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…And Justice for All: Marriage Equality Comes to America

By Lee Rosenberg

The NYSBA and many of its Committees and Sections, including the Family Law Section, presently under the stewardship of Chair Alton L. Abramowitz, have long supported the concept of marriage equality. The NYSBA joined in the filing of amicus briefs in both the *Windsor* and *Obergefell* cases.

We stand at a historic point in time where traditional notions of "marriage" have now changed. Same-sex couples throughout all 50 States may now marry and claim their inalienable right to "life, liberty and the pursuit of happiness" just as is provided in that most venerated of Declarations signed on July 4, 1776. The United States Supreme Court declared it so in its 5-4 decision in *Obergefell v. Hodges*.[1]

While the issue itself will remain under debate and discussion, as promised by certain presidential candidates and those with religious concerns, and while constitutional scholars and pundits may also explore the efficacy of the majority's analysis vis-á-vis the dissenters (including the vitriol and contempt contained in Justice Antonin G. Scalia's opinion[2]), the establishment of marriage as a fundamental right for all is a monumental shift in a relatively short period of time. In finding such a fundamental right, the majority held,

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.[3]

I have previously written and lectured on this issue for a number of years.[4] The national position on marriage equality has essentially reversed over the last two decades when one looks at the ease in which the Defense of Marriage Act (DOMA) was enacted in 1996.[5] This reversal has, however, really occurred within the last few years as Federal Appellate Court decisions have kept pace with reality and the political tide has followed the shift in public opinion. At one point in time in 2012 there were thirty states with *constitutional amendments* restricting marriage to one man and one woman and eleven states with *statutory laws* restricting marriage to one man and one woman. This transition has been one undertaken with lightning speed, with 60% of Americans supporting same-sex marriage[6] and 37 states permitting those marriages just prior to the *Obergefell* decision.[7]

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It was just in 2006 that New York's Court of Appeals, in *Hernandez v. Robles*,[8] rejected arguments asserting the legitimacy of same-sex marriage to find that no such right Constitutionally existed. In 2008, while then-Governor David Paterson directed state agencies to recognize same-sex marriages performed in jurisdictions where such marriages were valid,[9] California was enacting Proposition 8—serving to again ban same-sex marriages in that State. The decision invalidating Proposition 8 did not come until 2011 in *Perry v. Schwarzenegger*[10]—later referenced as *Perry v. Brown*[11]—and finally heard by the United States Supreme Court as part of *Hollingsworth v. Perry.*[12] *Hollingsworth* was decided by the Court along with *United States v. Windsor*[13] on June 26, 2013—two years to the day before *Obergefell.* The *Hollingworth* decision dismissed the challenge to the validity of same-sex marriage in California and *Windsor* struck down Section 3 of DOMA. The dominoes began to rapidly tumble from there.

In New York, it was not until June 26, 2011—four years before *Obergefell*—that a hard-fought battle was resolved by the signing of the Marriage Equality Act by Governor Andrew Cuomo.[14] At the time, New York became only the fifth State to permit the solemnization of same-sex marriages. Previously, in the post-*Hernandez* landscape, New York, while not permitting solemnization without legislative enactment, nevertheless recognized same-sex marriages performed in jurisdictions in which solemnization was valid.[15] It recognized the courts' ability to entertain the dissolution of foreign same-sex marriages; it recognized the rights of parties to a civil union possessed with the rights of married persons conferred under Vermont Law, to *both* be the legitimate parents of children born after the union even where there was no adoption.[16] It recognized as well the ability of the New York State Supreme Court to dissolve a foreign civil union under its equitable powers.[17]

The enactment of the Marriage Equality Act provided equality to all on one hand and protected religious freedom on the other. In changing his thought process after running on an anti-same-sex marriage position, Republican Senator Mark Grisanti[18] voted in favor of the Act. He spoke his heart and mind stating:

> I would not respect myself if I didn't do the research, have an open mind, and make a decision—an informed decision—based on the information before me. A man can be wiser today than yesterday, but there will be no respect for that man if he's failed in his duty to do the work. I cannot legally come up with an argument against same-sex marriage. Who am I to say that someone does not have the same rights that I have with my wife, who I love, or to have the 1300+ rights that I share with her? […] I cannot deny that right and opportunity for someone, nor stand in the way for them to obtain the rights that I have. […] I cannot deny a person, a human being, a taxpayer, a worker, people in my district and across this state—the state of New York—and those people who make this the great state it is, the same rights that I have with my wife.

The law of the land for the LGBT community is now as it is for all Americans. It has been long understood that both "separate and equal" and "separate, but not quite equal"—are wrong. So for those who spoke their minds honestly and to those who now have the same right to share their lives as wedded couples, we should all be proud.

Endnotes

1. *Obergefell v. Hodges* __ U.S. __, __ S.Ct. __ (June 26, 2015).
2. Beyond the dissenters' arguments that the majority usurped legislative and constitutional prerogatives and principles, particularly in finding a constitutional right of marriage, Justice Scalia referred to the majority's decision in such terms as a "threat to American democracy"; "a naked judicial claim to legislative—indeed, super-legislative—power; a claim fundamentally at odds with our system of government"; a "judicial Putsch"; an opinion "couched in a style that is as pretentious as its content is egotistic"; as well as other pejorative references to the majority opinion and to the unrepresentative character of the Court itself.
3. Majority Opinion of Justice Anthony M. Kennedy.
4. *See, e.g.*, On Matrimony, the Miller Commission, Legislative Failure, NYLJ Oct. 9, 2007; Same-Sex Marriage: Right to Divorce, But Not To Marry?, NYLJ, March 31, 2008; Matrimonial Representation and Same-Gender Newlyweds-to-Be, NYLJ, Dec. 9, 2011; Marriage and Divorce: An Overview of Rights, Obligations and Options for Non-Traditional Couples, with Andrea M. Brodie, Nassau Lawyer, Nov. 2011.
5. 1 U.S.C. §7, 28 U.S.C. §1738C.
6. http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx.
7. In addition to the 37 states permitting same-sex marriage, four additional states (Ohio, Michigan, Kentucky and Tennessee) were involved in the appeal of 6th Circuit determinations banning same-sex marriage. The U.S. Supreme Court took those cases and determined them together with *Obergefell*.
8. 7 NY3d 338 (2006).
9. *See* Jeremy W. Peters, *New York to Back Same-Sex Unions From Elsewhere*, NY Times, May 29, 2008.
10. 630 F.3d 898 (C.A.9 2011).
11. 667 F.3d 1078 (C.A.9 2012).
12. 558 U.S. 183 (2010).
13. 570 U.S. ___ , 133 S.Ct. 2675 (2013).
14. DRL §§10-a and 10-b.
15. *Martinez v. County of Monroe*, 50 A.D.3d 189 (4th Dept 2008).
16. *Debra H. v. Janice R.*, 14 N.Y.3d 576 (2010).
17. *Dickerson v. Thompson*, 73 A.D.3d 52 (3d Dept 2011).
18. Former Senator Grisanti is now a Court of Claims Judge sitting as an Acting Supreme Court Justice.

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Editor's Note: *Family Law Review* has long explored and catalogued the changes in the area of same-sex marriage, including a regular discussion of this issue as part of "Recent Legislation, Decisions and Trends in Matrimonial Law" by Wendy Samuelson, Esq.

Good to Go (and Return!) Part 2: The Sailor and the Perfect Storm

By Mark E. Sullivan

[The previous section of this article covered the ground rules for protecting and advising a military custodian as to mobilization, sea duty, deployments, and other military absences. It also outlined 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 step-parent or relative as alternate custodian, and to resuming custody when your client returns from overseas.]

Despite good planning, many military custody cases hit a "bump in the road" and overturn. Sometimes there's good planning, and sometimes there's NO planning. The results—which usually involve the absence of the military custodian with no legal back-up custodian outside of the other parent—lead to heartbreak, surprise, legal expenses, and sometimes child endangerment.

The reality in military life is that travel and reassignments are constant factors. No one stays in one place very long. Plans must be made for the day when a military custodian cannot be there to take care of the child due to military duties.

But some military custodians, it seems, do little planning for the eventual day when "military absence" removes them from caring for the minor child or children. Sometimes it's a remote tour, such as to Iceland, Korea, Turkey or other places where military rules designate the assignment as "unaccompanied." Sometimes the mission is called TDY, or temporary duty; often these assignments are unaccompanied. Assignments to combat zones and hostile fire areas are likewise without dependents. Any military absence can become a stumbling block in a case where the parent in uniform has sole or primary custody of the child. Here's an example from mid-June 2014.

Submarine Duty No Defense in Child Custody Case

By Dennis Pelham
Daily Telegram Staff Writer

The Daily Telegram - Adrian, MI

Being posted on a submarine in the Pacific Ocean does not exempt a father from obeying child custody orders, a judge ruled Monday in Lenawee County Circuit Court.

If Matthew Hindes is not available, then his current wife should have returned his daughter to the girl's mother, said Lenawee County Circuit Judge Margaret M.S. Noe. She ordered last week that the child be placed in Angela Hindes' custody in Adrian pending the outcome of a hearing on a custody petition she filed last year. The 6-year-old girl, Kaylee, is in Washington state with Matthew Hindes' wife, Benita-Lynn Caoile Hindes.

Attorney Rebecca Nighbert of Adrian asked for a stay in the case under the federal Servicemembers Civil Relief Act. The law provides a 90-day stay in civil court proceedings if military service affects a member's ability to participate. Matthew Hindes is a petty officer in the United States Navy, currently assigned to the *USS Michigan*. The submarine is now somewhere in the middle of the Pacific Ocean, Nighbert said. She presented a letter from a Navy administrative officer to confirm his duty posting.

