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The Complaint Department: The Effects of Voluntary Discontinuance Under CPLR 3217(a)(1) and the Need for Change

By Lee Rosenberg

It has been happening for years—even now in the new era of no-fault divorce. The action is commenced by summons with notice. You appear and demand the complaint. Settlement discussions ensue, but are not entirely fruitful. You exchange some discovery. A preliminary conference is ultimately requested and held. The parties stipulate and the court signs off as part of the preliminary conference order that fault is resolved—a no fault divorce under DRL §170(7). The case is litigated or lingers as more discussions ensue.

It's now a year or two later—you have engaged in extensive discovery or even worse—the case certified as ready and trial is about to commence. You now receive a CPLR 3217(a)(1) notice of discontinuance. The case is over. No one, or at least you, remembered the complaint. You thought it was served; the PC order said to serve within 30 days; you must have served an answer; surely it was done, right? You have been busy with the case, the financials, parenting issues settled, settlement discussions, trial prep. Your client—the monied spouse—has accumulated more assets; received a huge bonus; put a fortune away in the 401k—all of which is presumed to be post-commencement separate property. The marital pot is now all-encompassing—bonus, 401k, savings, etc. After you check your heart rate and scramble for a Xanax, you debate the first phone call—client or malpractice carrier? Now what? It is time for a change and some recent developments may spur that along.

The Unfettered Right to Discontinue?

CPLR 3217(a)(1) permits unilateral discontinuance by service of a notice on all parties at any time before a responsive pleading is served or within 20 days of the service of the pleading asserting the claim and filing the notice with proof of service, on the clerk of the court. That discontinuance is without prejudice unless the notice otherwise states or there was a prior discontinuance in an action which was based on or included the same cause of action.[1] This right to the absolute unilateral discontinuance has been widely upheld even at late stages of the case.[2] Further, without the complaint, a defendant cannot assert a counterclaim and prosecute a cause of action for divorce in his or her own name.[3]

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But what about the stipulation—the court order entered into at the preliminary conference? Grounds are resolved—the cause of action itself—"the plaintiff shall take the divorce against the defendant upon the grounds of irretrievable breakdown under DRL §170(7)." Isn't that it? Isn't it now a basis for estoppel? Maybe, maybe not.

While normally a plaintiff who does not serve the complaint has an "absolute and unconditional" right to discontinue an action prior to service of that pleading,[4] his or her ability to do so may be waived by the plaintiff's conduct in the action as was found in *Minkow v. Metelka*.[5] An application under CPLR 3217(b) to discontinue, as opposed to the unilateral right under CPLR 3217(a), permits the court to grant or deny the application and also to set conditions to the discontinuance.[6] The *Minkow* court held that behavior demonstrative of waiver include conduct showing that plaintiff voluntarily and knowingly relinquished the right to a discontinuance by abandoning that right. A valid waiver may be created through an express agreement, such as a so-ordered stipulation, or through conduct or failure to act as to evince an intent not to claim the purported advantage.[7] In *Tutt v. Tutt*,[8] the plaintiff husband commenced a divorce action by filing a summons with notice. In the preliminary conference stipulation and order signed by the parties and their attorneys and so-ordered by the court, the husband agreed to serve a complaint on or before a date certain, "the date from which the 'timeliness of a notice of discontinuance under CPLR 3217(a)' would be determined." No complaint, however, was ever served. Two months before the scheduled trial date, the husband served and filed a notice of discontinuance and the next day filed an action for divorce in Florida. The court found that the "clear and unambiguous terms of the so-Ordered stipulation" constituted a waiver of the right to discontinue more than 20 days after the date he agreed to serve the complaint by.

Some Recent Developments

Trying to find equitable solutions to the seeming absolutes of CPLR 3217(a)(1) in late-date attempts to discontinue, some courts have hit the issue head on. Certainly, though, the CPLR being clear on the right conveyed by the statute creates difficulty in matrimonial courts trying to use their equitable powers to find their way around the statute. A different example of this is found in *Mesholam v. Mesholam*,[9] where although the discontinuance was permitted and a later filing created an *ab initio* identification of the marital assets and their values, the Court of Appeals, although constrained by DRL §236B(1)(c),[10] held "the circumstances surrounding the commencement of the earlier action can and should 'be considered as a factor by [the trial court], among other relevant factors, as [it] attempt[s] to calibrate the ultimate equitable distribution of marital economic partnership property acquired after the start of such an action by either spouse.'..."

In 2012's *Hammer v. Hammer*,[11] Nassau County Supreme Court Justice Daniel Palmieri, who had previously permitted discontinuance in 2011's *Wang v. Fazio*,[12] and after another detailed analysis of the statute and the waiver issue granted a motion to vacate a similar notice. In *Hammer*, the husband's "deviousness and unfair conduct" in discontinuing warranted the court's use of its equitable powers, which were acknowledged by the court to have "found little favor in the present procedural context." The parties in *Hammer* executed an interim Stipulation resolving grounds and stating that the husband would serve a verified complaint for constructive abandonment. The wife waived her time to answer the complaint and agreed to sign an affidavit neither admitting nor denying the allegations set forth in the complaint and consenting to placing the matter on the uncontested matrimonial calendar. The Interim Stipulation also provided for the mortgage on the marital residence to be satisfied by certain funds originally held in the husband's investment account. He would then purchase another home and transfer title to the marital residence to the wife. The sum of $92,000 would be used to pay off the mortgage, and the husband would take an additional sum of $56,000 to aid in purchasing another residence. The parties acknowledged that they would determine credits due as a result of the mortgage payoff and transfer at a later date, "once the parties determine how the remaining assets shall be divided, the amount of which shall be determined by the parties or by a Court of competent jurisdiction." The Interim Stipulation concluded that "The parties agree that all other aspects of the division of property shall be determined upon the completion of certain appraisals and valuations that are in the process of being prepared." Both parties executed an Affidavit in Lieu of Oral Allocution in support of the Interim Stipulation. The husband took the money, paid off the mortgage, bought a new house, and never transferred the marital residence to the wife—he then discontinued. The court would have none of it.

In *G.S.S. v. A.S.*,[13] Justice Eric I. Prus in Kings County denied the wife's attempt to discontinue on the husband's motion to vacate her CPLR 3217(a)(1) notice. Justice Prus, also looking at the waiver language in *Minkow* and the Court of Appeals' very last line of *Battaglia v. Battaglia*[14] mentioning "devious or unfair conduct which might constitute grounds for any equitable estoppel," held

> In the instant case, it is admitted that no pleadings were served—neither a complaint nor an answer. However, this Court finds that the plaintiff waived her right to discontinue the instant action by her conduct and furthermore, it would be fundamentally unfair to permit her to do so.
>
> The plaintiff knowingly relinquished her right to discontinue the action when the Note of Issue, filed by the plaintiff on September 28, 2011—over a year after the action was commenced and indicating that the case was ready for trial—clearly contained the statement that the pleadings

were "completed." This act, in addition to the multiple agreements between the party resolving various aspects of the divorce action, constitutes a waiver as required and contemplated by the Second Department in Minkow, supra. The plaintiff participated in a preliminary conference wherein an Order was generated and fault was resolved. The plaintiff engaged in discovery and motion practice. The plaintiff and defendant came to agree on issues of custody, and equitable distribution. And, pursuant to an agreement with respect to the marital home which required its sale, the defendant vacated the premises—something he did not have to do.

Most recently, Justice Matthew Cooper, in *Marcilio v. Hennessy*,[15] responded to a motion to vacate the husband's notice to discontinue as follows:

> The issue before the court is whether a plaintiff, who served a complaint for divorce upon a defendant and actively participated in the litigation for over two years, may voluntarily discontinue the action without leave of court solely because the defendant failed to interpose an answer. *Based primarily on issues of timeliness, prejudice, and estoppel, the notice of discontinuance filed by plaintiff is deemed void and a nullity*. (Emphasis added).

While in *Marcilio*, the husband *did serve a complaint*, the wife never served an answer. The husband then used the lack of an answer to try and unilaterally discontinue under CPLR 3217(a)(1). Justice Cooper discusses the unique history and nature of matrimonial actions in terms of the relief involved and the normal practice of holding back the service of pleadings while trying to resolve issues.

> In the days before no-fault divorce, practitioners refrained from serving complaints so as not to detail the grounds for divorce. The fear was that allegations of fault—be it cruelty, adultery or abandonment—would inflame passions and impede settlement. Consequently, it became accepted practice for cases to proceed on the summons alone, with the complaint being filed only after the matter had been settled or just prior to trial. Even after the enactment of no-fault divorce, which has resulted in nearly every case being brought on the decidedly neutral ground of "irretrievable breakdown of the marriage," the tradition of dispensing with the timely serving of pleadings has continued. That is, plaintiffs regularly fail to serve complaints, and when they do, defendants often fail to interpose answers. Importantly however, these procedural failures are often not an indication that the parties wish to reconcile. Instead, they are tactical efforts to amicably progress toward divorce.

The facts regarding the proceedings and Mr. Marcilio's conduct again take on a familiar tone. Custody was in dispute and the court appointed an attorney for the children and a forensic psychologist who conducted a full custodial evaluation. The court appointed appraisers to value personal property and a pension. Both parties actively participated in the litigation, including substantial discovery and motion practice. When the husband refused to pay his share of the forensic psychologist's fees from post-commencement funds, the wife was directed to pay the psychologist with marital funds as an advance against the husband's share of equitable distribution. The custody dispute required the court to commence a trial that was ultimately resolved by the parties entering a final so-ordered parenting agreement—the husband then later unsuccessfully sought to vacate that agreement. Then, "[w]ith the remaining financial issues of child support and equitable distribution on the horizon, plaintiff, on December 4, 2014, filed a notice of discontinuance without leave of court pursuant to CPLR 3217(a)(1)."

The court applied equitable estoppel

> ...to allow plaintiff to discontinue the action at this late stage would severely prejudice defendant and the parties' children by prolonging a painful and inevitable divorce process and requiring defendant to incur further expert and counsel fees (not to mention wasting valuable court time and resources). Furthermore, if the case is allowed to be discontinued, defendant will be forced to commence a new action in order to reach the ultimate and unavoidable result, the parties' divorce. That outcome would clearly contravene the legislative intent behind CPLR 3217(a)(1), "to provide sufficient flexibility in the early stages of cases for parties to settle claims." Therefore, the court must conclude that the purported discontinuance is improper and untimely.

The court then issues a warning:

> Despite plaintiff not being able to discontinue in this instance, the case should stand as a warning to defendants of the perils of being remiss when it comes to pleadings, whatever the reason. Defendant was unquestionably burdened with having to take the time and expense to file this motion, and was made to face the anxiety of the case coming to an abrupt and incomplete

end notwithstanding all the litigation that has ensued thus far. Such burdens should not be endured in this matrimonial action or any other.

The Future

As we all know—or perhaps it is just our self-centered perspective as matrimonial attorneys—these cases are different. The issues are different. The equitable arguments and conditions always remain.

In January 2015, the Report of the Matrimonial Practice Advisory and Rules Committee addressed many issues in a 77-page document with an extensive appendix.[16] Among the recommendations was a proposal to limit unilateral discontinuances. The proposal would amend 22 NYCRR §202.16(f)(2)(v) based upon the Committee's deliberations:

> The Committee believes that a special rule on discontinuances for matrimonial actions is needed because pleadings are often not served or waived in divorce actions. Parties often do not file pleadings in such cases while they negotiate, and may not even be aware of all the ancillary issues until later in the case. With the advent of D.R.L §170(7), a party may not even file an answer and counterclaim, believing, erroneously, that it is unnecessary. It is unfair to the court and the other party and to the children to let a party discontinue after considerable resources and effort have been spent on the case. One solution would be to seek legislation amending CPLR 3217(a) to provide that a party may not discontinue a matrimonial action without a court order after a preliminary conference or once there has been a stipulation as to grounds. Rather than recommend an amendment to the CPLR containing an outright prohibition, the Committee believes the objective of limiting discontinuances at the time of trial can be achieved by a rule adopting a uniform statewide form of preliminary conference supplemental order/stipulation. Once grounds have been resolved at the preliminary conference and the preliminary conference order is signed, a supplemental order/stipulation could follow in recordable form with acknowledgements pursuant to which the parties stipulate as to grounds and waive their right to discontinue at the time of trial pursuant to CPLR 3217(a) if pleadings are not filed within a 60 day total time period. Rather than compel the parties to file pleadings within that time period, the form merely provides that the parties waive their rights to discontinue without court approval if they do not proceed to do so. If this form were used uniformly, issue would be joined and discontinuance would not be possible. The validity of this type of so ordered stipulation has been upheld (see Tutt v. Tutt, 61 A.D.3d 967 (2d Dept. 2009)).

