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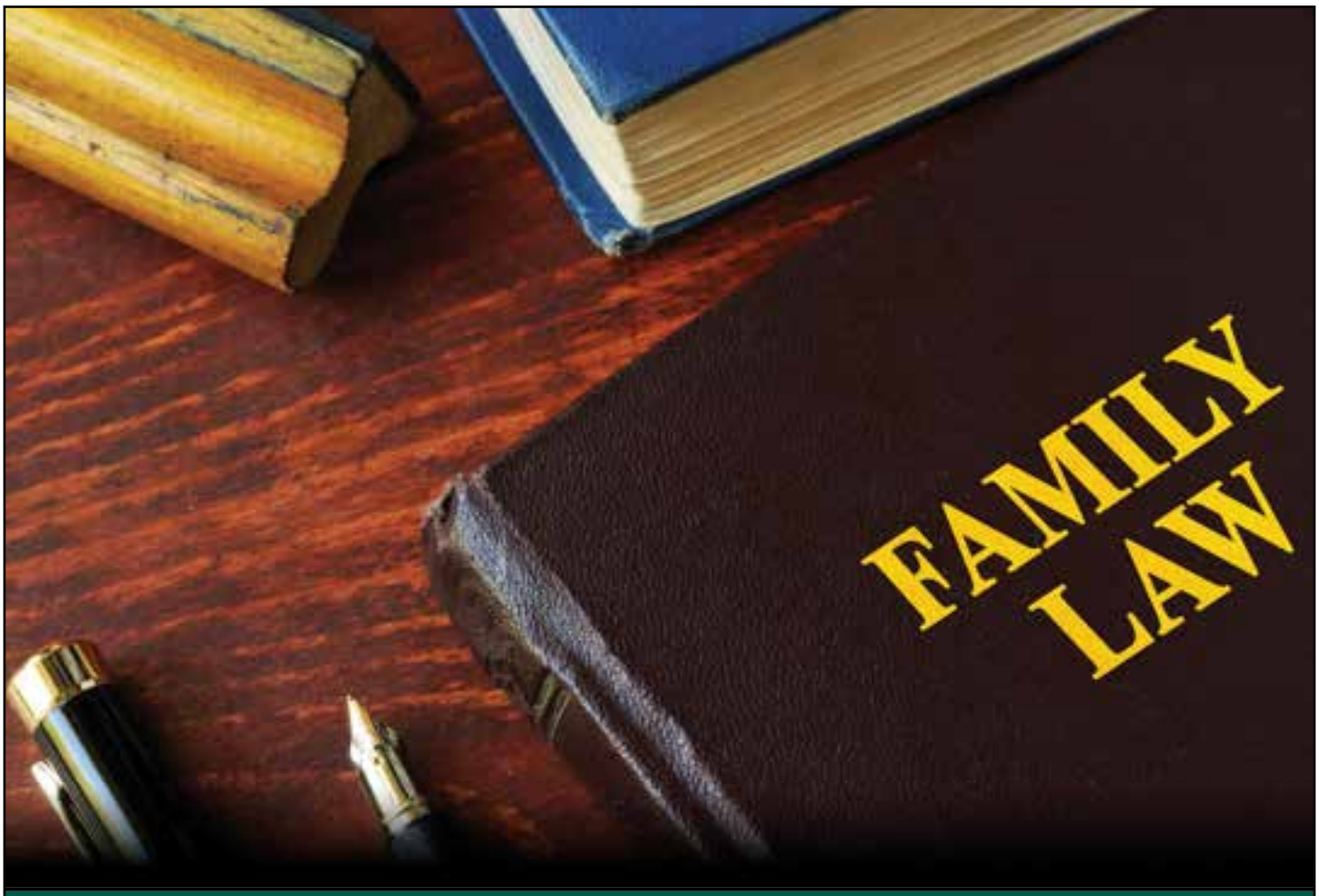

21st Century Custody: Issues in Parentage Continue

By Lee Rosenberg, Editor-in-Chief

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21st Century Custody: Issues in Parentage Continue