Noe denied the motion for a stay, ruling that he could have arranged for his wife to bring the child to her mother. "At this point, I don't think I have any alternative but to enter a bench warrant for his arrest," Noe said. "If the child is not in the care and custody of the father, the child should be in the care and custody of the mother"….

Nighbert said the wife has put together money to pay for a flight from her home in Washington, but does not yet have money to rent a car to drive to Adrian from the airport. Angela Hindes offered to drive to the airport to pick up her daughter. Noe agreed to waive an existing order that the wife not be present during the transfer of custody for parenting time.

Noe delayed her order for a bench warrant until Friday to allow the wife to bring the child to the airport. Noe also ordered the pre-trial hearing in the cus-

tody case to continue at 9 a.m. Monday, June 23.

Matthew Hindes was given custody of his daughter in 2010 after she was removed from Angela Hindes' home by Michigan Department of Human Services' Child Protective Services. An Oct. 1, 2010, divorce judgment gave him permanent custody, but Angela Hindes petitioned for a change in the custody order in August last year.

Analyzing this article requires guessing about a lot of facts, rules and information. There are certainly more questions than answers here. Not much is revealed in the article about the relationship of the parties, the terms of the custody order, the logistics of the divorce settlement negotiations which probably led to dad's getting custody, whether the father requested a stay of proceedings under the Servicemembers Civil Relief Act (SCRA), and the provisions—if any—for the child should the father become unavailable due to military absence (remote tour, deployment, TDY—temporary duty—or other reasons). Here are some of the questions about which the reader remains clueless:

- Did the custody order mention the protective order which removed the child from the mother's home? If not, why?
- When the divorce court granted the father custody, did it grant visitation to the mother? If so, why?
- If the mother's actions were serious, why didn't the father go to court and demand termination of the mother's parental right? Or at least termination of her visitation rights?
- What recitation, if any, is in the current custody order about what mom did to merit intervention by Child Protective Services? Was it a temporary lapse of judgment, or serious endangerment? Is it likely to happen again?
- When the father received notice of his impending sea duty, usually months in advance of the mission, did he immediately schedule a court hearing so that he could testify about the situation, the child's needs, and why he wanted to have the child bar any contact with the mother, or at least order supervised visitation?
- Was the mother's visitation, if granted by the court, structured as supervised visitation? If not, why? Did the father demand a hearing on this so that, while he was in court and available in person, he could press his case for NO visitation or—at least—supervised visitation?
- Did the father, upon being given custody, simply consent to the order and drop his other legitimate demands, such as the payment of child support and the restriction of mom's access to the child (in favor of his new wife as alternate custodian)?
- Was there perhaps a trade, which is common in domestic cases like this—custody to the father in exchange for no mention of the mother' wrongdoing and the waiver of child support from the mother? What were the terms of the bargain?
- Did the father ask for a stay of proceedings under the SCRA? If so, did he provide the essential parts of a stay request (i.e., a communication stating how his duties prevented his participation in the court hearing, as well as a date when he could be present, and a communication from his commanding officer stating that his military duties precluded his departure for the hearing and that he would not be granted leave)?

However the court order was written, it clearly did little to protect the child during the period when dad was at sea. Such duties for sailors are expected. They are part of the job description which begins, "You are now a member of the United States Navy…." All Navy personnel—"sailors"—are expected to serve at sea regularly.[1]

It is hard to imagine a judge's overlooking this fact of life, or the attorney for the father leaving out any plans for "sea duty" from the custody order which he or she either drafted or reviewed before it was signed by the judge and filed.

Note also that no custody order is ever permanent. Such orders may be adjusted when there is a change of circumstances. Who would argue that the incapacity of the father, to whom custody was given, to care for the child is not a change in circumstances? To put it another way, ask any military parent who has visitation (not custody) whether the inability of the custodial parent to care for the child should result in his having custody. The answer, by an overwhelming majority, is YES.

Clearly the father left his wife, the stepmother, in the worst possible position—unarmed against the demands of the child's mother and without the sailor's presence, protection and testimony in a contest with a strong-willed judge who became aware of the absence of the designated custodian. Like virtually all judges, this one probably ruled that there is a constitutional preference for parental custody, when one parent is absent the other is expected to care for the child, and only when one parent is proven to be unfit by virtue of abandonment, abuse, neglect or such other conduct as is inconsistent with parental responsibilities may the court designate custody in a third party.

There are few exceptions to the parental preference doctrine. One of them is consent. If a parent consents to the award of custody, on a permanent or temporary basis, to a third party, then that decision will be binding upon the parent. Another is waiver. If a parent, by his actions or inaction, waives the rights which the parental preference

doctrine gives him then he cannot later step into court to demand their protection and enforcement.

The Servicemembers Civil Relief Act (SCRA) provides some protections (such as a stay of proceedings under certain circumstances) for members of the military in civil lawsuits. The Act was passed to protect the rights of those in uniform. But what rights would be protected in this case? The father was given the right, nay, the duty to care for and protect the minor child in the custody order. How can he exercise this right when he is on a submarine in the middle of the ocean? Why would the SCRA be employed to protect rights which he no longer has? Why should the Act be used to keep the child with his new wife, who is not protected by the SCRA, when he cannot care for the child due to military duties? Why would the father try to use the act to defeat the rights of the mother of the child? It's not even clear that the servicemember-father asked for a stay, since the only reference to this is a statement that the stepmother presented "a letter from a Navy administrative officer to confirm his duty posting." This is not sufficient ask for a stay; there must be a communication from the sailor's commanding officer.

Use of the Servicemembers Civil Relief Act in such a custody case is almost universally rejected by the courts. The reason is in a doctrine known as "The Sword and the Shield." A good example of this equitable rule can be found in a New York military custody case, *Diffin v. Towne*.[2]

The SM-mother in that case, as in the Michigan case, also urged the court to find that a stay of proceedings barred the entry of a custody order, even on an interim basis. She said that that her new husband should take care of the child of her former marriage. This case, absent the information (or lack of information) about child protective services, is a close parallel to the newspaper scenario above involving sea duty for the sailor-father.

The mother in *Diffin v. Towne*, a member of the Army Reserve, had remarried after a divorce from the child's father about four years previously. She was served in April 2004 with a motion from her ex-husband asking for custody of their child in light of her upcoming mobilization to Fort Drum, New York.

The mother tried to defend against the motion by asking for a stay and pointing out that she had prepared a military Family Care Plan (which is required by military regulations) designating her new husband and her mother as guardians for the child.

In addition she argued that a stay of proceedings (requested under New York statutes that are similar to the SCRA) bar the judge from proceeding with any temporary or permanent relief. Finally, the Reservist-mother claimed that the stability derived from their child's continued education in the Fort Plain School District was more important in the child's life than living with the father. The new husband also petitioned for temporary custody.

The court in its opinion reminded the parties that a stay of proceedings is simply intended as a shield to protect SMs, not as a sword with which to deprive others of their rights.[3]

In the absence of extraordinary circumstances, such as abandonment, unfitness, or persistent neglect, the court must grant custody to the secondary custodial parent in a case such as this when the primary custodian cannot fulfill his or her custodial duties. Finding no such disqualifying circumstances, the court swept aside the mother's argument that her new husband should take care of the child pending her return from an indefinite mobilization period, stating that:

> the step-father has no legal or moral obligation to support the child, has no legal ability to obtain medical care for the child, and has no legal ability to inquire as to the education of the child.[4]

Here it should be noted that the court in Michigan could, if given the opportunity, hold a hearing on fitness and make a ruling as to the qualifications, ability and fitness of the mother for extended care of the child as the alternate custodian. The problem with this solution, of course, is absence of the best witness for the child, that is, the child's father. How can the dad argue and testify about the mother's conduct and ability (or lack thereof) to care for the child when he is in the middle of an ocean? Why did he not anticipate this possibility when the custody order was entered initially?

The New York trial court opinion went on to explain that the court had the power to enter a temporary order pending the final resolution of the matter regardless of the entry of a stay of proceedings because

> children of military personnel are not only entitled to receive support during their parent's tours of duty, but…they are also entitled to stability with regard to their care, upbringing and custody.[5]

Finally, the court noted that it was

> being asked to leave the child with a step-parent until such time as the mother is able to proceed. This is not in the child's best interest and the law requires this Court to enter a temporary order pending the trial of this action. To fail to provide for the child's legal physical custody during the pendency of the stay would result in an untenable situation where the child would be living with his step-father, a legal stranger to him, and his natural father's rights would be subrogated to the step-father. The Court

> agrees with the father, that the child should be allowed to complete the current school year in New York and then physical custody should be transferred to the father, the available natural parent, until such time that the mother is no longer on active duty in the military or a trial is held on this matter.[6]

Similar results, granting application of the stay provisions of the SCRA but allowing placement or temporary custody of the child on an interim basis, occurred in *In re Marriage of Grantham*.[7]

In that case, the father attempted to give custody through his military Family Care Plan to the child's paternal grandmother, and the mother obtained temporary custody while the father pursued an appeal that was ultimately unsuccessful. It is not difficult to understand why the court affirmed the trial court's transfer of custody and upheld its denial of the father's stay motion. Inequitable conduct by the servicemember-parent, turning the Act's protective shield into a sword, usually will result in a denial of a stay request, even though there is nothing in the SCRA stating this or even mentioning misconduct by a party. The SCRA is intended to protect the rights of a servicemember. It is hard to argue that a sailor who has been given custody of a child by the court, but who is now absent from his custody duties due to military assignment, still has rights to protect. What are those rights? In virtually every custody order, one parent is granted primary care and custody of the child. This is intended by the court to be exercised in person. Most courts expect that, if a parent is unable or unwilling to fulfill the heavy duties which come with custody, he will give them up and transfer them to the other parent, or else the other parent will ask the court to perform this function.