As no-fault divorce has finally changed our landscape for the better, a change to prevent the discontinuance of divorce actions under CPLR 3217(a)(1) as recommended, and without having to litigate the issue, reflects the realities of practice and would prevent prejudice to the litigants, to the courts, and to ourselves.

Endnotes

1. CPLR 3217(c). The cause of action is, of course, the grounds or such other stated elemental claims while the ancillary relief is just that—ancillary.
2. *McMahon v. McMahon*, 279 A.D.2d 346 (1st Dept. 2001); *Giambrone v. Giambrone*, 140 A.D.2d 206 (1st Dept. 1988); *Wang v. Fazio*, 33 Misc.3d 1228(A) (Sup. Ct., Nassau Co. 2011).
3. *Newman v. Newman,* 245 A.D.2d 353 (2d Dept. 1997); *Stevenson v. Diamond Fuel Co.*, 198 A.D. 345 (1st Dept. 1928); *White v. National Bond Holders Corp.*, 191Misc. 536 (Sup. Ct., N.Y. Co. 1948), *aff'd*, 273 A.D. 963 (1st Dept. 1948).
4. *Battaglia v. Battaglia*, 59 N.Y.2d 778 (1983); *Broder v. Broder*, 59 N.Y.2d 858 (1983).
5. 46 A.D.3d 864 (2d Dept. 2007).
6. The court in *Kane v. Kane,* 163 A.D.2d 568 (2d Dept. 1990) held that the court must consider if the adversary's rights would be prejudiced by discontinuing the action, as well as consideration of the stage that the litigation has reached and that a plaintiff's motive for seeking a discontinuance must be more carefully scrutinized where an action is in a later stage of litigation. *Id.; see also Tucker v. Tucker*, 55 N.Y.2d 378 (1982); *Turco v. Turco*, 117 A.D.3d 719 (2d Dept. 2014).
7. *See also Aivaliotis v. Continental Broker-Dealer Corp*., 30 A.D.3d 446 (2d Dept. 2006); *Golfo v. Kycia Assoc., Inc.*, 45 A.D.3d 531 (2d Dept. 2007).
8. 61 A.D.3d 967 (2d Dept. 2009).
9. 11 N.Y.3d 24 (2008).
10. Defining marital property as all property acquired "during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action."
11. 37 Misc.3d 946 (Sup. Ct., Nassau Co. 2012).
12. 33 Misc.3d 1228(A) (Sup. Ct., Nassau Co. 2011).
13. NYLJ 1202593737644, at *1 (Sup., Kings, decided March 19, 2013).
14. 59 N.Y.2d 778 (1983).
15. NYLJ 1202721148092, at *1 (Sup., NY, decided March 6, 2015).
16. http://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2015-MatrimonialCourt-ADV-Report.pdf.

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Domestic Abuse in Custody Cases: Do Courts Really Care Enough?

By Esther M. Schonfeld

Domestic violence continues to be a prevalent problem that has a profound impact on family law. As such, the attention paid to domestic violence in custody disputes is imperative. It is important that courts seriously consider domestic violence a significant factor in custody determinations. And, in fact, the New York courts are *mandated* by statute to consider the impact of domestic violence on the child in custody disputes.[1] While it is well settled law that the courts must consider the best interests of the child in making a custody determination,[2] the courts must consider the effect of domestic violence upon the best interests of the child where allegations of domestic abuse are proven by a preponderance of the evidence.[3]

The legislative policy behind this statute sets forth that "rather than imposing a presumption, the legislature hereby establishes domestic violence as a factor for the court to consider in child custody and visitation proceedings, regardless of whether the child has witnessed or has been a direct victim of the violence."[4] In the matter of *E.R. v. G.S.R.*, [5] the Family Court Judge, quoting from the legislative history of the statute, noted that the State Legislature "put it best" when it enunciated its policy stating, in pertinent part, "A home environment of constant fear where physical or psychological violence is the means of control and the norm for the resolution of disputes must be contrary to the best interests of a child."

As set forth above, while the courts must consider domestic violence in a custody determination, the burden of proving the abuse can be a real challenge and is often difficult for the victim to handle. Some cynics, both in the mental health arena and the legal field, would argue that incidents of domestic violence are sometimes exaggerated to bolster a custody claim.[6] Sadly, some victims are simply unable to prove their case. Others may have sufficient evidence to prove their case but the court may find their complaints are insignificant. Dr. Peter G. Jaffee, a psychologist and renowned researcher, notes that cases involving domestic violence are a special challenge for Judges who may have compassion for or believe that the batterer can change his or her behavior or that the child would still benefit from a relationship with the batterer no matter how dangerous the abuse was, or they may simply be swayed by the passionate pleas of the abuser.[7]

In the *Yves M. v. Mildred C.*,[8] the Family Court gave little weight to the mother's testimony regarding the alleged domestic violence, finding that the mother's testimony "was broad and vague and there was no evidence to substantiate the mother's claims that the father committed a family offense against her."[9] The court took judicial notice that the mother had filed for an order of protection the same time she filed for custody of the child and the case was dismissed without prejudice. We don't know what really happened in that case. The mother was unable to meet the burden of proof and she may have, in fact, been using this domestic violence claim to bolster her case. On the other hand, however, the fact that she was unable to meet the burden of proof does not mean that abuse did not actually occur—domestic abuse is by nature often secretive. We will never know for sure.

In *Mary E. v. Usher E.*,[10] the trial court found that the mother's testimony about physical violence was not credible. In so holding, the court found the mother's inconsistent statements, her failure to reveal her true assets and source of income, and the motive for her decision to live in a shelter for one year, among some of the reasons for this conclusion. The court found credible, however, the father's claim that he had to exercise control over finances due to the mother's secreting assets, manipulation of finances and the fear she imposed on her children regarding access to food.[11] The forensic evaluator testified that he did not believe that domestic violence took place and the court found the forensic evaluator's conclusion that the mother alienated the affections of the children toward the father to be valid. The court held that when the mother's actions were all taken in context, it appeared that she falsely reported that she was a victim of physical abuse to gain entry into the homeless shelter in order to obtain benefits at no cost. In conclusion, the court awarded custody of the two minor children to the mother but awarded the father full decision making authority for medical and mental health issues.[12] In this decision, it is clear that this Judge took the issue of domestic violence very seriously but the mother was simply unable to meet prove her case. Justice Jeffrey S. Sunshine, in his decision, acknowledged, "even one (1) act of violence against a spouse violates human dignity" and he further noted that domestic violence "is damaging both to society, the individual against whom the acts of violence were perpetrated and the family unit."[13]

One issue that is facing victims of domestic violence is that some courts and forensic evaluators are beginning to look at both parents as equal partners having an active role in raising their child. While this is certainly very beneficial and a long-awaited positive development for both fathers and children, it can have a negative impact on victims of domestic violence. This is a drastic change from long ago. Historically, the placement of children in relation to their parents has varied. When the English Common Law system was established, it was common for children to essentially be considered property of their

fathers and since women were not granted the right to own property during that time, custody went to the fathers.[14] The common law "tender years doctrine," a legal principle which has existed in family law since the late nineteenth century, presumed that during a child's tender years, the mother should have custody of the child.[15] The tender years doctrine was also frequently used in the 20th century until it was gradually replaced towards the end of the century by the "best interests of the child" standard. More and more expert testimony was being presented by child psychologists regarding the negative impact of presuming that one parent is more fit than the other as a matter of law. Research showed that children need a significant relationship with both parents in order to survive the emotional impact of divorce and continue to thrive thereafter.

Today, sole custody awards are giving way to joint custody or parenting plans.[16] This is because of the belief and desire that children should keep and maintain strong relationships with both parents whenever possible. Thus, the "tender years doctrine" was replaced with the notion that both parents play an important role in a child's development and the best interest of the child became the paramount concern. Since both parents are beginning to be viewed as having equally important roles in a child's life, there is a strong push in settling divorce cases for both parents to share joint legal and sometimes, shared parenting. For some, this is great news, but for those victims of domestic violence, this is another obtrusive hindrance. Joint custody and/or shared parenting plans are not a viable option in a case with domestic violence. The fact is that domestic violence not only makes joint custody a bad idea, but potentially places all of the family members at risk. According to Peter Jaffee, Nancy Lemon and Samantha Poisson, the presence of domestic violence in a custody dispute "demands a different analysis and distinct interventions by Judges, policymakers and mental health professionals."[17] There is a good reason why domestic violence cases must be treated differently, as shared or joint custody is particularly harmful to children when one of the parents is an abuser. Where there is a history of domestic abuse, parents cannot be advised to simply "put the past behind."[18] A parent cannot coparent with an abuser because it is unsafe to challenge him or her and compromise is impossible when there is unequal power. Parenting access and custody plans must safeguard both the well-being of the mother (or father, as the case may be) and the children. Citing Dr. Janet Johnson, a renowned expert in this area, Jaffee, Lemon and Poisson state that the notion of joint custody in these cases must be abandoned and replaced with specific custody and visitation plans.[19] Judicial authorities strongly urge against an award of joint custody in custody disputes where domestic violence is an issue.[20]

One of the challenges that victims of domestic abuse often face is getting the court to take them seriously, especially as many abusers completely deny the allegations. The fundamental problem, too often missed by courts, is that abusers are willing to see their children harmed in order to maintain what they believe is their right to control or punish their partner. Not all judges fail to understand the dynamics of domestic violence, and more and more are taking this issue very seriously, as is evidenced by a recent case in Essex County, New York.

In *Rutz v. Rutz*,[21] the Family Court, Essex County, made a bold and important statement relating to domestic abuse when it awarded sole custody of the parties' two children to the mother, stating, "The effect of domestic violence by the father against the mother is of deep concern to this court, particularly in its pervasive effect upon the development of the parties' children and the children's relationship with the mother."[22] In *Rutz*, among a laundry list of the father's abusive behavior toward the mother and the children, there were two incidents of domestic violence which involved police involvement, the children had been modeling the father's disrespectful and insulting behaviors towards the mother, and the father had exhibited poor parental judgment when he had the children pray for a reconciliation and alienated the children against the mother. In awarding the mother sole legal and physical custody of the children, the court reasoned that "the effect of any alleged domestic violence upon the children is a factor that must be conserved, among others, in custody cases."[23] Interestingly, in response to the father's presentation at trial of several witnesses to vouch for his "good character," the court noted, "It is intrinsic to the nature of domestic violence based relationships that the controlling and harmful behaviors accompanying such abuse are often limited to inside the four walls of the home, and remain a secret to on lookers."[24] It is encouraging to see a judge who understands the dynamic of an abusive relationship and who did not fall into the trance of a seemingly charming manipulator.

Similarly, in an earlier case, *Felty v. Felty*,[25] the Appellate Division, Second Department, affirmed the lower court's award of custody to the mother, finding that the Family Court properly found that the domestic violence perpetrated by the father upon the mother "demonstrates that the Mother is better suited to provide the children with moral and intellectual guidance."[26] The Appellate Court reasoned that the Family Court, which had the benefit of observing the witnesses first-hand, credited the mother's allegations of domestic violence by the father and found that his denials of domestic violence toward the mother "lacked veracity."[27]

The process by which custody decisions are reached is similarly significant in cases involving domestic abuse. It is typical that the same power dynamic between the spouses exhibited in the marriage and home will carry though to their custody proceedings. As matrimonial and family law attorneys, we often encourage the couple to consider mediation as a constructive alternative to

traditional litigation. As expressed in the New York State Bar Association, Task Force on Family Court: Final Report, "one of the most potentially beneficial Family Law initiatives in recent years has been the establishment and expansion of mediation, as well as other alternate dispute resolution programs."[28] The report made a recommendation to continue to expand and fund mediation programs to the benefit of all families. However, it strongly cautioned against using mediation in circumstances involving domestic violence.[29]

Successful mediation is dependent on both parties being on equal footing. While it is entirely possible and even common for spouses to have unequal earnings or a differentiation in their household roles they still maintain (at least prior to their marital discord) a partnership and mutual understanding. In an abusive relationship in which one party is exerting complete power and control over the other party, mediation would never be an appropriate avenue. The courts and attorneys alike must be careful not to push such parties in that direction. A mediation experience between such spouses would prove to be completely unproductive and would, in all likelihood, be extremely damaging to the abused party as he or she would continue to be manipulated and controlled.

