4]

A twist was added to the doctrine of merger by two Fourth Department cases decided on the same day, *Finocchio v. Finocchio*[5] and *Di Caprio v. Di Caprio*.[6] Mr. Finocchio's license was held to have merged into his practice and Mr. Di Caprio's degree and certification into his professional career, but the license, degree and certification were to be valued as separate assets. The future earnings to be projected were to be based on the present earnings.

This attempt to introduce reality into the calculation demonstrates the artifice of calling a license a thing of value. Present earnings are not the result solely of the license. What a person makes five or ten years out of school is the result not of obtaining a degree but of doing something with it. It is the result of one's skill or

lack thereof, one's personality or lack thereof and one's luck, good or bad. A degree or license is not an ability to earn but a piece of paper which lets one go out and try.

And then came *McSparron*,[7] which rejected the entire concept of merger, holding that any license had some residual value, although it might be nominal. Care must be taken so that the value of the license did not overlap the value of the professional practice and maintenance awards.

What followed were a series of cases holding that the maintenance award was greater than the residual value of the license, so that no equitable division of the value of the license should be made.[8]

The damage done to the non-licensed spouse was great.

> Thus the maintenance to be awarded in this case as hereinafter set forth would duplicate the value of defendant's enhanced earnings, and there can be no separate award to plaintiff for the value of defendant's medical license. Specifically, the award of maintenance of $400 per week for 7 years equals $145,600 which must be deducted from the value of plaintiff's share of the enhanced earnings of $135,227, leaving a negative balance.
>
> Therefore, no separate award is made to plaintiff by reason of defendant's enhanced earning ability, since the enhanced earning ability will be utilized to provide the maintenance hereinafter awarded to plaintiff.[9]

But in finding the value of the husband's license, the court had already reduced it for income taxes and discounted it for time. The maintenance paid to the wife would be taxable to her, but no allowance was made for that. It would be paid over seven years, but no discount was made for time. It would terminate on the death of either party or the remarriage of the wife but no discount was made for these possibilities.

Grunfeld[10] first saw the light of print as *Rochelle G. v. Harold M.G.*[11] The late Justice Lewis Friedman held that the maintenance award was greater than the wife's share of the residual value of the license, even if the award were reduced to present value.

The Appellate Division[12] modified, holding that one-half of the value of the professional license should be distributed to the wife. It made no adjustment of maintenance to the wife on that basis. The Court of Appeals reversed the Appellate Division, stating:

> To comply with McSparron, Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two. Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout.

Had the Court stopped with that, *Grunfeld* would not pose a danger to dependent spouses. However, the Court of Appeals went on to say:

> Where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income (See, Domestic Relations Law § 236 [B][5][d][5]. The necessity of this reduction was recognized in Wadsworth v. Wadsworth (219 AD2d 410). "Not to do so would involve a double counting of the same income" (id., at 415; see also, Reczek v. Reczek, 239 AD2d 867; Jafri v. Jafri, 176 Misc. 2d 246, 252; Procario v. Procario, 164 Misc. 2d 79, 87-88). *One advantage of this method is that the maintenance award may be adjusted in the future if the licensed spouse's actual earnings turn out to be less than expected at the time of the divorce* (see, Domestic Relations Law § 236[B][9][b]; O'Brien v. O'Brien, supra, at 591 [Meyer, J., concurring]; Scheinkman, op. Tic., at 303; Oldham, Divorce, Separation and the Distribution of Property § 9.02[1], at 9-11). This method is also consistent with our observation that in particular cases the value of the license "may be nominal" (McSparron v. McSparron, supra, at 286).
>
> On the other hand, there may be cases where it is more equitable to avoid double counting by reducing the maintenance award (see, Domestic Relations Law § 236[B][6][a][1]. Where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the value of the

> license as marital property rather than to take the license income into consideration, in determining the licensed spouse's capacity to pay maintenance (see, Seeman v. Seeman, 251 AD2d 487, 488; Vainchenker v. Vainchenker, 242 AD2d 620, 621; Turner, op. Cit., at 327-328; Orenstein and Skoloff, When a Professional Divorce: Strategies for Valuing Practices, Licenses, and Degrees, at 71-72).

"Forty-nine states in the United States divide marital and community property without resorting to the fiction of valuing a license or a degree. This writer submits that it is time for New York to join them."

Through the courtesy of Joel A. Rakower I have read an unreported case[13] which gave some recognition to the fact that a license is not self-operating.

> Defendant is entitled to a fair equitable share in the income enhanced based on an assessment of the potential income it will produce; however as many with licenses can attest the exploitation is fraught with the perils of economics, changing structures of government regulations and require many hours of labor beyond a 9 to 5 "job." This is not an asset which by dint of time alone income is generated.
>
> The Court finds in such matters that 50 percent of the future income from the income enhanced (over the base income potential of the licensed party at the time of marriage) should be reserved for the exploiter and the other 50 percent be subject to distribution. Plaintiff is entitled to preserve the first 50 percent because only his time, risk and toil will be available to exploit the asset.

Forty-nine states in the United States divide marital and community property without resorting to the fiction of valuing a license or a degree. This writer submits that it is time for New York to join them. It is time to stop calculating how many angels can dance on the angels already dancing on the head of a pin and confine degree valuation to the situation necessitating it. The value of a license should self-destruct at the end of a given period, say five years, and the valuation made should take only the expected earnings of that period into account. As aforesaid, at some point the ability, personality or luck of the individual comes into play and these are undoubtedly very separate property.

Endnotes

1. 66 N.Y.2d 576 (1985).
2. *Marcus v. Marcus*, 137 AD2d 131 (2d Dep't 1988).
3. *Martin v. Martin*, 200 AD2d 304 (3d Dep't 1994).
4. *Parlow v. Parlow*, 145 Misc. 2d 850 (Sup. Ct., Westchester Co. 1989).
5. 162 AD2d 1044 (4th Dep't 1990).
6. 162 AD2d 944 (4th Dep't 1990) *appeal denied,* 77 N.Y.2d 802 (1981).
7. *McSparron v. McSparron*, 87 N.Y.2d 275 (1995).
8. *See e.g., Wadsworth v. Wadsworth*, 219 AD2d 410 (4th Dep't 1996; *Cadet v. Cadet*, 31, N.Y.L.J., Dec. 11, 1996, p. 31, col. 6 (Sup. Ct., Rockland Co.); *Reczek v. Reczek*, 239 AD2d. 868 (4th Dep't 1997); *Musacchio v. Musacchio*, N.Y.L.J., July 31, 1997, p. 24, col. 4 (Sup. Ct., Kings Co.)
9. *Cadet v. Cadet*, *supra*.
10. *Grunfeld v. Grunfeld*, 94 N.Y.2d 696 (2000).
11. 170 Misc. 2d 808 (Sup. Ct., N.Y. Co. 1996).
12. 255 AD2d 12 (First Dep't 1999).
13. *Gold v. Gold*, Sup. Ct., Nassau Co. (1997).

Enhanced Earnings Evaluations Extended to All Exceptional Wage Earners, Even Those Without a Degree or License

By Elliot D. Samuelson

In one of the most comprehensive decisions to be written in the field of enhanced earnings, *Moll v. Moll*,[1] Justice Robert J. Lunn reached the conclusion, after examining most of the cases from *O'Brien v. O'Brien*[2] to *Hougie v. Hougie*,[3] that personal good will is inherent in a person's career and is a marital asset subject to evaluation and distribution upon divorce. Expressed another way, the judge decided that no license or degree was necessary to compute the enhanced earnings of an exceptional wage earner.

"[I]f one spouse has sacrificed and assisted the other in an effort to increase the other spouse's earning capacity, it should make no difference what form the asset takes, as long as it results in an increased earning capacity."

When the *O'Brien* decision was first released, many legal scholars believed that it was bad law and would be applied to its own peculiar fact pattern. How wrong they were. Since that time the courts of this state have gone on to extend the *O'Brien* rule to medical board certification,[4] a law degree,[5] an accounting degree,[6] a podiatry practice,[7] the licensing and certification of a physician's assistant,[8] a master's degree in teaching,[9] a master's degree and a permanent certificate in school administration,[10] a fellowship in the Society of Actuaries,[11] the celebrity career of an opera singer,[12] the increase in value of the wife's career as a model and actress,[13] the enhanced earning capacity attributed to a former Congressional career,[14] and the enhanced earning capacity of an investment banker,[15] all to constitute marital property. All of these decisions, like *O'Brien*, base their finding of marital property on the "enhanced earning capacity" which the "thing of value" provided to its holder.[16]

The courts have reserved the right to determine what interests fall within the statutory definition. The Court of Appeals interpreted the statutory definition of marital property as "sweeping" and has held that "spouses have an equitable claim to things of value arising out of the marital relationship."[17] These "things of value" may include intangible as well as a tangible assets.[18] The high Court also explained that, although the thing to be valued does not fit any common law concepts of property, this in itself does not prohibit a contrary finding.[19]

Justice Lunn remarked that all of the prior cases that dealt with this issue based their finding that such property was a marital asset on the "enhanced earning capacity" which the "thing of value" provided to its recipient.

Justice Lunn drew heavily on the rationale contained in *Golub*, (which was decided by Justice Silberman over ten years ago). As Justice Silberman explained, "when a person's expertise in a field has allowed him or her to be an exceptional wage earner, this generates a value similar to that of the good will of a business." In extending the *O'Brien* rule to an exceptional wage earner without a degree or license, and perhaps in order to insulate the rule from constitutional attack that failing to provide equal protection to all marital litigants runs afoul of the clause, Justice Silberman held that "the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution."

Finally, *Golub* was again cited with approval for the proposition that no rational basis exists to distinguish between a degree, a license or any other special skill that generates substantial income. The *Moll* court remarked that in determining the value of marital property, all such income generating assets should be considered if they were obtained during the marriage. The judge went on to note that, if one spouse has sacrificed and assisted the other in an effort to increase the other spouse's earning capacity, it should make no difference what form the asset takes, as long as it results in an increased earning capacity.

In *Moll*, the husband brought a motion for partial summary judgment to declare that he did not have enhanced earnings and therefore no marital asset existed. The husband's motion was denied. The court ruled: "that the husband's book of business or personal good will inherent in his career as a stock broker or financial

advisor is a marital asset subject to equitable distribution." The court cautioned, however, that the value of the plaintiff's share would be limited to the extent to which her direct or indirect efforts contributed to create or increase the husband's personal good will.

I thoroughly agree with the court's conclusions, especially when one considers that in *Hougie*, the court concluded that an investment banker had enhanced earning capacity regardless of whether or not his career required him to obtain a license.

"[I]t is the exceptional wage earning ability, whether created by a license or by special skills and experience garnered during the marriage on a person's career path, that is truly the marital asset which must be valued and distributed."

Were the courts to rule otherwise, it would deprive a significant number of spouses from obtaining a share of the enhanced earning capacity of an exceptional wage earner, artisan or entertainer. Unless ultimately the *O'Brien* decision is reversed by the Court of Appeals, all litigants must be treated equally and enjoy equal protection under the law. It would be highly inequitable to prefer a spouse with a professional degree or license over one without a similar degree. After all, it is the exceptional wage earning ability, whether created by a license or by special skills and experience garnered during the marriage on a person's career path, that is truly the marital asset which must be valued and distributed.

In order to preserve a client's right of appeal, it is recommended that a motion for summary judgment or partial summary judgment be made prior to trial. The court in *Moll* and *Hougie* approved such procedure. Undoubtedly, this ultimate issue will again be heard by the Court of Appeals and it is predicted that the *O'Brien* rule will be affirmed and extended to its logical conclusion.

Endnotes

1. 2001 WL 345421 (N.Y. Sup.).
2. 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985).
3. 261 AD2d 161, 689 N.Y.S.2d 490 (1st Dep't 1999).
4. *Savasta v. Savasta*, 146 Misc. 2d 101, 549 N.Y.S.2d 544 (Sup. Ct., Nassau Co. 1989).
5. *Cronin v. Cronin,* 131 Misc. 2d 879, 502 N.Y.S.2d 368 (Sup. Ct., Nassau Co. 1986).
6. *Vanasco v. Vanasco*, 132 Misc. 2d 227, 503 N.Y.S.2d 480 (Sup. Ct., Nassau Co. 1986).
7. *Morton v. Morton,* 130 AD2d 558, 515 N.Y.S.2d 499 (2d Dep't 1988).
8. *Morimando v. Morimando*, 145 AD2d 609, 536 N.Y.S.2d 701 (2d Dep't 1988).
9. *McGowan v. McGowan*, 142 AD2d 355, 535 N.Y.S.2d 990 (2d Dep't 1988).
10. *DiCaprio v. DiCaprio*, 162 AD2d 944, 556 N.Y.S.2d 1011 (4th Dep't 1990).
11. *McAlpine v. McAlpine*, 143 Misc. 2d 30, 539 N.Y.S.2d 680 (Sup. Ct., Suffolk Co. 1989).
12. *Elkus v. Elkus*, 169 AD2d 134, 572 N.Y.S.2d 901 (1st Dep't 1991).
13. *Golub v. Golub*, 139 Misc. 2d 440, 527 N.Y.S.2d 946 (Sup. Ct., N.Y. Co. 1988).
14. *Martin v. Martin*, 200 AD2d 304, 614 N.Y.S.2d 775 (3d Dep't 1994).
15. *Hougie v. Hougie*, 261 AD2d 161, 689 N.Y.S.2d 490 (1st Dep't 1999).
16. *See, e.g., McGowan v. McGowan,* 142 AD2d 355, 535 N.Y.S.2d 990 (2d Dep't 1988).
17. *See DeJesus v. DeJesus,* 90 N.Y.2d 643, 647, 655 N.Y.S.2d 36 (1985).
18. *Elkus v. Elkus*, 169 AD2d 134, 136, 572 N.Y.S.2d 901 (1st Dep't 1991).
19. *See O'Brien, supra,* 66 N.Y.2d 876.

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Selected Cases

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

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

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

H. Webster v. A. Ryan, Sr., Family Court, Albany County (Duggan, Dennis W., June 21, 2001)*

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In this case, the Court holds that a child has an independent, constitutionally guaranteed right to maintain contact[1] with a person with whom the child has developed a parent-like relationship.[2]

That right is constitutionally guaranteed because it is a fundamental liberty encompassed within the freedom of association right of the First Amendment[3] of the United States Constitution and Article 1 § 8 and § 9 of the Constitution of the State of New York.[4] This liberty is protected by the Due Process Clause of the Fourteenth Amendment and Article I § 6 of the Constitution of the State of New York. Because the State has provided no statutory basis for a child to assert such right of contact in a court of law, as it has for similar situations involving child contact with parents, grandparents and siblings, A. Ryan, Jr. has been denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States and Article I § 11 of the Constitution of the State of New York.[5]

I. Procedural History

The procedural history of this case is fully described in *Matter of Alex "LL" v. Albany County DSS* (260 A.D.2d 675, "*Ryan I*" and 270 A.D.2d 523, "*Ryan II*") and in *Webster v. Ryan* (187 Misc. 2d 127, "*Ryan III*"). A brief factual summary follows: A., Jr. was born in 1995, with a positive toxicology for cocaine. He was removed from his Mother's custody shortly after birth. Her parental rights were eventually terminated, as were the Father's in 1999. Both parents' terminations were based on permanent neglect. During the time that DSS was providing services for the Mother, the Father was filing at least four custody proceedings.[6] All of the Father's petitions were dismissed by the Family Court judge without a hearing. According to the trial court, the petitions were "dismissed due to [the Father's] unwillingness to partake in services recommended by DSS." (Ryan II, p. 579, FN2). For the years from 1995 to 1998, the Father received one hour of DSS-supervised visitation each week. In reviewing the denial of the Father's custody petitions, the Appellate Division held:

> In fact, the records in these proceedings reveal no evidence that the Father would not be a proper custodian for the child or that the child would be at risk in his custody. To the contrary, despite Family Court's limitation on the evidence received, the record generally supports a finding that the Father is qualified to serve as a custodian for the child. (Ryan II, at 580)

Concerning the termination of parental rights finding, the Appellate Division held that DSS made no effort to satisfy its burden of showing that it had formulated a realistic plan that was tailored to fit the Father's circumstances. It also held that the Family Court judge "repeatedly thwarted the Father's efforts to establish the lack of any reasonable basis for the plan that was put in place. . . . Obviously, the petition should have been dismissed at the conclusion of DSS' case, if not earlier." (*Ryan II*, at 581) The Appellate Division, in finding that the Family Court Judge had demonstrated hostility toward the Father and his attorney, ordered that all further proceedings be conducted before a different Judge.