[The final part of this article will discuss a prescription for avoiding disaster by crafting the court's custody order with an eye to the future and a plan for who gets custody when the military member is absent.]

Endnotes

1. *See, e.g., Schmalhofer v. Schmalhofer*, 2003 Tenn. App. LEXIS, at 7 (case involving Navy mother in which her supervisor testified that someone in the mother's position "was usually scheduled to work 48 months on shore, then 36 months at sea").
2. *Diffin v. Towne*, 3 Misc. 3d 1107A (Fam. Ct. Montgomery County 2004) *aff'd*, 47A.D.3d 988 (3d Dept 2008), *lv. den.* 10 N.Y.3d 710 (2008).
3. *Id.* at 3.
4. *Id.* at 6.
5. *Id.* at 7 (citing *Gilmore v. Gilmore*, 185 Misc. 535, 536, 58 N.Y.S.2d 556, 557 (1945) and *Kelley v. Kelley*, 38 N.Y.S.2d 344, 348–50 (1942)) (cases providing for family support while rest of matter was stayed).
6. *Id.* at 7
7. *In re Marriage of Grantham*, 698 N.W.2d 140, 2005 Iowa Sup. LEXIS 75 (Iowa 2005). For a contrary result, *see Dilley v. Dilley*, Chancery No. CH04-195, 2004 Va. Cir. LEXIS 235 (Cir. Ct., Shenandoah Co., Nov. 2, 2004) (trial-level decision granting continued custody to the SM-mother and maternal grandmother despite the mother's absence overseas, allowing the mother's stay request, and denying the father's motion for temporary custody).

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Foti v. Foti, Commingling of Separate Property by Tax Return, a Department Stands Alone Amid Federal Law and the Law of Other Jurisdictions

By Elliott Scheinberg

Foti v. Foti,[1] a four-sentence decision, misapplied the doctrine of quasi/judicial estoppel to convert separate property into marital property based on no more than a joint filing of a tax return. Citing *Mahoney-Buntzman v. Buntzman*,[2] the Fourth Department inexplicably held that, although the wife established that her father had gifted certain entities of real property to her, which remained separately maintained, the parties' joint federal tax return, in which the wife reported her interest in the entities as tax losses, estopped her from taking a position during the divorce litigation that the properties were separate because "a party to litigation may not take a position contrary to a position taken in an income tax return."[3]

Foti's retooling of the doctrine of quasi/judicial estoppel—that no more than the mere filing of a joint tax return traps and converts the separately *held* assets that were reported into marital property—starkly isolates it from not only the law of other Departments but also from the universe of federal authority and other jurisdictions as well.

The Estoppel Doctrine Requires a Three-Prong Test to Be Met Conjunctively

In *Martin v. C.A. Productions Co.*,[4] the Court of Appeals set forth the three predicate criteria, to be met conjunctively, of judicial estoppel: a prior proceeding; a prior successful position taken therein; and a current inconsistent position due to a change of needs:

> By reason of the successful position thus taken by him in the prior action, the defendant comes within the rule that a claim made or position taken in a former action or judicial proceeding will estop the party from making any inconsistent claim or taking a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party.

Jones Language Wootton USA v. LeBoeuf, Lamb, Greene & MacRae[5] captures the essence of judicial estoppel:

> The doctrine of judicial estoppel or the doctrine of inconsistent positions "precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." As stated by the United States Supreme Court, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position" (citations omitted). "The doctrine rests upon the principle that a litigant 'should not be permitted…to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.'"

The component at the heart of this three-prong test is that the party asserting the inconsistent position in the subsequent action must have actually prevailed on that position in the prior action or proceeding for the doctrine to apply, not just merely to have asserted that position; otherwise stated, if the proponent did not prevail on that position in the prior proceeding then the doctrine does not preclude the reassertion of the inconsistent position in a future proceeding.

Foti Cited Only *Mahoney-Buntzman* re Quasi/Judicial Estoppel, *Mahoney-Buntzman* Relied upon Three Decisions, All Contrary to *Foti*

Foti cited only *Mahoney-Buntzman*, a case involving the application of judicial estoppel to tax returns, discussed below, wherein the Court of Appeals referenced three cases, none of which extended or can be construed to have expanded the doctrine beyond the rule that judicial estoppel is not confined to positions taken in a formal courtroom but rather includes positions taken in administrative and insurance settings: *Meyer v. Insurance Co. of Am.*;[6] *Naghavi v. New York Life Ins. Co.*;[7] and *Zemel v. Horowitz*.[8]

Critically, *Mahoney-Buntzman* and each of the three cases issued narrowly tapered rulings limited to the subject monies. None of the cases held or even remotely hinted that quasi/judicial estoppel sweepingly swallows whole the underlying assets that generated the income or the losses. *Foti* misconstrued *Mahoney-Buntzman* to reach a conclusion never articulated or even distantly implied by the Court of Appeals or the cases cited therein.

Mahoney-Buntzman v. Buntzman

In *Mahoney-Buntzman*, the defendant and his father, David Buntzman, were embattled in extensive business litigation. Pursuant to their settlement agreement, the defendant agreed to accept $1.8 million to be reported for income tax purposes on a 1099 Form by one of the companies. To account for the increased tax liability that the defendant would incur as a consequence of that structure, the payment was increased by 17% rather than as a sale of an interest in stock.

The trial court and thereafter the Court of Appeals, in upholding the trial court, applied the doctrine of judicial estoppel to convert only the subject $1.8 million payment into a marital asset.[9] The trial court stated:[10]

> One form of estoppel, quasi estoppel, forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid the corresponding obligations or effects…In this case, in order to resolve a family dispute by obtaining a tax benefit for an entity owned by his father, defendant represented in a Federal Income Tax return that a $1,800,000 payment received by him constituted business income. Having obtained that benefit for a third party, he is estopped from asserting a separate property claim as to that payment or any property obtained with those funds…which "has cost h[im] a much larger benefit" in this matrimonial action…(cites omitted).

Meyer v. Insurance Co. of America

Nor does *Meyer v. Insurance Co. of America* support the conclusion in *Foti*:

> Meyer's sworn statement in her tax return may be the absolute truth, or she may have made the statement falsely in order to obtain business loss tax benefits to which she was not entitled. With Meyer's death, the Court cannot say for sure which it is. The Court can say, however, that Meyer and her estate is[sic] bound by her sworn representations in her tax return; Risa Meyer is estopped from now taking a position inconsistent with Meyer's representations to the IRS.

Meyer relied on settled authority that the doctrine applies with equal measure to nonjudicial proceedings. None of the courts extended the doctrine beyond the subject funds:

> Ginor v. Landsberg, No. 97-9061, 1998 WL 514304 at *1 (2d Cir.1998)…(taxpayers are estopped from pressing a new interpretation of a note's terms having previously made a contrary assertion to the IRS) (citing Davidson v. Davidson, 947 F.2d 1294, 1297 (5th Cir. 1991) (estopping party from taking a position in bankruptcy proceedings that was inconsistent with representations made to the IRS on tax returns));
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> Robb-Fulton v. Robb, 23 F.3d 895, 898-99 (4th Cir. 1994) (estopping a party from taking position in bankruptcy proceedings that was inconsistent with representations made to the IRS on tax returns);
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> Nowak v. Nowak, 183 B.R. 568, 570-71 (Bankr. D. Neb. 1995) (prohibiting plaintiff from asserting statements in bankruptcy proceeding inconsistent with representations made to the IRS).

Zemel v. Horowitz

Limiting its holding to the specific transaction regarding inconsistent reporting of a purported stock sale, *Zemel v. Horowitz* held that judicial estoppel applies to IRS representations:

> [O]n their tax returns, plaintiffs did not report any gain from the sale of the stock, which would have been required under applicable tax laws had they actually sold the stock, and loaned the proceeds to Horowitz. Instead, plaintiffs represented to the Internal Revenue Service, under oath and subject to the penalty of perjury, that they had sold stock which they subsequently acquired, the equivalent of a "short sale."
>
> [W]here [] the original position is represented in a context not precisely falling in the "judicial" forum category, the same principles are nevertheless applied, and often designated "quasi estoppel" or "estoppel against inconsistent positions." These estoppel principles forbid a party from receiving the benefits of a transaction or statute, and then subsequently taking an inconsistent position to avoid the corresponding effects. Thus, whether using the appellation of judicial estoppel, quasi estoppel, or estoppel against inconsistent positions, courts have consistently held that a party is estopped from adopting in court a position contrary to that previously asserted on his or her tax returns.

Naghavi v. New York Life Ins. Co.

In *Naghavi v. New York Life Ins. Co.*, the doctrine was applied to the discrete inconsistent insurance and tax representations:

> The [] affidavit of defendant's underwriter, accompanied by a page from defendant's underwriting manual stating that no disability policy would be issued to any person earning less than $16,000 per year, established, as a matter of law, the materiality of plaintiff's misrepresentation in his application that his earned income for the prior and current years was and would be $100,000…Although plaintiff contends that when commissions he allegedly earned from business activities abroad are taken into account, he actually did have annual income of $100,000 in the years in question, we deem him to be bound by his contrary representations in the income tax returns he filed for those years, the application for insurance having defined "earned income" in terms of amounts "reportable for personal federal income tax purposes" (cites omitted).

