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Family Law Review

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Notes and Comments

Elliot D. Samuelson, Editor

Gay Marriage Given Green Light by Supreme Court

By now, most everyone understands that the Supreme Court has become a political tribunal, the four conservative members usually voting in a bloc, and the liberal members doing likewise. Only Justice Kennedy appears to be the sole independent thinker, not being swayed by the label of either conservative or liberal. It is indeed quite difficult to comprehend that jurists on our highest court seemingly do not vote their own conscience, but rather interpret the law or facts of a case according to their political persuasion. When the next appointment is made by the President, it may well shape the direction of the court for years to come, if this practice of the jurists to vote in blocs continues.

With this in mind, the ruling of the Supreme Court in *U.S. v. Windsor*[1] to permit gay marriage was very much in the air since it depended, in the final analysis, as to the belief of one Justice Anthony Kennedy, who voted with the liberal bloc to strike down part of the Federal Defense of Marriage Act. Gay rights activists should appreciate how fragile their cause truly was, and if Kennedy had voted with the conservatives on the bench, the new law would not have affirmed the right of gays to marry and be accorded the same rights as heterosexual couples. But with the right come greater legal obligations if a gay couple separates or seeks a divorce. There are still eleven states that prohibit gay marriage, but it is felt that it is just a matter of time, and a short interval, for this legislation to be repealed or challenged on constitutional grounds. For matrimonial attorneys, a prime concern is how the Supreme Court decision will impact on the practice. *See also*, "How the Rulings Affect Gay Couples,"[2] and "Ruling on Same Sex Marriage May Help Resolve Status of Divorce."[3]

Of course not all gay persons will want to marry and accept all of the attendant responsibilities, but nevertheless continue to live together with their chosen partner. However, choosing to live together will not provide an escape valve to avoid all financial implications that may include express agreements for child support, maintenance and a division of property acquired during the living together period. In this regard their obligations might be equal to those of unmarried heterosexual couples.

In states where there are no obstacles to adopting a child, the issues of custody and visitation will remain. There still may be some remnants of old line thinking that will refuse to recognize sister state orders as being against the enforcing state's public policy. This conflict

Inside

of laws problem can be eliminated by making sure that the sister state chosen to enforce the custody and visitation order will give full faith and credit to such a decree where the issuing state is not prohibited from doing so according to its own rules and law.

Such gay and heterosexual couples must recognize that traveling to one of seven states that recognize common law marriage may now include unions between gay couples as a common law marriage. In doing so, New York would be obliged to give full faith and credit to the common law jurisdictions judicial decrees and orders, since they have already done so regarding unmarried heterosexual couples. An argument that gay couples are not receiving equal protection under the law will surely be raised if the decree of a sister state is rejected by any state court.

This leads to several dilemmas that will plague gay married couples. Even though there are states that recognize children born to a same-sex couple as the children of both parties, once a child is born to a female partner artificially inseminated or otherwise, the non-child bearing partner who has not gone through a formal adoption proceeding in some states may face issues concerning her rights and obligations as to child support and custody and visitation if the couple separate or end the marriage by a divorce decree.

Take, for example, the state of Texas, which does not recognize gay marriage. If a marriage takes place in New York that recognizes same sex marriage and the parties leave New York to relocate in Texas, which forbids such unions, they may be denied access to the courts on the theory that if the state does not recognize gay marriage, it cannot grant a divorce. In fact the attorney general in Texas has interceded to block the filing and litigation of a gay couple's divorce action which is presently being considered by the appellate court.

The gay couple might decide to return to New York and file for a divorce, but in order to do so they would have to establish the residency requirement of at least one year. Then their only option would be to see where gay marriage is permitted, and the shortest residency required. Depending on the jurisdiction, access to the Family Court might be blocked to a non-biological parent.

Another result could possibly occur. One of the parties could move to Texas and marry another, since Texas does not recognize same-sex marriage. Whether this person could or would be prosecuted for bigamy remains to be seen, as well as whether Texas would approve such unions after the appellate process is ended.

Still other problems can arise with respect to whether the IRS must amend its rules to permit gay couples to deduct their alimony payment and whether the exchange of property will be made without capital gain considerations as they are for heterosexual couples obtaining a divorce, or the decision of the Supreme Court in *Windsor* can be applied to IRS existing regulations. If not, their lifetime $1 million gift tax exemption may be used up, and they might incur a gift tax on the transaction as well as the payment in excess of $13,000 per year for the alimony provided by agreement or court decree until the IRS amends its existing rules.

The issue of whether to obtain a prenuptial or post nuptial agreement becomes far more important to obviate some of these bizarre results since contracts between parties will normally be enforced, unless of course they violate the enforcing state's public policy. These agreements would obviate existing statutes, because they are contract obligations normally incurred, and are encouraged in most all jurisdictions.

Still another problem will arise when it comes to equitably distributing marital property. The court must consider the length of the marriage in making these distributions and deciding what percentage should be given to the non-titled spouse. For same-sex partners, the length of time they lived together before gay marriages were permitted would undoubtedly be raised. Would a court decide to consider such unions as additional time to tack on to the existing marriage? Since the court could consider any other factor that was relevant but not specifically enumerated, more litigation would ensue and probably the answer will come from one or more appellate courts. Of course the legislature might pass amendments to the statute to address these and other similar problems which would eliminate the need for judicial review. Also, where the couple could not marry before the Supreme Court rendered its decision and whether or not their premarital contributions will be considered in determining if property is either separate or marital remains to be seen. One need only to postulate various similar scenarios to consider a prognosis for the forthcoming litigation that the courts will tussle with for years to come.

Over fifteen years ago, I authored a book entitled *The Unmarried Couple's Legal Survival Guide*[4] when no state recognized the right of gays to enter into a valid marriage. I postulated that because these prohibitions would violate the equal protection clause of the U.S. Constitution, it was only a matter of time before such a contest would be successful in the courts but should not be expected until the mores of society would become far more liberal and include a definition of marriage as a union of two individuals of any sex. Frankly, I was surprised by the relatively short time this end was achieved. In the final analysis it was the change of public opinion to accept the rights of all persons to choose their sexual orientation, and not be penalized by the law for doing so, especially when one considers that the Supreme Court of the United States in *Bowers v. Hardwick*[5] in 1986 approved a Georgia law that made sexual contact between gays a felony despite an equal protection argument.

It will be interesting to see if all the remaining states forbidding marriage between same-sex couples will join the others to permit them. Hopefully it will not be fifteen years for this to happen. It certainly will happen, and in far less time than it took the Supreme Court to change its view.

Post Script: After completing this article, the IRS promulgated new rules which will recogize same-sex couples for federal tax purposes, even in states that do not recognize their union. See Gay Marriages Get Recognition from the IRS, New York Times*, August 29, 2013. The full extent of the application of these new rules remains to be seen.*

Endnotes

1. 133 S.Ct. 2675 (2013).
2. New York Times, June 26, 2013.
3. New York Times, July 2, 2013.
4. Elliot D. Samuelson, J.D., Carol Publishing Group, Secaucus, N.J., 1997.
5. 106 S. Ct. 2841.

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Parental Alienation Syndrome

By Laurie Hollman, Ph.D.

Editor's Note: While the author has taken a position regarding parental alienation as a "syndrome" ("PAS"), we note that no such designation has been made to date by the Diagnostic Statistical Manual of Mental Disorders ("DSM") *and that the concept, introduced by the late Dr. Richard Gardner, has been widely criticized by legal and marital health scholars.*

Description of PAS

Parental Alienation Syndrome is a psychological situation in parental separation / divorce conflicts where one parent manipulates the children so that they are indoctrinated with a denigrated view of the other parent that is a distortion of reality. Beliefs, attitudes and memories are manipulated by one parent until the children dislike, disrespect and even fear the formerly loved parent. The formerly caring parent who nurtured and protected the child is now turned against by this child without foundation. The alienating parent seems to suffer no guilt as he or she spreads the denigration to the extended family of the alienated parent. This practice is symptomatic in high conflict custody cases.