Upon remand, in *Ryan III*, this Court returned custody of the child to the Father and entered a series of visitation orders to facilitate the transition of the child back into the Father's home. During this period of time,

the foster mother filed petitions seeking visitation and custody rights to A., Jr. This Court, in *Ryan III*, rejected the foster mother's claims. It found that there was no statutory, common law or constitutional basis to grant visitation to a non-biological, former custodian. The Court reserved on the question of whether the child has an independent constitutional right to seek visitation with his former foster mother and allowed the parties and the law guardian time to brief the issue. This decision answers that question in the affirmative. From A., Jr's. birth in 1995, until April 2000, when he was returned to his Father, the boy had lived with the foster mother for all of his life but for a few weeks.

II. Determination of Fundamental Rights

In this case, the Court has concluded that a child has a fundamental right to maintain contact, over the objection of a parent, with a person with whom the child has developed a parent-like relationship. The Court also holds that this right has constitutional protection but that this right must be balanced with the unquestionable fundamental right of the parent to raise his son without undue state interference.

The judicial determination (disparagingly described by some as "discovery") of fundamental rights has long been a subject of great debate in the legal and judicial professions.[7] There is, admittedly, no consensus on either side of the debate. On the restraint side, there is no agreement on their main point, which is that rights cannot be judicially discovered or determined outside the four corners of the Constitution. On the expansionist side, there is no agreement about where rights originate or how they are determined. In fact, there is no agreement by either side as to whether any particular judge is on any particular side at any particular time. Also, a judge's membership on either side can change, depending upon whose constitutional ox is being gored.[8]

A judge, wading into the constitutional rights determination quicksand, must have an abiding concern that he not set himself up as a judicial legislature. This concern goes back at least to the debate between Justices Chase and Iredell in *Calder v. Bull* (3 U.S. (3 Dall.) 386 (1798)). In *Calder*, Justice Chase set forth the proposition that the Court had the authority to set aside legislation that infringed on rights having their source in natural law. Justice Iredell countered that, even if a legislative act violated natural law, the Court, in setting the law aside, would be exercising powers not granted it by the Constitution.

So, where do fundamental rights come from? They cannot come from our Constitution in the sense that the Constitution itself grants or bestows rights on the governed. After all, a constitution is nothing more than a compact (though a very important one) among the governed as to how they wish to organize their government and what powers it should have and not have. A constitution may create non fundamental rights and protect or guarantee specific fundamental rights. But, if a constitution was a source of fundamental rights, this would mean that people could confer these rights upon themselves. To so hold would be to say that there were no fundamental rights before the Constitutional Convention of 1787 and those rights were first created in that convention. The absurdity of that argument is illustrated by just stating it. A constitution may be the repository of rights and even the source of some important rights, but not the source of fundamental rights. At this point, the definition of a fundamental right may have an air of circularity to it. Suffice it to say, that if a right can be created by majority vote then it can be extinguished in the same way. For a right to be fundamental, it must be exempt from that process. The obvious reason for this is that for a right to be fundamental, whatever that right may be, it must have some transcendental quality and such a right could not have been created by a majority vote of the thirty-nine men who signed the Constitution. It could have been enumerated by them to the extent they chose to do so, but not created by them.

Proof that the People possess other rights, not contained in or derivative of the Constitution, comes from three powerful positive sources: the Declaration of Independence, the Constitution and the Bill of Rights.

The Declaration of Independence, in its second paragraph, states:

> We hold these truths to be self-evident, that all men are created equal, that they are *endowed by their Creator with certain Unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness*. That, to *secure* these rights Governments are instituted among Men, deriving their just powers from the consent of the governed. (Emphasis added)

This Declaration, written by Jefferson, influenced heavily by Locke,[9] states that our rights come from our creator (whether that be a personal God, a deity, or just inherent in the unique dignity of humanness). It also states that our rights are unalienable; that is, they are not capable of being invested or divested, and that among those rights are life, liberty and the pursuit of happiness.[10] Life, liberty and the pursuit of happiness, according to the Declaration of Independence, is not an all-inclusive list of rights. Because the Declaration predates the Constitution, it is clear that every right we possess need not be found in, nor can be distilled from, some stated right in the Constitution. Nor can every

right we possess be found reposing in a penumbra[11] of some collection or amalgam of these enumerated rights.

The second evidentiary source for the proposition that all of our rights are not contained in the Constitution is the Constitution itself. The Constitution, as first passed, had no bill of rights at all. The Delegates to the Convention did not believe one was necessary. It was not necessary, in the Framers' view, because the Constitution, as written, gave the Federal Government no power to abridge any fundamental rights.

> James Wilson, a delegate from Pennsylvania, told a meeting of Pennsylvania citizens that a bill of rights would not only have been unnecessary but impracticable. "Enumerate all the rights of men? I am sure that no gentleman in the late convention would have attempted such a thing." The new Constitution in Wilson's view was not a body of fundamental law which would require a statement of natural rights. Rather it was municipal law, positive law—what in medieval days was called *jus civile*. Not a declaration of eternal rights but a code of reference (Catherine Drinker Bowen, *Miracle at Philadelphia*, Little Brown, 1966, 245-246).

The last vote for a bill of rights was taken on the last day of the Constitutional Convention. It was defeated 10-0 (*Bowen*, at 244).

During the Ratification debates, Hamilton, in *Federalist No. 84*, explained why the Constitution needed no bill of rights.

> I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would offer a colorable pretext to claim more than were granted. For, why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, where no power is given by which restrictions may be imposed?[12]

The final element of proof which establishes that all of our rights are not bestowed by or contained in the Constitution comes from the Bill of Rights itself—Amendment IX provides:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others *retained by the people*. (Emphasis added)

Amendment X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, *or to the people* (emphasis added).

Amendment XIV provides:

> No State shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States.

These three amendments all speak to rights held by the People that are not listed in the Constitution. Knowing that other rights exist, how are they to be determined and who should do the determining, the judiciary or the legislature? Most would readily agree that the legislature has the authority to determine rights or even create new rights. For example, the legislature could determine that the people have a right to universal health care. It is doubtful that the judiciary could make such a determination.

> When Mr. Justice Holmes speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," he went to the very essence of our constitutional system and the democratic conception of our society.[13]

The question to be asked here is, what is the judiciary's proper place in the rights determination business? It is clear that the Constitution does create some rights that would not be considered fundamental (e.g., the prohibition against bills of attainder and *ex post facto* laws). It is also clear that the Constitution protects or guarantees many other rights, some of which are now (but were not always) universally regarded as fundamental (e.g., freedom of speech and religion).[14] Finally, it is clear that other rights determined by the courts to be possessed by the people are not specified in but are protected by the Constitution. For example, the right to travel (*Edwards v. California*, 314 U.S. 160 (1941)), to marry (*Loving v. Virginia*, 388 U.S. 1 (1967)), and to privacy (*Griswold v. Connecticut*, 381 U.S. 479 (1965)) are rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, but they are not listed anywhere in the Constitution.[15]

The above discussion shows that if a right exists for a child to maintain contact with a person with whom he has developed a parent-like relationship, it will not be found explicitly or inferentially set forth in the Constitution, but it need not be. However, if such a right exists, and this Court holds that it does, that right has constitutional protection because it is a fundamental right and the Constitution protects our fundamental rights from unwarranted state intrusion or exclusion.[16] The search for such a right must begin with the Supreme Court's Talmudic exposition of our Constitution.[17]

If one scans two hundred years of Supreme Court decisions that define, determine or discover rights (however one defines the process)[18] and the work of legal scholars who have written on the subject, one is left quite disoriented from trying to find any consistently applied, generally agreed upon, theory of constitutional interpretation.[19] Evidence of this can be seen in almost any 5-4 Supreme Court decision where, among the majority and minority decisions, there are pluralities and sub-pluralities. These decisions literally provide something for everyone. This process begets other 5-4 decisions in the same area of law. The end result produces modifications, exceptions, qualifications and permutations that make the law unintelligible to trial judges, police, administrators and the public. For example, the law of search and seizure has reached such a state of complexity and confusion that a police officer, riding with a Supreme Court Justice, could not be expected to apply the law consistently. Observing critically on this issue is Joseph Goldstein, Sterling Professor of Law Emeritus at Yale Law School in *The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We The People Can Understand* (Oxford University Press, 1992). He illustrates the cacophony with which the Supreme Court often speaks by citing the introductory note to *Arizona v. Fulminante* (499 U.S. 279 (1991)). It reads as follows:

> White, J. delivered an opinion, Parts I, II and IV of which are for this Court, and filed a dissenting opinion in Part III. Marshall, Blackman, and Stevens, JJ., joined Parts I, II, III and IV of that opinion; Scalia, J., joined Parts I and II; and Kennedy, J., joined Parts I and IV. Reinquist, C.J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III. O'Connor, J. joined Parts I, II and III of that opinion; Kennedy and Souter, JJ., joined in Parts I and II; Scalia, J., joined Parts II and III. Kennedy, J., filed an opinion concurring in the judgment.

Professor Laurence H. Tribe, in *Constitutional Choices* (above, at FN 7), remarks on the problems of explaining how these constitutional choices can be validated as legitimate. He was moved, he said, "by a sense of the ultimate futility of the quest for an Archimedean point outside ourselves from which the legitimacy of some form of judicial review or constitutional exegesis may be affirmed." (at 3-5)

Somewhat at the other end of the judicial interpretive spectrum is Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit. Quoting him at length from *Overcoming Law*, he expresses the same sentiment but more vividly.

> There are two ways . . . in which judges can go wrong. The "fundamental values" approach goes wrong by being too willing to make political judgments. "Clause-bound interpretivism" goes wrong by not being willing enough to make political judgments, with the result that substantive injustices are ratified, even reveled in the name of the rule of law. The first mistake invites charges that the judges are being lawless, the second that they are being heartless. The first invites charges that the judges are elitist, anti democratic, arrogant in setting their judgment against that of the people's representatives, the second that they are too quick to yield to populist pressures, too insensitive to the danger of tyranny by the majority, too pious and credulous about the ideology of democracy, too callous, too servile—even cowardly. The objection to naming the avoidance of these extremes "interpretivism" is that it implies the existence of an objective technique, such as cryptograph, or translation, or reading a chest x-ray for signs of pulmonary disease, that, if only judges would adhere to it, would prevent them from going to either of the bad extremes. *If there is such a technique—something to lift free constitutional "interpretation" above the reading of palms and the interpretations of dreams—no one has discovered it.* (*Posner*, FN 7 at 199, emphasis added)

Despite the absence of a legislative road map or clearly defined constitutional sign posts or a generally accepted method of rights determinations to provide guidance, courts, since courts began, have been determining rights.[20] These rights have been birthed from

statutes, bills of rights, constitutions, natural law and the common law.

> As Chief Justice Coke said in the famous case of Dr. Bonham in 1610, if a statute should turn out to be against the reason of the common law . . . then the common law would control it and adjudge such an act to be void. (Gordon S. Wood, quoted in *A Matter of Interpretation*, FN 7, at 60)[21]

In recognizing that courts do determine rights and have been doing so for several hundred years, a court has a duty to describe what guideposts it is using when it determines that a right exists which was previously unrecognized (or at least unrecognized in a particular context). "Admittedly, this exercise is somewhat like a ship tacking into the wind. Each jig or jag of a judicial theory thrusts off in one direction until it requires corrective action to bring the law back on course. The polestar that guides this process must first be the faithfulness of a judge to his or her oath of office, always conscious that the People are the final repository of all rights and powers. With this guide, the course of judicial decision making has moved steadily (though not unvaryingly) forward with a consistent expansion of the individual rights of the governed.

The judiciary has no equivalent of the Rosetta Stone or Dead Sea scrolls to divine the Framers' intent or unlock the original understanding of Constitutional text when making a decision that determines a right or expands a recognized right. However, there must still be a faithfulness to the text of the Constitution, a respect for the traditions and values of our society and a deference to legislative authority.[22] The Court must follow, as Justice Scalia has described it, the "trajectory" of the Constitution (*A Matter of Interpretation*, FN7, at 43). At the same time, the Court must be cognizant of the errors that can be induced by incrementalism. With enough small steps, one can reach almost any legal conclusion. The final decision will seem so modest a change and the result so reasonable that the conclusion will almost appear to be self-evident.

> When therefore the State by its judges attempts to mark the respective limits of liberty and government, it must draw the line in such a way that the individual and the group, and the life appropriate to each, may have scope and opportunity for harmonious development. The location of this line is the overshadowing problem of liberty and law. (Benjamin N. Cardozo, *The Paradoxes of Legal Science*, Yale University Press, at 309 (1921))

As would be expected, Cardozo, speaking in a somewhat different context and with his typical felicitous use of language, has provided as clear a benchmark as can be distilled from the several dozens of Supreme Court cases on this subject. However, the court's *Griswold* decision is as good a starting point as any to examine how the Supreme Court drew the line of liberty in such a way that the individual and the group, and the life appropriate to each, were given scope and opportunities for harmonious development.

In *Griswold v. Connecticut* (381 U.S. 479 (1965)), the Supreme Court ruled unconstitutional a Connecticut law which made it a criminal offense for a doctor to counsel married couples about contraceptive methods. Justice Douglas, in delivering the majority opinion, recounted the progression of cases that granted persons protection against various types of governmental intrusions. He concluded:

> The forgoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. (*Griswold* at 484, emphasis added)

Today, the holding in *Griswold* would be uncontroversial. In fact, most people would probably be quite surprised to learn that just thirty-five years ago it was a criminal offense for a doctor to give birth control advice—and to a married couple no less. However, the method by which the Supreme Court arrived at its conclusion that the Connecticut law was unconstitutional was then, and continues to be, quite controversial. It was probably an unfortunate choice of words for Justice Douglas to associate rights with a "penumbra," a word borrowed from optics and astronomy which is associated with shadows or darkened regions. In constructing the "penumbra theory," Justice Douglas was dealing with two main problems. First, the Constitution nowhere mentions a right to privacy. Second, the Supreme Court purportedly laid to rest, only two years earlier, the oxymoronic concept of "substantive due process." (*Ferguson v. Skrupa*, 372 U.S. 726 (1963))

The concept of substantive due process, first articulated by Chief Justice Roger B. Taney in *Dred Scott v. Sandford* (60 U.S. 393 (1857)), was used as a basis to overrule the Missouri Compromise.[23] This legal concept got off to a rocky start in what is now considered the worst Supreme Court decision ever rendered. Substantive Due Process never really found solid, generally accepted, constitutional legs. One reason for this is that the concept was used primarily not to protect individual rights, but to protect private economic interests. However, it still had a sustained use in this fashion for some eighty years, ending, for all practical purposes, in

1937 with *West Coast Hotel Co. v. Parrish* (300 U.S. 379). That case involved the famous "switch in time that saved nine." A one judge realignment of the usual 5-4 court split resulted in the upholding of Washington State's minimum wage law and effectively ended President Roosevelt's "court packing" plan. However, during that 80-year period, a significant number of business and workplace regulatory laws were declared unconstitutional.