Nimkoff v. Nimkoff

Citing *Angelo v. Angelo*,[11] discussed below, the First Department, in *Nimkoff v. Nimkoff*,[12] upheld the trial court's decision that "the filing of joint federal and state tax returns should not be regarded as creating a joint tenancy with a right of survivorship in the resulting refunds" that, absent an agreement stating otherwise, tax returns "must be regarded as separate property of which each party is entitled to a pro rata share."

Spencer v. Spencer

Even the use of separate property to support one's family does not commingle it into marital property. Citing long settled authority on commingling,[13] in *Spencer v. Spencer*,[14] the First Department upheld a finding of noncommingling in an instance where the owner of the separate property "continued to maintain th[e] asset as separate throughout the marriage."

Johnston v. Nakis

In *Johnston v. Nakis*,[15] the Supreme Court, sitting in the Fourth Department, struggled valiantly before rejecting the plaintiff's contention that, under *Foti*, certain of the wife's accounts became marital "by reason of the fact that the activity in these accounts was reported to the federal and state taxing authorities on joint tax returns." Most significant in *Johnston* is that the Supreme Court could have entirely bypassed the *Foti* thicket, thereby avoiding confrontation with its parent Department, to effortlessly achieve the same conclusion because the parties had stipulated during trial that the accounts that the husband now claimed as marital, under *Foti*, remained the wife's separate property. It is eminently clear that the Supreme Court yielded to the importance of developing the issue.

Johnston struggled mightily to defend its Department; however, following a review of law and reason from federal courts and courts of other jurisdictions, the Supreme Court respectfully concluded that *Foti* could not have possibly meant what it held: "The court is fortified in its conclusion that the Appellate Division in Foti did not determine conclusively that the filing of a joint return transmutes gifted separate property business entities into marital property, as opposed to simply raising an issue of fact whether the judicial estoppel should be applied, by decisions from other states"[16]; "the choice to file jointly and report the tax losses on the gifted business entities is not conclusive."[17] Noble.

Johnston's analysis quoted *Angelo,* above, a very early post Equitable Distribution Law decision from the Second Department, which acknowledged that filing joint returns is intended to achieve no more than to confer a benefit on a married couple and not a gift:

> The filing of a joint income tax return must be viewed in the circumstances of the general financial background of the marriage; moreover, it should be construed as a response to the tax statutes designed to confer a benefit to the married couple. In itself the exercise of the option by the spouses to file a joint return should not be interpreted as the conclusive memorial of the intent to create a joint tenancy or to make a gift by one for the other. We should look beyond the simple execution of the return to the circumstances of the marriage.

Johnston also noted *Nimkoff*, that "in the absence of an agreement to the contrary, joint tax refunds generally are 'regarded as separate property of which each party is entitled to a pro rate share.'"

Johnston's examination of a litany of authority compelled its acknowledgment of the universal understanding and treatment of this issue, that commingling may not be backed into by way of a joint tax filing:

> The Angelo case is remarkable because it involved the question of ownership of the joint tax refund itself. The fact that… the joint refund is considered separate property of each spouse entitling each to his or her pro rata share, does not, without more, establish commingling of separate funds with marital funds. If the election to file jointly does not "conclusively" imply a gift of one spouse's pro

rata share to the other spouse, filing jointly cannot, by itself, imply a gift of the underlying separate accounts partially generating a return (or reduction in tax indebtedness). Something more is required to evidence an intent to create a joint tenancy in the accounts, which in this case are substantial (cites omitted).

[I]n Holden v. Holden, 667 So.2d 867 (1st Dist.Ct.App.Fla.1996), the court held that, "[b]y itself, the filing of a joint federal income tax return that includes the separate non-marital income of one spouse does not convert the separate income into marital property," reasoning that any contrary holding "would force married persons to file separate income tax returns, and to pay higher income taxes, simply to protect the non marital status of their separate property."

See also, Cerny v. Cerny, 440 Pa.Super. 550, 554, 656 A.2d 507, 509 (Superior Ct.Pa.1995) ("act of filing a return is not financial activity. One does not create or alter property by filing a tax return, as one does in opening or contributing to a bank account or other investment instrument. A tax return is merely a business record, and has no independent capacity to create or preserve wealth");

In re Marriage of Thomas, 199 S.W.3d 847, 864 (S.D.Mo.App.2006) ("the fact that the parties' joint income tax returns reflect income, expenses, and interest relating to the corporation…does not illustrate an intention to transmute Husband's interest in the corporation into marital property");

See Callaway v. C.I.R., 231 F.3d 106, 117 (2d Cir.2000) ("filing of joint tax return does not alter property rights between husband and wife"[18]) ("Callaway's decision to file jointly, see I.R.C. § 6013(a), had no effect on James' separate ownership of his Mountain View items");

Zeeman v. United States, 395 F.2d 861, 865 (2d Cir.1968) (I.R.C. § 6013(a)'s purpose "was to give all married persons the same tax reward on combined income that married persons in community property states enjoyed before its enactment,…[which enactment] was accomplished without changing their private ownership rights");

McClelland v. Massinga, 786 F.2d 1205, 1210 (4th Cir.1986) ("mere filing of a joint tax return by a husband and wife does not render the property taxed or the tax paid joint property");

In re Hejmowski, 296 B.R. 645, 648 (W.D.N.Y.2003) (describing Callaway as holding that, "if one spouse has ownership of an asset, such as a business, that has tax attributes for the two taxpayers jointly, the fact of joint filing does not give the other spouse a property interest in the business"), disagreed with on other grounds, In re Duarte, 492 B.R. 100 (E.D.N.Y.2011). Nothing in N.Y. Tax Law § 651 suggests a contrary result.

Federal Authority Holds That Filing Joint Tax Returns Does Not Alter Property Rights Between Spouses

In *United States v. Natl. Bank of Commerce*,[19] the U.S. Supreme Court held:

> " '[I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property.' " Aquilino v. United States, 363 U.S. 509, 513, 80 S.Ct. 1277, 1280, 4 L.Ed.2d 1365 (1960), quoting Morgan v. Commissioner, 309 U.S. 78, 82, 60 S.Ct. 424, 426, 84 L.Ed. 585 (1940). See also Sterling National Bank, 494 F.2d, at 921. This follows from the fact that the federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." United States v. Bess, 357 U.S. 51, 55, 78 S.Ct. 1054, 1057, 2 L.Ed.2d 1135 (1958). And those consequences are "a matter left to federal law." United States v. Rodgers, 461 U.S., at 683, 103 S.Ct., at 2137.

One court emphasized that a joint tax return is "wholly devoid of any operative words of conveyance."[20]

There Is No Duty to Maximize Taxes

The U.S. Supreme Court and the Second Circuit fortify the rebuttal doctrine of convenience in Banking Law §675(b) by emphasizing that a taxpayer does not run afoul of either the law or the spirit of the law in seeking to minimize tax liability. In *Helvering v. Gregory*,[21] Judge Learned held:

> Anyone may so arrange his affairs that his taxes shall be as low as possible; he is

> not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes. U.S. v. Isham, 17 Wall. 496, 506, 21 L.Ed. 728; Bullen v. Wisconsin, 240 U.S. 625, 630, 36 S.Ct. 473, 60 L.Ed. 830.

In *U.S. v. Thompson/Center Arms Co.*,[22] the U.S. Supreme Court adopted Judge Hand's reasoning in a dissent in *Commissioner v. Newman*:[23]

> In our system, avoidance of a tax by remaining outside the ambit of the law that imposes it is every person's right. Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.

Sayers v. Sayers, the Fourth Department Rules after *Johnston*

In *Sayers v. Sayers*,[24] a Fourth Department decision following *Johnston*, the husband appealed from an order that denied his motion for a downward modification of his maintenance obligation. Holding that the Supreme Court's misapplication of *Foti* was "of no moment," the Appellate Division, with no acknowledgment of *Johnston*, redoubled its intention to maintain the rule in *Foti* and distinguished *Sayers*:

> [C]ontrary to the court's determination, plaintiff was not taking a position contrary to a position taken on previously filed tax returns. Plaintiff and his current wife filed joint income tax returns, listing their income and earnings. At the hearing on his motion, plaintiff attempted to distinguish his income and earnings from those of his current wife. He at no time contradicted information contained in the tax return.

Conclusion

Foti strains reason as set forth in decisional authority at all levels nationwide. It imposes an unwarranted evidentiary burden upon the party who already bears the burden of proving separate property.

Transmutation or commingling of separate property into marital property requires an affirmative act on the part of the holder of the separate property that either consciously or by operation of law makes such a conveyance. Reporting revenue in order to benefit from a lower tax rate does not constitute such an affirmative act, as a matter of law.