The child suffers severe inner conflict blocking out positive memories of the alienated parent. The child begins to doubt his own thoughts and feelings and may cut off all ties with the alienated parent. The child experiences fear, identification with the alienating parent and dependence on that parent. When the child is with the alienated parent alone, he or she may react positively toward the parent, but when the other alienating parent is on the scene, like a light switch, the child transforms to ally himself or herself with the alienator. The alienated parent suffers extreme feelings of rejection, of failure as a parent, and a loss of authority.

Ignorance of this phenomenon in family courts can further lead toward destruction of the mental health of the family. Parental influence processes need to be fully understood to prevent the long-term consequences of PAS. With psychotherapy the scapegoated parent can regain feelings of positive self-worth, remembering all he or she had done for the children. With psychotherapy the child may regain a realistic view of both parents. This is contingent upon both the therapist and the lawyer being familiar with this form of emotional abuse or else s / he may be co-opted by the alienating spouse into the denigration.

The Children

Children impacted by this form of abuse lose the capacity to tolerate the anxiety of mixed feelings that naturally form toward each parent. They find the alienator above reproach and the alienated repulsive. There is black and white thinking with no in between. This may affect the child's ability to eventually think logically with good judgment in other situations, thus producing an emotionally based cognitive deficit. In addition, as the child learns to loathe the alienated parent, the child, in turn, also loathes himself or herself because that parent is a part of them internally. The result is a fragile self-esteem and possibly, especially in teenagers, an identity disorder. In the extreme, the child is remorselessly cruel to the denigrated parent, believing the brainwashing by the alienator that the alienated parent has been abusive.

The child involved in PAS can be viewed as both victim and victimizer. The child is turned against his or her inner self (Austin, 2006).[1] Judgment is severely compromised. Self-doubt and an ineffective moral base may be found. Some believe that PAS should be an official diagnosis in the DSM-IV which presently can be inferred under the diagnoses, Parent-Child Relational Problem or the Disintegrative Childhood Disorder. It is thought that if PAS was a primary diagnosis, it would become more readily understood and identified by psychotherapists and lawyers in the family court system. This would help the children burdened by deep loyalty conflicts that result in possible school difficulties and self-esteem problems.

The Legal System

Legally, alienators have sought justification for their vilification of their ex-spouse using a First Amendment argument for the right to free speech with the child. Family courts in New York have recognized parental alienation, opining on the legitimacy of claims put forth that the children's views of one parent were unrealistic and cruel. Forensic psychiatrists reported the unhealthy cloistering of the children from a normal social life along with the alienating parent's influence on the dismissal by the children of the good times they spent with their alienated parent. Custody arrangements were changed to reflect this finding. The family law system upheld the protection of the best interests of the children (Lorandos, 2006).[2]

It is essential that family law professionals prevent practices that support the alienating parent from unethical

behaviors that include, but are not limited to, filing false abuse charges and coercing children to make false accusations. Litigation battles in which targeted parents must defend themselves against unsupported accusations need a remedy. Articles such as this one are needed from the mental health community to inform lawyers and judges of the existence of this syndrome. Otherwise, common practices of awarding child custody to the alienator will occur. The judge hears the children say they hate their alienated parent and, not knowing this is a symptom of the brainwashing or PAS by the alienator, the judge awards custody to the denigrating parent.

The Alienated Parent

The task of alienated parents is multi-fold. It is important they do not begin believing the castigations and accusations sent their way. This is very difficult when the alienator and children request investigation by Child Protective Services as a ploy to undermine the alienated. CPS usually does report that after investigation the case is unfounded, but during the process the self-respect and self-worth of the alienated parent is hard to hold on to. First, the alienated parent needs support from other parents who are friends who have seen the good parenting of the alienated parent. Second, the alienated parent needs to not surrender emotionally to the alienating spouse. This can be done by empathizing with the children about the bind they are in rather than start defending themselves against accusations. That is, the alienated parent can point out to his or her child how hard it is to be in a severe loyalty conflict. The parent can remind the child of the good times they had and how this parent took good care of them. The parent needs to remind the children that she or he loves them regardless of their current views. In this way the alienated parent holds on to the connection with the child. When children visit the alienating parent, then leave and return to the alienated parent, they may not speak to the latter and turn their head and body away. It is helpful if the alienated parent does not read this as if he or she is a failure or is unloved and rejected. Most likely, the children are numb from the experience of the alienating parent denigrating their other parent whom they love. They can't allow themselves to feel the affection and love offered by the parent they are returning to because this puts them into deep conflict. However, after a few hours pass, the children may be able to reclaim the love and affection they dismissed earlier in the day.

The Alienating Parent

The alienating parent is a troubled person who sees himself or herself as the center of his or her children's lives. He or she loses sight of the complex nature of his or her children and ex-spouse and sees them in a one-sided fashion fulfilling the requirements of what he or she needs them to be. This process of denigration of the ex-spouse usually begins long before the separation and divorce. The alienator has pulled at least one child away from the other parent by inducing the child into believing the other parent is malevolent, worthless and possibly even dangerous. The alienating parent also seeks control of his or her spouse long before the divorce. He or she may come from parents who also sought to control him or her. The extended family of the alienator supports their adult child in his or her efforts to discredit the ex-spouse. This dismantling of the daughter- or son-in-law relationship may have a long history. The alienating parent and his or her original family may be characterized by an absence of guilt or shame as well as a lack of sympathy and empathy.

Conclusion

While I have described the individuals in the family separately, they are each actually in an interlocking family system where one targeted parent is scapegoated to maintain a new equilibrium after the family suffers a divorce. Either or both, the crisis of divorce or former interlocking pathologies of family members, may lead to interactions that result in PAS. For example, perhaps the child was early on too dependent on and infantilized by one parent. The child may have slept with that parent or gone out alone with that parent to the movies frequently. The younger the child, the easier the inducing process. During the crisis of separation and divorce that child may be pulled even closer to the parent who has already induced him or her into scapegoating the other parent. In any possible scenario, the seeds that pre-existed the divorce are further exacerbated by it. In conclusion, both the mental health community and the judicial system need to become aware of the parental alienation system to help the family succeed in negotiating their changed circumstances in an emotionally healthy and legally ethical way. Overcoming ignorance of PAS is the first step.

Endnotes

1. Austin, R., *PAS as a Child Against Self* in The International Handbook of Parental Alienation Syndrome (R. Gardner, S. Sauber, D. Lorandos, eds.), Charles C. Thomas Publisher, 2006.
2. Lorandos, D., *Parental Alienation Syndrome in American Law* inThe International Handbook of Parental Alienation Syndrome (R. Gardner, S. Sauber, D. Lorandos, eds.), Charles C. Thomas Publisher, 2006.

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Plenary Action or a Motion?

By Donald M. Sukloff

Stipulations and agreements are not lightly set aside.[1] Nevertheless, they are frequently attacked on such grounds as concealment, fraud, duress, overreaching, collusion, mistake, accident, or unconscionability. Should such litigation be initiated by plenary action or by motion?

The stipulation of settlement or the separation agreement usually contains one of two directions, i.e., a merger into the decree so that it loses its identity as an independent instrument, or an incorporation with a reservation preserving its survival as an independent contract.[2] In the event there is no clause providing either for merger or for survival, the rules, in the absence of finding an intent to the contrary, are that a stipulation is deemed to merge[3] and a separation agreement retains its identity as an independent contract.[4] In *Davis-Taylor v. Davis-Taylor*,[5] the judgment of divorce was based on an oral stipulation, but the parties and the court agreed they would execute a more detailed written stipulation to be incorporated but not merged. However, the judgment did not expressly incorporate either a written or oral stipulation. The court held it had discretion to deem the stipulation as merged where there had been no resettlement sought.