Substantive due process got a second life when the court started ruling unconstitutional, legislation that restricted individual personal liberties as opposed to economic liberties. However, the primary criticism of the concept of substantive due process remained the same. It allows courts to "substitute their social and economic beliefs for the judgment of legislative bodies who are elected to pass laws." (*Skrupa*, above, at 730, Black, J.) For these reasons, and writing only two years after *Skrupa*, Justice Douglas would have had a hard time yoking substantive due process to a right of a married couple to obtain contraceptives from their doctor. In truth, *Griswold* was a substantive due process case and Justice Goldberg (with Chief Justice Burger and Justice Brennan concurring) met that head on.

> I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported by both numerous decisions of the Court, referred to in the Court's opinion and by the language and history of the Ninth Amendment. . . . [T]he Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not deemed exhaustive. (*Griswold*, at 485)

Dissenting in *Griswold*, Justice Black itemizes the "collection of catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment, laws which offend their notions of natural justice" (*Griswold*, above, at 513). These include the following:

1. The Court can forbid action which "shocks the conscience." (*Rochin v. People of California,* 342 U.S. 165, 172)
2. State legislation may not run counter to the "decencies of civilized conduct." (*Rochin*, above, at 173)
3. A law may not violate "some principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental." (*Snyder v. Massachusetts*, 291 U.S. 97)
4. A law may not violate "those canons of decency and fairness which express the notions of justice of English-speaking peoples." (*Malinsky v. People of the State of New York*, 324 U.S. 401)
5. A law may not violate "the community's sense of fair play and decency." (*Rochin*, above, at 173)
6. A law may not conflict with "deeply rooted feelings of the community." (*Haley v. State of Ohio*, 332 U.S. 596)

This list could easily go on with another dozen variations on the same theme. The criticism layered on the judiciary on this point is, who is supposed to determine what these deeply rooted traditions and feelings of the community are? Uncovering the traditions and feelings of the community seems like a very difficult place to search for rights. Where does the search start, Fifteenth century England? What feelings? Whose traditions? In fact, many of the rights protecting provisions of the Magna Carta and the Constitution are anti tradition.[24] The separation of church and state is one of the more obvious examples. If one attempts to look for tradition and the conscience of the community, as expressed in the Constitution, one is met with a document that initially protected slavery[25] and where the notion of extending the vote to women never seriously crossed the Framers' minds.[26]

Any earnest search for tradition would again get derailed at the time of the passage of the Civil War Amendments. The conscience of the community in 1867 had no qualms about segregated schools. In that period, several states, including New York, mandated segregated schools.[27] It took almost one hundred years for the Supreme Court to set aside this legislatively established policy on constitutional grounds. (*Brown v. Board of Education*, 347 U.S. 483 (1954)) Enforcement issues, created by both *de facto* and *de jure* segregation, added an additional forty years to the struggle to end school segregation.

If one is to look for "tradition" or some "sense of decency and fairness rooted in the community so as to be considered fundamental," by examining the Supreme Court's journey down that path, one must start fairly recently. Slavery, as noted, was protected in the Constitution and this "peculiar institution" certainly did not bother any judicial notion of the community's sense of justice and decency in the first half of the nineteenth century.[28] In 1857, in the *Dred Scott* decision, "the Supreme Court had written two new rules into the fundamental law of the nation: first, that no Negro could

be a United States citizen or even a state citizen 'within the meaning of the Constitution'; and second, that Congress had no power to prohibit slavery in the territories, and that accordingly all legislation embodying such prohibition, including the Missouri Compromise, was unconstitutional." (*Fehrenbacher*, FN23, at 4) Forty years after *Dred Scott* and thirty years after the Fourteenth Amendment was passed, the Supreme Court was still expounding on the community's traditions about race that were then held to be fundamental. We would now consider those traditions to be repulsive. In *Plessy v. Ferguson* (163 U.S. 537 (1896)), the Supreme Court gave constitutional protection to the concept of "separate but equal" facilities for Blacks and Whites. "If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."[29] (*Plessy*, at 552) It seems clear that traditions and various virtues rooted in the community provide an unreliable compass to point to fundamental rights. Despite all of the criticism of the concept of "substantive due process," the judiciary found it too useful as a tool of interpretational analysis and had nothing else of equivalent power to fall back on. So, despite its reported demise, it is still alive and well. "Neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." (*Planned Parenthood v. Casey*, 505 U.S. 833, at 848 (1992))

However these liberty rights are found, the Supreme Court's progression of rulings on issues affecting family privacy rights does show a fairly consistent trend. This trend expands the rights of families and individual family members.

1. In *Meyer v. Nebraska* (262 U.S. 390 (1923)), the Supreme Court ruled unconstitutional a Nebraska law which prohibited the teaching of any foreign language in any elementary school.
2. In *Pierce v. Society of Sisters* (268 U.S. 510 (1925)), the Supreme Court ruled unconstitutional an Oregon statute which required all children to attend public schools.
3. In *Skinner v. Oklahoma* (268 U.S. 535 (1942)), the Supreme Court declared unconstitutional the Oklahoma Criminal Sterilization Act. It declared that Skinner, who had two convictions for robbery and one for stealing chickens, had a fundamental right to procreate.
4. In *Griswold v. Connecticut* (381 U.S. 479 (1965)), the Court held unconstitutional a law which prohibited the dissemination of contraceptive materials to married couples.
5. In *Levy v. Louisiana* (391 U.S. 68 (1968)), the Court ruled unconstitutional a Louisiana law that prohibited illegitimate children from recovery for the wrongful death of their mother.
6. In *Glona v. American Guarantee* (391 U.S. 73 (1968)), the Court ruled unconstitutional a Louisiana Law which denied the right of a mother to recover for the wrongful death of her child because the child was illegitimate.
7. In *Loving v. Virginia* (388 U.S. 1 (1967)), the Court held unconstitutional a Virginia law which prohibited interracial marriages.
8. In *Eisenstadt v. Baird* (405 U.S. 438 (1972)), the Court ruled unconstitutional a Massachusetts law which prohibited the distribution of contraceptives to unmarried people.
9. In *Weber v. Aetna* (406 U.S. 438 (1972)), the Court held unconstitutional a Louisiana law which denied workers' compensation benefits to an unacknowledged illegitimate child.
10. In *Carey v. Population Services* (431 U.S. 678 (1972)), the Court ruled unconstitutional a New York law which permitted only pharmacists to sell contraceptives to adults and a blanket prohibition on such sales to minors.
11. In *Wisconsin v. Yoder* (406 U.S. 205 (1972)), the Court held that the State could not require parents of the Amish Church to send their children to public school after the eighth grade.
12. In *Roe v. Wade* (410 U.S. 113 (1973)), the Court ruled that the State cannot prohibit a woman from terminating a pregnancy during the first two trimesters of her pregnancy because it violates her fundamental privacy right.
13. In *Gomez v. Perez* (409 U.S. 535 (1973)), the Court ruled unconstitutional a Texas law which prohibited illegitimate children from claiming child support from their father.
14. In *Cleveland Board of Education v. LaFleur* (414 U.S. 632 (1974)), the Court held unconstitutional mandatory maternity leaves.
15. In *Planned Parenthood v. Danforth* (428 U.S. 52 (1976)), the Court held that the State could not require spousal consent as a predicate for a woman having an abortion or give a parent veto power over a minor's decision to have an abortion (a competing rights case).
16. In *Moore v. City of East Cleveland* (431 U.S. 494 (1976)), the Court ruled unconstitutional a housing ordinance which prohibited a grandmother

and her grandchildren from living together in a single dwelling unit.

17. In *Caban v. Mohammed* (441 U.S. 380 (1979)), the Court ruled unconstitutional New York's adoption consent statute which gave the unwed mother of a child an automatic right to veto an adoption, while the father had to show that the adoption would not be in the child's best interest.

18. In *Clark v. Jeter* (486 U.S. 456 (1988)), the Court held that a six-year statute of limitations in which to establish paternity, violated the equal protection clause.

Consistent with this progression of Supreme Court decisions that protect, extend and expand the liberty rights of individuals and families, and within the trajectory of the developed meaning of the Constitution, would be a holding that the State cannot deny (or in this case, refuse to enforce) the First Amendment rights of a child to associate with another person with whom the child has developed a parent-like relationship. If a child has such a right, and the court holds that he does, and the State extends a procedure to protect or enforce similar rights of similar persons in similar situations, but excludes the child from the due process that protects that right, then the child has been denied the equal protection of the laws.

It has been firmly established that children are persons within the meaning of the Constitution and accordingly possess constitutional rights. Precisely defining these rights has not been an easy task.

> The question of the extent of State power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of a precise answer. We have been reluctant to attempt to devine "the totality of the relationship of the juvenile and the State." Certain principles, however, have been recognized. Minors as well as adults, are protected by the Constitution and possess constitutional rights. "(W)hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." On the other hand, we have held in a variety of contexts that "the power of the State to control the conduct of children reaches beyond the scope of its authority over adults." Thus, minors are entitled to constitutional protection for freedom of speech, equal protection against racial discrimination, due process in civil context, and a variety of rights of defendants in criminal proceedings. (*Carey v. Population Services*, (431 U.S. 678, 692 (1977))

In this case, there is no claim that the State is intervening in a family relationship for regulatory or *parens patriae* purposes. The narrow holding in this case is that a statutory scheme that permits court intervention to order contact between a child and a parent or his sibling or grandparent is an unconstitutional denial of a child's right to equal protection of the laws when the law does not provide a procedure for the child to assert the same right with respect to a person with whom the child has a significant or substantial parent-like relationship. Since the Court holds that such a right is fundamental and constitutes a liberty interest under the Due Process Clause, the child must have an effective forum to assert that right.

III. Balancing the Fundamental Rights of a Parent and Child[30]

The Supreme Court has infrequently addressed the situation where constitutional interests between parents and their children compete, either with each other or with the State. In *Prince v. Massachusetts* (321 U.S. 158 (1943)), the Court held that the State's child labor laws trumped the parent's right to have her child engage in religious activity in public and the child's independent right to do so. (The case involved the public distribution of the religious magazine "Watchtower" by the parent and child who were both Jehovah's Witnesses) *Prince* stands for the proposition that the State has *parens patriae* authority over children up to a point and that point, wherever it may be, was not crossed in this case. Any interpretive methodology as to how a court is to make a determination like this is missing from *Prince*. In analogizing to the state's authority to impose compulsory education of minors, the Court cites with approval *State v. Bailey* (157 Ind. 324 (1901)) which held, without any constitutional introspection:

> The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the State and, may be restricted and regulated by municipal laws. . . . The welfare of the child, and the best interests of society require that the State exert its sovereign authority to secure to the child the opportunity to acquire an education. (*Bailey*, at 329)

Bailey, like *Prince*, is bereft of any constitutional interpretational analysis and silent on any attempt to balance a parent's right to determine the best interest of his or her child with this assumed authority of the State to know what is best for children.

In *Planned Parenthood v. Danforth*, (428 U.S. 52 (1976)) the Court was called on to balance the rights of a parent to the custody and control of his or her child and the right of the child to obtain an abortion, as guaranteed by *Roe v. Wade*. The Missouri statute in question required parental consent for an unmarried woman less than eighteen to obtain an abortion. The Court held that in these circumstances, the child's constitutional rights outweighed the parent's.

> Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent. Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors as well as adults, are protected by the Constitution and possess constitutional rights. (Above, at 76)

In *Santosky v. Kramer* (455 U.S. 745, (1982)), the Supreme Court held that New York's statutory scheme to terminate parental rights was flawed because due process required that the fact-finding determination be made by clear and convincing evidence, as opposed to a preponderance of the evidence standard. The majority decision, essentially parent focused, held that the risk of fact-finding error should be distributed toward the Department of Social Services and away from the parents. In so holding, the decision assumes an alliance or unity of interest between the parents and the child. The minority, in finding that due process was served by a preponderance of the evidence standard, which allocated the risk of error evenly between the parents and the agency, left the children in a neutral position.

> The child has an interest in the outcome of the fact finding hearing independent of that parent. . . . [T]he child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. (*Kramer*, above, at 790, Rehnquist, C.J.)

In *Swann v. Charlotte-Mecklenburg* (402 U.S. 1 (1971)), the Court sought "to review important issues as to the duties of school authorities and the scope of powers of federal courts under the Court's mandate as set forth in *Brown v. Board of Education* (347 U.S. 483 (1954)) to eliminate racially separate public schools established and maintained by State action." The issue of a parent or a child's right to have some say over where and how the child goes to school was completely missing from the Court's discussion. The forced busing of a child to a distant school was an enormous governmental intrusion into a parent's fundamental right to determine the best educational setting for the parent's children. In *Swann*, this issue deserves no mention.

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities. (*Swann*, at 16)

In *Michael H. v. Gerald D.* (491 U.S. 10 (1989)), the Court was called upon to determine the constitutionality of a California statute that provided that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage and that this presumption may be rebutted only by the husband or the wife. In this case, there was no factual dispute that the mother's boyfriend was the father of the child. This was proven by blood test results indicating a 98.07% probability of paternity and by admissions of all the parties. In addition, the mother, boyfriend/genetic-father and the child lived together for more than a year. At other times, the mother lived alternately with another man or her husband. Both the genetic-father and the child filed petitions for access with each other. The child claimed that she was denied the equal protection of the laws because both the mother and her husband could challenge the legitimacy presumption but not the child. As to the boyfriend/genetic-father, the Court held that California's irrebuttable presumption was, in reality, a substantive law that in effect stated that an "adulterous natural father shall not be recognized as the legal father." (*Gerald D.*, above, at 120) In upholding the presumption against the boyfriend/genetic father, the Court raised the legal test that "liberty rights must be rooted in history and tradition."

> Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael [the boyfriend/genetic-father] and Victoria [the child] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. (*Gerald D.*, above, at 124)

Read one way, *Gerald D.* stands for the proposition that biology is not destiny and the court will look to the family relationships or unit that best serves the child's best interest, without regard to genetic parenthood.

> Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.[31]

The Court took eighteen pages to dismiss the boyfriend/genetic-father's constitutional claims. It needed only three paragraphs to dismiss the child's.[32] Justice Scalia does note that: "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent in maintaining her filial relationship." (*Gerald D.*, above, at 110). However, Justice Scalia also held that the child's claim must fail because there was no basis in law, history or tradition for a child to make a claim for multiple fatherhoods.