Endnotes

1. 114 A.D.3d 1207 (4th Dept. 2014).
2. 12 N.Y.3d 415, 422 (2009).
3. *Foti*, at 1208.
4. 8 N.Y.2d 226 (1960).
5. 243 A.D.2d 168 (1st Dept. 1998).
6. 1998 WL 709854 (S.D.N.Y. 1998).
7. 260 A.D.2d 252 (1st Dept. 1999).
8. 11 Misc.3d 1058[A] (Sup. Ct. N.Y. County 2006).
9. The Appellate Division had not weighed in on this issue.
10. *Mahoney-Buntzman v. Buntzman*, 13 Misc.3d 1216(A) (Sup Court Westchester County 2006).
11. 74 A.D.2d 327, 333 (2d Dept. 1980).
12. 120 AD3d 1099 (1st Dept. 2014).
13. *McGarrity v. McGarrity*, 211 A.D.2d 669 (2d Dept. 1995); *Alaimo v. Alaimo*, 199 A.D.2d 1039 (4th Dept. 1993); *Feldman v. Feldman*, 194 A.D.2d 207 (2d Dept. 1993).
14. 230 A.D.2d 645 (1st Dept. 1996); *see Feldman v. Feldman*, 194 A.D.2d 207, 216 (2d Dept. 1993).
15. 46 Misc. 3d 651 (Sup. Ct. Monroe County 2014).
16. *Johnston, id.*, at 666.
17. *Johnston*, *id.*, at 665.
18. *In re Barrow*, 306 BR 28, 30 (Bankr WDNY 2004); *In re McKain*, 455 BR 674, 687 (Bankr ED Tenn 2011); *Cinema '84 v. C.I.R.*, 294 F3d 432 (2d Cir 2002); *In re Hejmowski*, 296 BR 645, 648 (Bankr WDNY 2003); *In re Edwards*, 400 BR 345, 347 (D Conn 2008); *Matter of Honomichl*, 82 BR 92, 94 (Bankr SD Iowa 1987); *In re Taylor*, 22 BR 888, 890 (Bankr ND Ohio 1982) ("Ohio law also governs the question of the spouses' relative property rights in the federal and state income tax refunds which are the subject of this dispute.").
19. 472 U.S. 713, 722, 105 S. Ct. 2919, 2925, 86 L. Ed. 2d 565 (1985), quoted in *Johnston v. Nakis*, 46 Misc. 3d 651 (Sup. Ct. Monroe County 2014).
20. *In re Wetteroff*, 453 F.2d 544, 547 (8th Cir 1972), *cert. denied*, 409 U.S. 934, 93 S.Ct. 242, 34 L.Ed.2d 188, rehearing denied 409 U.S. 1050, 93 S.Ct. 532, 34 L.Ed.2d 503 (1972).
21. 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).
22. 504 U.S. 505, n.4, 511 (1992).
23. 159 F.2d 848, 850-851 (2d Cir. 1947), *cert. denied*, 331 U.S. 859 (1947).
24. 129 A.D.3d 1519 (4th Dept. 2015).

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Practice in New York Under the Automatic Orders

By Barton R. Resnicoff

In 2009, the legislature added a requirement that Automatic Orders were required to be filed and served when a matrimonial action was commenced. How were these Automatic Orders going to be enforced? Just recently, in *Reliastar Life Insurance Company of New York v. Cristando and Lozada*[1] the Second Department—in what appears to be the first appellate decision on this issue—gave us an idea of what to expect when there is a violation of the Automatic Orders. What are they? Why is it important? How did we get to this point? And, finally, what should the practitioner do going forward? As *Reliastar* dealt with life insurance proceeds, this article will deal primarily with that issue.

A Brief History of Stays

The real need for stays on dissipation of assets got its start when New York enacted the Equitable Distribution Law in 1980 providing for disposition of marital assets regardless of whose name property was held in. Before that, New York was a "title State" wherein the manner in which an asset was titled governed its disposition in the divorce, with the rarely successful exception of impressing a constructive trust. If the marital residence or other asset was owned by one party or the other, that was it. In reality, the courts usually could only deal with exclusive possession (or sale, if jointly owned) based upon DRL §234, which provides that

> In any action for divorce, for a separation, for an annulment or to declare the nullity of a void marriage, the court may(1)determine any question as to the title to property arising between the parties, and(2)make such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties. Such direction may be made in the final judgment, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and final judgment.

There were exceptions, but DRL §234 was primarily used to deal with issues of exclusive possession[2] of the marital residence or other items of property, like exclusive use of a motor vehicle.[3] Occasionally, pre-equitable distribution, there would be a need to freeze an asset or safe deposit box, primarily for disclosure purposes. But the need for stays became more common when equitable distribution became the law.

When that need initially occurred, practitioners were forced to be creative, as initially there was no requirement to maintain the *status quo*, which led to applications by Order to Show Cause to stay the dissipation of assets. The leading case of *Froelich-Switzer v. Switzer,*[4] held that

> The interests of justice, in an equitable distribution case, require that the assets of *both* parties not be significantly disturbed or rearranged by being transferred, relocated or altered, by loans, liens or otherwise, *until there has been a final determination by the court as to what the assets are and the rights of the respective parties thereto in terms of ownership and possession.*
>
> Obviously, a party against whom a claim for equitable distribution and/or maintenance is made may seek to minimize the assets possessed, by way of disposition or otherwise, so as to affect the court's decision. This is so since it is in the interest of the spouse resisting a claim for equitable distribution to show the least amount of personal assets possible. Similarly, the interest of the party seeking equitable distribution is to minimize its own personal assets.
>
> Accordingly, with the emergence of equitable distribution in New York's legal firmament, *the financial status quo of both parties, as it existed at the time of the commencement of the action, should be maintained until and unless a court has had a proper and fair opportunity to appraise the evidence presented*.
>
> Apparently, the State of Michigan and allegedly, other jurisdictions, which do have equitable distribution, have followed the practice of restraining any abnormal disposition of the parties' assets except in the course of regular business and personal affairs, unless prior permission be obtained from the court. This approach is logical and persuasive. (Emphasis added)

There were other early cases also trying to address this issue such as *DeKwaitowski v. DeKwaitowski*[5] and *Annexstein v. Annexstein*.[6] Under *Liebowits v. Liebowits*,[7] the procedure to effectuate a restraint of assets under DRL §234 was explained:

> Section 234 of the Domestic Relations Law provides the authority for the issuance of an order restraining disposition of marital assets during the pendency of a divorce action. Therefore, compliance with the formalities and jurisprudential requirements of CPLR article 63 relative to preliminary injunctions is not a prerequisite to an order of restraint.

With *Liebowits,* it was nearly automatic to start a divorce action with a request for an interim stay whenever there was a fear of transfers or dissipation of assets, and if any motion was made at the time of commencement, those forms of relief were usually added to a request for Temporary Restraining Orders (TRO) against third parties as a form of relief.

In 2009, that changed when DRL §236B(2)(b)was added and established "Automatic Orders," requiring that

> …the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in this paragraph. The automatic orders shall be binding…upon the defendant immediately upon the service of the automatic orders with the summons. The automatic orders shall remain in full force and effect during the pendency of the action, unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged. The automatic orders are as follows:
>
> (1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.
>
> (2) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party, or upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.
>
> (3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbering any assets, or unreasonably using credit cards or cash advances, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.
>
> (4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.
>
> (5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

The need for the court to issue a stay against a party and/or the holder of a specific asset should then no longer exist, or should it?

Consider a divorce I was retained in; where the wife (my client) reported to me that her husband had a drinking problem and was spending unreasonable amounts at bars and strip joints, with copies of the banking statements to confirm this. Would this be an appropriate case to request such stays beyond the existence of the Automatic Orders? Both my client and I thought so; the judge did not. While the action was pending and even after it was settled, the husband continued to feed his addiction with inappropriate and unreasonable withdrawals. I still think that the judge should have granted the stays requested against the financial institutions. In other words,

the Automatic Orders should not preclude further actions such as those permitted under CPLR 6301. But that is another subject for another time. Let's then address the issues in *Reliastar*.

The Repercussions of Violating Automatic Orders

In *Reliastar*, the husband (my client) had commenced a divorce action against his wife, filing and serving the Automatic Orders. While the divorce was pending, the wife developed stomach cancer which reached a terminal stage. The husband's position was that her goal was to do everything in her power, whether in compliance with Court Orders or not, to see to it that her husband got little or nothing from the marriage. After her motion for an expedited trial was granted but before the trial commenced, the wife drafted a new will disinheriting the husband and giving her entire estate to her brother. She transferred to her brother her one-half interest in a separate property house she owned jointly with her brother without consideration. She changed the beneficiary on her life insurance policy from her husband to her brother. This was done without advising the husband or the court, and obviously not requesting permission as required by the Automatic Orders. While the parties had two young daughters, they were not made the beneficiaries. None of this was disclosed at the trial that commenced a few weeks later.

At the beginning of the trial, the husband proceeded to inquest on the issue of grounds (the action was commenced pre-no fault) based upon constructive abandonment; the trial judge indicated that he "will" grant the divorce, and the trial on the other issues continued and concluded. Less than a month after the end of the trial, but before post-trial submissions and, therefore, a decision, the wife passed away. Whether or not there was a divorce was the subject of another appeal in *Cristando v. Lozada*.[8]

Both the husband and the brother submitted a written claim for the life insurance proceeds. The life insurance company commenced a stakeholder proceeding under CPLR 1006(f) for the Court to determine who was entitled to the proceeds, with both the husband and the brother requesting the funds. The Supreme Court awarded those proceeds to the husband, finding a violation of the Automatic Orders. The brother appealed.

Key to the brother's position was that the wife owned the life insurance policy (she did); and that the life insurance company must, based upon that contract, deliver the proceeds to him. Key to the husband's position was that the Automatic Orders were clearly and intentionally violated, and that the courts must enforce them and award the proceeds to him.

The Automatic Orders are very clear and unambiguous; the wife was precluded from changing the beneficiary of the life insurance policy at the time she did so. Because of that, the husband's position was that the change of beneficiary was void and should not be honored. The husband's position was that to have any other result would have made the Automatic Orders useless.