CPLR 5015 enables the rendering court to relieve a party from its judgment or order on terms as may be just. This may apply to the judgment of divorce, but not to the underlying stipulation or separation agreement. The well established rule is that where a stipulation or an agreement survives and is not merged, it cannot be impeached unless challenged in a plenary action.[6] A motion to vacate a judgment of divorce and the underlying separation agreement, where the agreement survived, is a fatal application and must proceed by plenary suit.[7] However, in the *Caldwell*[8] case, although the effort to reform the stipulation of settlement was commenced by motion instead of plenary action, the court on appeal did not vacate the proceedings because the determination of the lower court was made after full hearing tantamount to a plenary trial so that an affirmance was made in the interest of judicial economy.[9]

Where the action has not terminated and there is a challenge to a stipulation entered into during the course of litigation, the attack need not be by the commencement of a plenary action, but may be made by motion.[10]

Failure to commence a plenary action, therefore, is fatal to an application by motion to challenge a separation agreement or a stipulation that survived even though the judgment of divorce may be attacked pursuant to CPLR 5015.[11] A merged agreement, however, enables the attack to be made by motion.[12]

Suppose that a motion is made to enforce an incorporated, but not merged, agreement, and the opposing party contends that the agreement underlying the claimed violation was invalid. The enforcement effort may proceed by motion but the claim of invalidity must proceed by plenary suit or, in this limited circumstance, by responsive motion. In *Baramy v. Baramy*,[13] the plaintiff moved to hold the defendant in contempt for his failure to pay child support under the incorporated but not merged separation agreement. The defendant, instead of bringing a plenary action to set aside the agreement, or even a cross-motion to vacate or set it aside, asserted in his opposition papers that the separation agreement's child support provisions were invalid and unenforceable. The lower court denied the contempt motion and vacated the child support provisions as unenforceable. The Appellate Court, in reversing, pointed out that the proper vehicle for challenging the support provisions in the separation agreement was either by commencing a separate plenary action or by a motion within the context of an enforcement proceeding. Because the defendant neither interposed a cross-motion nor commenced a separate plenary action, the Supreme Court should not have vacated the child support provisions. By the same token, in *Fassano v. Fassano*,[14] on an enforcement of child support motion, the court granted the cross-motion to set aside a portion of the agreement's provisions on child support.

In summary:

1. If the agreement or stipulation survives, it cannot be attacked by motion but only by plenary action.
2. If a stipulation or agreement merges it can be attacked by motion.
3. Where the attack is incorrectly instituted by motion and there has been a full scale hearing on the issue, the court may not dismiss the motion and may allow such a determination in the interest of judicial economy.

4. If the action is continuing, the previously agreed to separation agreement or stipulation may be attacked by motion.

5. A plenary action may not be necessary in opposing an enforcement motion by cross-motion.

Endnotes

1. *See Hallock v. State of New York*, 64 NY2d 224, 230 (1984).
2. *Kleila v. Kleila*, 50 NY2d 277 (1980).
3. *Vest v. Vest*, 50 AD3d 776; *Steinard v. Steinard*, 221 AD2d 835 (3rd Dept., 1995); *Cooper v. Cooper*, 179 AD2d 1035 (4th Dept., 1992).
4. *Von Schaaf v. Van Schaaf*, 257 AD2d 296 (3rd Dept., 1999).
5. 4 AD3d 746 (3rd Dept., 2004).
6. *Makara v. Makara*, 65 AD3d 1018 (2nd Dept., 2009); *Lambert v. Lambert*, 142 AD2d 557 (2nd Dept., 1988); *Caldwell v. Caldwell*, 209 AD2d 1022 (4th Dept., 1994); *Gaines v. Gaines*, 188 AD2d 1048 (4th Dept., 1992).
7. *Riley v. Riley*, 179 AD2d 750 (2nd Dept., 1992).
8. 209 AD2d 1022 (4th Dept., 1994).
9. *Dunham v. Dunham*, 214 AD2d 961 (4th Dept., 1995).
10. *Weissman v. Weissman*, 42 AD3d 448 (2nd Dept., 2007); *Arguelles v. Arguelles*, 251 AD2d 611 (2nd Dept., 1998); *Sippel v. Sippel*, 241 AD2d 929 (4th Dept., 1997).
11. *Carter v. Carter*, 265 AD2d 620 (2nd Dept., 1999); *Deppe v. Deppe*, 287 AD2d 480 (2nd Dept., 2000).
12. *Whitney v. Whitney*, 254 AD2d 274 (2nd Dept., 1998).
13. 71 AD3d 613 (2nd Dept., 2010).
14. 43 AD3d 988 (2nd Dept., 2007).

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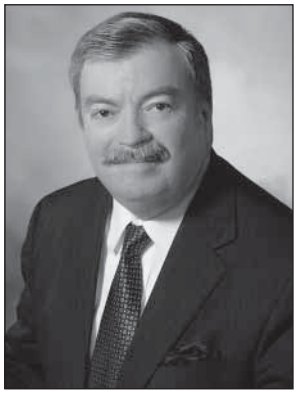
V.A. Payments and Family Support

By Mark E. Sullivan



There is a lot of confusion among family law attorneys, and practitioners in general, about VA disability compensation payments. The questions and responses below will help to clear the muddy waters.

Q Are VA benefits subject to levy, seizure or attachment?

A In general, the answer is no. Under 38 U.S.C. §5301(a)(1), benefits paid by the Department of Veterans Affairs (VA) are not subject to levy, seizure or attachment. "However," adds Steve Shewmaker, a Georgia lawyer who is also an Army Reserve JAG lieutenant colonel, "the general rule is that they are available for consideration by the court in deciding matters of family support. *Levy, seizure or attachment* refers to collection of debts; the courts interpreting this have consistently stated that this does not mean the duty of support for a family."

Q Do the cases on "family support" include alimony as an exception to 38 U.S.C. §5301(a)(1)?

A Yes—alimony (also known as spousal support or maintenance) is one of the exceptions. A useful example would be a 1994 Iowa case involving an appeal from an alimony decision. The husband's main source of income was a VA disability check of $1,548 per month. It was based on a disability rating of 100%. In that case, *In re Marriage of Anderson*, 522 N.W.2d 99, 101-102 (Iowa App. 1994), the state Court of Appeals recognized this "family support exception" to 38 U.S.C. §5301(a)(1):

> The issue raised by the appellant has been answered by the United States Supreme Court in the case of *Rose v. Rose*, 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599 (1987). The *Rose* case involved nonpayment of child support as opposed to nonpayment of alimony. However, both are viewed as familial support by the United States Supreme Court in *Rose.* 481 U.S. at 631-32, 107 S. Ct. at 2037, 95 L. Ed. 2d at 611. The *Rose* case involved a disabled veteran whose sole means of support was his V.A. checks. The state court held him in contempt for failure to pay child support. The U.S. Supreme Court held a state court has jurisdiction to hold a disabled veteran in contempt for failing to pay child support, even if the veteran's only means of satisfying his obligation is to use veteran's benefits received as compensation for a service connected disability. 481 U.S. at 619, 107 S. Ct. at 2030, 95 L. Ed. 2d at 604. The Court held:
>
> > Neither the Veteran's Benefits provisions of Title 38 nor the garnishment provisions of the Child Support Enforcement Act of Title 42 indicate unequivocally that a veteran's disability benefits are provided solely for that veteran's support. We hold, therefore, that as enacted these federal statutes were not in conflict with and thus did not preempt § 36-820 (the Tennessee child support statute). Nor did the Circuit Court's efforts to enforce its order of child support by holding appellant in contempt transgress the congressional intent behind the federal statutes.
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> 481 U.S. at 636, 107 S. Ct. at 2039, 95 L. Ed. 2d at 614.