> In contrast, allowing a claim of illegitimacy to be pressed by the child . . . *may well disrupt an otherwise peaceful union*. Since it pursues a legitimate end by rational means, California's decision to treat Victoria differently from her parents is not a denial of equal protection. (*Gerald D.*, above at 131, emphasis added)

This case, involving a married woman who had affairs of some duration with two other men and admittedly had a child out of wedlock, does not seem the best factual situation in which to raise an issue about disrupting "an otherwise peaceful union." Also, Justice Scalia, by inserting at the end, the phrase, "legitimate ends by rational means," puts the constitutional analysis of this case at the lowest level of scrutiny. However, the issues raised in this case and the precedents cited would support a higher level of constitutional scrutiny. Justice Stevens, concurring in the judgment, remarks on this as follows.[33]

> [Our] cases . . . demonstrate that enduring "family" relationships may develop in unconventional settings. I therefore would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this. Indeed, I am willing to assume for the purposes of deciding this case that Michael's relationship with Victoria is strong enough to give him a constitutional right to try to convince a trial judge that Victoria's best interest would be served by granting him visitation rights. (*Gerald D.*, above, at 133)

In *Nguyen v. INS* (__ U.S. __, June 11, 2001), the Court examined the legislative scheme that determined how a child, born outside the United States, acquired citizenship when the parents were not married and when only one parent is a citizen, in this case the father. The case relates to this decision insofar as it shows again how courts do not approach family based constitutional issues from a child-focused point of view. *Nguyen* is analyzed from a gender based, equal protection point of view. On a surface level, it should be. However, it can also be looked at as a child's rights case that allocates a very important right, citizenship, based on the child's relationship to his mother or father. It is surely true that motherhood and fatherhood are inextricably linked to gender, but when this case is looked at through the child's eyes, gender becomes a secondary characteristic. When this happens, one can view the equal protection issue much differently. In this case, the question then becomes whether a child's rights should be different depending on whether he gets them from his mother or father and not from a male or female who happens to be a parent.[34]

The citizenship acquisition statute examined in *Nguyen* conferred automatic citizenship on a child who was born overseas to a mother-citizen. However, if the father was the only citizen-parent, he had to take affirmative steps to establish parentage by the time the child was eighteen. Unexamined by either the majority or minority is that the child could do nothing by himself to establish the citizenship right that Congress gave to him based on his father's citizenship. For example, there was no discussion of whether the heightened scrutiny that applies to gender-based distinctions, and the "means-end" test that goes along with it, should have required a tolling provision to permit the child a reasonable period of time to assert his citizenship right once he turned eighteen. *Gerald D.* and *Nguyen* look much different when viewed through the constitutional eyes of the child.

The two cases that most directly impact the holding in this case are the Supreme Court's grandparents' visitation decision, handed down last year in *Troxel v. Granville* (530 U.S. 57 (2000)) and the New York Court of Appeals "*de facto*" parent visitation decision in *Alison D. v. Virginia M.* (77 N.Y.2d 651 (1991)).[35] In *Troxel* (a 6-3 decision containing six separate opinions—three for and three against, the Supreme Court examined a Washington State statute that permitted any person to petition for visitation with any child at any time. The visitation could be granted with the court only having to consider whether the contact would be in the child's

best interest. The Supreme Court held that the Washington statute *as applied* was unconstitutional.[36] The first deficiency they noted in the statute was that in allowing any person at any time to apply for visitation, the law was "breathtakingly broad." Secondly, the statute contained "no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." (*Troxel*, at 67) At the fact-finding stage, the trial court (1) presumed that grandparent visitation was in the child's best interest, (2) placed the burden on the parents to first articulate reasonable objections to the visits and (3) the court articulated no "special factors" which would "justify the State's interference with [the parent's] fundamental right to make decisions concerning the rearing of her two daughters." (*Troxel*, at 68)[37]

Justice Stevens, in dissent (and Chief Judge Kaye in dissent in *Alison D.*, above) provides the analytical framework which, when the issue is examined from a point of view that first considers the child's constitutional rights, supports the results in this case.[38] Justice Stevens is the only justice to raise the issue of the child's constitutional rights.

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual whose interests are implicated in every case to which the statute applies—the child. While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to one extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too must their interests be balanced in the equation. (*Troxel*, above, at 86, 88, citations omitted.)

Stevens goes on to note that there is, in effect, a place at the constitutional table for a child in A. Ryan, Jr.'s situation.

> Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship and so forth. (*Troxel*, above, at 85)

Justice Kennedy, also in dissent, lends support to the concept that, under appropriate circumstances, court-ordered visitation between a child and a non parent is constitutionally permissible.

> My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. . . . Cases are sure to arise . . . in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. (*Troxel*, above, at 98)

In *Alison D. v. Virginia M.* (77 N.Y.2d 651 (1991)), two women in a committed relationship decided to have a child. They agreed that Virginia would be artificially inseminated and bear the child. For about two and one-half years after the child's birth, they both raised the child as joint custodians. The parties then terminated their relationship. However, for another two or more years, Alison continued visitation with the child. The child referred to her, as well as Virginia, as "mommy." Virginia then terminated Alison's nearly five year relationship with the child. Alison petitioned for visitation which was denied by the trial court. In a per curium opinion, the Court of Appeals held that there was no statutory basis for Alison's petition. They also declined to read "*de facto*" parent into the definition of parent in Domestic Relations Law § 70. There was no mention of any constitutional right of the child or what might be in the child's best interest.[39]

In dissent, Judge Kaye grounds her legal argument on the fact that the law nowhere defines the word "parent" and she would do so to include a "*de facto*" parent. She would also read DRL § 70 so as to give meaning to the words: "In all cases . . . the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness." In using Justices' Stevens and Kaye's analytical framework, we still must balance the child's constitutional rights with the parent's.

In balancing the unquestionable constitutionally guaranteed right of a parent to raise his or her child on one hand and the constitutional right of a child to maintain contact with a parent-substitute (and the State

intrusion in giving a court forum to voice that right) on the other hand, it will be helpful to examine other areas where a State does intrude into the parent's constitutional right to raise his or her child free of State interference. By examining these circumstances, we can gauge the level of intrusion into the parent's rights that are caused by recognizing this right for the parent's child.

The bedrock principle of *Troxel* is that "the liberty interest at issue in [this] case—the interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by the [Supreme Court]." (*Troxel*, above at 65) While that is undoubtedly true, the pedigree for that claim was *Meyer v. Nebraska* (262 U.S. 390), decided in 1923. Starting more than one hundred years earlier than that, State Courts were establishing a substantial body of law in which the state's *parens patriae* authority was used to uphold child custodial rights of non parents against the claims of parents. In 1816, in *Matter of Waldron* (13 Johns. 418), the Supreme Court of Judicature of New York, on a best interest theory, kept a child with the grandparents against the claim of the father. In *Maples v. Maples* (49 Miss. 393 (1873)), the Supreme Court of Mississippi denied the petition of a mother and upheld the continued custody of a teenage boy with his grandfather. In *Bently v. Terry* (59 GA. 555 (1877)), the Supreme Court of Georgia denied the petition of a mother and continued the five-year custody relationship of the child with the child's aunt. In *Drumb v. Keen* (47 Iowa 435 (1877)), the Supreme Court of Iowa sustained the continued custody of a five-year-old child with his grandmother in the face of a claim by the boy's father. See also the following cases, all granting or continuing custody of a child with a non parent against the parent's claim:

Chapsky v. Wood,	26 Kan. 650 (1881)
Verser v. Ford,	37 Ark. 27 (1881)
Smith v. Bragg,	68 GA. 650 (1882)
Newmeyer v. Bonnett,	61 Iowa 199 (1883)
Sturtevant v. Havens,	16 Neb. 459 (1884)
Jones v. Darnall,	103 Ind. 569 (1885)
Bryan v. Lyon,	104 Ind. 227 (1885)
Curly v. Porter,	3 ILL. App. 196 (1887)
Clark v. Boyer,	32 Ohio St. 299 (1887)
Hoxsie v. Potter,	16 RI 374 (1888)
In re Lydia Blackburn,	41 Mo. App. 622 (1890)
Matter of Gates,	95 Cal. 461 (1892)
Legate v. Legate,	877 Tex. 248 (1894)
Sheers v. Stein,	75 Wis. 44 (1889)
In the Matter of Vance,	92 Cal. 195 (1891)
Green v. Campbell,	35 W. Va. 698 (1891)
Enders v. Enders,	164 Pa. 266 (1894)
Stringfellow v. Somer,	95 Va. 701 (1898)
McKercher v. Green,	13 Colo. App. 270 (1899)

These cases illustrate a well-established policy of the judiciary to manage conflicted family relations based on the best interest of the child. There is no mention of fundamental or constitutional rights in any of these cases, or any doubt expressed by the courts that they had the authority to make these decisions.[40] This position was not limited to state courts. Supreme Court Justice Joseph Story, riding circuit, in *U.S. v. Green* (3 Mason, 482 (1824)) held as follows:

> As to the question of the right of the father to have custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector, both for the maintenance and education. When therefore, a court is asked to lend its aid to put the infant into the custody of the father and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to its father, or that the latter has an absolute vested right in the custody. (Quoted in *McKercher*, above, at 282)[41]

Accompanying the judiciary's foray into the management of parent and child family relationships, has been the legislature's. There are any number of laws that restrict the activities of juveniles. Most, if not all, of those laws were passed without any mention that they restrict the child's parent's right to permit the child to engage in certain activities or engage in them in a fashion that the parent feels is appropriate. Looked at from this "parent restricting" point of view, we have the following laws which illustrate that point:

1. A parent may not let his child purchase, or consume alcohol outside a home setting, until the child is twenty-one. (Alcohol Beverage Control Law § 65-B)

2. A parent may not allow his child to drive a car until age sixteen. (Vehicle and Traffic Law Article 19)

3. A parent may not permit his child to be a passenger in his car unless seat belted or, if less than four, in a car seat. (Vehicle and Traffic Law § 1229(c))

4. A parent may not permit his child to ride a bike or a scooter without a helmet. (Vehicle and Traffic Law § 1238, County Law No. "C" for 2001)

5. A parent must submit his or her child to a series of vaccinations. (Public Health Law § 2164)

6. A parent may not permit his child less than sixteen to possess a BB gun, hand gun, shot gun or rifle. (Penal Law § 265.05)

7. A parent may not permit his child to purchase cigarettes. (Public Health Law § 1399-C (3))

8. A parent may not permit his child less than sixteen to be employed in most occupations. (Labor Law §§ 139 et seq.)

9. A parent may not permit a child to marry if the child is less than fourteen or, if less than sixteen, without the permission of a judge. (DRL §§ 15, 15-a)

10. A parent may not permit his child less than sixteen to enter a bar without adult supervision. (Penal Law § 260.2(1))

11. A parent may not permit his child to get a tattoo. (Penal Law § 260.21(2))

12. A parent may not permit a child less than eighteen to hunt bear or deer or less than sixteen to hunt other wildlife with a firearm. (Environmental Conservation Law § 11-0703(3))

13. A parent may not permit his child to appear in a professional wrestling or boxing match if less than sixteen and, if less than fourteen, the child may not attend such a performance. (Unconsolidated Laws § 8921)

14. A parent may not permit his child less than ten to operate a snowmobile off the parent's land. (Parks, Recreation and Historic Preservation Law § 25.19)

15. A parent must send his child to a full time school from age six to sixteen. (Education Law Article 65)

Almost all parents would probably support almost all of the above laws or consider them to be minor intrusions into their parental rights. Except for some religious opposition to mandatory vaccinations (See, *Jacobson v. Massachusetts*, 197 U.S. 11), most of these parent restricting, child regulatory laws have been uncontroversial. However, this was not the case with the greatest legal intrusion into fundamental parental rights—mandatory schooling. Today, mandatory schooling is universally accepted. This was not always so. Although most States had compulsory education laws by the late 1800's, compliance was honored more in the breach.[42]

> Amid this changing American scene, public debates began to arise concerning compulsory school attendance laws. There was bitter opposition to the compulsory nature of such laws. Many felt that such legislation deprived parents of their inalienable right to control their children and was an unconstitutional infringement upon the individual liberty guaranteed by the Fourteenth Amendment. Opponents also claimed that compulsory education laws were "monarchical" and that already powerful state governments were arrogating new powers. Claims that the laws were un-American and inimical to the spirit of free democratic institutions were made.[43]

In commenting upon New York's compulsory education law in 1918 the Appellate Division, Third Department, had this to say:

> The State is sovereign in the matters of attendance of a child at school. The dominion of the State is absolute as far as attendance upon instruction is concerned during the ages prescribed in § 621 of the Education Law. (*Delease v. Nolan*, 185 AD 82)

The Appellate Division's use of such words as "absolute" and "dominion," shows that any consideration of parental rights, fundamental or otherwise, was far from their minds. All of the regulations of children listed above were based on the police power of the state exercised in the State's capacity as *parens patriae* (parent of the country). The laws needed to have only a rational basis to sustain constitutional muster.[44] If the state can direct a parent to send his or her child to all day school for 180 days each year, how less an intrusion into parental rights is it to permit a Court to order the parent to provide visitation to a *de facto* parent for, say, two days each month? When balanced with the child's constitutional right, this is a fairly modest incursion into the parent's constitutional right to direct the upbringing of his or her child.

There is also a significant body of statutory law that permits a Family Court to invade the fundamental right of a parent to the control of his or her child. FCA § 320.5 permits the Court to remand a child alleged to be a juvenile delinquent, to a secure detention facility upon a finding that "there is a substantial probability that he will not appear in court on the return date; or there is a serious risk that he may, before the return date, commit an act, which if committed by an adult, would constitute a crime." There is no mention in the statute of any heightened burden of proof or that the Court must take into consideration the parent's right not to have his or her child removed from their care. Identical statutory language applies to the pre-dispositional stages of PINS cases (FCA § 739(a)). Upon disposition of juvenile delinquency and PINS proceedings, the Court may place the juvenile in state custody in a juvenile facility for an initial period of one year and thereafter from year to year, upon review by the Court, until the child is eighteen (FCA §§ 353.3(5) and 756(b)). Again, that statute does not make any reference to the parent's fundamental rights to raise his or her child.

These statutes clearly illustrate the accepted authority of the state to intrude into a parent's custodial rights to his or her child when the child's best interests are at stake. An even more obvious example would be the several provisions of FCA Article 10, which provides for the removal of children from neglectful or abusive parents. For this entire statutory framework, there is no indication from the laws' words or context that any "special weight" must be given to a parent's wishes, as that point was made in *Troxel*.

Conclusion

The historical development of family law in America, and the expansion of individual constitutional rights by the Supreme Court of the United States and the Court of Appeals of the State of New York, give foundation to a holding that a child has a constitutional right to maintain contact with a person with whom the child has developed a parent-like relationship. Accompanying that right, is also a right to the equal protection of the laws. This requires that the child have the due process necessary to claim his right. This claim can be given constitutional protection, while at the same time giving due recognition, respect and protection to a parent's constitutional right to the custody, care and control of his or her child. Accordingly, with this goal in mind, the Court holds the following:[45]

1. That a child has certain enumerated and unenumerated constitutionally protected rights.
2. That these rights are protected coextensively by the cited provisions of the Constitution of the United States and the Constitution of the State of New York.
3. That the child's unenumerated rights include a fundamental right to maintain contact with a person with whom the child has developed a parent-like relationship.
4. That the child also has an enumerated First Amendment Freedom of Association right under the State and Federal constitutions to maintain personal relations with a non biologically related person.
5. That the child's rights listed above are liberty interests protected by the due process clauses of the Federal and State Constitutions.
6. That the child is entitled to the equal protection of the laws to be similarly situated with other children who have a statutory procedure to enforce their constitutionally or statutorily protected association rights.
7. That a child having such a right must be provided a process to enforce that right against unwarranted restrictions by the State or a third person, in this case a parent.
8. That a parent has a fundamental right to direct the care, custody and guardianship of his or her child and is presumed to act in the child's best interest. (*Parker v. J.R.*, 442 U.S. 584 (1979))
9. That this fundamental right of the parent must be balanced with the fundamental rights of the child. That a proper balance can be made by using the following procedure.
    - 9.1 A child or person acting in the child's behalf seeking to establish or maintain contact with a person who is not one of the child's parents or siblings must allege facts, which if proven, would establish that the child has developed a parent-like relationship with another person and that his or her custodial parent has refused contact or arbitrarily restricted established contact.
    - 9.2 That the Court will first conduct a standing hearing to determine if the child does have a parent-like relationship with the person with whom contact is desired.
    - 9.3 That upon a finding of standing, the court will conduct a hearing to determine if continued contact is in the child's best interest and to what extent such contact is appropriate.