There was very little case law to present on this subject, and what did exist were all trial court decisions. When the wife changed the beneficiary designation on the policy in question, she was in violation of the fifth paragraph of the Automatic Orders, doing exactly what the law was meant to prevent. What effect did these Automatic Orders have on the life insurance policy? One of the trial court decisions, *Sykes v. Sykes*,[9] considered this issue and noted that

> Justice Ellen Gesmer held in *PS v. RO*, 31 Misc3d 373, 916 NYS2d 755 (Sup. Ct., NY Co., 2011), that the promulgation of DRL §236(B)(2)(b) as a court rule in 22 NYCRR 202.16-a constitutes a "lawful mandate of the court" and that the legislative history of DRL §236(B)(2)(b) clarifies "that the Legislature intended that a violation of the automatic orders would be redressed by the same remedies available for violations of any order signed by a judge." *Id*. at 376, 916 NYS2d 755….
>
> …to adjudge a party in civil contempt, a court must conclusively determine three things: 1) the existence of a lawful order expressing an unequivocal mandate of which the party had knowledge; 2) the disobedience of such order; and 3) that the rights and remedies of a party to the action were prejudiced by the violation of the order. *Matter of McCormick v. Axelrod*, 59 NY2d 574, 583, 466 NYS2d 279, 453 NE2d 508 (1983); Judiciary Law §753(A)(3)….it has been established that the automatic orders are a lawful mandate of the court. See *PS v. RO*, 31 Misc3d at 376, 916 NYS2d 755…. Plaintiff…had actual or constructive knowledge of the language of the automatic orders contained within the summons. Finally… plaintiff breached the terms of the automatic orders…the only issue remaining…is whether plaintiff's breach of the automatic orders prejudiced defendant's rights in this…action (see Judiciary Law §753[A]; *McCormick*, 59 NY2d at 583, 466 NYS2d 279, 453 NE2d 508 ["prejudice to the right of a party to the litigation must be demonstrated"]) and whether alternative remedies to a finding of contempt are unavailable or would be ineffectual. See *Farkas v. Farkas*, 201 AD2d 440, 607 NYS2d 945(1st Dept. 1994).

> …In the Assembly's Memorandum in Support of Legislation, it is stated that the automatic orders are needed "to prevent both parties from dissipating assets, incurring unreasonable debts, or removing a party or the children from health or life insurance policies." Mem. in Support of 2009 NY Assembly Bill A2574, Bill Jacket, L. 2009, ch. 72; see also Introducer's Mem. in Support, 2009 N.Y. Senate Bill S2970….
>
> Dissipation has a specialized meaning within the context of matrimonial law. It has often been characterized as having a nefarious or devious undertone carrying the implication that the party transferring the funds did so with the intent of impeding the economic rights of the other spouse…35 Misc3d 595, 940 NYS2d 477-8.

The wife in *Reliastar*, knowing she was terminally ill, acted to impede the husband's rights as the primary beneficiary of the policy and made a gift *causa mortis* to her brother. There is an alternative remedy to a finding of contempt, i.e., to declare the change in beneficiary void. *Sykes* is not about punishing someone for contempt, *per se*, but to make the parties whole based upon the law, including the Automatic Orders. As was also noted in *PS v. RO*,[10]

> …the court rules constitute lawful mandates of the court. Furthermore, the legislative history of Domestic Relations Law Section 236(B)(2)(b) makes clear that the legislature intended that a violation of the automatic orders would be redressed by the same remedies available for violations of any order signed by a judge.

It should be clear that the wife, by changing the beneficiary on the policy did exactly what the legislature wished to prevent. The key was not a finding of contempt,[11] but to prevent the damage by making sure that the husband's economic rights were protected. The only way to do that was to void the change of beneficiary and award the proceeds from the policy to him.

Beneficiary Status: The DRL and Contract Law

The courts in *Liebman v. Liebman*,[12] and *S.G. v. P.G.*,[13] specifically directed the life insurance not be changed, based upon the specific provisions of DRL §236B(2)(b)(5), and be maintained during the action. In *Estate of George Bowens, Jr.*,[14] there was no specific prohibition against the change of a pension death benefit and neither of the parties to the underlying divorce prosecuted the action for about three years. Accordingly, the court in *Estate of George Bowens, Jr,* did not prohibit the change of beneficiary. In *Reliastar*, both husband and wife worked very hard to litigate the divorce and the Automatic Orders specifically prohibited the wife's actions.

In *Reliastar*, there was an intentional violation of an Order of the Court, raising, at a minimum, a fiduciary duty as between husband and wife concerning the policy.

One issue considered was "should the change in beneficiary submitted by the wife, as part of her contract with Reliastar, take precedent over her obligations under the Automatic Orders." There were no appellate decisions on all fours on this issue, but the case law indicated that the contract should give way to the directions of the Automatic Orders.

What effect then did the Automatic Orders have on the contract between the wife and Reliastar? Can an Order in another action directly affect that contract? *Rosen v. Equitable Life Assur. Socy.*[15] held that an outside impediment should affect the contract, as the insurance company sought an order of interpleader to include an alternate beneficiary of annuities under CPA §287 (the predecessor of CPLR 1006)—the basis of Reliastar's application here. Both the decedent's wife and brother in *Rosen* had claimed the proceeds from the policies. The Court held that the insurance company acted appropriately in letting the courts decide who was entitled to policy proceeds, without regard to whether or not it was part of the contract. The Automatic Orders in *Reliastar* are such an impediment.

Further proof that an outside force can affect or prevent a change in beneficiary is found in *Zies v. New York Life Ins. Co.*,[16] when it held that

> If a contract was made for valuable consideration to take out a certificate…and the consideration fully furnished by the beneficiary, the member would not be allowed to destroy the rights…by…naming a new beneficiary.

Zies permits consideration outside the insurance policy to prevent a change in beneficiary when appropriate. When the *Reliastar* policy was taken out, the consideration for the husband to be named as beneficiary was the marriage between him and the wife; the Automatic Orders merely confirmed this formally, justifying the outcome.

In *Bell v. Roosevelt Sav. Bank*,[17] a Stay was granted in a divorce action against the wife and her mother from withdrawing funds from a bank account at Roosevelt Savings Bank. The bank was not stayed, but was made aware of the stay against the account holders when the wife and mother brought an action to direct that their contract rights with the bank should be enforced by the bank and withdrawals permitted. The Court held that

> If the Bank was so concerned about its rights and responsibility and those of its depositors it should have commenced an interpleader action. It failed to do so. Thus it will require a final resolution of this action (Index # 45166/93) to determine if the Bank in fact acted so improperly as to result in liability and if liable the extent of damages.
>
> In so far as plaintiff's [*sic*] seek summary judgment on this action there are questions of fact as concerns this account and the rules applicable to it. The court cannot grant plaintiffs' application.
>
> Furthermore, to grant plaintiffs' application at this juncture would be equivalent to granting plaintiffs permission to violate the order of this court (Index # 17932/92) which prevented them, individually, from removing the funds in question. The court cannot sanction this requested relief.

In other words, the Court, in *Bell*, as in *Reliastar*, would not let the plaintiffs violate a Court Order by voiding the transaction. Also relevant is *Pass v. Kramer,*[18] which held that

> The granting of an order of interpleader does not turn the action into a suit in equity, but is a statutory remedy designed for use in common law courts and actions, to the application of which certain rules derived from the practice of the equity courts have been adapted. *Englander v. Fleck*, 51 Misc 567, 101 NYS 125; *Nolan v. Smith*, 193 Misc 877, 85 NYS2d 380. 160 NYS2d 415.

If principles of equity are considered, as was noted in *Bell*, the Court did not permit the brother to benefit from a violation of a Court Order. In reality, in an interpleader action such as in *Reliastar*, the aspects of equity are important. See also *Mann v. John Hancock Mut. Life Ins. Co.*[19]

Interestingly, in *Reliastar*, the brother attempted to continue to litigate his sister's divorce, an attempt that was rejected as the trial Court noted

> Edwin Lorenzo[*sic*]does not have standing to raise such an issue because he was not a party to the matrimonial proceeding. Further, upon death of a party, the matrimonial action terminates.

He also claimed that a term life insurance policy wasn't really an asset concerning the rights of a beneficiary, but it was pointed out that a life insurance policy is a contract, with rights and obligations. The owner has an affirmative obligation to make premium payments; the insurance company, upon the death, has an obligation to pay the death benefit. Whether the husband only had an inchoate right until the wife's passing is beside the point. The legislature, in directing the Automatic Orders, set forth the law and the obligation of parties to divorce litigation, that beneficiaries of life insurance not be changed. The wife violated that. The Courts recognized that violation and enforced the law.

A Practical Result of *Status Quo Ante*

On a practical level, the husband's position was that to permit the change of beneficiary would circumvent the express purpose of the Automatic Orders. If the wife, while the divorce was pending wished to change beneficiaries, she always had the option of obtaining permission to do so from the divorce court. To have done so, surreptitiously, indicated a desire to violate law in an attempt to prevent the husband from collecting what he was entitled to.

As Automatic Orders are not conditioned upon either parties' actions concerning maintaining a specific asset, for the brother to have claimed that the husband was less entitled to the proceeds because he did not directly pay the premiums while the divorce was pending was without merit, and not a factor on the question of the wife's violation of those orders.

Nothing done by the husband directly impacted upon the brother's entitlements here. The wife, by her intentional violation of the Automatic Orders, created enforcement similar to civil contempt. When civil contempt is remedy, it has been held that

> …civil contempt fines must be remedial in nature and effect (*Gompers v. Bucks Stove & Range Co.,* 221 US 418, 31 SCt 492, 55 LEd 797). The award should be formulated not to punish an offender, but solely to compensate or indemnify private complainants (*Geller v. Flamount Realty Corp.*, 260 NY 346, 183 NE 520; *Socialistic Co-op. Pub. Assn. v. Kuhn*, 164 NY 473, 58 NE 649)…*State v. Unique Ideas, Inc.*[20]

In reality, that is what the husband sought; a return to the *status quo* prior to the violation of the Automatic Orders, i.e., reinstatement as beneficiary of the insurance policy—exactly what the Courts ultimately did.