Q Are there cases in other states which also say this?

A Yes. In a 1984 Louisiana Court of Appeals case, the trial court found that the husband, Mr. Collins, had virtually no source of income other than his VA benefits. The husband argued that VA benefits are exempt from awards of temporary alimony ("alimony pendent lite") under the anti-attachment wording in Title 38. The Court of Appeals stated:

> Mr. Collins was obliged to, and did support Mrs. Collins out of his Veterans' benefits during the time they lived together. His obligation to support her out of whatever income and assets are available to him continues until their marriage is dissolved by divorce.
>
> An award of alimony pendente lite is not an "attachment, levy, or seizure" as contemplated in 38 U.S.C.A. § 3101(a) [the previous number for this section of Title 38]….

> The provisions of 38 U.S.C.A. § 3101(a) do not apply to awards of alimony pendente lite. The duty to pay alimony pendente lite does not arise as the result of the judicial process. An award of alimony pendente lite is the legal enforcement of a marital duty rather than a process for the collection of a debt. If no other income is available for the purpose, Mr. Collins must use his Veterans' benefits for the support of Mrs. Collins when she "has not a sufficient income for maintenance pending suit." La.C.C. Art. 148. The trial judge erred in discontinuing the previous award of alimony pendente lite.

Collins v. Collins, 458 So.2d 1008 (La. App. 1984).

In a 1990 Maryland case, the Court of Special Appeals said:

> Neither [the *McCarty* nor the *Mansell* case] purported even to suggest that… disability benefits actually received by a veteran cannot be counted as income to the veteran for purposes of determining his or her ability to pay alimony.
>
> The law generally is that such benefits *may* be considered as a resource for purposes of setting the amount of alimony and that doing so does not constitute an affront to the Federal anti-attachment and anti-alienation provisions, such as 38 U.S.C. § 3101 and 42 U.S.C. § 662(f)(2) protecting those benefits from the claims of creditors…. We find those cases persuasive and therefore hold that the VA disability benefits received by Dr. Riley may be considered as a resource for purposes of determining his ability to pay alimony. Accordingly, we reject his legal challenge to the order denying his motion to terminate or reduce alimony.

Riley v. Riley, 82 Md. App. 400, 409-10, 571 A.2d 1261 (1990).

The Vermont Supreme Court stated in a 1987 case:

> 38 U.S.C. § 3101(a) protects recipients of disability benefits from the claims of creditors and provides security to the recipient's family and dependents…. Section 3101(a) does not apply in the present case, however, since a wife seeking spousal maintenance is not a "creditor" under the statute. *Id.* Veterans' disability benefits may be considered for alimony or spousal maintenance payments…. Further, the instant proceeding is not litigation in which the wife seeks to attach, levy or seize plaintiff's veteran benefits…. While 38 U.S.C. § 3101(a) would preclude an assignment or apportionment of plaintiff's veteran disability benefits, it does not preclude consideration of disability benefits by a trial court as a source of income upon which an award of alimony may be based.

Repash v. Repash, 148 Vt. 70, 528 A.2d 744 (1987).

Q Are there any other cases which support this?

A Yes. Many other cases confirm this rule of law in the context of spousal support. Some of these are:

- Alabama—*Nelms v. Nelms*, 2012 Ala. Civ. App. LEXIS 54; *Mims v. Mims*, 442 So.2d 102 (Ala. Civ. App. 1983)
- Arkansas—*Womack v. Womack*, 307 Ark. 269, 818 S.W.2d 958 (1991); *Murphy v. Murphy*, 302 Ark. 157, 787 S.W.2d 684 (1990)
- Colorado—*In re Marriage of Nevil*, 809 P.2d 1122 (Colo. App. 1991)
- Iowa—*In re Marriage of Howell*, 434 N. W. 2d 629, 633 (Iowa 1989)
- Kansas—*In the Matter of the Marriage of Bahr*, 32 P.3d 1212 (Kan. Ct. App. 2001)
- Maine—*Gillis v. Gillis*, 2011 Me. 45, 15 A.3d 720, 723 (2011)
- Maryland—*Riley v. Riley*, 82 Md. App. 400, 571 A.2d. 1261, 1266, *cert. denied*, 577 A.2d 50 (1990)
- Mississippi—*Hollis v. Bryan*, 166 Miss. 874, 143 So. 687 (1932)
- Mississippi—*Steiner v. Steiner*, 788 So.2d 771 (Miss. 2001)
- Montana—*In re Marriage of Strong*, 300 Mont. 331, 8 P.3d 763 (Mont. 2000)
- Nebraska—*Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986); *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982)
- Oregon—*Matter of Marriage of Tribbles*, 63 Or. App. 774, 665 P.2d 1267 (1983); *Gerold v. Gerold*, 6 Or. App. 353, 488 P.2d 294 (1971)
- Pennsylvania—*Parker v. Parker*, 335 Pa. Super 348, 484 A.2d 168
- S. Dakota—*Urbaniak v. Urbaniak*, 2011 WL 6276005
- Virginia—*Lambert v. Lambert*, 10 Va. App. 623, 627, 395 S.E.2d 207 (1990)
- West Virginia—*In re Marriage of Zickefoose*, 2012 W. Va. LEXIS 4

- Wisconsin—*In re Marriage of Kraft*, 119 Wn.2d 438, 832 P.2d 871 (1992); *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Wis. App. 1990); *In re Gardner*, 220 Wis. 493, 264 N.W. 643 (1936)

Q Does that mean that veterans' benefits can also be divided at divorce in "property division"?

A No. The law is clear on that, and Congress has spoken. The Uniformed Services Former Spouses' Protection Act clearly says that VA disability compensation payments under Title 38 of the U.S. Code are not subject to property division upon divorce. The same is true to a large extent with military disability retirement payments under Title 10, Chapter 61 of the U.S. Code.

Q Has the U.S. Supreme Court also spoken?

A Yes. The case is *Mansell v. Mansell*, 490 U.S. 581 (1989). The *Mansell* case involved a California court decree which divided a military retiree's disability benefits as part of the property settlement, not as alimony or spousal support. In the *Mansell* decision, the Court held that federal law does not permit state courts to divide or partition disability benefits as community or marital property upon divorce. It also prohibits the treatment of a waiver of military retired pay (to obtain VA payments) as marital or community property.

Q How are the courts handling support cases with VA disability elections before and after the divorce?

A Alexander R. Rhoads, an Iowa family law practitioner, states the rules this way:

> Congress has never passed a law stating that veterans' benefits may not be considered with respect to spousal support. Nor has the U.S. Supreme Court ever held that VA benefits cannot be considered in this manner.

- Where the disability benefits are elected before the divorce, disability benefits are income for purposes of support. See *Womack v. Womack*, 307 Ark. 269, 818 S.W.2d 958 (1991); *In re Marriage of Bahr*, 29 Kan. App. 2d 846, 32 P.3d 1212 (2001); *Riley v. Riley*, 82 Md. App. 400, 571 A.2d 1261 (1990); *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990).

- Where disability has not been elected at divorce, but an election is pending or otherwise seems likely, the court may make a nominal award or otherwise reserve jurisdiction to make an award of support after the election is final. See *Collins v. Collins*, 144 Md. App. 395, 798 A.2d 1155 (2002) and *Longo v. Longo*, 266 Neb. 171, 663 N.W.2d 604 (2003) ($1 per year permanent alimony award).

- Where disability is elected after the divorce, the election of disability is a sufficient change of circumstance to permit an increase in alimony. See *Ashley v. Ashley*, 337 Ark. 362, 990 S.W.2d 507 (1999); *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997); *In re Marriage of Murphy*, 151 Or. App. 649,950 P.2d 377 (1997); *In re Marriage of Jennings*, 138 Wash. 2d 612, 980 P.2d 1248 (1999).