Judges, attorneys, mediators, clergy, and all decision-makers must exercise great caution in assuring that firstly, the process by which the custody arrangements will be made is fair and balanced and in avoiding awarding, agreeing to or even suggesting sole custody or shared parenting to perpetrators of domestic violence. Sensitivity toward the unique issues and challenges presented in domestic abuse cases is of paramount importance to a fair disposition. Both parties must be represented by strong and knowledgeable representatives who can advocate for them in an adversarial scenario and not mediation. A far-reaching and forward thinking plan must be put into place so as to insure the safety and well-being of all parties while preemptively leveling the playing field for future custody questions that might arise. It is imperative that we do everything we can to protect the children and the victims of domestic abuse so that they can move forward with their lives as survivors and not be further victimized by an unsympathetic or flawed system.

Endnotes

1. N.Y. Domestic Relations Law § 240 (1).
2. *Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982).
3. *Frankiv v. Kalitka*, 105 A.D.3d 1045 (2d Dept 2013).
4. N.Y. Domestic Relations Law § 240 (1) (L 1996, ch 85); *E.R. v. G.S.R.,* 170 Misc. 2d 659 (Family Ct., Westchester Co. 1996).
5. *E.R. v. G.S.R.*, 170 Misc. 2d 659 (Family Ct., Westchester Co. 1996) (citing DRL § 240 L 1996, ch 85 § 1).
6. Peter G. Jaffe, Nancy K.D. Lemon and Samantha E. Poisson, *Child Custody & Domestic Violence: A Call for Safety and Accountability*, 11 (2002).
7. Peter G. Jaffe, Nancy K.D. Lemon and Samantha E. Poisson, *Child Custody & Domestic Violence: A Call for Safety and Accountability,* 16 (2002).
8. *Yves M. v. Mildred C.,* 44 Misc. 3d 1218 (A), 2014 N.Y. Misc. LEXIS 3427 (Family Ct., Kings Co. 2014).
9. *Id.*
10. 38 Misc. 3d 1229 (A), 967 N.Y.S.2d 868 (Sup. Ct., Kings Co. 2013).
11. *Id*.
12. *Id.*
13. *Id.*
14. Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 Cal. L. Rev. 335 (1982).
15. One early case to recognize the tender years doctrine was the case of *Commonwealth v. Addicks,* 5 Binn 520, 521 (Pa. 1813*)* decided in 1813. The court stated that "…considering their tender age, [the minor children] stand in need of that kind of assistance, which can be afforded by none so well as a mother."
16. It should be noted, however, that the New York Courts will not award joint or shared custody unless the parents can demonstrate certain criteria, including but not limited to, a level of maturity, willingness and ability to set aside their personal differences in order to decide what is in the best interest of their child.
17. Peter G. Jaffe, Nancy K.D. Lemon and Samantha E. Poisson, *Child Custody & Domestic Violence: A Call for Safety and Accountability*, viii (2002).
18. Peter G. Jaffe, Nancy K.D. Lemon and Samantha E. Poisson, *Child Custody & Domestic Violence: A Call for Safety and Accountability*, 3 (2002).
19. Peter G. Jaffe, Nancy K.D. Lemon and Samantha E. Poisson, *Child Custody & Domestic Violence: A Call for Safety and Accountability*, 15 (2002).
20. Catherine F. Klein, Leslye E. Orloff, *Symposium On Domestic Violence: Article: Providing Legal Protection For Battered Women: An Analysis Of State Statutes And Case Law*, 21 Hofstra L. Rev. 801.
21. 2014 N.Y. Misc. LEXIS 4609 [2014 NY Slip Op. 51531(U)].
22. *Id.*
23. *Id.*
24. *Id.*
25. *Felty v. Felty*, 108 A.D.3d 705 (2d Dep't 2013).
26. *Id*. at 708-709.
27. *Id.*
28. New York State Bar Association, Task Force on Family Court: Final Report 24 (January 2013), available at www.nysba.org/TFFCFinalReport.
29. *Id.*

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Client-Directed Representation Makes Good Sense

By Patricia Miller Latzman

An article in the Fall 2014 issue of the *Family Law Review* entitled *Does Client-Directed Representation of Children Make Good Sense Based on Neuroscience and Child Psychology* ,[1] questions the role of the Attorney for Children ("AFC") and the child's involvement in parental custodial disputes. Contrary to the mandate of section 7.2 of the Rules of the Chief Judge,[2] the article's author, a practicing psychiatrist, argues against client-directed representation and concludes that the child should be spared from involvement in the proceeding. The author is a mental health professional, not an attorney involved in the court process with a full understanding of the role of the AFC and the Court in custodial disputes.

When parents make custodial decisions, there is no need for children to have an attorney advocate their positions. The best interests of a child are served when parents make decisions without the intervention of the Court.[3] When parents are unable to agree what is best for their children, they empower the Court to decide. In custody and visitation disputes, the Court, as *parens patriae*, is charged with deciding what is best for a child. The appointment of an AFC to represent the interests of a child is appropriate and helpful to the court.[4] Even then, the Court encourages the parents to enter into agreements settling all matters regarding custody and parenting time. While the AFC will be heard regarding the child's position, the Court will not withhold approval of the parents' settlement solely because the child does not agree.[5]

Children are placed in the middle of the matrimonial dispute by their parents, not by the Court. It is the role of the AFC to insure that the child is heard despite the litigants' rancor. Children will not be spared from involvement so long as their parents continue to use custody and visitation issues as chips in their matrimonial actions. The Court must consider the child's position as a factor in its final determination. Someone besides the warring parents must speak for the child. The AFC, employing the client-directed model, speaks to the Court on behalf of the child. The AFC protects the child from being forced to take sides by adversarial parents.

A child has a legal interest and specific rights to protect in a custody dispute that neither the parents nor the court can adequately represent. The adversarial nature of the proceedings leaves no other option to protect the child.[6] The United States Supreme Court has held that courts cannot adequately represent the interests and protect the rights of children.[7] Thus, if the fundamental rights of parents are involved in custody disputes, can the determination be less important to a child? Without the AFC presenting the child's position, a Court would hear only the litigants' self-interested position on custodial issues. As the United States Supreme Court said in *Ford v. Ford*,[8]

> Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.

Without the AFC presenting the child's position, the court hears from the child only through the subjective lens of the parents.

The AFC is charged with "zealously advocating the child's position" (unless the AFC is "convinced" that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child). The AFC consults with and advises the child, is to have a "thorough knowledge of the child's circumstances," and "may recommend to the child a course of action that in the attorney's view would best promote the child's interest."[9] The AFC constantly advises the Court of the child's wishes. The AFC fully participates at trial, introducing evidence, presenting and cross examining witnesses, participating in *Lincoln* hearings, and submitting a closing statement. By providing representation to the child, the AFC insures that all evidence is developed and presented. Neither the AFC nor the child makes the ultimate decision; that is the function of the Court in making the best-interest determination. By advocating a child's position, the AFC insures that the Court is aware of all the facts and circumstances necessary to protect the child and render a truly best-interest determination. The client directed representation mandated by Rule 7.2 provides the Court with information directly from the child rather than the adverse parents.

The child's position is only one factor in a Court's best interest determination.[10] No Court relies on the child to choose one parent over the other. While a Court should consider a child's view when determining issues of custody and visitation, it is not determinative.[11]

As the child's attorney, the AFC consults, counsels, advises and assists the child in rationally forming and articulating her position. With the AFC's assistance a child is better able to understand the real consequences of her position. The obligation of the AFC to consult and advise the child to the extent and manner consistent with the child's capabilities, explain options and recommendation avoids placing the child in the untenable position of

having to choose one parent over another. By discussing issues, consistent with his or her level of understanding, the AFC provides the child with the necessary guidance to avoid poor decisions based upon impulsivity or desire for pleasure. The presence of an AFC impedes the parents from pressuring the child or encouraging decisions through permissiveness. AFCs assist the children in reaching decisions based upon their needs and parental expectation.

In intact families, children have always had a say in their own lives. Children may not have the final say but they are permitted input into the decision making of his or her daily lives. Allowing children choices encourages their future autonomy. Through the AFC the child knows his or her wishes are heard. By requiring client-directed advocacy, Rule 7.2 recognizes that children, even in the midst of an acrimonious matrimonial action, should continue to have input into their own lives.

The client-directed representation mandated by Rule 7.2 is the result of the Court's careful and considered role of the AFC and the parameters of proper advocacy. Until mental health professionals offer evidence-based conclusions specifically referring to adverse effects resulting from current practice, there is no basis to reconsider this approach. The only basis for change should be data-driven research specifically targeting the effect of the AFC advocating for his or her client consistent with the Rule 7.2.

Endnotes

1. William H. Kaplan, M.D., *Does Client-Directed Representation of Children Make Good Sense Based on Neuroscience and Child Psychology*, Family Law Review, Fall 2014, Vol 46, No. 3.
2. 22 NYCRR §7.2.
3. Kimberly C. Emery and Robert E. Emery, *Who Knows What is Best For Children? Honoring Agreements and Contracts Between Parents Who Live Apart*, 77 Law & Contemporary Problems, 151 (2014).
4. *Anonymous v. Anonymous*, 102 A.D.2d (2d Dept 2013).
5. *See McDermott v. Bale*, 94 A.D.3d 1542 (4th Dept 2012).
6. *See Borkowski v. Borkowski*, 90 Misc.2d 957 (Sup. Court, Steuben County (1977).
7. *In re Gault*, 387 U.S. 1 (1967).
8. 371 U.S. 187, 193 (1962).
9. 22 NYCRR §7.2(d).
10. *Eschbach v. Eschbach*, 56 N.Y.2d 167 (1982).
11. *William-Torand v. Torand*, 73 A.D.3d 605 (1st Dept 2010).

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The First Department Decision in *Anonymous v. Anonymous*—A Further Erosion of the Prenuptial Counsel Fee Waiver?

By Glenn S. Koopersmith

The recent decision of the Appellate Division, First Department in *Anonymous v. Anonymous*,[1] is yet another in the ever-increasing stream of cases addressing the validity and impact of prenuptial agreements. *Anonymous* indicates that while the First Department remains more willing than the Second Department to uphold the validity of such agreements (especially where they are negotiated over time, with the benefit of counsel), it will not summarily uphold a waiver of counsel fees, if a portion of the agreement—in this case the maintenance provision—*potentially* may be deemed unconscionable and unenforceable.

In *Anonymous*, the husband, the (much) wealthier spouse, insisted upon the execution of a prenuptial agreement as a condition to the marriage. Although the wife was represented by "highly competent and experienced matrimonial counsel," and six drafts of the agreement were prepared over a four week period, she nevertheless sought rescission, claiming that: (a) she was pressured into signing the agreement on the night before their wedding; and (b) the husband had promised to "rip up the agreement after they were married for 10 years," echoing the successful claim advanced in *Petrakis v. Cioffi-Petrakis*.[2],[3] The *Anonymous* prenuptial agreement (hereinafter the "Agreement") recognized the husband's vastly superior financial circumstances, noting that the amounts the wife would receive "are so significantly less than either defendant's assets or annual income that the precise amount of [his] assets and income is irrelevant to her decision to enter into this Agreement...."

The wife commenced an action for divorce after 12 years of marriage. In determining the wife's motion which sought, *inter alia*, rescission of the Agreement, Justice Ellen Gesmer concluded that the wife had failed to sustain her burden of establishing a basis for setting aside the agreement as a whole.[4] In what proved to be a significant ruling, she referred to trial the wife's claim that the maintenance provision of the Agreement was unconscionable and will be unconscionable upon the entry of Judgment. Although she awarded the wife $300,000 in counsel fees for the custody litigation, she denied additional counsel fees for non-child related issues, upholding the validity of the counsel fee waiver in the Agreement.

On appeal, the First Department issued a majority opinion; there was a separate concurring opinion authored by Justice David B. Saxe, in which Justice Richard Andrias joined. The majority opinion affirmed that portion of the subject order which upheld the validity of the Agreement, confirming that the wife had failed to sustain her burden of proof. Notwithstanding that the husband will likely retain the vast majority of assets and income pursuant to the Agreement, the Court did not take the *Petrakis*-bait—it *rejected* the wife's claim that the husband had promised to "tear up the agreement," noting that "the agreement expressly disclaims reliance on representations other than those set forth in the agreement...." It also refused to consider extrinsic evidence with regard to the wife's claims since the Agreement was not ambiguous. Based upon the parties' express acknowledgment of the enormous disparity in income and assets, the Court rejected the wife's claim that the purported failure of the husband to disclose his assets was sufficient to state a *prima facie* claim for rescission. Lastly, it concluded that the husband's failure to transfer a parcel of real property to the wife pursuant to the Agreement, for which no demand was ever made, might have stated a claim for breach of contract but did not support a cause of action for rescission.