The Appellate Division in *Reliastar* decided that the wife, by changing the beneficiary to her brother while the divorce was pending, did exactly what the legislature wanted to prevent. The key was not a finding of contempt, but to void the change in beneficiary by making sure that the husband's economic rights were protected,

awarding the proceeds of the policy to him, and not relitigating the divorce.

Enforcing the Automatic Orders, and also permitting use of the CPLR to ensure compliance by non-parties, remains especially important where the integrity of the marital estate is threatened to such an extent as to frustrate equitable distribution.

Endnotes

1. __ AD3d __, 2015 NY Slip Op. 04630 (2d Dept, June 3, 2015).
2. *Schwartz v. Schwartz*, 23 AD2d 572 (2d Dept 1965).
3. *DiMascio v. DiMascio*, 88 AD2d 966, 451 NYS2d 812 (2d Dept. 1982).
4. 107 Misc2d 814 (Sup. Ct., NY Co. 1980).
5. NYLJ, 5/17/81 (Sup. Ct., NY Co.).
6. NYLJ, 4/14/81 (Sup. Ct., Kings Co.).
7. 93 AD2d 535, 462 NYS2d 469 (2d Dept. 1983).
8. 118 AD3d 846, 987 NYS2d 621 (2d Dept. 2014).
9. 35 Misc3d 591, 940 NYS2d 474 (Sup. Ct., NY Co. 2012).
10. 31 Misc3d 373, 916 NYS2d 755 (Sup. Ct., NY Co. 2011).
11. As the wife had already passed away, a contempt finding against her would not lie, nor would it accomplish anything.
12. 37 Misc3d 1224(A) (Sup. Ct., Queens. Co. 2013).
13. 32 Misc3d 1233(A) (Sup. Ct., Nassau. Co. 2011).
14. 172 Misc2d 153 (Surr. Ct., Bronx. Co., 1998).
15. 289 NY 333 (1942).
16. 237 AD 367 (1st Dept. 1933).
17. 160 Misc2d 728 (Sup. Ct., Kings Co. 1994)
18. 160 NYS2d 414 (App Term, 1st Dept., 1954)
19. 20 AD2d 608 (3d Dept. 1963).
20. 44 NY2d 345 (1978).

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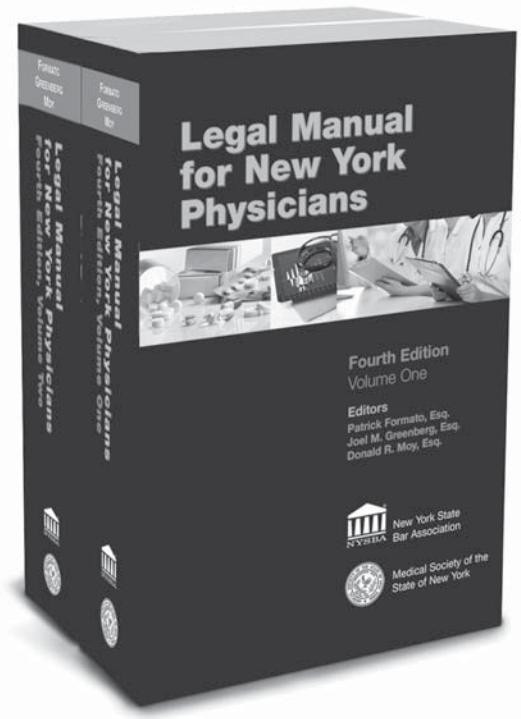

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Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Same-Sex Marriage Update

Landmark Supreme Court ruling legalizes same-sex marriage

Over the past several years in this column, I have been following the fate of same-sex marriage and the changing landscape of acceptance across America. The 13 states where same-sex couples have not, until this point, been able to share in the freedom to marry were Ohio, Michigan, Tennessee, Kentucky, Alabama, Texas, Arkansas, Georgia, Mississippi, Nebraska, North Dakota, South Dakota, and Missouri.

On June 26, 2015, the U.S. Supreme Court ruled 5-4 that the U.S. Constitution's guarantee of due process and equal protection under the law means that states cannot ban same-sex marriages. With the landmark ruling in *Obergefell v. Hodges*, gay marriage became legal in all 50 states, and it no longer matters to which state a same-sex married couple travels. This landmark case will have significant tax, estate planning, immigration, employee benefits, and other financial and legal implications for individuals and businesses that reside in states that didn't recognize same-sex marriages previously.

> Justice Anthony Kennedy, writing on behalf of the court, stated: It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The reasoning behind this new civil right was poignantly stated: "Without the recognition, stability and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser."

The ruling is the Supreme Court's most important expansion of marriage rights in the United States since its landmark 1967 ruling in the case *Loving v. Virginia* that struck down state laws barring interracial marriages.

The U.S. is now the 21st country to legalize same-sex marriage nationwide, including territories. Married same-sex couples will now enjoy the same legal rights and benefits as married heterosexual couples nationwide and will be recognized on official documents, such as birth and death certificates, and will receive the same economic benefits as married heterosexual couples.

Recent Legislation

Maintenance Guidelines legislation

On June 25, 2015, the New York State Legislature passed the Office of Court Administration's Maintenance Guidelines legislation. As of this writing, the bill is awaiting signature by Governor Cuomo.

The new legislation changes the way temporary maintenance is calculated, provides a formula for post-divorce maintenance, different calculations for households with and without children, as well as advisory guidelines as to the duration of support based on the length of the marriage. It caps income at $175,000 with bi-annual CPI increases (reduced from the current cap of $543,000), although the court has discretion to go above the cap. The court will no longer distribute the value of the enhanced earnings of a license, degree, or celebrity goodwill, but shall consider the direct or indirect contributions of one spouse to the enhanced earning capacity of the other spouse for purposes of equitable distribution. Actual or partial retirement is now a grounds for modification. Temporary and post-divorce maintenance shall be calculated prior to child support, because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

Child Custody

Modification of custody

***Matter of Thomas v. Wong*, 127 AD3d 769 (2d Dept. 2015)**

The Second Department affirmed the decision of the Family Court and granted the father's petition to modify the custody order, awarding him sole custody of the parties' child based on the totality of the circumstances, which was supported by a sound and substantial basis in the record. Additionally, the Appellate Division affirmed the lower court's denial of the mother's request mid-hearing for an updated psychiatric report of the mother, because she failed to demonstrate that an updated report was necessary.

Non-biological, non-adoptive parent has standing to seek custody or visitation based on equitable estoppel

***Matter of Arriaga v. Dukoff*, 123 AD3d 1023 (2d Dept. 2014)**

After entering into a domestic partnership in 2007, the parties decided to have a child through artificial insemina-

tion, and thereafter, the inseminated party gave birth to the parties' daughter. The parties equally shared in the responsibilities of caring for the child, but the non-birth-mother never formally adopted the child. Subsequently, when the child was almost four, the two women ended their relationship and the non-birth-mother moved out of the parties' residence. The non-birth-mother proceeded to visit with the child on a daily basis and remained involved in the daughter's daily life.

Shortly after the non-birth-mother moved out, the birth mother petitioned for child support from the non-birth-mother. The Family Court, holding that the non-birth-mother was responsible for the financial support of the child, stated that the "uncontroverted facts establish that [she] is a parent to [the child]; and as such is chargeable with the support of the child."

The non-birth-mother then petitioned for custody or visitation with the child. Following the Family Court's holding regarding child support, the non-birth-mother filed an amended petition asserting that she had been adjudicated a parent of the child in the support proceeding and was therefore entitled to petition for custody. The birth mother, arguing that the non-birth-mother was not a biological or adoptive parent, moved to dismiss the custody or visitation petition based on lack of standing.

The Second Department affirmed the decision of the Family Court, which held that the birth mother was judicially estopped from arguing that the non-birth-mother was not a parent of the child after asserting that she was a parent during the support proceeding and obtaining an award of child support from the non-biological parent.

Non-biological, non-adoptive parent does not have standing to seek custody or visitation

Matter of Barone v. Chapman-Cleland, 2015 WL 3797129 (4th Dept. 2015)

The petitioner, the former same-sex partner of respondent, sought visitation with respondent's son on the ground that a parent-child relationship existed between her and respondent's son. The parties were never married and petitioner never adopted respondent's son. Noting that parentage under New York state law derives from either biology or adoption and that any change to the meaning of "parent" should come by way of legislation, the Fourth Department rejected petitioner's request for visitation.

Supervised visitation

Matter of Majuk v. Carbone, 2015 WL 3648604 (4th Dept. 2015)

The mother filed a petition requesting that the father's visitation with the child be supervised. The court, absent any such request by the mother or the attorney for the child, issued an order permanently terminating the father's access to the child. The father appealed. The mother argued that, since the father defaulted by failing to appear at a scheduled court appearance, the father was not permitted to appeal.

The Fourth Department reversed and remitted for further proceedings. The court found that the father did not default since the father's attorney appeared on his behalf. The mother's petition sought supervised visitation, not an outright termination of the father's parental rights, and therefore, the parties were not notified of or given an opportunity to address the potential issuance of such an order.

Imprisoned father granted visitation *Matter of Kadio v. Volino*, 126 AD3d 1253 (3d Dept. 2015)

The parties, who began dating upon the father's release from prison, are unmarried parents of a child. The father was again incarcerated on a parole violation, and while he was incarcerated, the mother brought the child to visit the father in prison. Upon the father's release from prison, the father resided with the mother and the child for a few months.

Thereafter, the father petitioned for visitation of the two-year-old child. An order was granted on consent awarding the mother sole custody of the child with the father to have unsupervised visitation on alternate weekends and one weekly midweek day.