- Where the trial court originally awarded nonmodifiable alimony, and the husband thereafter elected disability benefits, an Ohio court held that it was error not to reopen the judgment to make the alimony modifiable on the ground that the original judgment was no longer equitable. *Schaefferkoetter v. Schaefferkoetter*, 2003 WL 22359725 (Ohio Ct. App. 2003).

Q So far the cases have only dealt with alimony. What about child support?

A Child support may also be awarded based on disability payments to either parent being considered as income. Laura Wish Morgan notes the following cases to support this rule in her treatise, *Child Support Guidelines: Interpretation and Application*:

> *Loving v. Sterling*, 680 A.2d 1030 (D.C. 1996) (federal law does not prohibit treating child support obligor's veterans administration disability benefits as income under support guidelines); *In re Paternity of C.L.H.*, 689 N.E.2d 456 (Ind. Ct. App. 1997) (full amount of veteran's disability benefit was income under guidelines); *In re Marriage of Lee*, 486 N.W.2d 302 (Iowa 1991) (veterans' disability benefits, Social Security benefits, retirement benefits, and workers' compensation benefits are includable in income); *In re Marriage of Benson*, 495 N.W.2d 777 (Iowa Ct. App. 1992) (veterans' disability, Social Security disability, workers' compensation, retirement income, are all to be considered income for support); *Riley v. Riley*, 82 Md. App. 400, 571 A.2d 1261 (1990) (military disability is income); *In re Marriage of Strong*, 8 P.3d 763 (Mont. 2000); *Fox v. Fox*, 592 N.W.2d 541 (N.D. 1999); *Dye v. White*, 976 P.2d 1086 (Okla. Ct. App. 1999); *Wingard v. Wingard*, 11 D. & C. 4th 343 (Pa. Ct. Com. Pl.), *aff'd*, (1987); *Weberg v. Weberg*, 158 Wis. 2d 540, 463 N.W.2d 382 (Ct. App. 1990) (military disability pension is income).

Laura Wish Morgan, Child Support Guidelines: Interpretation and Application (1996, Supp. 2009).

Q How do the courts explain the rule which allows VA benefits to be used in setting family support?

A The Montana Supreme Court explained the law as follows in *In re Marriage of Strong*, 300 Mont. 33, 342,

8 P.3d 763, 769-770 (Mont. 2000):

> Should the court's new property distribution appear inadequate to provide for Brandy's "reasonable needs" post-dissolution, then the District Court may consider awarding Brandy spousal maintenance under § 40-4-203, MCA, in lieu of or in addition to what marital property the court may legally apportion to her. Even though Justin's VA disability benefits are his sole current source of income and, thus, would necessarily be used to satisfy his maintenance obligations, such action is permitted under the logic of the U.S. Supreme Court's decision in *Rose v. Rose* (1987), 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599.

In *Rose*, the Tennessee trial court held the veteran spouse in contempt for failing to pay ordered child support. The veteran challenged that action on appeal, arguing that it was impermissible since his income was composed almost entirely of disability benefits received from the VA. *See Rose*, 481 U.S. at 622, 107 S.Ct. at 2032, 95 L.Ed.2d at 605 (noting that the veteran also received nominal monthly disability income from the Social Security Administration). After reviewing the legislative history applicable to what is now 38 U.S.C. § 5301(a) (formerly 38 U.S.C. § 3101(a)), the Court held that VA disability benefits were never intended to be exclusively for the subsistence of the beneficiary. Rather, Congress intended such benefits

> to support not only the veteran, but the veteran's family as well. Recognizing an exception to the application of [§ 5301(a)'s] prohibition against attachment, levy, or seizure in this context would further, not undermine, the federal purpose in providing these benefits.

Rose, 481 U.S. at 634, 107 S.Ct. at 2038, 95 L.Ed.2d at 613. The Court thus held that the "[n]either the Veterans' Benefits provisions of Title 38 nor the garnishment provisions of the Child Enforcement Act of Title 42" preempt the authority of state courts to enforce a child support order against a veteran, even where the veteran's income is composed of VA disability benefits that would necessarily be used to pay child support. *See Rose*, 481 U.S. at 636, 107 S.Ct. at 2039, 95 L.Ed.2d at 614.

> Under the logic of *Rose*, since "Congress clearly intended veterans' disability benefits to be used, in part, for the support of veterans' dependents," *Rose*, 481 U.S. at 631, 107 S.Ct. at 2036, 95 L.Ed.2d at 610-11, "a state court is clearly free to consider post-[dissolution] disability income and order a disabled veteran to pay spousal support even where disability benefits will be used to make such payments." *Clauson*, 831 P.2d at 1263 n.9. In addition to Alaska, several other jurisdictions have concluded that federal law does not prohibit considering veterans' disability pay as a source of income in awarding spousal maintenance. *See In re Marriage of Kraft* (Wash. 1992), 832 P.2d 871; *Womack v. Womack* (Ark. 1991), 818 S.W.2d 958; *In re Marriage of Nevil* (Colo. Ct. App. 1991), 809 P.2d 1122; *Riley v. Riley* (Md. Ct. Spec. App. 1990), 571 A.2d 1261; *Lambert v. Lambert* (Va. Ct. App. 1990), 395 S.E.2d 207; *Weberg v. Weberg* (Wis. Ct. App. 1990), 463 N.W.2d 382….

Q What about apportionment by the Department of Veterans Affairs? Isn't that administrative remedy the method that must be used to decide the amount of family support which a veteran must pay and the means to transfer that to the child or children?

A No. This issue was covered in the *Rose* decision. The Supreme Court found no basis for the contention that Congress intended this to be the exclusive means of setting family support or enforcing it, and stated that the VA regulations bear this out:

> Nowhere do the regulations specify that only the Administrator may define the child support obligation of a disabled veteran in the first instance. To the contrary, appellant, joined by the United States as *amicus curiae*, concedes that a state court may *consider* disability benefits as part of the veteran's income in setting the amount of child support to be paid.

The Court stated that:

> The statute simply provides that disability benefits "may…be apportioned as may be prescribed by the Administrator." 38 U. S. C. § 3107(a)(2). The regulations broadly authorize apportionment if "the veteran is not reasonably discharging his or her responsibility for the…children's support." 38 CFR § 3.450(a)(1)(ii) (1986).

The Supreme Court went on to say:

> In none of these provisions is there an express indication that the Administrator possesses exclusive authority to order payment of disability benefits as child support. Nor is it clear that Congress envisioned the Administrator making independent child support determinations in conflict with existing state-court orders. The statute gives no hint that exercise of the Administrator's discretion may have this effect.

Q Can a court garnish the benefits of a veteran for child support or alimony?

A Generally speaking, the answer is no. However, Congress enacted an exception in the case of a military retiree who has waived pension payments (in whole or part) to receive VA benefits. It is found at 42 U.S. Code § 662(f)(2). In *U.S. v. Murray*, the Georgia Court of Appeals reviewed a case brought by the ex-wife of a veteran who sought to garnish the veteran's VA disability compensation for alimony. The Court held that VA disability payments are subject to garnishment for alimony to the extent that they replace "waived retired pay." *U.S. v. Murray*, 158 Ga. App. 781, 282 S.E.2d 372 (1981).

Q Does the tax-free status of VA disability compensation mean that it cannot be considered in determining support?

A "No," says Jim Higdon, a retired Navy Reserve captain who practices in Texas. "There is no exemption for payments which are tax-free. They are counted as all other sources of money (except for means-tested benefits) in computing the income of the individual who is to pay support, even though they are not subject to income tax. Other military payments which are tax-free but are generally counted in determining support are the basic allowance for housing (BAH) and the basic allowance for subsistence (BAS). Pay and allowances in general are exempt from taxation when the servicemember is in a combat zone, yet they are also subject to consideration in calculating alimony and child support. Since such payments are tax-free, the entire amount should be considered."