With respect to the counsel fee award, the First Department modified the order on appeal by affirming the $300,000 award for "child-related issues," while invalidating the waiver of fees for services rendered "beyond that incurred for child-related issues." The majority held that since the decision to refer the determination of the enforceability of the maintenance provision to the trial was "not challenged on appeal,[5] an award of counsel fees *may* be necessary despite the fee waiver, 'as justice requires' (Domestic Relations Law §237[a]) in order to ensure a level playing field to litigate her claim (footnote omitted)." In addressing the rationale underlying its determination, the majority stated:

> (G)iven the unique procedural posture of this case and the great disparity between the parties finances both at the time of the execution of the prenuptial agreement and at the time of the commencement of this action, plaintiff's request for counsel fees beyond those incurred for child-relat-

ed issues is an issue appropriate to leave for trial (*See Kessler,* 33 AD3d at 47-48).

Presumably, the "unique procedural posture" references the referral of the maintenance-waiver issue to trial, without appeal. Thus, the majority opinion pertaining to counsel fees for "non-child related issues" was based on the *possibility* that the maintenance provision could be invalidated at trial. Conspicuously absent from both the majority and concurring opinions is an explanation as to why any future counsel fee award was not limited to the only open issue—maintenance—instead of the much broader "non-child related issues" which potentially leaves unresolved whether there has been a waiver of counsel fees for services rendered with respect to equitable distribution.

While continuing to laud the sanctity of prenuptial agreements (they are "presumed to be valid and controlling unless and until the party challenging it meets his or her very high burden to set it aside"), the majority finds that this "unique procedural posture" coupled with the "great financial disparity" between the respective parties' circumstances at the time of execution of the agreement and upon the commencement of the action provides a basis for overruling and invalidating the counsel fee waiver. Given that many, if not most, prenuptial litigations involve parties who are in grossly disparate financial circumstances (both upon execution and commencement of a divorce action), this may appear to constitute an open invitation to both attorneys and litigants to seek the invalidation of these waiver provisions on a routine basis. It is this concern which appears to have been the primary motivation underlying the Court's concurring opinion.

Initially, the concurring opinion focuses upon two divergent, competing public policy considerations—permitting parties to decide "their own interests through contractual arrangements" and ensuring that non-monied spouses "have the ability to litigate legitimate issues." While agreeing that it was proper to refer the issue of whether the wife "may be entitled to an award of counsel fees for the litigation of the non-child-related issue of maintenance" to trial, Justice Saxe was concerned by the "strong possibility that this ruling may be misunderstood or misapplied... "since it "could encourage future baseless applications for awards of counsel fees despite fairly-negotiated, valid prenuptial agreements containing fee waivers."

The concurring opinion notes that "prenuptial agreements most often involve substantial disparities of wealth between the parties," but emphasizes that "under most circumstances, courts should enforce counsel fee waivers contained in prenuptial agreements." Justice Saxe explains that where an agreement is not set aside on the basis of fraud, duress or other inequitable conduct, specific provisions of that agreement may be invalidated. Ironically, he references the "heightened standard" of review that the Domestic Relations Law establishes for awards of child support (which must comply with the Child Support Standards Act) and maintenance (which cannot be unconscionable at the time of the entry of judgment pursuant to DRL §236[b][3][3]), while noting that there is no comparable standard for the payment of counsel fees. While acknowledging that there is "simply no statutory basis for setting aside a presumptively valid counsel fee waiver on any grounds other than the usual grounds for setting aside a contract provision, such as unconscionability based on overreaching or inequitable conduct in the execution of the agreement," he still concludes that under the "unique procedural posture of the matter" it was proper to disregard the counsel fee waiver regarding the "non-child" related issues and refer the ultimate determination of the validity of the waiver to trial.

In reaching this determination, the concurring opinion cites the Second Department decision in *Kessler v. Kessler*,[6] in which the Court found a counsel fee waiver provision to be "unconscionable and unenforceable in light of the strong public policy embodied in Domestic Relations [Law §] 237(a)." The *Kessler* Court justified its invalidation of the counsel fee waiver by noting that there were triable issues as to distribution of property acquired after the execution of the agreement, which presented, in Justice Saxe's words, "a legitimate need for some litigation." He differentiates *Kessler* from *Anonymous* by noting that the dispute in *Anonymous* does not relate to the Agreement's failure to cover certain issues, but rather to the as yet unchallenged possibility that the maintenance provision may be deemed to be unconscionable at trial.

The concurring opinion emphasizes that a fee waiver in a valid prenuptial agreement should generally be honored notwithstanding a significant financial disparity between the respective parties' finances, noting that the waiver will be invalidated *only* in the "narrowest of circumstances" where: (a) the party challenging the waiver has made a "potentially meritorious challenge" to the terms of the prenuptial agreement; (b) "litigation of an issue is required although it is covered by the parties' prenuptial agreement"; and (c) "justice requires an award of fees to permit the nonmonied spouse to litigate the issue."

Unfortunately, while Justice Saxe's attempt to clarify the significance of the ruling was surely well intentioned, it raises as many questions as it answers. The Justices in the majority apparently did not "share the concern" of their concurring colleagues that the decision "will encourage baseless fee applications" and claim that the decision "does nothing to alter or expand well settled precedent regarding enforcement of valid prenuptial agreements." There is no indication that the majority endorses either the analysis or conclusions advanced in the concurring opinion. What does seem clear is that where a prenuptial agreement contains a counsel fee waiver provision and there is a substantial economic disparity

between the parties which may impede the non-monied spouse's ability to litigate the issue, to the extent that any issue survives summary judgment and remains viable, determination of the waiver issue must await trial and should not be resolved in a pre-trial motion. Moreover, *Anonymous* would appear to portend that to the extent that a trial court invalidates any portion of a prenuptial agreement, a counsel fee waiver may not be enforced for the services provided to the non-monied spouse with regard to that issue, provided that he or she needs such an award to "level [the] playing field" (which is usually the case given the financial disparity which often accompanies such agreements). Notwithstanding the protestations in the concurring opinion, it surely will *not* decrease the frequency with which attorneys for the non-monied spouse attempt to challenge the validity of the counsel fee waiver provisions of a prenuptial agreement. Only time will tell whether it will result in an increase in those applications.

Endnotes

1. 123 AD3d 581 (1st Dept. 2014).
2. 103 AD3d 766 (2d Dept. 2013).
3. Petrakis was addressed in the author's prior column entitled *Marital Agreements After* Petrakis *and* Petracca, NYSBA Family Law Review, Fall 2014.
4. She also denied the wife's motion to extend the stipulated time period within which the wife was required to seek rescission to afford her additional discovery on the issue.
5. It is curious that both the majority and concurring opinions reference the failure to appeal this issue since an order which defers disposition of a motion to the trial is generally not appealable as of right. See CPLR 5701(a)(2)(v); *Nathel v. Nathel*, 55 AD3d 434 (1st Dept. 2008); *Beharry v. Guzman*, 33 AD3d 741, 742 (2d Dept. 2006).
6. 33 AD3d 42 (2d Dept. 2006).

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Post-No-Fault Maintenance Awards: Will Predictability of Results Trump Equity?

By Nancy E. Gianakos

For the matrimonial world, 1980 and 2010 were years of great significance. In 1980, the Equitable Distribution Law, Domestic Relations Law ("DRL") §236, was enacted permitting courts authority to divide marital assets irrespective of which party held title. In 2010, significant amendments to the law included no-fault grounds for divorce and the introduction of maintenance guidelines for temporary awards. This year may prove to be another watershed year as proposals for reform of the maintenance provisions of the Domestic Relations Law percolate among various groups with diverse opinions regarding future awards of temporary and post-divorce maintenance.[1]

The Genesis of a Formulaic Approach to Maintenance Awards

It was generally believed in 1980 that with enactment of DRL §236, spousal support awards would actually diminish in both duration and amount because courts for the first time could fairly divide and distribute all assets acquired by either spouse during the marriage irrespective of title. In the years immediately following, courts fashioned awards based on the notion that given adequate time a dependent spouse (typically the woman) could acquire the skills or education necessary to acclimate to the workforce and presumably become self-sufficient. Times were changing, the socioeconomic landscape seemingly afforded women greater employment opportunities, and equality of the sexes resonated politically.

The concept of marriage as an economic partnership was evolving and courts were afforded broad discretion in defining marital interests. Enhanced earnings due to a professional license or advanced degree, as well as the appreciation of the titled spouse's separate property, became part of the marital estate for equitable distribution purposes. As the marital estate was enlarged, the frequency of long term and lifetime maintenance awards diminished, as was anticipated by the 1980 Legislature. In addition, the concept of marriage as a business relationship reflected a growing judicial reluctance to assign "marital fault" or to give it any weight in distributions of marital property, except under the most egregious of circumstances that would "shock the conscience of the court."[2]

By the mid-1980s, however, it had become apparent from testimony given during statewide hearings that the application of the new statutory provisions, rather than economically benefiting the dependent spouse, actually caused more undue hardship. National surveys confirmed the harsh reality that the standard of living of women and children post-divorce took a steep decline as compared to the male spouse.[3] The lag in women's wages and the barriers of the corporate "glass ceiling" exacerbated this disparity.

In 1986, additional amendments to DRL §236 B were enacted. The modifications called for recognition of a "lifestyle" component by the courts in determining final awards and continuation of a discretionary approach. This component theoretically was the panacea to address deficits in amount and duration resulting solely from a "needs based" analysis.

Nearly a decade later, the Court of Appeals refined the "lifestyle analysis" in its decision in *Hartog v. Hartog*.[4] In effect, the Court recognized that each family's circumstances are unique and rejected cookie cutter awards and arguably, a formulaic approach to spousal support awards. There the Court mandated that a self-supportive test (needs-based analysis) be predicated on the particular pre-divorce lifestyle of the maintenance recipient and not some generally defined acceptable level of subsistence. Under a *Hartog* analysis, discretion remained with the trial court to tailor maintenance awards for both duration and amount reflective of the family's socioeconomic status.

2010: Temporary Maintenance Guidelines—Policy for Predictable and Consistent Results

By 2010, pressure from constituents around the state for "no fault" divorce resulted in amendment of the Domestic Relations Law to include irretrievable breakdown as a basis for divorce. (New York was the last state to enact a "No-Fault" Divorce ground.) The financial impact of divorce on families which permeated policy concerns of the 1980s were no less of a concern in 2010. Rectifying the disparity in lifestyles between spouses post-divorce was a high priority during debates surrounding no fault legislation in 2010.

The final passage of the "no fault" bill resulted from an eleventh-hour compromise between the groups seeking no-fault and those who argued for statewide consistency in the implementation of maintenance awards via a formulaic approach. Those groups who advocated on behalf of dependent spouses with limited assets pushed for a guidelines formula. They argued that a lack of funds generally resulted in inadequate representation and unfavorable maintenance outcomes. It was their position that the

predictability of results emanating from application of a guidelines formula would provide a consistency of results throughout the state along with assurances to both payer and payee regarding their obligations and perhaps even diminish litigation.

As a result, adoption of the no-fault provisions was accompanied by the passage of the temporary support guidelines similar to the guidelines of the Child Support Standards Act (the "CSSA"). [In 1989, provisions of the Family Court Act ("FCA") §413 and DRL §240 were amended to include and establish a support standard in compliance with the Federal Family Support Act of 1988 (Pub L. No. 100-485.[5] For the first time, a formula based approach was introduced in determining a support award, the "CSSA" guidelines. (Millions in federal subsidies would have been forfeited had New York failed to embrace federal policy initiatives).]

The temporary maintenance guidelines presently calls for a redistribution of income between spouses on income of up to $543,000 of the payor's income and the result of the formulaic equation is deemed "presumptively" correct.[6]

Inherent flaws in these guidelines and the CSSA guidelines lie in the definition of income and the presumption that the payer has the ability to pay. The income used to calculate a temporary award is based upon the "gross (total) income as should have been or should be reported in the most recent federal income tax return."[7] Gross income is then reduced by FICA, New York City and Yonkers tax (and other lesser deductions), but not federal or state income taxes.[8] Failing to give consideration to the impact of income taxes presumes income available for redistribution that simply doesn't exist. Not only is the formula flawed, but so too is the application of the law. Some trial courts interpreted the statute to direct the "monied spouse" (the spouse with the greater income) to pay the presumptively correct amount of maintenance as well as the payment of the carrying charges of the marital residence, health insurance premiums and other marital expenses.

As a result, litigants often find themselves caught in *pendente lite* limbo when a recipient fares better on an interim basis than what could be reasonably anticipated in a final award. Temporary awards could extend beyond the length of the marriage itself. The burden was shifted to the monied spouse to convince the court that equity called for a deviation from guidelines. The appellate mantra that *pendente lite* inequities are best remedied by a "speedy trial" permeates their decisions. Appellate relief for improvident interim awards is rare. If unsuccessful, either the monied spouse suffers the inequities in compliance or defends a contempt motion.