9.4 That in determining what is in the child's best interest, the Court will take into account all of the circumstances usually considered when making such determinations and also consider the following.

9.4.1 How the relationship was formed and whether the parent objected or consented to any aspect of the relationship's formation and continuation.

9.4.2 The length, nature and quality of the relationship.

9.4.3. Whether any Court ordered contact would significantly interfere with the parent-child relationship or with the parent's rightful authority over the child.

9.5 That it will be presumed that the parent's decision to restrict or terminate contact is in the child's best interest.

9.6 That the child or other person seeking access will carry the burden of proving all relevant issues by a preponderance of the evidence.

9.7 That the Court must give significant weight to the parent's determination as to what is in the child's best interest including the decision to allow a certain level of contact.

Based on this Decision, the Court will conduct a standing hearing in this case.

Endnotes

1. At the outset, the Court notes that the terms "custody" and "visitation" have outlived their usefulness. Indeed, their use tends to place any discussion and allocation of family rights into an oppositional framework. "Fighting for custody" directs the process towards determining winners and losers. The children, always in the middle, usually turn out to be losers. Churchill once said that we shape our buildings and afterwards our buildings shape us. The same can be said for our words. This Court has abandoned the use of the word "visitation" in its Orders, using the phrase "parenting time" instead. If the word "custody" did not so permeate our statutes and was not so ingrained into our psyches, that would be the next phrase to go. If our domestic relations law, in both substance and process, was more child focused, as I believe this decision is, there would be a better framework for determining family rights. Instead, we focus on parental rights. This misplaced focus draws parents into contention and conflict, drawing the worst from them at a time when their children need their parents' best. The Court notes, for example, that the Family Court Act of Australia uses neither the word custody nor visitation, but refers only to "parenting orders" which can include "residence orders" and "contact orders." (Australian Family Law Reform Act of 1995, § 64B)

2. The Court has given prior notice of this constitutional issue to the State Attorney General pursuant to CPLR § 1012(b).

3. The Supreme Court has ruled that the First Amendment provision guaranteeing the freedom of speech and the right to peaceably assemble includes a freedom of individuals to associate in intimate, personal relationships (See *Griswold v. State of Conn.*, 381 U.S. 479 (1965); *NAACP v. Alabama* ex rel, Palteen, 357 U.S. 419 (1958)). The First Amendment association rights have been found to be protected from intrusion by the State by virtue of the Due Process Clause of the Fourteenth Amendment. (*See DeJong v. Oregon*, 299 U.S. 353 (1937)).

4. Article 1 § 8 of the New York State Constitution states: "Every citizen may freely speak, write and publish his sentiments on all subjects, ... and no law shall be passed to restrain or abridge the liberty of speech. . ." Article 1 § 9(1) states: "No law shall be passed abridging the rights of the people peaceably to assemble." (See: *Fargnole v. Faber*, 105 AD2d 523 (1984)).

5. Amendment XIV of the United States Constitution reads, in relevant part, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due-process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article I § 9 of the New York State Constitution states: "No person shall be denied the equal protection of the laws of this State or any subdivision thereof."

6. This is a procedural anomaly used in many Family Courts. The correct procedure would be for the Father to file a termination of placement petition pursuant to FCA § 1062 as opposed to a custody petition. It would make little difference, either way, as long as the Court applies the correct best interest test. It is not a pure best interest test like this between two parents, as set forth in *Friederwitzer v. Friederwitzer*, (55 N.Y.2d 89, 94). Rather it is a balancing test of whether it is in the child's best interest to be returned to the father as opposed to continued placement in foster care. It is not a contest between the father and the foster mother as to who is the better parent (See, *Matter of Michael B.*, 80 N.Y.2d 299).

7. See, for example, on the restraint side: *A Matter of Interpretation, Federal Courts and the Law*, Antonin Scalia, Princeton University, 1997; *Government by Judiciary*, Raoul Berger, Liberty Fund, L.ed., 1997; *The Problems of Jurisprudence*, Richard A. Posner, Harvard University Press, 1990; On the expansionist side see: *A New Birth of Freedom*, Charles L. Black, Jr., Grosset/Putnam, 1997; *Constitutional Choices*, Laurence H. Tribe, Harvard University Press, 1985; *The Limits of Judicial Power*, *The Supreme Court in American Politics*, William Lusser, University of North Carolina Press, 1988. With a Foot in Both Camps, see *Democracy and Distrust, A Theory of Judicial Review*, John Hart Ely, Harvard University Press, 1980; *The Partial Constitution*, Cass R. Sunstein, Harvard University Press, 1993; *The Supreme Court and The Idea of Progress*, Alexander M. Bickel, Harper and Row, 1970. Antonin Scalia is a justice of the United States Supreme Court; Raoul Berger, retired as Charles Warren Senior Fellow in American Legal History at Harvard Law School; Richard A. Posner is a judge of the U.S. Court of Appeals for the Seventh Circuit and senior lecturer at the University of Chicago Law School; Charles L. Black, Jr. was Sterling Professor Emeritus at Yale Law School; Laurence H. Tribe is the Tyler Professor of Constitutional Law at Harvard Law School; William Lusser is Professor of Political Science at Clemson University; John Hart Ely is the Robert E. Paradise Professor of Law at Stanford Law School; Cass R. Sunstein is the Karl N. Llewellyn Distinguished Service Professor of Jurisprudence at the University of Chicago; Alexander M. Bickel was the Chancellor Kent Professor of Law and Legal History at Yale University.

8. See, for example, the unusual ideological crossover of judges in the recent Supreme Court case holding that a search warrant must be obtained before police may use thermal detectors. Jus-

tices Scalia, Souter, Thomas, Ginsburg and Breyer were in majority. Chief Justice Rehnquist and Justices Stevens, O'Connor and Kennedy were in the minority. (*Kyllo v. U.S.*, __ U.S. __, June 11, 2001).

9. "Man being born, as has been proved, with a Title to Perfect Freedom and an uncontrolled enjoyment of all the Rights and Privileges of the Law of Nature, equally with any other Man or Number of Men in the World, hath by Nature a power, not only to preserve his Property, that is, his Life, Liberty and Estate against the injuries and Attempts of other Men." John Locke, *Second Treatise of Government*, Black Swan Books, 1698, Chapter VII § 87.

10. Professor Pauline Mauer of M.I.T. notes that the phrase "pursuit of happiness" appeared frequently in American and English political writings of the time. "The inherent right to pursue happiness probably also included the means of acquiring and pursuing property, but not the ownership of specific things since property can be sold and is therefore alienable." (*American Scripture, Making the Declaration of Independence*, Alfred Knopf, 1997, p. 134)

11. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

12. The Federalist Papers, written by Hamilton, Madison and Jay, have become a primary source for lawyers and judges in their efforts to understand our Constitution. However, it is not clear that Hamilton really believed what he was saying in *Federalist No. 84*. It is worth remembering that, at their inception, the Federalist Papers were op-ed pieces that appeared in New York newspapers under the byline Publius. They were meant to carry the Federalist argument in support of the ratification of the Constitution and to persuade New Yorkers, where ratification was in serious doubt. *Federalist No. 84* was meant to explain away the glaring defect, in most peoples' view, of the absence of a Bill of Rights. It has only been with time that the Federalist Papers have achieved their status as, perhaps, the greatest political commentary ever produced in America. In July, 1788, New York, by a thirty to twenty seven vote, became the eleventh State to ratify the Constitution.

13. Justice Frankfurter, dissenting in *West Virginia v. Barnette*, 319 U.S. 621 (1943) at 649. *Barnette* held that a school child could not be compelled to recite the pledge of allegiance.

14. Today, probably not much issue would be taken with characterizing the freedom of religion as fundamental. In 1787, this was not the case. The Constitutional Convention, by unanimous vote, approved a prohibition on religious tests to hold office. "In so doing, the Convention demonstrated a rare liberality of spirit because all the framers but those who represented New York and Virginia came from States that had Constitutions discriminating against some religious denominations by imposing as a qualification for public office some religious test. (Leonard W. Levy, *Essays on the Making of the Constitution*, Second Edition, Oxford University Press, 1959)

15. If a time line was made of what people generally consider to be their constitutional rights, it would probably amaze them how late arriving most of these rights are. *Gideon v. Wainwright*, 372 U.S. 335 (1963), established the right of poor people to have a court appointed lawyer in felony cases. *Griswold v. Connecticut*, 381 U.S. 479 (1965), established a constitutional right to privacy within marriage. Conversely, some things that most people would probably consider as a constitutional (or fundamental) right are not so at all. For example, the right of a child to an education, is not constitutionally protected. (*San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973)). One reason for this slow evolution of personal rights is that liberty rights follow property rights. Until a person's right to own and control property became protected by the constitution, the rights to free speech, religion, and to assemble, were little more than lofty ideas. The Alien and Sedition Acts are a good example of how fragile and unprotected the rights of free speech and assembly were in 1798. "(M)ost of us would readily concede that the framers of the 1787 Constitution adopted a federal system of government organization in order to, among other goals, help secure the institution of private property." (Laurence H. Tribe, *Constitutional Choices*, Harvard University Press, 1985, p 11. For a fuller discussion in this area see *Law and the Conditions of Freedom in the Nineteenth Century United States*, James Willard Hurst, University of Wisconsin Press, 1956).

16. This case does not involve a state intrusion into a constitutional right but rather an exclusion of a constitutional right. It is a maxim of law that for every right there must be a remedy. For example, it is beyond dispute that each person has a fundamental right not to be assaulted. Accordingly, it is incumbent on the state to criminalize such behavior and provide a process for a person to file a complaint to initiate the prosecution for such a physical trespass.

17. The Court's use of the word Constitution in this decision includes both the New York State and Federal Constitutions. The Court finds that each Constitution's protective reach covers the right determined in this decision and should be interpreted identically.

18. There was little rights determination done in the first seventy or so years of the Supreme Court, up until the *Dred Scott* decision in 1857 (60 U.S. (19 How) 393 (1857)). As noted above, the Court was busy developing a constitutional law of property rights. Advancing the proposition that society must first protect property as a foundation for protecting individual liberty, see, for example, the following early 19th Century Supreme Court cases: *Fletcher v. Peck*, 10 U.S. (6 Cranch) 187 (1810); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Gibbons v. Ogden*, 22 U.S.(9 Wheat.) 1 (1824); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

19. The science of statutory interpretation is in no better state. "The hard truth of the matter is that American Courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation (Henry M. Hart, Jr. and Albert M. Sachs, *The Legal Process*, Harper Books, at 1169, (1994)).

20. Professor Gordon S. Wood notes that "The sharp distinction we recognize between legislation and adjudication is a modern one. All the legislatures in the English-speaking world began as courts making judgments. Parliament had originally been called the High Court of Parliament and the Massachusetts legislature is still called the "General Court." (Wood, quoted in *A Matter of Interpretation*, FN7, at 60) Colonial judges, on the other hand, had extensive administrative functions. The executive and legislative branches also exercised various judicial functions. For example, the City of Albany had a Mayor's Court up until the 1940's and members of the New York State Senate sat on New York's highest appellate court until 1847. The executive branch also exercises considerable legislative authority through its administrative rule making powers.

21. Thomas Bonham was jailed and fined for practicing medicine without a license. The licensing and enforcing authority was the Royal College of Physicians. The statute allowed the college to keep a portion of the fines. "Such self-dealing violated the common-law maxim that 'no man [may] be a judge in his own case'." (*The Life of the Law*, Alfred H. Knight, Oxford University Press at 71, (1996))

22. One often hears conservative politicians state that persons appointed to be judges should be "strict constructionists." A strict constructionist is, apparently, one who stays close to the "original intent" of a law as shown by the "legislative history" and the "framers' intent." Most would characterize Supreme Court Justice Antonin Scalia as being in this group. Justice Scalia, however, rejects this label. "I am not a strict constructionist, and no one ought to be . . . A text should not be construed

strictly and it should not be construed leniently. It should be construed reasonably, to contain all that it fairly means." Most would be surprised to learn that Justice Scalia objects to the use of legislative history (primarily because it is invariably confusing or contradictory) and legislative intent as the proper tools with which to interpret law. "What I look for in the Constitution is precisely what I look for in a statute, the original meaning of the text, not what the original draftsman intended." (Scalia, *A Matter of Interpretation*, FN7, at 38)

23. See, *Slavery Law and Politics, The Dred Scott Case in Historical Perspective*, Don E. Fehrenbacher, Wallace Robertson Coe, Professor of History and America Studies, Stanford University. Actually, the New York State Court of Appeals articulated a substantive due process theory in 1856, in *Wynehamer v. New York*. (13 N.Y. 328)

24. The restraint side often derides the expansionist side for using traditions to discover new rights. However, they have no such problem discovering and using tradition when denying the existence of a claimed right. (See *Bowers v. Hardwick*, 478 U.S. 186 (1986)) In *Bowers*, the Court held a Georgia law to be constitutional that criminalized certain consensual adult sexual activity within the confines of a person's home. It would be hard to predict how *Bowers*, another in the multitude of 5-4 rights decisions, would be decided today. (See, for example, the recent thermal imaging search case, *Kyllo v. United States*, __ U.S.__ (June 11, 2001)). "In the home, our cases show all details are intimate details, because the entire area is held safe from prying government eyes." (*Kyllo* at 10, Scalia, J.).

25. "The migration or importation of such person as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the years one thousand eight hundred and eight . . ." (U.S. Const. Art. I, § 9). "No person held to Service or Laborer in one State under the Laws thereof, escaping into another, shall, in consequence of any Law or Regulation therein, be discharged from such service or Labor, but shall be delivered up on claim of the Party to whom such service or Labor may be due." (U.S. Const., Art. IV, § 2, Repealed by the Thirteenth Amendment, December 6, 1865).

26. It seems clear that denying the vote to woman did not violate any fundamental sense of fairness or justice of the community when the Fourteenth Amendment was passed in 1868. Woman had to wait until 1920 to get the franchise with the passage of the Nineteenth Amendment. This was a seventy-two year struggle, measured from the 1848 Convention in Seneca Falls, New York. However, the territory of Wyoming enfranchised women in 1869. The New Jersey revolutionary-era constitution also permitted women to vote, but that right was later taken away, in the early 1800's (see: *The Right to Vote, the Contested History of Democracy in the United States,* Alexander Keyssar, Basic Books, 2000).

27. Our Court of Appeals had little trouble validating the constitutionality of separate schools for the "colored races." (*King v. Gallagher*, 93 N.Y. 438 (1883))

28. There always existed an intense, sometimes violent, anti-slavery movement with such luminaries as Nat Turner, William Lloyd Garrison, Frederick Douglas, Harriet Beecher Stowe and John Brown, to name a few. However, it was clearly a minority movement, bucking the "traditions" of contemporary society. The focus of the debate within "mainstream" America, leading up to the Civil War, was over the extension of slavery, (See *The Approaching Fury*, Stephen B. Oates, Harper Perennial, 1997).

29. One should pause to speculate which of today's Supreme Court decisions will, one hundred years from now, be seen as wrong as we now see *Plessy* to be, one hundred years after it was rendered.

30. For a general discussion of this topic See: *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory,* Lawrence D. Houlgate, University of Pennsylvania Journal of Law, 1 U. Pa. J. Const. L. 77, December, 1999. *Parent and Child Conflict: Between Liberty and Responsibility*, Melinda A. Roberts, Notre Dame Journal of Law, Ethics and Public Policy, 10 ND J.L. Ethics & Policy 485, 1996. *A Time For Change: Reevaluating the Constitutional Statutes of Minors,* Justine Witkin, Florida Law Review, 47 Fla. L. Rev. 113, January, 1995. *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships With Parent-Like Individuals*, Gilbert A. Holmes, 53 Md. L. Rev. 358, Winter, 1994. *Do Siblings Possess Constitutional Rights*, Barbara Jones, 78 Cornell L. Rev. 1187, September, 1993.