Q Are VA benefits exempted from consideration as "income" in setting child support because they are "means-tested payments"?

A "Since they are not *means-tested payments* in the first place," responds John Camp, a family lawyer and a retired Air Force Staff Judge Advocate from Warner Robins, Georgia, "the answer is no." Camp continues, "*Means-tested* refers to payments which depend on a person's having little or no money. The individual is "tested" as to his means of support; if it falls below a certain level, then benefits are paid. While that is true for VA pensions, it does not apply to VA disability compensation. For the latter, the wealth or poverty of the recipient doesn't matter, nor does one's previous rank. If John Smith has a service-connected disability and applies for VA disability compensation, the payments will be made by the Department of Veterans Affairs without regard to whether he is rich and was formerly an admiral, or whether he is poor and used to be a corporal. The monthly amount doesn't vary due to these factors."

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of *The Military Divorce Handbook* (Am. Bar Assn., 2nd Ed. 2011) and many Internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

Recent Legislation, Decisions and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages or civil unions

Since my last column, three new states have approved same-sex marriage, including Rhode Island, Delaware, and Minnesota. The other states that have recognized same-sex marriage include Washington, Maine, Maryland, New York (as of July 24, 2011 when it passed the Marriage Equality Act) (new DRL § 210-a, 210-b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia.

Eleven foreign countries also grant full marriage rights: Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, Spain, South Africa, Sweden, as well as Mexico City, Mexico.

Landmark Rulings on Same-Sex Marriage from the United States Supreme Court: DOMA and Proposition 8 Ruled Unconstitutional

The U.S. Supreme Court, in two 5-4 rulings, held that married gay couples are eligible for federal benefits, and paved the way for same-sex marriage in California, although the justices stopped short of a ruling endorsing a fundamental right for gay people to marry. My column has closely followed these two gay marriage cases from the beginning.

In ***Windsor v. United States*, 133 S.Ct. 2675 (2013)**, the U.S. District Court of the Southern District of New York ruled that the Defense of Marriage Act (DOMA), Section 3, which defines "marriage" as a legal union between a man and a woman is unconstitutional. Justice Kennedy, writing for the majority, said that the act wrote inequality into federal law and violated the Fifth Amendment's protection of equal liberty: "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the state, by its marriage laws, sought to protect in personhood and dignity" and that the law imposes "a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the states." Therefore, the high court invalidated DOMA, and now legally married gay couples will receive the same federal benefits as heterosexuals, including Social Security survivor benefits, immigration rights, family leave, and can file joint federal tax returns and will not have to pay federal estate taxes on spousal inheritance.

The problem is not solved yet, though. If a gay couple marries in New York and moves to another state that does not recognize their marriage, will they still receive federal benefits? The answer may hinge on whether the federal government recognizes the marriage based on where the couple were originally married rather than their residence.

In the Proposition 8 case, ***Hollingsworth v. Perry*, 570 U.S. __ (2013)**, the Ninth Circuit held that Proposition 8 allowing California citizens to vote in 2008 on banning same-sex marriage is unconstitutional. The Supreme Court held that it could not rule on a challenge to Proposition 8, because supporters of the ban lacked the legal standing to appeal a lower court's decision against it. Therefore, the ban is unconstitutional and effectively allowed same-sex couples to marry in California.

Recent Legislation

As a reminder, as of January 31, 2012, the combined parental income to be used for purposes of the CSSA changed from $130,000 to $136,000 in accordance with Social Services Law 111-i(2)(b) in consideration of the Consumer Price Index. In addition, the threshold amount for temporary maintenance is now $524,000 rather than $500,000.

CPLR 3103(a) amended, effective January 1, 2014: Motions for Protective Orders

The amendment expands the delineated persons who may make a motion for a protective order regarding discovery devices to include any person about whom the discovery is sought. Currently, the statute only permits such a motion by the court *sua sponte* or by a party or person from whom discovery is sought. Therefore, under the current statute, as it existed before the amendment, if documents are subpoenaed about a non-party, it is unclear if CPLR 3101(a) would give standing to such person to make a motion for a protective order, as odd as this may be.

CPLR 5241 and 5242, and Social Service Law 111-b amended, effective April 7, 2014: Income Withholding for Child Support

The CPLR and Social Service Law were amended regarding income withholding for child support to, *inter alia*, ensure compliance with new federally mandated income withholding form ("IWO").

Driver's License Suspension Laws for Failure to Pay Child Support Extended from June 30, 2013 to June 30, 2015

VTL and related laws which permit suspension of driving privileges for child support enforcement are ex-

tended for two years to June 30, 2015. Clearly, extension of the effectiveness of said laws will be instrumental in the collection of child support for New York families.

22 NYCRR 118.1 (e)(14) added effective May 1, 2013: Attorney Filing Requirements

When attorneys file their registration statement with the Chief Administrator of the Courts, they now must disclose the following: a) voluntary unpaid pro bono services and b) voluntary financial contributions made to organizations primarily or substantially engaged in the provision of legal services to the underserved and to the poor during the previous biennial registration period.

22 NYCRR 202.28 (1)(b) added, effective May 20, 2013: Notice to the Court

The assigned judge must be notified of the following:

- If an action is discontinued pursuant to 22 NYCRR 202.28(1)(a);
- If an action is wholly or partially settled pursuant to CPLR 2104;
- A motion is wholly or partially moot;
- A party died;
- A party becomes a debtor in a bankruptcy.

22 NYCRR 202.5-b: Electronic Filing in Supreme Court

Pursuant to 22 NYCRR 202.5-b, there is a consensual electronic filing program in the Supreme Court. However, most counties in New York do not have this service available for matrimonial actions except for Broome County and Westchester County (pilot program only).

Court of Appeals Round-up

Prenuptial agreement held invalid where there is a typographical error in the acknowledgment

Galetta v. Galetta, 21 NY3d 186 (2013)

In this divorce action, the plaintiff-wife moved for summary judgment declaring that the parties' prenuptial agreement was invalid because the defendant's signature was not acknowledged in accordance with the requirements for the recording of a deed as mandated by DRL §236(B)(3). The certificate of acknowledgment relating to the wife's signature contained the requisite boilerplate language. However, in the acknowledgment relating to the husband's signature, a key phrase was omitted (seemingly a typographical error) "to me known and known to me" leaving only the following statement: "On the 8[sic] day of July, 1997, before me came Gary Galetta described in and who executed the foregoing instrument and duly acknowledged to me that he executed the same." In opposition, the defendant-husband submitted an affidavit from the notary who witnessed his signature, but the notary failed to produce evidence that he in fact knew or received proof that the signer was the person identified in the document. Rather, the notary's affidavit stated that it was his usual and customary practice to ask and confirm that the person signing the document was the same person named in the document.

The Supreme Court denied the plaintiff's motion for summary judgment. The Fourth Department affirmed (3-2), holding that defects in an acknowledgment executed may be cured and that the defendant raised an issue of fact as to whether the defect in this case was cured based upon the notary's affidavit. The Court of Appeals reversed and granted plaintiff's motion for summary judgment. Where there is a defect in the acknowledgement, the court is inclined to allow a cure where: (1) the signer made the oral declaration required by RPL 292; and (2) the notary or other official either actually knew the identity of the signer or secured satisfactory evidence of identity ensuring that the signer was the person described in the document. However, in this case the notary failed to present sufficient proof of what actually took place and only stated what his usual course of practice is, which was insufficient.

Author's note: Bottom line, make sure there are no typos in the acknowledgement, as this will render the entire agreement defective!

Incarceration, standing alone, does not make visitation inappropriate

In the Matter of Granger v. Misercola, 21 NY3d 86 (2013)

There is a rebuttable presumption that, in initial custodial arrangements, a non-custodial parent will be granted visitation in the absence of proof that such visitation will be harmful to the child. The court below found that the father and three-year-old child had a meaningful relationship before the father's eight-year incarceration for felony drug charges and that losing contact for a long period of time while the father is incarcerated would be detrimental to this established relationship. The Fourth Department affirmed the father's visitation order of four hour visits every other month (despite that the child had to be driven two hours each way), and the high court affirmed.