By Lee Rosenberg

Life has changed for many as we continue post the 2016 elections on many fronts. What many expected to occur did not. With that, the LGBTQ+ community, which saw a dramatic positive shift in national opinion and laws encompassed in New York by the passage of the Marriage Equality Act,[1] then the United States Supreme Court's decisions in 2013's *U.S. v. Windsor*[2] and 2015's *Obergefell v. Hodges,*[3] and then the New York Court of Appeals decision on 2016's *Brooke S.B. v. Elizabeth A.C.C.,*[4] has become afraid of the loss or reversal of that momentum. (Tragically, the trailblazing voice of Judge Sheila Abdus-Salaam, who authored the Court's impactful decision in *Brooke S.B.*, has been silenced by her untimely death this past April.) It was then thought that the next phase of rights expansion would be in the transgender/bi-gender community. In March of this year, however, the U.S. Supreme Court opted not to hear a case initially scheduled before it on the issue of bathroom rights in *Gloucester School Board v. G.G.*[5]

Changes in our notions of non-traditional rights and defining "what is a parent?" continue, however, to extend beyond "normal" gender considerations. In *Dawn M. v. Michael M.*,[6] the Supreme Court, Suffolk County, has awarded "tri-custody" as an "extension" of *Brooke S.B.* where a "pre-conception agreement" to raise the child together was found to exist in a polyamorous relationship between a husband (Michael), his wife (Dawn), and another woman (Audria) who gave birth to the child.

"Tri-Custody?"

The initial reaction to the term "tri-custody" as the decision in *Dawn M.* self-labels[7] it is certainly one of curiosity and incredulousness. It is not, however, the first time more than two individuals have been awarded custody of a child.

In *DiBenedetto v. DiBenedetto,*[8] for example, the Second Department maintained an agreed-upon custody arrangement where the mother, father, *and* the paternal grandparents had joint custody of the children with primary physical custody and decision-making authority to the grandparents.

In *Curless v. McLarney*,[9] the Third Department also awarded primary physical custody to the grandmother, with joint custody shared by the parents *and* the grandmother. These types of cases and others, however, involve an investigation into, and determination of, "extraordinary circumstances" to first determine standing rights as and between parents and non-parents/biological strangers followed by a best interests determination—presuming that extraordinary circumstances actually exist.[10]

In *Dawn M.*, the court, using *not* the extraordinary circumstances test, but an *extension* of the Court of Appeals' ruling in *Brooke S.B.*, found Dawn M. to be a "non-biological" *parent* under a "pre-conception" agreement between the biological parents. This analysis created both standing and the ability of Dawn to assert custodial rights to the biological child of her husband Michael and the child's birth mother Audria who had previously settled custody and parenting rights between them.

As a reminder, *Brooke S.B.*, overruled the Court of Appeals prior decision in *Alison D. v. Virginia M.*,[11] to extend the rights of same-sex couples,

> Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child... By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption. It is this context that informs the Court's determination of a proper test for standing that ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.[12]

Judge Abdul-Salaam held, on the "limited facts" before the Court, that standing may be established to apply to the court for custody and visitation under DRL § 70(a) if:

1. The petitioner is not a biological or adoptive parent.

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2. There is a "pre-conception" agreement.
3. The agreement provides that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents.
4. The foregoing is proven by clear and convincing evidence.[13]

The Facts of *Dawn M.*

Plaintiff, Dawn M., was married to Respondent, Michael M., on July 9, 1994. They could not conceive a child together. In April 2001, they met Audria G., and in 2004 the three of them began an intimate relationship, ultimately deciding to act as a family and have a child together. Before conception, it was agreed that they would raise the child together "as parents."

Michael and Audria had unprotected sexual relations and conceived a child, J.M., who was born January 25, 2007. The court determined,

> The evidence establishes that plaintiff's medical insurance was used to cover Audria's pregnancy and delivery, and that plaintiff accompanied Audria to most of her doctor appointments. For more than eighteen months after J.M.'s birth, defendant, plaintiff and Audria continued to live together. *Audria and plaintiff shared duties as J.M.'s mother* including taking turns getting up during the night to feed J.M. and taking him to doctor visits. (Emphasis added.)