31. Similar to this is *Lehr v. Robertson* (463 U.S. 248 (1983)) where a genetic father's attempt to block an adoption by the unwed mother's new husband was denied.

32. The dissent is actually worse on this point, never discussing the child's constitutional claims at all.

33. *Gerald D.* is yet another 5-4 Supreme Court decision in which it is virtually impossible to discern a clear rule of law. The judicial trench warfare is conducted in the footnotes, where much effort is expended by each side pointing out how "startlingly" mistaken the other side is about virtually everything.

34. It surely would have put a bee in the Court's interpretive bonnet if this family unit was created by an overseas same sex adoption (as allowed in New York, *Matter of Jacob*, 86 N.Y.2d 651) and the child had two mothers or two fathers.

35. To the extent that this Court's decision could result in visitation being granted between A. Ryan, Jr., and his former foster mother, it is conceded that that result would probably be opposite if the case were analyzed under the rule of *Troxel* and surely opposite if analyzed under *Alison D.*

36. The Washington Supreme Court invalidated the statute because it was unconstitutional on its face. The Supreme Court has now told the Washington Supreme Court that the unconstitutionality arises only from "as applied" defects. Justice Souter, in the majority, weighs in on the facial invalidity side, so the "as applied" theory garnered only four of nine votes. Chief Justice Rehnquist's admonition in dissent in *Santosky v. Kramer* (455 U.S. 745 at 770-771(1982)) is trenchant at this point. "If ever there were an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic', it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason. . . . Throughout this experience the Court has scrupulously refrained from interfering with State answers to domestic relations questions. Both theory and the precedents of this Court teach us solicited for State interests, particularly in the field of family and family property arrangements." (Citations omitted)

37. Justice Thomas, concurring, notes that the plurality opinion fails to set forth the appropriate standard of review. He would apply strict scrutiny and require the State to articulate a compelling interest to justify intrusion into a fundamental right. On the other hand, we just noted that in *Nguyen* (above), the biological father's constitutional rights were to be measured, according to Justice Scalia, by the rational basis test.

38. Justice Scalia, in dissent, states: "I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right." Justice Scalia, in effect, is saying that only enumerated rights have constitutional protection. This is a distinctly minority position. However, if it is an enumerated right, it is a different matter. "I note that the (mother) is not asserting, on behalf of her children, their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights." (*Troxel*, at 93) Justice Scalia is apparently saying that only a par-

ent and perhaps not a law guardian for the child can raise the child's constitutional rights. However, what would a Court do if a grandparent petitioned for visitation and one parent favored it and one parent opposed it. Could one of those parents raise the child's First Amendment association rights to be used against the other parent?

39. It would seem that *Alison D.* could have come out the other way if the principal of equitable estoppel was applied. The fact pattern is nearly identical to that in Judge Cooney's thoughtful opinion in *Matter of J.C. v. CT.* (184 Misc. 2d, 935) which permitted non-parent visitation on an estoppel theory. Very similar is *Maby H. v. Joseph H.* (246 AD2d, 282) where the Court applied the estoppel theory to prevent a mother from cutting off visitation of the child by the child's non-genetic father. The Court here has not relied on the estoppel theory because one of its elements, the consent of the biological parent to the formation of the child/non-parent relationship, is missing. Even so, from a child's best interest focused point of view, this consideration would drop down on the importance scale. See also, *Mancinelli v. Mancinelli* (203 AD2d 634) where, despite an HLA test establishing non-paternity, the Court held that the husband was estopped from denying this two year long "*de facto*" fatherhood of his child in an attempt to escape his child support obligation.

40. It is not being suggested that the nineteenth century courts had a tin ear for constitutional principles. It should be remembered that the emotional valuing of children is a fairly recent development. For much of history children were treated by the legal system as a little more than a variation on the law of chattel (see, generally, *Founding Mothers and Fathers, Gendered Power and the Forming of American Society*, May Beth Norton, Vintage Books 1996; *Pricing the Priceless Child, the Changing Social Value of Children*, Viviana A. Zelizer, Basic Books, 1985.)

41. For a general discussion of how the legislatures in America passed much responsibility for the determination and development of family law to the judiciary see: *Governing the Hearth, Law and the Family in Nineteenth-Century America*, Michael Grossberg, University of North Carolina Press, 1985. "By 1867, thirty-three of thirty-seven American jurisdictions had substituted judicial for legislative divorce. These grants of domestic authority to the bench included a large discretionary power to award custody. Though judges constantly reaffirmed their allegiance to paternal supremacy, they used assertions of equity and children's welfare to equalize custody rights." (*Grossberg*, at 251)

42. *A History of Compulsory Education Laws*, M.S. Katz, Phi Delta Kappa Educational Foundation, 1976.

43. *Legal Foundations of Compulsory School Attendance*, Lawrence Kotin and William F. Ochman, Kennnik at Press, 1980.

44. The rights determination business got a new lease on life after the decline in popularity and acceptance of substantive due process as a constitutional rights search engine. In its place, the equal protection clause gained prominence with the development of the concept of heightened scrutiny to evaluate governmental restrictions of fundamental rights. This eventually developed into a three tiered inquiry. General regulatory legislation need only have a rationally related basis to the desired ends. Restrictions in areas such as gender would have to be substantially related to meet an important governmental interest (intermediate scrutiny). Restrictions of fundamental rights must be justified by a compelling state interest and be narrowly tailored to meet the law's objectives. This was all foreshadowed in Justice Stone's famous footnote no. 4 in *United States v. Caroline Products Co.* (304 U.S. 144 at 152 (1938)) where he spoke of legislation being "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment."

45. The first criticism of a holding such as this is to reduce it to absurdity by saying, for example, that this would mean a child's babysitter or day care provider could petition for visitation rights. It holds no such thing. Judge Kaye recognized this line of attack in her dissent in *Alison B.*, where she said; "Arguments that every dedicated caretaker could sue for visitation if the term "parent" were broadened, or that such action would necessarily effect sweeping change throughout the law, overlook and misportray the Court's role in defining otherwise undefined statutory terms to effect statutory purposes, and to do so narrowly, for those purposes only." (Above, at 661).

***Official citation—189 Misc. 2d 86**

* * *

Paulette S. v. Robert S., Family Court, Orange County (Kiedaisch, Debra J., October 5, 2001)

Attorney for the Petitioner:	David Levinson, Esq. Levinson, Reineke, Ornstein, P.C. P.O. Box 244 Central Valley, NY 10917
Attorney for the Respondent:	Sheila Callahan O'Donnell, Esq. 257 Main Street P.O. Box 484 Cornwall, NY 12518

Upon the following papers:

Objections, filed August 10, 2001; Rebuttal to objections, dated August 15, 2001; Reply to rebuttal, dated August 22, 2001; Order to Show Cause, dated March 8, 2001; Petition (Docket No. F-343-01), sworn to February 23, 2001, with exhibits annexed; Notice of motion to dismiss, dated May 9, 2001; Affidavit (Sheila O'Donnell, Esq.), dated Financial disclosure affidavits, W-2 forms, income tax returns of parties; Family Court file.

The petitioner mother objects to the decision and order of the Hearing Examiner, dated, July 10, 2001, which continued the father's child support obligation for the parties' one child in the amount of $125 per week based on the Hearing Examiner's finding that the father's current income is approximately $40,842. The mother alleges the Hearing Examiner failed to impute to the father in fixing his child support obligation the level of income the father had been earning at his long term employment with Orange & Rockland Utilities, which she alleges was over $50,000 per year. The father voluntarily resigned such employment during the year 2000 to pursue a writing career which it appears may hold the potential for future success. The father alleges the child may, some day, therefore, share in greater financial support as the father's income as a writer may

surpass the income he employed in his former employment. The father contends that the determination of his child support obligation as set forth under the terms of an incorporated stipulation of the parties is to be determined based upon his annual income as reported annually on his income tax returns. The father contends the above stated amount of income as found by the Hearing Examiner is the father's income as reported on his year 2000 income tax return. The father further alleges that he was due to retire from his employment with Orange & Rockland Utilities, Inc. in two and one-half years in which case he would have been receiving less income than his working salary.

The parties were divorced by State of New York Supreme Court judgment, dated August 28, 2001, which incorporated but did not merge an in-court stipulation of the parties which was entered into on May 12, 1998. The stipulation provided the mother was the custodial parent of the parties' child and for two years the father would pay $155 per week child support to the mother, which was below Child Support Standard Act (CSSA) guidelines for reasons stated in the stipulation.

The May 12, 1998 stipulation further provides:

> Two years from today's date the father shall be required to pay child support to the mother predicated upon the Child Support Guidelines and predicated upon the father's income from all sources. The father shall deliver to the mother his income tax return for the year immediately preceding the modification so the allocation and adjustment of the child support shall become effective on June 1st of that year.

The stipulation further states that the above reference to "income from all sources" means "income pursuant to the statute" which is a reference to the CSSA (FCA 413 et seq.).

It is clear from the plain language of the stipulation that the parties agreed that as of June 1, 2001 the father would begin paying CSSA formula guidelines support pursuant to the CSSA. Under FCA § 413(1)(a) [which is part of the codification of the Child Support Standard Act in the Family Court Act] the parental duty of support is declared to be based not only on what a parent may be earning at a particular time but is dependent upon what the parent is capable of earning.

In the case of *Collins v. Collins*, 241 A.D.2d 725 the Court stated: "It is well settled that '[a] parent's child support obligation is not necessarily determined by his or her current financial condition' (*Matter of Orlando v. Orlando*, 222 A.D.2d 906, 907, *lv. dismissed in part and denied in part*, 87 N.Y.2d 1052) but rather by his or her ability to provide support (*see id.*; *Matter of Darling v. Darling*, 220 A.D.2d 858, 859). Both Domestic Relations Law § 32(3) and Family Court Act § 413(1)(a) charge parents with the obligation to support their children if they are 'possessed of sufficient means or able to earn such means' (*see*, *Orlando v. Orlando*, *supra*, at 907; *Matter of Darling v. Darling*, *supra*, at 859). Furthermore, a court need not rely upon a parent's own account of his or her finances in determining child support (*see*, *Brown v. Brown*, 239 A.D.2d 535; *Orlando v. Orlando*, *supra*) and may attribute or impute income 'based upon a prior employment experience * * * (*Matter of Susan M. v. Louis N.*, 206 A.D.2d 612, 613 [citations omitted])"

"Where the reversal in a spouse's financial condition is brought about by the spouse's own actions or inactions, the court should not grant a downward modification" (*Matter of Doscher v. Doscher*, 80 A.D.2d 945, *aff'd*, 54 N.Y.2d 655; *see*, *Matter of Johnson v. Junjulas*, 215 A.D.2d 559, 560; *Matter of Graves v. Smith*, 213 A.D.2d 482).

The same is true where a supporting parent's lower income is attributable to a voluntary decision to accept less lucrative employment (see, *Knights v. Knights*, 71 N.Y.2d 865).

Accordingly, were the determination of the father's child support obligation to be determined upon his year 2000 earnings the Court would under the authority of the above cited statutory and decisional case law impute to the father the higher annual income he was earning from his prior employment with Orange & Rockland Utilities, Inc.

However, it does not appear from a careful reading of the stipulation that the father's adjustment to full CSSA formula guidelines support was to be based on income reported on his year 2000 income tax return, but rather on what his year 1999 income tax return showed. The stipulation states that as of June 1, 2000 the father would begin paying CSSA formula guidelines support and to determine the amount of such support the father was to furnish his "income tax return for the year immediately preceding the modification so the allocation and adjustment of the the child support shall become effective as of June 1st of that year [i.e. 2000]." That could only be the previous year's (1999) income tax return as the tax year 2000 would only be half over on June 1, 2000 and a tax return for that year did not exist to facilitate the adjustment of child support. While the CSSA, and case law which has developed under the law, may in certain instances allow modification of support based on substantial changes in income, the CSSA does not generally require or permit annual adjustment of support based merely on changes in income (*Matter of Klein v. Klein*, 251 A.D.2d 733, 734-735; *Matter of Chariff v. Carl*, 191 A.D.2d 795, 796). While parties to a stipulation may bind themselves to annual adjustment of

CSSA child support, and annual exchange of financial documents to facilitate such adjustment, there is no such language in the parties' stipulation mandating annual adjustments (cf. *Cohen-Davidson v. Davidson*, 255 A.D.2d 414). The stipulation in this proceeding requires a one-time adjustment or changeover in which the father is to begin paying full CSSA formula guidelines support as of June 1, 2000 based on the father's 1999 income from all sources. To facilitate the changeover the father is required to furnish his 1999 income tax returns. Thereafter, the father's obligation with respect to child support, including modification of support upward or downward, is governed by the CSSA. In contending his income diminished from 1999, the controlling tax year under the stipulation, as a result of his voluntarily changing his manner of earning a living during the year 2000 thereby entitling him to a smaller child support obligation is substantively no different from those cases in which a parent seeks downward modification of a fixed CSSA formula guidelines child support obligation after voluntarily diminishing his income. In any event, the Court rejects the argument proposed by the father that the breadth of the father's duty of support is determined by the particular procedural posture of the case, namely, that the dispute arises in the context of a petition by the mother to enforce the support provisions of the divorce judgment rather than a petition by the father for downward modification of a prior order of support. Upon a reading and understanding of the stipulation the burden would be upon the father to prove his entitlement to use his 2000 voluntarily diminished income rather than his 1999 income as the basis for the child support adjustment contrary to the language of the stipulation.

The father's contention that he would have had less income based on his intended retirement in two and one-half years and that somehow this bears on his present child support obligation presumes that with an adolescent child to support the father would have been permitted by virtue of voluntary retirement to diminish his income and child support obligation if the matter had become litigated.

That the father alleges he may ultimately become more financially successful because of his new career also has no bearing on his current child support obligation.

While the papers submitted in connection with the proceedings held below contain allegations as to the father's income in 1999, the Family Court file does not contain any copies of the father's 1999 income tax returns or for that matter, the mother's. Since the father's obligation commencing June 1, 2000 was to be based on the prior year's completed 1999 income tax return the mother should also furnish her 1999 income tax returns so the Hearing Examiner may have before him the complete picture of both parent's combined parental income for 1999 in fixing the father's CSSA child support obligation as of June 1, 2000, in accordance with the divorce judgment.

Accordingly, the decision and order of the Hearing Examiner, dated July 10, 2001, is vacated. The matter is remanded to the Hearing Examiner for further proceedings consistent with this order.

* * *

Sherry B. v. James B., Supreme Court, Nassau County (Raab, Ira J., July 5, 2001)

Attorney for Plaintiff:	Steven M. Silpe, Esq. Cohen, Goldstein & Silpe, LLP 505 Park Avenue New York, NY 10022
Attorney for Defendant:	Sari M. Friedman, Esq. 666 Old Country Road Suite 704 Garden City, NY 11530
Attorneys for Non-Party, James R. B.	Mark E. Goidell, Esq. Galasso, Langione & Goidell 225 Old Country Road Melville, NY 11747

In this matrimonial action, although information may have been illegally obtained by the wife, it is nevertheless discoverable to ascertain its truth. Such information may lead to the disclosure of admissible evidence. Accordingly, the motion of the husband's father, a non-party witness, to quash the Subpoena and Notice for a Non-Party Deposition, or in the alternative, to obtain a Protective Order, is denied.