Other Cases of Interest

Child Support

Child support awarded to non-custodial parent where shared parenting

Leonard v. Leonard, 968 NYS2d 762 (4th Dept 2013)

The father was awarded sole custody of the parties' two children, but the parties were awarded shared physical custody with equal parenting time. The court below erred in awarding child support to the father, the higher wage earner, and should have awarded child support to the mother. Since there is a shared residential arrangement, the party with the higher income is deemed to be

the noncustodial parent for purposes of child support. The fact that the father has sole legal custody or decision-making authority does not increase his child-related costs in this scenario. Since the father earns approximately $134,000 and the mother earns approximately $25,000, the only way to provide for the children's pre-separation standard of living is for the father to pay the mother child support. Therefore, the matter was remitted for a determination of the mother's award of child support.

In addition, since the court below failed to articulate its reasons why the wife was not awarded counsel fees, the matter was remitted for the court to either articulate its reasons or to reconsider its determination.

Unallocated child support is not automatically reduced upon child's emancipation

***Lamassa v. Lamassa*, 106 AD3d 957 (2d Dept 2013)**

The parties settled their divorce action by Stipulation of Settlement setting forth an unallocated amount of child support for their four children. The husband reduced (without a court order) his child support payment when each of the parties' children became emancipated. The wife sought enforcement, claiming that the husband unilaterally, and without her consent, reduced her child support payments. The husband moved to modify the terms of the parties' Stipulation of Settlement to reduce his child support payments and to cancel any child support arrears on the basis that the children were emancipated and that there was an oral agreement to modify the terms of child support. The husband presented no proof, other than his own testimony, that there was an oral agreement to downwardly modify child support. The Appellate Division held that unallocated child support for multiple children is not automatically reduced upon the emancipation of the oldest child. Instead, the burden is on the payor to prove that the child support is excessive based upon the needs of the remaining children, which the husband failed to do. Therefore, the husband was not entitled to a reduction in child support and his child support arrears were not canceled.

Custody and Visitation

Award of joint custody in the Second Department with one parent to have final decision-making authority

***Prohaszhka v. Prohaszhka,* 103 AD3d 617 (2d Dept 2013)**

The parties were awarded joint custody of the children, with the mother to have physical residential custody of the children and to have final decision-making authority. The Appellate Division upheld the trial court's award, but modified it to the extent of directing the mother to consult with the father "regarding any issues involving the children's health, medical care, education, religion, and general welfare prior to exercising her final decision-making authority." *Id.* at 618.

Generally, the Second Department does not award joint custody. Here, since the mother is awarded sole decision-making authority after consultation with the father, it is really no different than awarding sole custody to the mother.

In an initial custody proceeding where relocation is sought, the court does not have to apply the factors to be considered in a relocation case

***Santano v. Cezair*, 106 AD3d 1097 (2d Dept 2013)**

The parties never married, but had a three year old child together. Throughout their relationship, the mother and child lived with the the maternal grandparents, and were dependent upon them for support. When the grandparents moved to Philadelphia, the mother and child moved with them. The father had meaningful visitation with the child while the child lived in New York. When the mother relocated, the father moved for custody, and the mother cross-moved**.** In an initial child custody and visitation proceeding, where a parent is also relocating, the strict application of the factors applicable to relocation petitions was not required, and relocation is only one of many factors to be considered in determining custody. The lower courts award of primary physical custody to the mother was upheld.

Modification of custody

Error to suspend visitation where court failed to conduct *in camera* interview with 13-year-old child

***Zubizarreta v. Hemminger,* 107 AD3d 909 (2d Dept 2013)**

The Family Court did not have adequate information to make its determination as to whether terminating the father's visitation with his 13-year-old son was in the best interests of the child because it failed to conduct an *in camera* interview of the child to ascertain the child's views, despite that the lawyer for the child claimed that the child did not wish to visit with the father any longer.

Grandparent visitation *denied*

***Pinsky v. Botnick*, 105 AD3d 852 (2d Dept. 2013)**

The paternal grandmother petitioned the Family Court for grandparent visitation with her four grandchildren ages 9, 7, 5 and 3, approximately six weeks after the death of her son, the children's father. The mother was served with the petition in the presence of the children, and thereafter, the children expressed fear that their grandmother would take them from their mother.

The lower court granted the grandmother visitation with the children for three hours every other Sunday and such other visitation as agreed upon by the grandmother and the mother. Prior to the date when said visitation would commence, the grandmother, without permission from the court or the mother, began to attend the children's after-school and extracurricular activities. One child reported that she felt that she was being stalked

by her grandmother. The grandmother contacted school officials and the children's coaches, and demanded to be included on mailing lists. The grandmother's aggressive behavior caused two of the children to refuse to attend their extracurricular activities. The grandmother also showed up at the kindergarten graduation ceremony for one of the children, and at the party following same, stood by one of the exits, and had her husband stand by the other exit, essentially preventing the children from leaving without interacting with the grandmother or her husband.

The mother's motion to the lower court to modify the terms of the visitation with the grandmother was denied. The mother appealed and the Second Department reversed, finding that while the grandmother had standing because of the death of the children's father, it was clearly not in the best interests of the children to have visitation with their grandmother. The record demonstrated through the testimony of the mother, the mother's expert, Dr. Peter Favaro, and the children, that the children had apprehension regarding visitation with the grandmother. The children's attorney also supported a denial of visitation to the grandmother.

Enforcement

Civil contempt for wife's failure to obey order prohibiting her from having paramour live in the marital residence

Ruesch v. Ruesch, 106 AD3d 976 (2d Dept 2013)

The mother was granted exclusive occupancy of the marital residence, temporary custody of the children and *pendente lite* maintenance and child support. In a So Ordered Stipulation, the mother agreed that her paramour was barred from entering the marital residence absent subsequent order of the court. A month later, the father moved to hold the mother in contempt (that she be fined and incarcerated) and that her maintenance be suspended, since her paramour continued to live in the marital residence. The lower court suspended the mother's *pendente lite* maintenance payments, found her in civil contempt, and further fined her $250 per day prospectively until she purged her contempt and caused her paramour to vacate the marital residence. The husband appealed, and claimed that the court below should have suspended maintenance from the first day that the wife violated the order.

The Appellate Division affirmed, and distinguished criminal contempt, which is aimed to punish the offender and deter future behavior, from civil contempt, which is remedial in nature and is aimed to coerce the recalcitrant party to comply with the court's order. Since the husband failed to prove actual monetary loss, any penalty imposed on the wife for past acts in violation of the court's order would be considered criminal contempt and improper within a civil contempt adjudication.

Equitable Distribution

Retirement funds

Adelsberg v. Amron, 103 AD3d 571 (1st Dept 2013)

The parties executed a setting forth that the date of the commencement of the divorce action would be the valuation date for the distribution of retirement assets. Since said stipulation was clear and failed to include an adjustment for earnings and/or losses, no adjustments would be made for account changes after the date of the commencement of the parties' divorce action.

Waiver of benefits

Lamassa v. Lamassa, 965 NYS2d 195 (2d Dept 2013)

The defendant waived her interest in the plaintiff's variable supplement fund ("VSF"), based upon advice from her counsel that VSFs were not marital property pursuant to the law in effect at the time. When the law changed to provide that VSFs are now marital property, the defendant moved to modify the terms of the parties' QDRO to add a provision to equitably distribute the marital portion of the plaintiff's VSF benefits. The referee held that the defendant was entitled to equitable distribution of the VSF since the law on this issue was unclear at the time the parties settled. The Appellate Division modified the lower court's order by deleting the provision regarding defendant's entitlement to the VSF, holding that "the fact that the plaintiff did not have definitive guidance on the issue of whether the VSF benefits were subject to equitable distribution is not a sufficient basis upon which she may avoid the effects of her otherwise knowing and voluntary waiver." *Id.* at 959.