Following this order, the parties' relationship became increasingly volatile, resulting in numerous reports to the police and child protective services, multiple orders of protection, and periods of incarceration for the father. Thereafter, the father plead guilty to burglary and was sentenced to 16 years to life in prison. Pursuant to the terms of an order of protection entered on consent, the father was prohibited from contacting the mother or the child for a period of one year.

During that period of time, the mother married and had two children with her husband. Based on information received from the mother, the six-year-old child believed that the mother's husband was his father.

The father sought to modify the prior consent order, such that visitation with the child would be permitted at his place of incarceration. Arguing that it would be detrimental to the child's mental health to learn that his stepfather was not his real father and to visit the father in a prison setting, the mother vehemently opposed the father's application for visitation. The Family Court granted the father's request for visitation and ordered that the mother, with financial contribution from the father, was to arrange for transportation of the child to the father's correctional facility, located two hours from the mother's residence, for visitation with the father 12 times per year. In addition, the Family Court ordered that the child was to receive counseling prior to beginning visitation with the father.

The mother appealed, and despite the opinions of the psychologist and the attorney for the child that prison

visitation would be traumatic for the child, the Third Department affirmed the Family Court's ruling. However, finding that 12 times per year was excessive, the Appellate Division remitted the matter to the Family Court with instructions that visitation was not to exceed four times per year until such time as the father makes an application for modification and the court finds that there has been a substantial change in circumstances sufficient to warrant an increase in the frequency of the visits.

Mother's relocation does not control child's school selection *Matter of Brennan v. Kestner*, 124 AD3d 980 (3d Dept. 2015)

At the time of the parties' separation in 2012, the parties' son was enrolled in first grade at St. Pius X Catholic School in Albany County. The parties' separation agreement provided that the parties would have shared parenting time and joint legal custody, with the mother to have primary physical custody, and that the parties could relocate within four different counties. Additionally, the agreement provided that, "the child shall attend school in the district where the [m]other resides should the child no longer attend St. Pius." In 2013, the mother relocated and communicated to the father that she wished to enroll the child in the public school district in her town. The father commenced an action to modify the agreement to provide him with decision-making authority over the child's attendance at St. Pius. The mother moved to dismiss. The Family Court, explaining that the agreement permitted the mother to relocate and presumed that the child's attendance at St. Pius would eventually cease, partially granted her motion on the basis of the father's failure to state a case.

On appeal, the Third Department held that the Family Court erred by not holding a hearing and misconstruing the parties' separation agreement to read that the mother's relocation controlled the choice of school. The court reasoned that, although the agreement provided that the child shall attend school in the mother's district, attending school in the mother's district only becomes controlling upon the child's cessation of attendance at St. Pius. Since the separation agreement did not specify any event that would terminate the child's enrollment at St. Pius, the court found that the child was to continue attending St. Pius until the child finishes the eighth grade (St. Pius does not have a high school) or the parties mutually agree to withdraw the child from the school.

Enforcement

***Pelgrim v. Pelgrim*, 127 AD3d 710 (2d Dept. 2015)**

The parties are the parents of three children and were divorced by judgment in 2011. Pursuant to the terms of the parties' stipulation of settlement, which was incorporated, but not merged, into the judgment of divorce, the wife was to have exclusive occupancy of the marital residence for two years and be responsible for payment of all carrying charges on the residence until its sale following the two-year occupancy period. In addition, the parties agreed that the wife would have legal and physical custody of the parties' children, with the husband, who lived in California, to have daily communication with the children and visitation with the children whenever he visited New York through the "Making It Work" program.

In 2012, the wife was held in civil contempt for violating the judgment of divorce by interfering with the sale of the marital residence and failing to vacate it within the specified time period.

Thereafter, in 2013, the husband moved for reimbursement of the property taxes that accrued on the marital residence beyond the agreed-upon two-year period and enforcement of the parental access provisions. In January 2013, the trial court issued an interim order directing that the wife provide the husband with the address and telephone number of the parties' three children. The wife failed to comply with this directive and the husband sought to again hold the wife in civil contempt. Revealing that she had relocated with the children to Maryland in 2012, the wife opposed the husband's motion for an order finding her in contempt and argued that New York was not an appropriate forum to hear the parties' custody disputes.

Ultimately, the trial court held, and the Appellate Division affirmed, that the husband was entitled to reimbursement for his payment of the real estate taxes that accrued due to the wife's delay in placing the marital residence on the market and declined to exercise jurisdiction over the custodial access issues. Although the parties' stipulation of settlement conferred continuing jurisdiction over custody matters with the courts of New York and New York was the children's "home state" as defined by the Uniform Child Custody Jurisdiction Enforcement Act, neither party currently resided in New York and evidence concerning the children's care, education, and relationships was not readily available in New York. Lastly, as a result of the wife's disobedience and contemptuous conduct, the husband was granted counsel fees in the sum of $8,359.50 in connection with the reimbursement/enforcement motion and $2,417.50 for the prosecution of the contempt motion.

***Caren Ee. v. Alan Ee.*, 124 AD3d 1102 (3d Dept. 2015)**

The parties entered into a divorce agreement concerning the parties' adult autistic son, who received public recognition for his achievements as a visual artist, whereby the parties would mutually manage the son's affairs. Specifically, the parties agreed that "[a]ny books or movies dealing with [the son] or his artwork" must be contracted by the parties' mutual agreement.

Thereafter, in 2012, the wife published a book without the consent of the husband, which discussed a certain medical disorder that she believed to be present in the parties' son and other autistic children. The wife based the book on her research as well as her experience as the mother of an autistic child. Using a pseudonym for identification purposes, the book indirectly alluded to the parties' son and his various medical conditions.

Following the book's publication, the husband moved to enforce the provision of the parties' divorce agreement that required the consent of both parties prior to the publication of any material relating to the son, counsel fees, and a temporary and permanent injunction to prevent the wife from "making bookstore, media or any other promotional appearance(s) and/or engaging in any profit driven enterprise related to [the son's] health condition."

Both the trial court and the Appellate Division denied the husband's requests for temporary and permanent injunctions, reasoning that injunctive relief is an extraordinary remedy to be granted only in the case of irreparable injury. The Appellate Division reversed the trial court's decision to deny the other relief requested by the husband, found that the wife had violated the terms of the divorce agreement, and remitted the matter to the trial court to determine the amount of net proceeds from the book to be deposited into the parties' joint account and the amount of counsel fees to be awarded to the husband. The court reasoned:

> Notably, none of these definitions [of "dealing with"] includes qualifying words such as "primarily" or "solely" that would narrow the meaning of the phrase as the wife contends, nor does any such limiting language appear in the disputed provision. The parties could have included such language if they had wished to narrow the scope of their agreement to books that dealt mainly or exclusively with the son, but they did not do so, and a court may not create a new contract in the guise of interpretation by adding terms to the language chosen by the parties.

Equitable Distribution

Recoupment of marital funds spent to pay down separate property mortgage, but not for payments made prior to marriage

***Ceravolo v. DeSantis*, 125 AD3d 113 (3d Dept. 2015)**

Two and one-half years before the parties were married, the husband purchased the marital residence in his own name using $130,000 of his own funds, a loan of $100,000 from his father that was secured by a note and mortgage, and $30,000 of the wife's separate funds. After the closing, the wife proceeded to pay the mortgage for a period of two years prior to the parties' marriage and during their marriage until the mortgage was satisfied.

The trial court determined that the wife's financial contributions transformed the husband's pre-marital, separate property into marital property. The Appellate Division reversed and held that "financial transactions between persons prior to their marriage…cannot be considered to have been the product of the marital enterprise." Since the parties were not married when the home was purchased, title controls. However, the court found that the wife was entitled to recoup an equitable share of the marital funds expended to pay down the husband's mortgage on the marital residence. The dissent focused on the unfairness that the wife was unable to recoup her $30,000 contribution to the down payment and the mortgage payments she made prior to the marriage.

Counsel Fees

***Karg v. Kern*, 125 AD3d 527 (1st Dept. 2015)**

In affirming the decision of the trial court, the First Department held that the wife was entitled to an interim award of counsel fees in the sum of $136,000 based on the significant disparity in the parties' incomes and assets.

***Carlin v. Carlin*, 127 AD3d 682 (2d Dept. 2015)**

The wife moved for a money judgment against the husband for failing to make a required distributive award and requested in excess of $88,000 of attorneys' fees from the husband. The court granted the wife's motion for a money judgment and awarded her $45,000 in counsel fees. The wife appealed and the Appellate Division affirmed.

***Evgeny F. v. Inessa B.*, 127 AD3d 617 (1st Dept. 2015)**

Based on the financial circumstances of the parties and the husband's litigious conduct throughout the parties' child custody dispute, the court found that an award of interim counsel fees in the sum of $525,000 and expert fees in the sum of $38,000 to the wife was appropriate.

***Myles v. Perry III*, 127 AD3d 579 (1st Dept. 2015)**

The parties' settlement agreement provided that the parties "agree that, with respect to the unpaid legal fees and disbursements each party owes to his or her attorneys…requests may be made for same to the Court upon papers…Notwithstanding the foregoing, each party shall be responsible for and shall pay his or her respective counsel…fees…" Although the husband requested more than $100,000 in counsel fees, the court considered the wife's earlier payment of $40,000 as well as the husband's substantial distributive award in fashioning its award of only $62,500 in attorneys' fees to the husband.

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. Ms. Samuelson may be contacted at (516) 294-6666 or WSamuelson@SamuelsonHause.net. The firm's website is www.SamuelsonHause.net.

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