The Court has before it a Notice of Motion by James R. B., the father of the defendant herein. The movant seeks to quash a Subpoena and Notice for Non-Party Deposition. In the alternative, movant seeks a Protective Order limiting the scope of the deposition by suppressing the use of information, which the movant claims was improperly obtained. In lieu of formal papers, this Court has a letter from plaintiff's counsel, dated May 24, 2001, and a response from Mark E. Giodell, Esq., attorney for James R. B., dated May 25, 2001, which will be deemed, respectively, affirmations in opposition and reply.

The movant's application to quash is denied. In a matrimonial action, under equitable distribution and Domestic Relations Law § 236(B)(4), broad financial disclosure is necessary and required. Such discovery is not restricted to the parties, but is obtainable from appro-

priate third parties. *Gellman v. Gellman*, 160 AD2d 265, 553 N.Y.S.2d 705 (1st Dep't 1990). Such discovery is permitted of an employer, even where there is no equity interest, especially where it appears that plaintiff ***may*** have other financial interests in the entity. *Colin v. Colin*, 113 AD2d 817, 493 N.Y.S.2d 495 (2d Dep't 1985).

The movant's application for a protective order is also denied. The movant's reliance on *In The Matter of Weinberg (Beiny)*, 129 AD2d, 126, 517 N.Y.S.2d 474 (1st Dep't 1987), is misplaced. The information obtained therein was done by wrongful, underhanded means. The evidence and/or information sought to be suppressed herein, was obtained under Court Order, and during Court supervised deposition of the third party witnesses.

The term "evidence" in CPLR 3101(a), has not been restrictively interpreted to mean that a party has no right to obtain "information" at a pretrial examination that might be inadmissable or might not be used as evidence at trial. *Avila Fabrics, Inc. v. 152 West 36th St. Corp.*, 22 AD2d 238, 254 N.Y.S.2d 609 (1st Dep't 1964); *Baxter v. Orans*, 63 AD2d 875, 405 N.Y.S.2d 470 (1st Dep't 1978).

It is permitted to conduct pretrial disclosure of testimony or documents which, while themselves are inadmissible, may lead to the disclosure of admissible proof. *Shutt v. Pooley*, 43 AD2d 59, 349 N.Y.S.2d 839 (3rd Dep't 1973).

The purpose of disclosure procedures is to advance the functions of a trial, which are to ascertain truth and to accelerate the disposition of suits. If there is any possibility that the information is sought ***in good faith*** for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material and necessary to the prosecution or defense of the action. *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968); *Wiseman v. American Motors Sales Corp.*, 103 AD2d 230, 479 N.Y.S.2d 528 (2nd Dep't 1984).

Accordingly, the deposition of James R. B. shall be held on July 25, 2001, at 11:00 a.m., in Room 05, Supreme Court, Nassau County. The third party witness is directed to produce all documents listed in the Subpoena and Notice for Non-Party Deposition. A conference shall be held in Part 34 immediately thereafter.

Erratum

In our Spring Edition, Volume 33, No. 1 of the *Family Law Review*, we inadvertently omitted the attorneys' names in the *Angela A. v. Januarius C.* decision which are as follows:

Barry Bondorowsky, Esq.
Attorney for the Petitioner
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Recent Decisions, Legislation and Trends

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Common Law Marriage—Pennsylvania

In re Landolfi, 283 AD2d 497, 724 N.Y.S.2d 470 (2d Dep't 2001)

In *In re Landolfi*, *supra*, a proceeding pursuant to SCPA 1421 to determine the validity of a notice of election, the Appellate Division affirmed a decree of the Surrogate's Court which, after a trial, dismissed the petition on the ground that the petitioner failed to establish her status as the decedent's surviving spouse based on a common-law marriage under Pennsylvania law.

The petitioner, Edith Landolfi, a/k/a Edith Shearer, filed a notice of election to take against the decedent's estate pursuant to EPTL 5-1.1-A and commenced a proceeding pursuant to SCPA 1421 for a decree determining her right of election as the decedent's surviving spouse. The petitioner and the decedent lived together in Brooklyn for 26 years after their respective spouses died but they were never formally married. The petitioner contended that she was the decedent's spouse pursuant to a common-law marriage valid under the laws of Pennsylvania which came into existence when she and the decedent visited Pennsylvania. Following a trial, the Surrogate determined that the petitioner failed to meet her burden of establishing a valid common-law marriage under Pennsylvania law and dismissed the petition.

The Appellate Division stated that it is well settled that although abolished in New York,

> a common-law marriage contracted in a sister state will be recognized as valid here if it is valid where contracted. Courts in New York have declared that behavior in New York before and after a New York couple's visit to a jurisdiction that recognizes common-law marriages, like Pennsylvania, may be considered in determining whether the pair entered into a valid common-law marriage while cohabiting, even briefly, in the other jurisdiction.

Pennsylvania law does not require that the couple reside within its borders for any specified length of time before their marital status will be recognized.

The Appellate Division concluded that the petitioner failed to present sufficient evidence of cohabitation in Pennsylvania to warrant applying the law of that jurisdiction to determine her marital status. The alleged agreement to marry between the petitioner and the decedent was made in New York, and the couple continuously resided in Brooklyn. The couple never stayed in a hotel in Pennsylvania, and did not repeat the alleged marriage vows there. Evidence of the couple's connection to Pennsylvania was limited to testimony regarding several visits they made to the home of a relative in an area near New York, which, at best, implied that they may have stayed overnight on one such visit.

The Appellate Division held that, assuming that the testimony offered by the petitioner was sufficient to establish cohabitation, however briefly, in Pennsylvania, the petitioner failed to establish that she and the decedent had a common-law marriage which would be recognized under Pennsylvania law. As explained by Pennsylvania's Supreme Court, "[a] common-law marriage can only be created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by that." If there is no testimony regarding the exchange of words in the present tense, which are called in Latin *verba in praesenti*, Pennsylvania law applies a rebuttable presumption in favor of a common-law marriage based on proof of constant cohabitation and a broad and general reputation of marriage. However,

> if a putative spouse who is able to testify and fails to prove, by clear and convincing evidence, the establishment of the marriage contract through the exchange of verba in praesenti, then that party has not met its heavy burden to prove a common-law marriage, since he or she does not enjoy any presumption based on evidence of constant cohabitation and reputation of marriage.

The court held that petitioner could not rely on the rebuttable presumption since she testified at trial about the alleged *verba in praesenti*. The Surrogate determined that the respondent, Ralph Landolfi, Jr., impliedly waived the protection of the Dead Man's Statute (CPLR 4519) by introducing the petitioner's deposition testimony regarding the purported exchange of marriage vows and by questioning her at trial on that issue. The petitioner testified that she and the decedent privately agreed in 1971 that they were husband and wife. However, the petitioner's further testimony that the decedent explained to her at that time that he did not want to marry because of the dissension it would create in his family completely undercut her claim that she and

the decedent intended to create the legal relationship of husband and wife. Accordingly, since the petitioner failed to meet her clear and convincing burden of proof as to *verba in praesenti*, there was no need to consider evidence of constant cohabitation and reputation of marriage.

The record supported the Surrogate's conclusion that there was insufficient evidence of a broad and general reputation of marriage. Under Pennsylvania law, the testimony of a few neighbors and friends is insufficient to establish a general reputation. Family members on the whole were not aware that the petitioner and decedent were married; the petitioner filed a tax return under her deceased husband's name, Shearer; she owned a joint brokerage account with the decedent under the name Shearer; and she collected Social Security benefits under the name Shearer.

The appellate court noted that the Surrogate was in the best position to consider the credibility of the witnesses. The court found no basis in this record to set aside the Surrogate's determination that the petitioner failed to meet her burden of establishing a common-law marriage by clear and convincing proof. Accordingly, the petition was properly dismissed.

Distribution of Retirement Plan Benefits

Egelhoff v. Egelhoff, __ U.S. __, 121 S.Ct. 1322, 69 U.S.L.W. 4206 (2001)

ERISA's preemption of state law was emphasized by the U.S. Supreme Court in *Egelhoff v. Egelhoff, supra*. While David A. Egelhoff was married to petitioner, he designated her as the beneficiary of a life insurance policy and pension plan provided by his employer and governed by ERISA. Shortly after petitioner and Mr. Egelhoff divorced, he died intestate. Respondents, Mr. Egelhoff's children by a previous marriage, filed separate suits against petitioner in state court to recover the insurance proceeds and pension plan benefits. They relied on a Washington statute that provides that the designation of a spouse as the beneficiary of a nonprobate asset—defined to include a life insurance policy or employee benefit plan—is revoked automatically upon divorce. Respondents argued that in the absence of a qualified named beneficiary, the proceeds would pass to them as Mr. Egelhoff's statutory heirs under state law. The trial courts concluded that both the insurance policy and the pension plan should be administered in accordance with ERISA, and granted petitioner summary judgment in both cases. The Washington Court of Appeals consolidated the cases and reversed, concluding that the statute was not preempted by ERISA. The state Supreme Court affirmed, holding that the statute, although applicable to employee benefit plans, does not "refe[r] to" or have a "connection with" an ERISA plan that would compel preemption under that statute.

The U.S. Supreme Court held that the state statute had a connection with ERISA plans and was expressly preempted. It noted that ERISA's preemption section, 29 U.S.C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. A state law relates to an ERISA plan "if it has a connection with or reference to such a plan." The court found that the state statute had an impermissible connection with ERISA plans, as it binds plan administrators to a particular choice of rules for determining beneficiary status. It noted that administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. It held that the statute implicated an area of core ERISA concern, running counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," section 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," section 1104(a)(1)(D). It also held that the state statute had a prohibited connection with ERISA plans because it interfered with nationally uniform plan administration. Administrators cannot make payments simply by identifying the beneficiary specified in the plan documents, but must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. Requiring administrators to master the relevant laws of 50 states and to contend with litigation would undermine the congressional goal of minimizing their administrative and financial burdens. It noted that differing state regulations affecting an ERISA plan's system for processing claims and paying benefits impose precisely the burden that ERISA preemption was intended to avoid.

Samaroo v. Samaroo, 193 F.3d 185 (3d Cir. 1999)

ERISA's unbending nature was emphasized in *Samaroo v. Samaroo*, *AT & T Management Pension Plan v. Robichaud, supra,* where Robichaud and Samaroo were divorced on October 25, 1984, by the New Jersey Superior Court, Chancery Division. The divorce decree incorporated a property settlement reached by the parties which had the following language concerning Robichaud's rights in Samaroo's pension benefits: "(d) Pensions, Profit Sharing and Bell System Savings Plan Savings Plan—(1) Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 per month. At the time of husband's retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount."

Neither the decree nor the property settlement mentioned any rights to Samaroo's survivor's annuity. Samaroo died at the age of 53 on September 20, 1987, about three years after the divorce, while still actively employed by AT&T. He was covered under the AT&T Management Pension Plan, a defined benefit plan which provided pensions and survivors' annuities in amounts based on a percentage of the employee's average salary times years of service. Based on Samaroo's age and years of service, he had a vested right to a deferred vested pension, which would have begun, at the earliest, at age 55. Because Samaroo did not live to the age to qualify to receive pension payments, there were, strictly speaking, no pension benefits that ever became payable in respect of Samaroo. Therefore, the benefit expressly mentioned in the divorce settlement agreement never came to fruition. However, the Plan provided a pre-retirement survivor annuity available to the surviving spouse of any Plan participant who died after vesting but before retiring. If there is no surviving spouse, there is no annuity.

The Plan denied Robichaud's claim for a pre-retirement survivor's annuity because the divorce decree did not mention any entitlement to such rights, and in the absence of a surviving spouse or a QDRO designating a former spouse as such, there was no pre-retirement survivor's annuity payable in respect of Samaroo. Robichaud filed a motion in the New Jersey Superior Court, to amend the Final Judgment of Divorce *nunc pro tunc* to convey to her a right to 50 percent of the pre-retirement survivor's annuity payable in respect of Samaroo. She joined the Plan as a defendant in the divorce case. The Plan removed the action to federal court and also filed a complaint for declaratory relief in the same court. The two cases were consolidated. The district court remanded that portion of the removed case that involved the terms of the divorce, but retained jurisdiction of Robichaud's claim against the Plan for the retirement benefits. After a hearing, the New Jersey state court held that the Plan did not have standing to object to alteration of the divorce decree. Samaroo's estate did not oppose Robichaud's request to amend the decree *nunc pro tunc*, since conveying the survivorship rights once Samaroo was dead did not cost the estate anything, but undid the effect of Samaroo dying without a survivor. The attorney who drafted the agreement testified that the issue of survivors' benefits never came up at the time of the agreement. Robichaud herself testified that "neither Winston [nor his attorney] or I thought about the survivor rights to this pension."

Based on the evidence that the divorce was amicable, the state court amended the divorce decree retroactively to give Robichaud "rights of survivorship to 50 percent of [Samaroo's] vested pension benefits." The court stated, however, that whether or not the state court order resulted in any benefits becoming payable to Robichaud under the Plan was a question of federal law over which the federal court had retained jurisdiction and which would have to be resolved by the federal court.

After the state court's ruling, Robichaud and the Plan filed cross-motions for summary judgment in the pending federal district court action. The district court examined the statutory requirements for a QDRO under 29 U.S.C. § 1056(d)(3)(C) and (D). The court held that the amended divorce order satisfied the specificity requirements of section 1056(d)(3)(C), but not the substantive requirements of section 1056(d)(3)(D)(i) and (ii). Under that section, a domestic relations order is not a QDRO if it requires the plan to provide any type of benefits not otherwise provided by the plan or to provide increased benefits. The court relied on the reasoning of *Hopkins v. AT & T Global Information Solutions Co.*,[1] to conclude that entitlement to a survivor's annuity in respect of Samaroo had to be determined as of the day Samaroo died, and that the amended divorce decree represented an attempt to obtain increased benefits from the Plan. The court therefore entered summary judgment for the Plan and against Robichaud.

On appeal the Third Circuit affirmed. It noted that the lower court relied on the statutory language defining QDROs. Under section 1056(d)(3)(D) a domestic relations order meets the requirements of this subparagraph only if such order—(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan, [and] (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value). It held that a domestic decree that would have the effect of increasing the liability of the Plan over what has been provided in the Plan (read in light of federal law) is not a QDRO, no matter what the decree's status under state law. The district court held that a decree conferring survivor's benefits on Robichaud after those benefits have lapsed would provide increased benefits and therefore cannot be a QDRO. The district court relied on the Fourth Circuit's decision in Hopkins, which recognized that defined benefit plans are based on actuarial calculations that would be rendered invalid if participants were allowed to change the operative facts retroactively.

In *Hopkins*, a pension plan participant retired and began to draw his pension in the form of a joint and survivor annuity based on the lives of himself and his current wife. Sometime later, his former wife obtained a state court order that she should be treated as the participant's surviving spouse for purposes of the annuity. The Fourth Circuit held that this domestic relations order was not a QDRO because the current wife's right

to the survivor's benefits vested upon the participant's retirement and could no longer be alienated. The court observed in a footnote that its holding was consistent with actuarial necessity.

The Third Circuit held that because the disbursement of plan benefits is based on actuarial computations, the plan administrator must know the life expectancy of the person receiving the surviving spouse benefits to determine the participant's monthly pension benefits. As a result, the plan administrator needs to know, on the day the participant retires, to whom the surviving spouse benefit is payable.