At the time of the passage of "no-fault" divorce, similar guidelines were considered for final maintenance awards but were not enacted. However, the 2010 legislature reserved the the issue for future address by appointment of a Law Revision Commission (the "Commission") to assess the post economic consequences of divorce on families. The statute directs the Commission to review the maintenance laws of the state and make recommendations including "proposed revisions of the maintenance laws to achieve stated legislative goals and objectives."[9] The policy of the state is, as enunciated by the 2010 legislature, "…to achieve equitable outcomes when families divorce" with emphasis on the importance of ensuring that "the economic consequences of a divorce are fairly shared by divorcing couples."

Proposals for Maintenance Awards Post-2010

The Commission in its "Final Report on Maintenance Awards in Divorce Proceedings," dated May 15, 2013, acknowledged the need for striking a balance between predictable results and lifestyle considerations of families. It also addressed some of the inherent problems presented by application of the current guidelines for temporary awards. The Commission's recommendations attempted to straddle divergent policy objectives by proposing a methodology with a two tier approach to awards.

For temporary awards, the presumptively correct amount of the award would result from the formula applied as follows:

a. for income below a set cap ($136,000 similar to the then CSSA income cap) it was proposed that a mathematical formula be applied and

b. for income in excess of the cap, it was recommended that the formula be applied to the first $136,000 of combined income and that the court be guided by a set of statutory factors in its consideration of an additional award beyond the statutory cap, which would be adjusted biennially.

c. If the court finds either that the award is unjust or inappropriate, then the Commission recommended the court be given the discretion to deviate from the presumptive award guided by certain statutory factors including any awards under DRL § 236B(8) to cover necessities, and for any amounts that one party paid to or on behalf of the other party, be they voluntary or court ordered payments. The presumption of actual need would have to be considered by the court for those who had established separate households prior to or during a matrimonial action. If the court deviated, then the rationale for deviation must be in writing or orally on the record.

d. In all cases, the court must allocate responsibility for the family expenses between the litigants during the pendency of the action.

e. The term of the award must not exceed the length of the marriage and would generally terminate with the pendency of the action.

Final Award Recommendations

A. Amount of a post-divorce award

- Application of the same formula recommended for temporary awards using the two tier approach.
- Continuation as is required under the present statute for the court to consider the assets each party receives in equitable distribution.
- Elimination of "increased earning capacity" as a marital asset for equitable distribution[10] and instead utilize enhanced earnings as a factor in determining the amount of income to be awarded as post-divorce maintenance.

B. Duration of post-divorce award

Factors for consideration to include the length of the marriage, the time required for the non-monied spouse in acquiring sufficient education or training to find employment as well as the age of the non-monied spouse. In addition the court must state the basis for the duration of its award in its decision. The Commission rejected outright durational limitations.

The Commission avoided the issue of tax impacting maintenance payments as too complicated; it expressed concern that interim payments would be delayed to the detriment of the lower income recipients if taxes were part of the formula. Some opposed a net income approach for maintenance calculations in the belief that confusion would result because child support is based on "adjusted gross" income. Ignoring the tax impact on available income for maintenance perpetuates an inequity and hardly seems justifiable given that tax impacting is a consideration in equitable distribution awards.[11]

During the 2013 legislative session, a bill that ultimately emerged failed in many respects to adequately address the problems encountered since the enactment of the 2010 guidelines. It partially incorporated the two-tier approach for maintenance awards proposed by the Commission. However, it did not take the suggested reduced income cap of $136,000 for the guidelines formula (to match the CSSA cap) nor did it alleviate the burden of the monied spouse to prove the necessity of a deviation.

In September 2013, the Family Law Section, in correspondence addressed to the State Assembly, voiced opposition to the bill, supporting recommendations of the NY State Law Review Commission. Those recommendations also included continued judicial discretion to deviate from the presumptively correct award if it found the award to be "unjust or inappropriate" using prescribed statutory factors expressed in a written decision. In those cases where income exceeded the guidelines cap, the court could adjust the award following the *Hartog* analysis.[12] It also called for a court in all cases to allocate the responsibilities for the family's expenses to each party during the pendency of the action, to consider whether parties have maintained separate households prior to commencing or during an action and the actual need for temporary support as well as set a termination date for temporary maintenance so the duration of the award not exceed the length of the marriage.

The maintenance issue again made its way into the legislative agenda in 2014 with a bill proposed by Senator John J. Bonacic. It called for durational parameters that in effect guaranteed payments for a time certain based solely on the number of years of marriage and capped the maximum duration to the number of years married.[13]

In a Memorandum of Opposition dated May 12, 2014 (the "Memo"), the Family Law Section, reiterated reasons to reject the bill for its imposition of arbitrary durational limits; the application of a guidelines formula on income of up to a proposed cap of $300,000 for both temporary and permanent maintenance and to extend maintenance awards after the remarriage of the maintenance payee.

To support its position, the Family Law Section relied on statistics gathered during the Commission's fact finding session. In 2008, it was reported that 94.8% of individual income tax return filers (including joint returns) reported income of less than $200,000. According to the Memo, if the purpose of the arbitrary cap is to protect lower and middle income families, then a $300,000 cap is too high. By lowering the cap to align with the CSSA guidelines, it was argued that the "majority of New Yorkers" would be protected and only those exceptional income cases would be determined outside of the presumptively correct cap. This would reserve to the court its discretionary powers and preserve the current equitable approach to final maintenance awards where assets received in distribution of the marital estate are also part and parcel of the maintenance equation.

The bill died with the session's end.

On the Maintenance Horizon

The law as it currently stands confronts policy makers on the one hand with temporary guidelines for predictable results and the need for individualized treatment for each marriage in determining final awards. The 2010 legislative directive "to achieve equitable outcomes when families divorce" remains an aspiration.

Renewed efforts in the 2015 legislative session for reform of maintenance laws are anticipated. If the persuasive forces behind the Bonacic bill for durational limits prevail, we could see maintenance legislation along the lines of New Jersey's new alimony provisions N.J.S.A. 2A:34-23 (b) in September, 2014.[14] The most significant change was the elimination of "permanent alimony" replaced by "open durational alimony." Setting time limits on maintenance awards appears to be the main thrust of that newly revised statute, which also included:

- Termination of payments if the recipient lives with another if unmarried;
- Modification of an award if payer is out of work for more than 90 days;
- A rebuttable presumption that alimony ends once payer reaches the full retirement age of 67; and
- Marriages of less than 20 years cannot have payments exceeding the number of years of the marriage unless a judicial finding of "exceptional circumstances."

As of January 2015, the Matrimonial Practice and Advisory Rules Committee has been working on recommendations to reflect a compromise of the varied approaches to determining maintenance awards.[15] It will be interesting to see if some of the rumored revisions include:

- a guidelines cap of $175,000 for both temporary and permanent awards;
- implementation of two varying formulas depending upon whether or not there are children of the marriage;
- judicial discretion to apply guidelines to income in excess of the cap;
- the definition of income may include "imputed" income from equitably distributed assets;
- durational limits will be advisory (unlike the Bonacic bill); and
- the elimination of enhanced earning capacity as an asset subject to equitable distribution.

Past policy considerations as reflected in modifications to the existing laws and the continued legislative pursuit to right economic disparities of divorce for the vast majority of New Yorkers, both on a temporary and permanent basis, are laudable. In an effort to find a solution, formulas are appealing for their predictable results and their ease of application. However, if equity is the ultimate policy consideration then the methodology must yield to the diversity of needs and lifestyle presented by each divorce.

Endnotes

1. Some members of this diverse group include the NYS Law Review Commission (appointed in 2010), the NYSBA Family Law Section, the American Academy of Matrimonial Lawyers and advocates against Domestic Violence.
2. *See Blickstein v. Blickstein*, 99 A.D.2d 287 (2d Dept 1984) where the court held that "As a general rule, the marital fault of a party is not a relevant consideration under the Equitable Distribution Law in distributing marital property…" unless the "…marital misconduct is so egregious or uncivilized as to demonstrate a blatant disregard for the marital relationship such that it "…shocks the conscience…" of the court "compelling the court to invoke its equitable power to do justice between the parties." Such conduct includes attempted murder (*Brancoveanau v. Brancoveanau*, 145 A.D.2d 395 (2d Dept 1988), repeated pattern of domestic violence (physical and verbal abuse) over a 21-year period (*Havell v. Islam*, 186 Misc. 2d 726 (Sup. Ct., N.Y. Co. 2000) and where husband sexually molested wife's 8-year-old granddaughter (*Eileen G. v. Frank G.*, 34 Misc. 3d 381 (Sup. Ct., Nassau Co. 2011).
3. Scheinkman, Practice Commentaries, McKinney's Cons. Laws of NY, Book 14, Domestic Relations Law §236.
4. *Hartog v. Hartog*, 85 N.Y.2d 36 (1995).
5. Gallet and Finn, *Spouse and Child Support in New York* §7.1 at 288 (2014).
6. Initially, the cap on income to which the temporary guidelines applied was $500,000; it is raised annually according to a formula, as of the most recent increase, March 2014, the cap is $543,000.
7. See Appendix A to the New York Temporary Maintenance Guidelines Worksheet, Itemization of Income and Deductions, I. Gross Income.
8. CSSA income is reduced for FICA and local New York City and City of Yonkers taxes.
9. DRL §236B(6)(a). A preliminary report was to issue within nine months of the 2010 amendments with a final report to follow.
10. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985). Court of Appeals decision interpreting DRL §236B(5) to include the "enhanced earnings" resulting from a professional license as a marital asset subject to equitable distribution. The bill would permit the consideration of "enhanced earnings" in a final maintenance award.
11. DRL §236B(6)(14).
12. *See Kaplan v. Kaplan*, 21 A.D.3d 993 (2d Dept 2005) where the court upheld applying CSSA guidelines to combined parental income of $300,000 when the combined income was over $400,000.
13. S7266—A9606, 2014.
14. N.J.S.A. 2A:34-23(b).
15. One of the standing committees established by the Chief Administrative Judge pursuant to Section 212(1)(q) of the Judiciary Law, consisting of judges and attorneys from around NY state.

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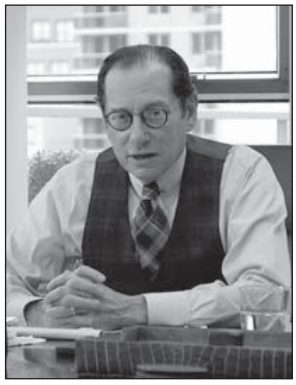
EDITOR'S NOTE: Details of proposed compromise legislation crafted by various groups interested in maintenance guidelines, including the New York State Bar Association Family Law Section, the New York Maintenance Standards Coalition, the Women's Bar Association of the State of New York, and the New York Chapter of the American Academy of Matrimonial Lawyers, were set forth in a New York Law Journal article authored by NYSBA Family Law Section Chair Alton L. Abramowitz, entitled *The Time Has Come for Maintenance Guidelines* on January 26, 2015. The compromise was part of efforts undertaken at the Matrimonial Practice Advisory and Rules Committee. As of the date of this publication, we await the formal introduction of legislation.

What Is a Matrimonial Lawyer?

By Robert Z. Dobrish



In every inquiry into what something is, or what something means, it is necessary to begin with the word and its roots. We all know what a "lawyer" is and what "family" means, but what about "matrimonial?" How has that word come to describe what we do? But just like the concepts we research in matrimonial law itself, finding a definitive answer, or even a source, is not as simple as one would hope. The word "matrimonial" is not clearly derived from any one source and one must therefore explore various alternatives. For example the Old French word "matremoine," which appears around 1300 CE, is clearly a good beginning, but it hardly provides a definitive end. Some say that that French word ultimately derives from Latin "matrimonium" which, itself, combines two concepts—"mater" meaning mother and "monium" meaning action or condition. But "monium" itself has a slightly and subtly different connotation, as in the word "pandemonium," where the "monium" clearly indicates an agitated condition. Thus, "matrimonium," in the Latin, might literally mean an agitated mother, which is one of the conditions that leads to a matrimonial action. Going back to the Old French, however, the word "matremoine" may have been derived elsewhere, from French roots itself. The French word "maitre" or "maitresse" in the feminine, when used as an adjective (as in maitre chez soi), means to be master/mistress in control. These concepts "control," "master" and "mistress" are concepts that are very common in matrimonial situations and one is therefore inclined to lean toward the French version. But what about the other part of the word, "moine"? Well, probably someone dropped the "s" at the end for an "e." The word is really "moins," which means "less" in French. Less is definitely a matrimonial concept as the payor is always left with less, the payee receives less than expected, and each parent receives less time with the children than they desire. Even if the "s" was not lost, but merely misplaced, as esses often are, the second part of matremoine may have once been matremonies, and we all know how appropriate a word derived from control of monies would be to describe our field. So, "matremoine" seems to fit very well.