Support

COBRA coverage

Paulson v. Paulson, 107 AD3d 677 (2d Dept 2013)

The Appellate Division affirmed the lower court's decision granting the wife's motion to enforce the husband's payment of $483 per month to maintain her COBRA health insurance coverage for three years following entry of the parties' judgment of divorce. If the parties intended that the husband would be relieved of his obligation to make payments upon the loss of his ability to obtain COBRA coverage for the wife, the parties' Stipulation should have incorporated language to this effect.

Counsel Fees

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

Each column, I continue to update the reader with large counsel fee awards in matrimonial litigation.

***Vujanic v. Petrovic,* 103 AD3d 791 (2d Dept 2013)**

In an action for divorce, the defendant was awarded $150,000 in counsel fees based upon her unopposed motion. The plaintiff sought to vacate his default, but the court denied same because they did not accept the plaintiff's excuse of law office failure as a reason for his default, since same was not supported by a "'detailed and credible' explanation of the default." *Id* at 792. The plaintiff also failed to set forth a basis for a meritorious defense.

***Goncalves v. Goncalves*, 105 AD3d 901 (2d Dept 2013)**

The wife was awarded $75,000 in interim counsel fees based upon the significant disparity of the parties' income (no other relevant facts were included).

***Gluck v. Gluck*, 38 Misc3d 1207(A) (Sup Ct Nassau County 2013) (Palmieri, J.)**

The husband was awarded more than $84,000 in legal fees in a divorce action where the matter took three years to complete, the husband earned approximately $89,000 and the wife earned approximately $365,000. The court stated that the mere refusal to settle a case and proceed to trial does not, by itself, prove obstructionist conduct. The court based the award of fees on the *pro rata* share of income of the parties, and awarded the husband 80% of the fees.

***GC v. KC*, 39 Misc3d 1207(A) (Sup Ct Westchester County 2013)**

In a post-judgment divorce enforcement litigation, the plaintiff-former wife was awarded $48,665.56 in enforcement legal fees and disbursements, which amounted to 75% of the total fees sought to be paid by the plaintiff. The former husband-defendant's recalcitrance and obstructive tactics forced the plaintiff to, *inter alia*, file three separate motions to compel the former husband to comply with the clear terms of the parties' Stipulation of Settlement, including a motion to reveal his residential address so that the plaintiff would know where the parties' child would be staying during visitation with the father and to oppose the defendant's application to reduce his child support obligation, which the court found without merit. It is to be noted that in the parties' underlying divorce action, the plaintiff was awarded over $550,000 in counsel fees based upon the defendant's dilatory tactics.

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A special thanks to Carolyn Kersch, Esq. for her editorial assistance.

Selected Case

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 a case that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, e.g., Fall 2013) 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.

DR v. ZP, Supreme Court, Rockland County (Thomas E. Walsh, II, J., February 22, 2013)

The following papers numbered 1-12 read on this motion by Order to Show Cause by defendant seeking an Order dismissing the complaint in this matrimonial action, together with such other and further relief as to the Court may seem just and proper:

Order to Show Cause / Affidavit (ZP) / Affirmation (Kristensen) / Exhibits (A-E)-1-4

Affidavit in Opposition (AP) (Affirmation (Driscoll III) / Affirmation in Opposition (Feinberg) / Exhibits (A-C)-5-8

Affidavit in Reply (ZP) Affidavit (Mark P) Exhibits (F-I)-9-11

Defendant's Memorandum of Law-12

Defendant seeks the dismissal on the grounds that the guardian of plaintiff's person and property, appointed pursuant to Art. 81 of the Mental Hygiene Law, lacks the authority to bring or maintain this matrimonial action.

The parties were married on November 24, 1979. There is one child born of the marriage, Mark P., who is now thirty (30) years of age. On August 5, 1982, plaintiff was injured in a motor vehicle accident. The post accident medical treatment plaintiff received as a result of those injuries was the subject of a medical malpractice action in favor of the plaintiff that was eventually settled. The injuries sustained by plaintiff as a result of the accident and / or his medical treatment resulted in, among other cognitive problems, plaintiff's inability to recognize his wife and son and his violent and assaultive behavior directed at them. The defendant asserts that plaintiff's altered mental status required her to leave the plaintiff in March or April of 1985 for her and her son's physical safety. The parties have not resided together for the over twenty-five years since her departure in 1985. There is no information in this motion record indicating that plaintiff's condition will improve.

Plaintiff's injuries resulted in the appointment of a Conservator in 1991 and then, seventeen years later in 2008, the appointment of two co-guardians of plaintiff's person and property pursuant to MHL Art. 81. Defendant has opined that plaintiff would not want the divorce sought in this action.

By Order dated May 21, 2012, this Court granted the unopposed motion of one of the co-guardians which sought an Order authorizing him to retain matrimonial counsel for the plaintiff and to commence this matrimonial action.

The grounds for the divorce that is sought is the irretrievable breakdown of the marriage for a period in excess of six (6) months (Defendant's Exhibit C). One of the two Art. 81 guardians verified the matrimonial complaint that was filed on July 6, 2012. The other co-guardian alludes to financial benefits that would inure to the plaintiff's estate should the divorce be granted (§4, Driscoll affirmation).

The holdings in *Mohrmann v. Kob*, 291 N.Y. 181, 1943, and *Matter of Wechsler*, 3 A.D. 3d 424 (2004), relied upon by the movant, are predicated on the authority conferred on a Committee pursuant to Art. 68 and Section 1377 of the Civil Practice Act, legislative enactments that have been replaced by MHL Art. 81.

It has been held that a Guardian ad litem could be appointed for an incompetent to enable him to prosecute an action for divorce based on an alleged adultery [McRae v. McRae, 43 Misc.2d 252 (Sup. Ct. Queens Co., 164)].

The various powers that can be conferred on a Guardian of the Property appointed pursuant to Art. 81 of the Mental Hygiene Law are listed in MHL §81.21. However, the legislature did not enact an exhaustive list. Immediately preceding the list of potential powers the statute refers to the powers as those "…which may be granted include, *but are not limited to*…" [MHL §81.21]. The various powers that can be conferred on a Guardian of the Person appointed pursuant to Art. 81 of the Mental Hygiene Law are listed in MHL §81.22. However, the legislature did not enact an exhaustive list in that section either. Immediately preceding the list of potential powers the statute again refers to the powers as those "…which may be granted include, *but are not limited to*…" [MHL §81.22].

Marriage is a civil contract [Domestic Relations Law § 10] and may be voided by a court of competent jurisdiction if either party thereto has been incurably mentally ill for a period of five years or more [Domestic Relations Law §7(5)]. If, at the time of the marriage, one of the parties was incapacitated within the purview of Art. 81 of the Mental Hygiene Law the marriage contract is voidable by reason of that person's want of understanding [*Matter of Dot E. W.*, 172 Misc.2d 684 (Sup. Ct., Suffolk Co., 1997); also MHL §81.29(d)].

This Court finds that under the circumstances of this matter MHL §81.21 confers upon the plaintiff's co-guardian the authority to commence this matrimonial action.

Based upon the foregoing the motion is denied in its entirety.

All parties shall appear with counsel for a conference on March 25, 2013 at 9:30 a.m., thereof at which time a schedule for the completion of all necessary discovery will be issued by the Court.

The foregoing constitutes the Decision & Order of the Court.

All attorneys are reminded that the Individual Part Rules of this Court require a letter and conference as prerequisites to the submission of any written motion. [See Judge Walsh's Individual Park Rules Art. IVA].

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Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word (pdfs are NOT acceptable), along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

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