Robichaud argued that by determining the right to benefits as of the day of Samaroo's death, the Plan has cheated Samaroo out of receiving any benefit from participating in the Plan. The court rejected this argument because successful operation of a defined benefit plan requires that the plan's liabilities be ascertainable as of particular dates. The annuity provisions of a defined benefit plan are a sort of insurance, based on actuarial calculations predicting the future demands on the plan. Some annuity participants will die without ever receiving a payment and some participants will receive payments far in excess of the value of their contributions. The fact that some participants die without a surviving spouse to qualify for benefits is not an unfair forfeiture, as Robichaud contended, but rather part of the ordinary workings of an insurance plan. Allowing the insured to change the operative facts after he has lost the gamble would wreak actuarial havoc on administration of the Plan. The court indicated that it was inaccurate to say that Samaroo was deprived of any benefit from the Plan. Until he died, Samaroo enjoyed the right to remarry and thereby bestow on a new wife the survivorship rights under his pre-retirement annuity. Alternatively, after the enactment of the Retirement Equity Act, he could have entered a QDRO conveying the rights to Robichaud. But if Samaroo had entered a QDRO making Robichaud his "surviving spouse" under the Plan, he would have lost the right to confer the same survivorship benefits on a new wife by virtue of 29 U.S.C. § 1056(d)(3)(F) which provides that to the extent QDRO designates former spouse as participant's surviving spouse, current spouse shall not be treated as spouse for purposes of plan. When Samaroo died without remarrying or naming Robichaud as alternate payee of the survivor's rights, the right to dispose of the benefits lapsed. Allowing Samaroo or his estate to preserve the right to confer the benefits on a new wife as long as he was alive and had the possibility of remarrying, and then to designate Robichaud as the surviving spouse after his death, is allowing him to have his cake and eat it too.

Agreements—Stipulations

***Rubenfeld v. Rubenfeld*, __ AD2d __, __ N.Y.S.2d __ (1st Dep't 2001)**

In *Rubenfeld v. Rubenfeld*, *supra*, the husband and wife were married in 1952. The matrimonial action was instituted by the wife in 1997, and trial commenced on July 13, 1999. During the second day of trial, the respective attorneys informed the court that the parties were negotiating a property settlement. Over the course of the next two days, the wife with her attorney and two accountants worked out the financial details of the settlement to her satisfaction. On July 15, a stipulation of settlement was read into the record with schedules listing marital property, separate properties of the spouses and a list establishing distribution of personal property. During allocution, both parties, on the record and under oath, stated that they had had an adequate opportunity to discuss the terms of the stipulation, that they understood its terms and that they had no reservations regarding settling the actions according to those terms. Both parties expressed satisfaction with their respective attorneys and their representation. Each party acknowledged his and her entry into the agreement on a knowing and voluntary basis and that the settlement agreement set forth the entire agreement of the parties.

Subsequently, the wife sought a judgment of divorce on the ground of constructive abandonment. She moved that the settlement agreement be incorporated into but not merged in the judgment. The motion was granted and the judgment of divorce was signed on September 28, 1999. On that same day, though, the wife moved by order to show cause for an order vacating the stipulation of settlement. The wife now had new counsel.

The wife, relying on Court of Appeals authority in *Matisoff v. Dobi*,[2] challenged the validity of the stipulation on the basis that it was neither subscribed nor acknowledged nor provable in the manner required to record a deed. She also argued that the specific formalities required by DRL § 236(B)(3) overrode the general authority conferred by CPLR 2104 allowing for in-court settlement by stipulation. She also contended that she had not understood the stipulation, and had expected to be provided with a written agreement for her review setting forth the results of the in-court negotiations. In effect, she now viewed the stipulation as merely outlining a preliminary agreement of the parties, subject to further clarification and agreement upon some still-tentative terms to be finalized in writing. The day after the motion or judgment of divorce was granted, the wife started asserting several rights under the stipulation of settlement.

The IAS court denied the motion to vacate the stipulation. The court was not persuaded by the applicability of a statute that imposes formalities on ante- and post-nuptial economic agreements to a stipulation entered in open court with all necessary formalities of such a stipulation to settle a divorce action. The court also noted that the wife herself had moved post-settlement to incorporate the terms of the settlement into the divorce, underscoring, rather than undermining, its manifest finality, and that the wife's allocution belied her present plea that the agreement was involuntarily entered. The husband subsequently moved to compel the wife to execute the documents necessary to effectuate the separation of the marital property, to direct that a residence be listed for immediate sale and that the wife vacate that residence by a date certain, and, in accordance with the stipulation of settlement, to appoint a referee to oversee that sale and the distribution of proceeds. The wife cross-moved to direct the simultaneous distribution of various assets at a fair market value, including that residence, as contrasted with the $1 million value established in the agreement.

The motion was granted to the extent of directing the wife to execute necessary documents for distribution of marital assets and giving the wife until February 15, 2000 to execute a binding option to purchase the husband's interest in the residence at the negotiated price of $1 million in accordance with the stipulation of settlement. The wife appealed from both orders and the judgment.

The First Department held that the case was readily resolved by reference to the precise terms of DRL § 236(B)(3) and by considering what *Matisoff* does not say. It noted that the policy and evidentiary concerns underlying enactment of DRL § 236(B)(3), given effect by strict judicial application of the statute, were inapplicable to the present circumstances. Thus, it held that the formalities of DRL § 236(B)(3), by the statute's terms and its legislative intent, do not govern an oral agreement entered on the record in open court during a matrimonial action intended to settle that action.

It discussed the history of DRL § 236, which it stated generally constitutes our Equitable Distribution Law, enacted in 1980, and is designed to impose cohesion on the apportionment of responsibilities and property upon the dissolution of a marriage. It noted that the present action was not commenced with a view to enforcing an extant agreement. The agreement was entered as a means of settling the extant divorce action. It held that the major flaw of the wife's argument was that this was not a nuptial agreement. It pointed out that the wife relied principally on *Matisoff*, but distinguished, *Matisoff*, which it stated does not squarely address DRL § 236(B)(3). It explained that in *Matisoff*, the wife, who had the greater financial resources, had initially urged that the parties enter the agreement at the time of their marriage. They entered and signed a written agreement providing for a distribution of assets in the event of a divorce, but the agreement remained unacknowledged. By the time of the divorce, though, the husband's income significantly exceeded that of the wife, and he sought to enforce the terms of the agreement. The Court of Appeals held that the terms of the statute were to be given full effect as written—the requirement of a written contemporaneous acknowledgment was mandatory rather than permissive. The *Matisoff* ruling, though, did not hold that DRL § 236(B)(3) applies to a different class of agreement, one terminating litigation, which was never within the contemplation of the Legislature in enacting the Equitable Distribution Law. On this basis, it distinguished *Matisoff*. Here, the wife commenced an action for a divorce. That action was not commenced in part to give effect to an existing agreement regarding distribution of assets. Hence, there was no opting-out agreement providing an alternative to the distribution of assets otherwise addressed in DRL § 236 generally. Insofar as there was no opting-out agreement, DRL § 236(B)(3) does not apply. Since DRL § 236(B)(3) is not triggered, its formalities do not govern what is only a stipulation, governed by CPLR 2104, settling the matrimonial action.

Prenuptial Agreements

Bloomfield v. Bloomfield, __ AD2d __, 723 N.Y.S.2d 108 (2d Dep't, 2001)

In *Bloomfield v. Bloomfield, supra*, the First Department affirmed an order of the Supreme Court, which held the parties' prenuptial agreement unenforceable. Marshall and Barbara Bloomfield separated in January 1995 after 25 years of marriage, and Marshall initiated divorce proceedings in August 1995. Barbara answered and counterclaimed, demanding, *inter alia*, equitable distribution.

At the time they were married, Marshall was about 30 years old, a practicing attorney, and the son of a practicing attorney who was involved in real estate, owned various properties and placed real estate properties in Marshall's name. Barbara was 24 and had finished one year of college. Before the wedding in May 1969, at Marshall's request, Barbara signed a document in which she waived certain property and elective rights. Barbara claimed they were alone in her apartment. Marshall claimed they were at his father's office with a notary present. Barbara was not represented by counsel. The document reads:

> I, BARBARA FRIEDLANDER, in order to induce MARSHALL E. BLOOMFIELD, to marry me, and for the consideration of a Lady's Wedding Ring,

> the receipt of which is hereby acknowledged, (which I have had appraised by Marcus & Co., Inc., located in Gimbel Bros., 33rd Street in New York City, Invoice No. 69630) appraised at the value of one-thousand and six-hundred dollars ($1,600.00), and for the consideration of Marshall's promise to maintain a life insurance policy on his life payable to me upon his death (should he die before me) in the amount of ten-thousand dollars ($10,000), and for other good and valuable consideration, do hereby WAIVE AND RENOUNCE ANY AND ALL RIGHTS that, and to which, I would otherwise be entitled to because of such marriage , whether present or future rights, to any and all property which Marshall has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property, or of any kind or nature and wherever situated, and I do further expressly WAIVE THE RIGHT OF ELECTION to take, or to make any demand for, contrary to the provisions of Marshall's last will and testament, pursuant to the provisions of 5-1.1 of the Estates, Powers and Trusts Law of the State of New York, as said section now exists or may hereafter be amended.
>
> I understand the meaning of the above, and I make each and every statement contained in this agreement of my own free will and accord. Copy received.

The initial provision of the agreement, which is completely separate states:

> I . . . do hereby WAIVE AND RENOUNCE ANY AND ALL RIGHTS that, and to which, I would otherwise be entitled to because of such marriage, whether present or future rights, to any and all property which Marshall has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property, or of any kind or nature and wherever situated.

This is followed by a separate provision that states: "And I do further expressly WAIVE THE RIGHT OF ELECTION to take, or to make any demand for, contrary to the provisions of Marshall's last will and testament" (emphasis added).

The First Department held that, since in 1969 when the agreement was executed, a wife had no rights in or to her husband's property, and, apart from the right to support or alimony, the only right that could possibly have been referred to in this waiver was Barbara's right to support upon termination of the marriage. It pointed out that at the time the agreement was entered into GOL § 5-311 prohibited a wife from waiving her right to support, and an agreement that sought to do so was void. It held that the agreement was void on this ground alone.

Marshall construed the first provision in the agreement, which he acknowledged was a "waiver of non-existent distribution rights," as being "merely prophylactic" and not waiving "any current property rights, but only the right to receive a distribution if there were any subsequent changes in the law."

The First Department pointed out that, in 1969, a wife's waiver of "any and all rights that, and to which, I would otherwise be entitled to because of such marriage, whether present or future rights," necessarily encompassed her right to alimony. It stated that the agreement must be read in the context of the economic disparities that generally prevailed between husbands and wives at the time the agreement was entered into and the import of the law as it existed at the time it was signed by Barbara in 1969. It found that the only meaning that could be attributed to the first provision was that it purported impermissibly to relieve Marshall of his obligation to support Barbara and was therefore void.

The court then held that Supreme Court correctly rejected Marshall's argument that Barbara was time-barred from challenging the 1969 agreement. It found that the statute of limitations was no defense to her claim that the agreement was void at its inception,[3] holding that the statute of limitations does not apply in the case of an agreement void on its face.[4] It went on to state, in *dicta*, that even if the agreement was voidable, it would find that the statute of limitations for a challenge to a prenuptial agreement was tolled during the marriage, referring to *Lieberman v. Lieberman*[5] which held that, in view of the public policy of this state, the statute must be tolled until the parties physically separate, until an action for divorce or separation is commenced, or until the death of one of the parties. Otherwise, irrespective of the viability of the marriage relationship, the husband and wife would have to assume adversarial positions as to their prenuptial agreement within the first six years of their marriage or forever lose their right to challenge the agreement.

Justice Friedman dissented. He pointed out that, in *Propp v. Propp*,[6] the First Department was faced with the

identical issue and found that it was the current version of GOL § 5-311 which controlled. There the court adopted the reasoning of the Second Department's decision in *Goldfarb v. Goldfarb*.[7] He also asserted that it has long been the law that the statute of limitations is not tolled merely because the parties are married, and the creation of such a toll is beyond the power of any court.[8]

We agree with the dissent. In *Propp v. Propp*, the First Department held that the validity of the agreement was governed by the current GOL § 5-311 which provides in effect that either spouse may waive his or her right to support as long as he or she is not likely to become a public charge.[9]

In *Goldfarb v. Goldfarb*,[10] the parties executed a separation agreement on October 16, 1979. It provided for a limitation on the husband's liability to support his wife, that the total amount of support would be $7,000, payable within seven years. At the time the agreement was executed, former section 5-311 of the General Obligations Law prohibited spouses from contracting to relieve a husband from his liability to support his wife, which is exactly what the parties did, by limiting the total amount of support to be paid to the wife. The first cause of action sought rescission of the separation agreement as violative of former section 5-311 of the General Obligations Law, which had been previously repealed—the current section being in effect at the commencement of the action. The Second Department held that the current section was the applicable law. While pointing out that contracts made by private parties must necessarily be construed in the light of the applicable law at the time of their execution a contract "may be affected by subsequent legislation in the exercise of the police power, or by a subsequent statute announcing a new public policy . . . or by repeal of a prohibitory act." Where there has been a repeal of a prohibitory statute, which had rendered invalid a contract violative of its provisions, such a repeal will render the contract valid and enforceable and not subject to the defense of illegality. This principle, however, applies only to those acts of the Legislature which are strictly measures of public policy, not to those which are intended primarily to establish or affect the rights of parties as to each other. The 1980 enactment of a new GOL § 5-311, as part of this statutory overhaul of the family law of New York represented a change in the public policy of this state. Consequently, even though the parties, by including in their separation agreement a partial waiver of the husband's wife support obligation, violated former section 5-311, those provisions were rendered valid and enforceable and not subject to a claim of illegality, when the statute prohibiting such a waiver was repealed by acts of the Legislature constituting measures of public policy.

Family Court Act § 415

Dutchess County Department of Social Services v. Day, 96 N.Y.2d 149, 726 N.Y.S.2d 54 (2001)

In *Dutchess County Department of Social Services v. Day*, the Court of Appeals held that the CSSA applies to all calculations of child support obligations. Family Court Act § 415 requires a support payment of a "fair or reasonable sum" by the spouse or parent of a publicly assisted person. The CSSA was adopted in response to federal legislation that required states to "adopt uniform standards for establishing child support liability." The CSSA requires able parents to pay child support of a "fair and reasonable sum" as determined by a formula in the statute. The statute goes further to state that the court may deviate from that formula if that amount is "unjust or inappropriate" under enumerated factors. Both statutes cover the same subject matter, thus they must be construed together. Since "fair or reasonable sum" is referred to in both statutes, it should be construed in both statutes using the formula provided in the CSSA. The Legislature's desire to adopt uniform standards for determining child support liability supports this interpretation.

Endnotes

1. 105 F.3d 153, 156 (4th Cir. 1997).
2. 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997).
3. *Citing Pacchiana v. Pacchiana*, 94 AD2d 721, *appeal dismissed*, 60 N.Y.2d 586.
4. *Citing Clermont v. Clermont*, 198 AD2d 631 *appeal dismissed*, 83 N.Y.2d 953.
5. 154 Misc. 2d 749.
6. 112 AD2d 868, *appeal dismissed,* 66 N.Y.2d 855.
7. 86 AD2d 459.
8. *Citing Scheuer v. Scheuer*, 308 N.Y. 447; *Dunning v. Dunning*, 300 N.Y. 341, 343; *see, Rosenbaum v. Rosenbaum*, 271 AD2d 427; *Pacchiana v. Pacchiana*, 94 AD2d 721, *appeal dismissed,* 60 N.Y.2d 586; *Anonymous v. Anonymous*, 71 AD2d 209, 212.
9. N.Y. Laws 1980, ch. 281, § 19.
10. 86 AD2d 459, 450 N.Y.S.2d 212 (2d Dep't 1982).

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