But the word "matrimonial" was not actually linked with the practice of law until the 19th Century (1857) in England, with the passage of the "Matrimonial Causes Act" in Great Britain. Until that time, marriages were terminated by either annulment or by a private bill. It has been said that the first divorce in the Colonies occurred in 1643, but divorces were extremely rare, with marriages being ended only upon death or abandonment. There were no matrimonial lawyers then. It was not until after the Civil War (and, therefore, shortly after the passage of the Matrimonial Causes Act in Great Britain) that divorce rates began to rise in the United States. It is estimated that roughly 5% of marriages ended in divorce just after the Civil War, rising to 36% in 1964. This history helps us to understand where "matrimonial lawyer" comes from. Like so many other of our legal terms, it is derived from English law. So perhaps Old French shouldn't really apply, even if it seems apropos.

Moreover, the English have never liked the French and vice versa. There are many French words that the English have borrowed (e.g., legerdemain, rendezvous, manage a trois), but "matremoine" is probably not one of them. So, we return to the Latin. The possible Latin roots are Ma/tri/mon, Mat/rim/oni and Matri/moni. The first possibility would be "Ma," which could mean "mother" (from Mami) or possibly "mine" in a number of different languages. Or it could be the abbreviation for magister artium (Master of Arts), but that is unlikely.

"Tri" clearly comes from the root for the number three. But it is not always clear which three are involved. The expression "two's company, three's a crowd" could be employed to apply to various situations in matrimonial law. Then again, "tri" might be short for triage—a procedure that is employed in hospitals and matrimonial law offices on a daily basis. "Mon," going back to the French, means (masculine) mine. Since "Ma" could mean (feminine) mine the roots ma/tri/mon could derive from "mine (feminine) -triage -mine (masculine)" which describes the matrimonial conflict quite accurately: the man and woman each making claims that require triage. That works very nicely.

If we tried to split the word at Mat/rim/oni we could talk about going to the mat, being on the edge and dealing with quickly prepared canned pasta dinners due to the lack of time or interest. However, that would be really stretching it. Therefore, the final division of the word as matri/moni is the obvious choice; however, using "matri" as we do in matricide or matriarch—referring to the mother, and using "mon" from the Latin root for one (as in monomaniac) or otherwise for economic interest (as in monetary). In either case, it fits, particularly if the mother that is referred to in "matri" is the litigant's mother, who would probably be blamed for being the cause of all of the problems in the first place.

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Good to Go (and Return!)—Part 1: Unraveling the Rules

By Mark E. Sullivan

[This is an article about military parents who have sole or primary custody, and how military absences can affect their custody orders and their military family care plans. The first part of the article will cover the ground rules for protecting and advising a military custodian as to mobilization, sea duty, deployments, and other military absences.]

Janet Smith was just stopping for a cup of coffee at The Courthouse Deli when she saw Sam Jones in a corner booth looking glum. After ordering, she came over and joined him, asking "Why the long face, Sam?"

Sam replied, "I've got a problem, Janet. Maybe you can help me—I know you were in the Army JAG Corps for four years, and you might know some answers. It's about a military custody situation."

"Sure," replied Janet. She had done her homework and was familiar with the literature on military custody issues.[1] "Let's hear what it involves."

Sam responded, "My client is Army Sergeant Jane Doe. She's about to be deployed, and she has custody of her son, Johnny. I've heard that when she deploys, she'll have to give custody over to the dad, her ex-husband, and that really worries her."

"No, she doesn't have to transfer custody," replied Janet. "So long as the father has been found to be unfit in court or else he has waived his rights to custody, she doesn't need to give up custody for the interim while she's away."

Sam sat up. "What do you mean? He's not been found to be unfit, and there's no waiver. Jane just wants to make sure that Johnny is in the right place while she's overseas. After all, it's about the child's best interest!"

Janet replied, "Well, the 'right place' (as Jane calls it) is *probably* with dad, unless he's been excluded legally, such as by his own waiver, a custody consent order, termination of parental rights, or a court's finding of unfitness. There is in most states a presumption that it is in the best interest of the child for custody to be given to one or both of the child's parents, as opposed to a third party."

"Does she have to give custody of Johnny to him?"

"Probably so," Janet replied, "since he's not waived his rights to custody, he hasn't consented to another person's having custody, and he isn't unfit. The law in virtually every state says that you cannot exclude the other parent from custody without one of these conditions. And—if it's unfitness—the finding must be made in a court order. That means Jane may be asking for trouble if she tries to transfer custody of Johnny to her current husband, to her mother in San Diego, or to her cousin Elvira in Florida."

"A court order? But she already has a Family Care Plan listing her mother as Johnny's caregiver. It's an official Army document. It's required by law and by Department of Defense regulations.[2] It has been approved by her commanding officer. Isn't that enough?"

Janet answered, "Yes—it's enough for the Army. But a Family Care Plan is not a court order. When there's no written agreement with the other parent, and when the only document is one without a judge's signature, then the client has serious exposure."

Sam protested, "But surely we're okay if we get a court order granting custody to the child's grandmother in San Diego—right?"

"Yes, that's fine, so long as there's full compliance with state law requirements," responded Janet. "In that case, state law will probably permit the court's transfer of custody to the grandmother if the father doesn't appear and contest, or if he consents to the transfer. The requirements of state law ordinarily include—

- Mom has located dad and properly served him with the initial complaint and summons;
- She's also given him reasonable advance notice of the hearing; and
- She filed suit in compliance with the UCCJEA (Uniform Child Custody Jurisdiction and Enforcement Act), which requires (ordinarily) that the children must have lived in your state for at least the last six months preceding the filing. In other words, you clearly have *custody jurisdiction*."

"However the preferable way to move forward," Janet continued, "would be to get the dad's consent to a relative taking custody—if you can obtain that consent. The general rule is that the other party, the non-custodial parent, cannot be excluded from custody—absent his consent—unless he is found by the court to be unfit by reason of abandonment, abuse, neglect or other conduct inconsistent with parental rights and responsibilities. And in some states, you must show *actual harm* before excluding the other parent."

Sam exploded. "Abandonment? Abuse or neglect? Whoa! How are we supposed to prove those charges?"

Janet coolly replied, "Look to state law and cases for elements of proof in this area. You will usually find the answers under *termination of parental rights* or a similar heading."

Sam continued his questions. "What if dad is *not unfit* but he agrees to give custody to the maternal grandmother? Or, more likely, what if the father is not unfit and will not consent to giving up custody?"

"If the father isn't unfit but will agree, then you should file for custody, serve the father and grandmother, and prepare a consent order or 'agreed order' for the transfer of custody to the grandmother. Make sure you have secured dad's *unconditional consent*. Consider getting an appearance before the judge or a notarized statement, if appropriate under state law, or if you think that dad might change his mind later."

"If, on the other hand," continued Janet, "there is no unfitness and the dad won't agree, then I suppose Jane Doe should consider transferring custody to him for the duration of her deployment, since he's not waived his rights to custody and he is not unfit."

Sam was having none of it. "But this guy is a real bum! He drinks, he smokes heavily and he's got a gun rack in his pick-up truck. Not only that, but we understand that he is also 'seeing another lady' these days. We're really worried about his getting custody!"

"So? Is he unfit? Can you prove it?"

Sam retrenched and dug in. "But the father will probably demand child support from my client!"

"Of course he will," answered Janet. "Why shouldn't he? He'll need help in supporting Johnny while Jane is overseas. There's nothing wrong with a father asking for child support when he's in charge of the kid and he has a custody order."

Sam's last-ditch question showed the ultimate concern his client had. "But we're really, really worried that he won't return the child when the deployment's over. We think that he'll demand permanent custody!"

Janet responded, "There are many factors, Sam, which come into play in determining the custody of Johnny when a military absence (such as deployment, mobilization, TDY, or remote tour) ends. For example:

- Will Johnny be thriving in the new environment, or doing poorly?
- Will he have lots of new friends near his dad's home, few friends, or about the same?
- Let's talk about Johnny's health. Will dad neglect his physicals, shots and dental check-ups? Or will he do a great job, better—perhaps—than *your client* did?
- Neighborhoods play a part. What are each of the neighborhoods like—that of Johnny when he was at "home," and the new neighborhood with dad? How does dad's home stack up against your client's home?
- How about Johnny's outside activities—with your client, and with the father? How do they compare?
- If Johnny's in school, then we'll need to look at his grades. What kind of progress is he making with dad? How does that compare to his academic performance when he was with your client? And what about dad's participation in school activities and parent-teacher conferences, compared to *your client's* participation?
- What does *state law* say about return of the child at the end of the deployment? Most states have statutes which say that a deployment cannot be held against the military custodian in a change-of-custody motion, and that any temporary custody order during deployment ends promptly after the return of the absent military parent.
- If there is a temporary custody order, what does it say? A *good court order* will say that Johnny's environment prior to the deployment was satisfactory in every way. It will also state that Johnny is to be returned to the mother immediately upon her return from deployment. This return to mom is to be done without delay, without the need to go to court, without the requirement of any court order to effectuate the return of custody."

The bottom line, according to Janet, is this:

1. If you're the lawyer for the soon-to-be-absent parent, you owe her your best efforts to write up an airtight custody consent order—bullet-proof and rock-solid.
2. You should draft and get signed—upon trial or by consent—a foolproof temporary custody order, drafted after thinking about the possible objections and changes-of-mind that dad will have "after the fact."
3. That order should be one which states explicitly the current circumstances of the child. If there are flaws, problems, advantages or facts which need to be established (such as the child's progress in school, the benefits of the current neighborhood, or the prior misconduct of the other parent), then the order needs to explain these. If you want Johnny to return to the previous environment when the absence ends, you need to say that the child is in an excellent situation at present, prior to the deployment.
4. And, in addition to requiring the automatic return of the child upon the deployed mother's return home, the order should also provide for the rights and protections which your client wants for herself and for her child, such as interim visitation during any leave which she has, and telephone contact with the child during her absence.

These are the key points in maintaining military custody for a parent in uniform, dealing with the custody claims of the other parent during a military absence, appointing a stepparent or relative as alternate custodian, and to resuming custody when your client returns from overseas.

[The second part of this article will cover the danger of adverse court action if the service member doesn't plan ahead.]

Endnotes

1. See, e.g., Mark E. Sullivan, "Third Rail Custody: The Military Case," *Juvenile and Family Court Journal*, Vol. 65, Issue 1, pp. 45-72 (Winter 2014), and Chapter 4, "Custody and Visitation," from Sullivan, *The Military Divorce Handbook* (ABA, 2nd Ed. 2011).
2. See Department of Defense Instruction 1342.19. A flow chart showing the responsibilities of service members and commanders in the development and implementation of family care plans is below and will be further discussed in the remaining parts of this article.

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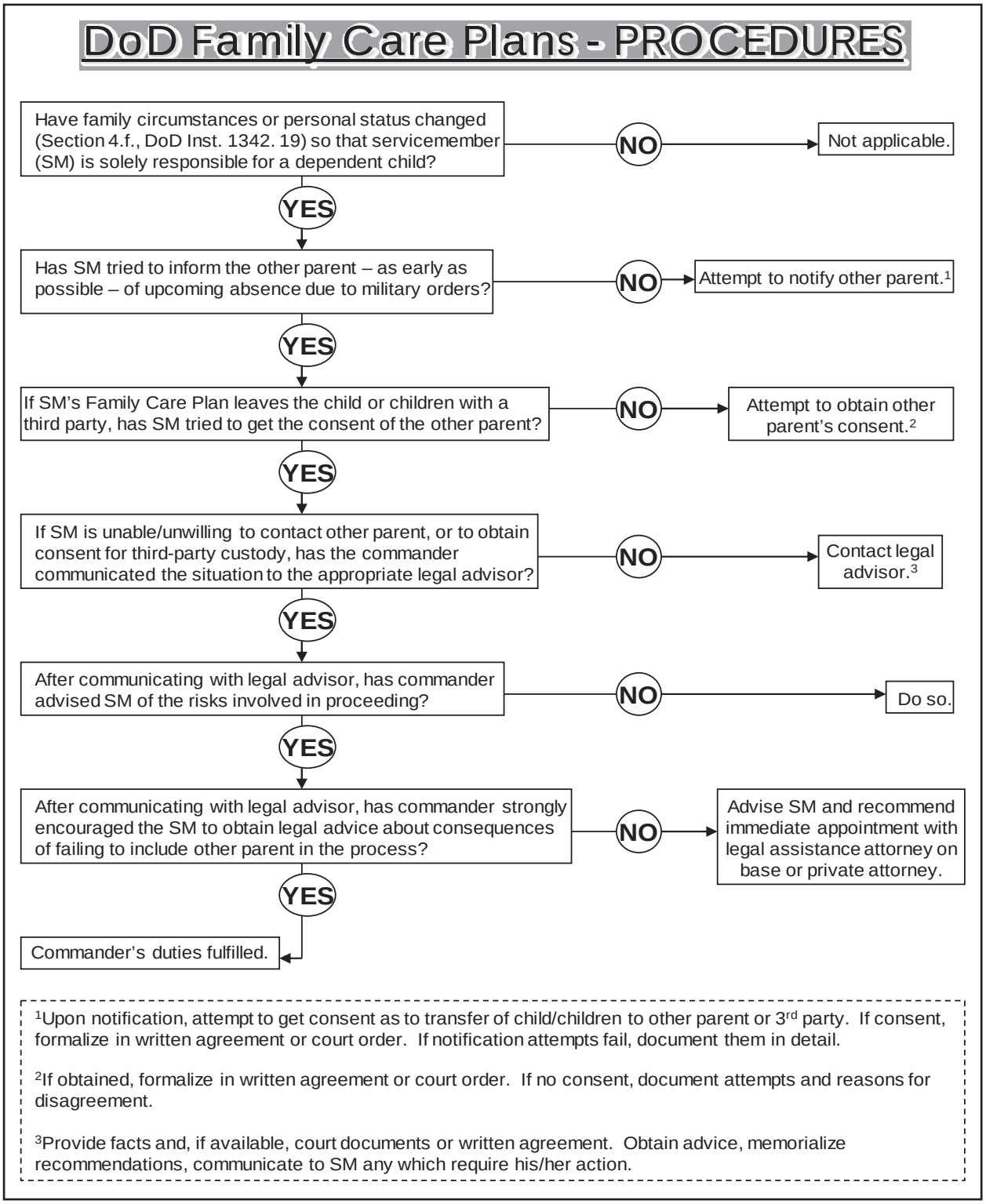

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Same-Sex Marriage Update

June 2014 marked the one-year anniversary of the landmark Supreme Court decision of *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down the core of the federal Defense of Marriage Act (DOMA) and held that married same-sex couples are eligible for federal benefits, but stopped short of endorsing a fundamental right for same-sex couples to marry. There is grave legal uncertainty and chaos for same-sex married couples who move to states that don't respect their marriage, while the federal government does. Since *Windsor*, same-sex marriage litigation has exploded in dozens of states.

I have been following the steady increase of states that allow same-sex marriage. We now have 37 states that permit gay marriage, including, in alphabetical order: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, plus Washington, D.C. Additionally, based on a pro-marriage ruling that is currently on appeal, same-sex couples can marry in some counties in Missouri and Missouri will recognize out-of-state same-sex marriages.

On January 16, 2015, the U.S. Supreme Court agreed to take on a historic constitutional challenge with wide cultural impact by agreeing to hear four new cases on same-sex marriage from four states—Kentucky, Michigan, Ohio and Tennessee. After oral arguments on April 28, 2015, the Supreme Court will rule on the power of the states to ban same-sex marriages and refuse to recognize such marriages performed in other states. A final ruling is expected in late June of 2015. A positive outcome will mean that gay marriage will be permitted nationwide.

The following countries permit same-sex marriage: Argentina, Belgium, Brazil, Canada, Denmark, Finland, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom, Uruguay, and Mexico City, Mexico. In Slovenia, Parliament approved a marriage bill in early March 2015, which will permit same-sex couples to marry and adopt children.

Recent Legislation

As a reminder, as of January 31, 2014, the combined parental income to be used for purposes of the CSSA changed from $136,000 to $141,000 in accordance with Social Services Law § 111-i(2)(b), and in consideration of the Consumer Price Index. Agreements should reflect the new amounts. The CSSA chart for unrepresented parties will change to reflect that amount as well. In addition, the threshold amount for temporary maintenance is now $543,000, rather than $524,000. The self-support reserve is now $15,512.

My last column reported new legislation through December, 2014. Since then, no new legislation has been passed in the Domestic Relations Law or Family Court Act. However, there have been some new CPLR amendments.

Civil Practice Law and Rules § 3216(a) and (b)(2)-(3) amended, effective January 1, 2015: Want of Prosecution

Section 3216(a) of the Civil Practice Law and Rules was amended to require that the court shall provide notice to the parties upon dismissing a party's pleadings *sua sponte* or on motion as a result of that party's unreasonable delay in the prosecution of an action. In addition, section 5241(b)(2) was amended to specify that no dismissal shall be directed, unless, among other things, one year has elapsed since the joinder of issue or six months has elapsed since the issuance of the preliminary court conference order, whichever is later. Lastly, subsection (3) of section 5241(b) was amended to include that where written demand to resume prosecution is served by the court (as opposed to a party to the action), the demand must state the specific conduct that constituted neglect and such conduct must evidence a general pattern of delay.

Civil Practice Law and Rules § 2106 amended, effective January 1, 2015: Affirmation of Truth of Statement

Section 2106 of the Civil Practice Law and Rules was amended by adding a subdivision (b), which provides that the statement of any person physically located outside of the United States, Puerto Rico, the United States Virgin Islands, or any territory subject to the jurisdiction of the United States, which is subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of an affidavit.

Cases of Interest

Support

Imputation of income based on lifestyle

Weitzner v. Weitzner, 120 AD3d 1406 (2d Dept. 2014)

The wife, who had custody of the parties' five children (ranging in age from 3-16), was properly awarded $3,530 per month in temporary child support, $4,604 per month in temporary maintenance, and the husband's pro rata share of the child's playgroup expenses. The trial court imputed $200,000 in income to the husband because the parties' marital lifestyle far exceeded the amount of income reported on the husband's income tax returns. In addition, the court imputed to the wife, who had not worked throughout the marriage, the equivalent of a ten-hour work week as an accountant. The court found that playgroup expenses were in the nature of school expenses, especially where the husband was paying the child's pre-school and playgroup expenses prior to the commencement of the action. Based on the large disparity in the parties' respective incomes, the court below properly awarded $30,000 in interim counsel fees to the wife.

Imputation of income based on parental gifts

G.R.P. v. L.B.P., No. 2011-08834 (Sup. Ct., Monroe County Dec. 15, 2014)

Following the court's award of child support and spousal maintenance, which imputed a significant sum of income to the husband based on annual gifts from the husband's parents, the husband sought termination of his maintenance obligation, downward modification of his child support obligation, and reimbursement from the wife for her 25% *pro rata* share of the children's health insurance costs and unreimbursed medical expenses.

The husband alleged, *inter alia*, that in the three years since the court's initial review of the husband's income, he has not received any gifts from his parents, his current income represents his true earning capacity, and the payment of child support and maintenance have depleted his retirement accounts and accumulated wealth. The wife's attorney, opposing the husband's application and noting the substantial costs of this matrimonial action, sought permission to withdraw as the wife's counsel, or alternatively, an award of counsel fees.

The court determined that there had not been a substantial change in the husband's financial condition in the three years preceding this application. In fact, the court found that the husband's parents had continued to pay for virtually all of the husband's monthly expenses, including the mortgage, medical insurance and unreimbursed medical expenses for the husband and the parties' children, the husband's car, and vacations. With regard to the husband's claim that his current income is much less and that his reported taxable income represents his true earning capacity, the court rejected this contention, citing the husband's failure to offer any evidence that he has diligently sought employment or employment retraining to increase his income. In considering the husband's assertion that his interests in certain reserve accounts have been reduced by the payment of maintenance and child support, the court noted that, for the year 2014, the husband withdrew in excess of $208,000 from these accounts, a substantial portion of which was used to pay debts he owed his parents.

Declining to "countenance this self-made poverty as a basis for modifying the husband's support obligations," the court found that the husband's claimed "hardship" was a result of favoring his parents as creditors over his wife and his children by electing to use his separate property funds to repay his intra-family loans as opposed to paying his support obligations.

With respect to the husband's request for reimbursement from the wife of her *pro rata* share of the children's health insurance costs and unreimbursed medical expenses, the court found that the husband's father pays the health insurance and unreimbursed medical expenses for the husband and the parties' children. The court, in denying the husband's request for an order directing the wife to pay her *pro rata* share of the unreimbursed health insurance costs, stated that requiring the wife to do so would essentially convert the wife's obligation to pay health insurance costs incurred by the children into a gift from the wife to the husband.

The court awarded the wife $20,000 in counsel fees. The court explained that, upon the commencement of the divorce action, the husband's parents, after not requesting repayment of their monetary contribution to the marital residence for years, threatened to demand payment of the mortgages or foreclose on the marital residence, which forced the wife to expend substantial fees in bringing an action to invalidate the mortgages as liens against her marital interest in the property. Finding that the wife's financial circumstances warranted an award of counsel fees, the court stated, "[i]t would be grossly unfair, unjust, and inequitable for this court to close its eyes to what is really happening in this case: the husband's father is financing litigation against his daughter-in-law to diminish claims that she has to equitable distribution of the marital residence, and to diminish his son's obligations to pay mandated child support and maintenance." Additionally, the court found that the merits of the wife's position trumped that of the husband, because the wife was acting in the best interests of the marital estate by protecting the residence from an unwarranted debt. Although questioning the husband's motives in siding with his father against his wife and children, the court declined to find that either parties' conduct resulted in unnecessary litigation.

Downward modification of support

***Gadalinska v. Ahmed*, 120 AD3d 1232 (2d Dept. 2014)**

The parties entered into a stipulation of settlement in July 2010, prior to the effective date of the 2010 amendments to Family Court Act § 451, providing that the mother would have custody of the parties' children and the father would pay a specified amount of child support on a weekly basis. In 2012, the father petitioned for a downward modification of his child support obligation, alleging that he had become unemployed, that his financial resources had decreased significantly, and that the mother's income had significantly increased since the signing of the stipulation. The Family Court dismissed the father's petition without a hearing on the basis of failure to state a cause of action. The Appellate Division reversed, noting that "a substantial and unanticipated change in circumstance" was the applicable standard at the time the parties' stipulation of settlement was executed, and determined that the father's allegations were sufficient to warrant a hearing on the issue of modification.

Upward modification of support

***O'Gorman v. O'Gorman*, 122 AD3d 743 (2d Dept. 2014)**

The court below properly granted the mother's petition to increase the father's child support obligation and require him to contribute his *pro rata* share of the oldest child's college expenses for an out-of-state public school. The court found a substantial change in circumstances based on a significant increase in the father's income and an increase in the cost of the children's expenses. No facts were provided in the decision regarding the parties' original income, their present income, or the specific needs of the children that were not being met.

Support enforcement by QDRO

***Lundon v. Lundon*, 120 AD3d 1395 (2d Dept. 2014)**

The parties are married and have one child. The Supreme Court, among other things, dismissed the cause of action for divorce, and awarded the wife permanent maintenance and child support, including a portion of child support add-ons for the child's extracurricular activity expenses, school costs, and unreimbursed health care expenses. After the husband defaulted in paying his support obligations, the parties entered into a so-ordered stipulation providing that the husband would pay the wife child support and maintenance arrears owed according to the 2009 judgment as well as the legal fees she incurred in attempting to enforce the judgment. The husband, however, again failed to make the required payments, and thus, the wife moved for a money judgment for unpaid child support, maintenance, unpaid counsel fees, pre-judgment interest pursuant to DRL § 244 on the unpaid obligations, and QDROs directing payments from the husband's retirement plan to the wife to satisfy unpaid judgments for child support, maintenance and counsel fees, and for counsel fees for the enforcement motion.

The trial court properly denied the wife's motion for awards of pre-judgment interest and counsel fees based on a showing by the husband that the default was not willful pursuant to DRL §§ 237(c) and 244. The trial court improperly denied the wife's motion for a QDRO directing payments from the husband's retirement plan to the wife to satisfy the judgments for arrears of child support and maintenance. However, the court properly denied the wife's motion for a QDRO directing payments from the husband's retirement plan to the wife's attorney for unpaid counsel fees, because the attorney did not qualify as an "alternate payee."

Child Neglect

***Matter of Isaiah L.*, 119 AD3d 797 (2d Dept. 2014)**

Despite his living with the mother for only one month, the Family Court properly found that the mother's boyfriend was considered a parent legally responsible for the child under FCA § 1012. Where the mother and the child moved into the boyfriend's apartment, the boyfriend purchased food and fed the child, slept in the same bed as the child and the mother, and represented himself to caseworkers as the child's parent, the court found that the boyfriend had assumed parental responsibilities. Thus, the boyfriend's failure to act upon noticing an extreme decline in the child's weight and witnessing the mother aggressively shake the child on two occasions amounted to child neglect. In addition, the boyfriend's biological child, who was born 11-months following the neglectful treatment of the first child, was considered derivatively neglected as a result of the boyfriend's failure to receive services to remedy his conduct in the interim.

Custody

Modification of custody

***Doyle v. Debe*, 120 AD3d 676 (2d Dept. 2014)**

The Family Court's decision to deny the mother sole custody of the parties' 8-year-old daughter and permission to relocate with the child to Georgia was reversed on appeal. In reaching this decision, the court considered the home environment provided by each parent, the likelihood of each parent fostering a relationship between the child and the non-custodial parent, a custody agreement entered into by the parties in 2010, and the recommendation of the court-appointed evaluator. The parties' custody agreement provided that the child would reside with the mother in Georgia during the school year and visit with the father during the summer. The father withheld the child from the mother in violation of the parties' stipulation. The court deemed this to be evidence of the father's inability to nourish a relationship between the mother and the daughter. In Georgia, the child would have her own bedroom in a home shared by the mother

and her new husband, whereas in New York, the child would be sharing a bedroom with her grandmother in a one bedroom apartment occupied by the father, the grandmother, and the child's two uncles. The court believed that the mother's home environment was in the child's best interests.

Modification of decision-making authority

***Goldhaber v. Rosen*, 119 AD3d 862 (2d Dept. 2014)**

The Family Court granted the father additional parenting time with the children based on his claim that a strained relationship existed between the mother and the children. On appeal, the Second Department concluded that this finding was not supported by a sound and substantial basis in the record, and thus, did not warrant a modification of the father's parenting schedule. Since the parties' relationship was acrimonious, the Appellate Court affirmed the Family Court's decision to grant the mother sole decision-making power with respect to the children's extracurricular activities and directed the father not to pick up the daughter early from any extracurricular activities or events.

Modification of custody

***Cisse v. Graham*, 120 AD3d 801 (2d Dept. 2014), l*v. granted*, 24 NY3d 1028 (2014)**

Pursuant to a stipulation entered into by the parties in June 2004, the parties shared joint legal custody of their daughter, now age 13, with the mother having primary residential custody and the father having parenting time with the child. Between 2007 and 2008, both the mother and the father petitioned for a modification of the custody provisions of the stipulation. The Family Court determined that a change of custody to the father was in the daughter's best interests based on evidence that the mother had interfered with the father's visitation, the opinion of the court-appointed forensic psychologist that the mother was not capable of transforming her words into actions with respect to acknowledging the importance of the daughter's relationship with her father, the mother's new work schedule that hindered her ability to spend quality time with the daughter and hindered the daughter's opportunity to socialize with other children, the daughter's frequent attendance in aftercare on the days she was not visiting with her father, the close bond exhibited between the daughter, her father, her step-mother, and her half-siblings, and the daughter's expressed desire to live with her father. On appeal, the Second Department found that a transfer of custody from the mother to the father was supported by a sound and substantial basis in the record. In the dissenting opinion, Justice Roman found that the father failed to demonstrate a sufficient change in circumstances to warrant a modification in custody, cited the importance of maintaining stability for the child, who had lived with the mother for her entire life, and intimated that the mother was being penalized for being a working mother.

Equitable Distribution

Personal injury settlement

***Rizzo v. Rizzo*, 120 AD3d 1400 (2d Dept. 2014)**

Following an on-the-job accident that rendered the husband unable to work, the parties jointly commenced an action to recover damages for personal injuries and loss of consortium. The parties, both named plaintiffs in the action, entered a settlement agreement, which provided for an initial lump-sum payment, periodic monthly payments of $3,235 for a guaranteed 30 years, and a continuing monthly payment for the life of either party. The agreement failed to specify the portion of the award that was for personal injuries and the portion that was for loss of consortium. Thereafter, an annuity was created to effectuate the monthly payments, naming both parties as joint payees with rights of survivorship. The parties proceeded to deposit the monthly payments into a joint bank account and use the funds to pay household expenses. The trial court held that the annuity was the husband's separate property. The Appellate Division reversed, holding that while a personal injury award is typically the separate property of each party named in the action, the award in this case had been converted into marital property by virtue of the parties' conduct in receiving an annuity as joint payees with rights of survivorship and depositing the funds into a joint account. However, the court held that the husband was entitled to a 90% share of each monthly annuity payment and the wife was entitled to a 10% share of such payment, but upon the death of one party, the surviving party would be entitled to receive the entire monthly annuity payment. In addition, the court reversed the trial court's determination that the husband's disability pension was his separate property, explaining that a disability pension that serves as compensation for personal injuries is considered separate property, while a disability pension that constitutes deferred compensation is marital property subject to equitable distribution. Finding that the wife was entitled to that portion of the pension that represents deferred compensation, the court remitted to the trial court the issue of apportioning the disability pension. With respect to certain debt incurred during the marriage, the Supreme Court properly determined that the cost of the defendant's surgery constituted a marital debt, and thus, the defendant was required to reimburse the plaintiff for the funds that he had paid for the defendant's share of the cost of the surgery.

Equitable distribution of business interests

***Hymowitz v. Hymowitz*, 119 AD3d 736 (2d Dept. 2014)**

The parties, who were married for 20 years and have two now emancipated children, acquired various interests in businesses throughout their marriage. One such business was a family-owned hardware store, which the

husband acquired as a gift during the marriage via a transfer of a one-third interest from his father and uncle. The Appellate Division, finding that the trial court erred in failing to award the wife a share of the appreciation in value of the business, awarded the wife a 25% share of the appreciation on the basis of her indirect efforts as a housewife and mother.

The husband also acquired a one-third share in BSH Park Row, LLC, which owned the building where the family's hardware store was located and operated. The Appellate Division found that, since the business was formed and the building was acquired during the marriage, and the husband failed to trace the use of separate funds to establish the purchase of his portion of the cost of the property, the business was marital property subject to equitable distribution, and awarded the wife a 25% share of the husband's interest in the business.

In addition, the husband held an interest in HGH Family, LLC, which was acquired during the marriage and operated an MRI facility. The parties entered into an oral stipulation of settlement in open court agreeing that the husband's entire 12.9% interest in the business was marital property. However, the trial court, rather than awarding the wife an equitable share of the husband's interest in the business in accordance with the terms of the stipulation, awarded the wife a 50% share of the husband's annual distributions from the business until her 66th birthday. The Appellate Division found that the trial court erred by not incorporating the parties' stipulation into the judgment, and consequently, modified the trial court's decision by awarding the wife a 40% share of the marital interest in the business.

The trial court erred in awarding the husband a credit against the proceeds of the sale of the marital residence for 100% of the payments he made to reduce the principal balance of the mortgage during the divorce proceedings, rather than a credit for 50% of the payments. Additionally, the trial court erred in failing to award the wife a credit against the proceeds of the sale of the marital residence for the amount of money the husband withdrew from the parties' home equity line of credit to pay his attorney's fees and expert's fees. By doing so, the non-monied spouse was essentially paying for a substantial portion of the monied spouse's counsel fees, which violates DRL § 237.

With regard to maintenance, the trial court erred in fixing the duration of maintenance awarded to the wife. Based on the parties' ages, the parties' pre-divorce lifestyle, and the parties' respective financial circumstances, the court found that the wife should be awarded maintenance until the earliest of her eligibility for full Social Security benefits at the age of 66, her remarriage, or the death of either party. With respect to child support, the trial court should not have limited the calculation to the statutory cap of the first $130,000 of the combined parental income, but rather $175,000 of combined parental income. The amount of child support must be awarded retroactive to the date that an application for support was made, which was when the wife served her motion for *pendente lite* child support. Thus, the Appellate Division remitted the matter to the trial court for calculation of the husband's retroactive support obligation. In calculating the husband's retroactive support obligation, the trial court was directed to determine the amount of payments made by the husband on behalf of the wife and children under the pendente lite order, and to the extent that these payments could appropriately be allocated to temporary child support, rather than temporary maintenance, the husband should be permitted to offset such payments against accrued arrears.

Capital gains taxes

***Cavaluzzo v. Cavaluzzo*, 121 AD3d 538 (1st Dept. 2014)**

Where the wife was awarded approximately $93,000 for her interest in the husband's investment property, the trial court properly determined that the wife should not be responsible for any capital gains tax liability that the husband may incur upon a future sale of investment property. The court reasoned that, since the husband would not incur any taxes upon the wife's transfer of her interest in the subject investment property to him and there was no imminent sale, the wife should not be forced to pay any capital gains tax liability that the husband may incur from a future sale. In addition, the trial court properly permitted the wife to claim all three of the parties' children as exemptions for income tax purposes, because the wife's income was half of the husband's income, and the husband had declared the children as dependents on his own tax returns for the past few years.

Wasteful dissipation of marital assets

***Lowe v. Lowe*, 123 AD3d 1207 (3d Dept. 2014)**

Over the course of the parties' six-year marriage, the wife spent over $30,000 of marital funds to purchase various items from television shopping channels, over the husband's objections. As a result of the wife's extreme shopping habits and expenditures, the trial court properly found that the wife's award of equitable distribution should be reduced by one-half of the amount she wastefully dissipated.

Pensions

***Fisher v. Fisher*, 122 AD3d 1032 (3d Dept. 2014)**

The parties were married for more than 40 years, were both in their early 60s and in good health, and have two adult children. Over the course of the marriage, the husband's $40,000 per year salary was the primary source of financial support. At the time of trial, the wife was employed and earning approximately $27,000 per year. Considering the nearly equal distribution of the parties'

marital assets and the wife's award of 50% of the husband's pension, which was not yet in pay status, the trial court granted the wife maintenance for only 3 years in the amount of $500 per month. The Appellate Division, however, noting that the husband had not yet retired, opted to avoid a break in the wife's receipt of financial support by extending the wife's maintenance until the husband's retirement and the wife's simultaneous receipt of her portion of the husband's pension benefits. In addition, the trial court did not err in failing to compel the husband to select survivorship benefits on his pension since the wife failed to request such relief during the trial or in her post-trial brief.

Counsel Fees

***McMahon v. McMahon*, 120 AD3d 1316 (2d Dept. 2014)**

Due to the great disparity in the parties' incomes, the insignificant equitable distribution award received by the wife, and the husband's role in prolonging the litigation, the Second Department held that awards of counsel fees in the sums of $22,480 and $22,520 to the wife were warranted. The court did not provide any facts regarding the parties' respective incomes, the actual equitable distribution award, or the specific conduct of the husband that protracted the litigation. Additionally, the court below erred by granting, *sua sponte*, an additional $3,500 in counsel fees to the wife for having to defend against the husband's motion for leave to reargue since the wife did not make an application for such relief or present evidence of the subject fees.

***Sutaria v. Sutaria*, 123 AD3d 908 (2d Dept. 2014)**

Based on the husband's significantly higher income and his behavior in protracting the litigation, the wife was properly awarded $73,602 in counsel fees. Once again, the Appellate Court failed to provide any facts regarding the parties' respective incomes or the behavior that caused protracted litigation.

***Ralph D. v. Courtney R.*, 123 AD3d 635 (1st Dept. 2014)**

In a child custody proceeding, the First Department affirmed the Family Court's award of $105,680 in counsel fees to the mother based on the father's ownership of property listed for sale for $13 million, the significant rental income that the father received from this property, the father's regular receipt of money from his father, and the father's filing and withdrawing of several petitions throughout the litigation.

***Lubrano v. Lubrano*, 122 AD3d 807 (2d Dept. 2014)**

The trial court properly directed the husband to pay the sum of $38,000 towards the wife's attorneys' fees. In doing so, the court noted the disparity in income between the parties, the merits of the parties' positions, and the husband's actions in prolonging the proceedings. No facts were provided regarding the parties' respective incomes or the specific conduct of the husband that prolonged the litigation.

Wendy B. Samuelson is a partner of the boutique matrimonial law firm of Samuelson Hause Samuelson Geffner & Kersch, LLP, located in Garden City, New York. She has written literature and lectured for the Continuing Legal Education programs of the New York State Bar Association, the Nassau County Bar Association, and various law and accounting firms. Ms. Samuelson was selected as one of the Ten Leaders in Matrimonial Law of Long Island, was featured as one of the top New York matrimonial attorneys in Super Lawyers, and has an AV rating from Martindale Hubbell.

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