In another twist, Dawn and Audria moved out of the marital residence *with the child* in October 2008. Dawn commenced the instant divorce action against Michael in 2011. Prior thereto, Michael commenced a custody proceeding *against Audria—the biological mother*—which was settled by agreement with joint legal custody; residential custody to Audria and parenting time to Michael, albeit with no written schedule. The divorce action between Michael and Dawn was settled by written stipulation in 2015 as to all issues, except for Dawn's claim for custody and parenting time with J.M. Notably, Dawn still resides with Audria and the child. At the *in camera*, the 10-year-old child indicated he considers both Dawn *and* Audria to be his mothers and would like the status quo arrangement to continue.

> He makes no distinction based on biology. J.M. is a well adjusted ten-year-old boy who loves his father and his two mothers. He knows nothing about this action. He has no idea that his father opposes tri-custody and court-ordered visitation with plaintiff.[FN5] The in camera with J.M. leaves no doubt that J.M. considers both plaintiff and Audria to be equal "mommies" and that he would be devastated if he were not able to see plaintiff. The interview with J.M. also clearly shows that he enjoys his present living situation and would not want it altered in any way.

Dawn sought shared legal custody of the child with Michael. The application was opposed by Michael who had already settled custody with the biological mother, Audria. Audria supported Dawn's position. The decision does not indicate the extent, if at all, Dawn participated in the settlement between Michael and Audria, although she did reside with Audria at the time it was resolved.

The court then lays the foundation of its decision,

> Although not a biological parent or an adoptive parent, plaintiff argues that she has been allowed to act as J.M.'s mother by both Audria and defendant. She has always lived with J.M. and J.M. has known plaintiff as his mom since his birth. Plaintiff asserts that the best interest of J.M. dictates that she be given shared legal custody of J.M. and visitation with him. J.M.'s biological mother Audria strongly agrees. Plaintiff argues, along with the child's attorney, that defendant should be estopped from opposing this application because he has created and fostered this situation by voluntarily agreeing, before the child was conceived, to raise him with three parents. And, further, that the defendant has acted consistent with this agreement by allowing the child to understand that he has two mothers.

The court then looked to the language of *Brooke S.B.* and found that Dawn, being a parent by virtue of the preconception agreement, had standing to apply for custody and that the best interests of the child further required the court to make a custody determination under DRL § 70, which would support those interests. Further, that Michael's own conduct in fostering this relationship should estop him from now attempting to contravene the parenting arrangement.

> Such joint legal custody will actually be a tri-custodial arrangement as Audria and defendant already share joint legal custody. As it appears from Audria's testimony that she whole-heartedly supports such an arrangement, this Court finds no issue with regards to Audria's rights in granting this relief. *Indeed, tri-custody is the logical evolution of the Court of Appeals' decision in Brooke S.B., and the passage of the Marriage Equality Act and DRL § 10-a*

which permits same-sex couples to marry in New York.

...In sum, plaintiff, defendant and Audria created this unconventional family dynamic by agreeing to have a child together and by raising J.M. with two mothers. The Court therefore finds that J.M.'s best interests cry out for an assurance that he will be allowed a continued relationship with plaintiff. No one told these three people to create this unique relationship. Nor did anyone tell defendant to conceive a child with his wife's best friend or to raise that child knowing two women as his mother. Defendant's assertion that plaintiff should not have legal visitation with J.M. is unconscionable given J.M.'s bond with plaintiff and defendant's role in creating this bond. A person simply is responsible for the natural and foreseeable consequences of his or her actions especially when the best interest of a child is involved. Reason and justice dictate that defendant should be estopped from arguing that this woman, whom he has fostered and orchestrated to be his child's mother, be denied legal visitation and custody. As a result of the choices made by all three parents, this ten-year-old child to this day considers both plaintiff and Audria his mothers. To order anything other than joint custody could potentially facilitate plaintiff's removal from J.M.'s life and that would have a devastating consequence to this child. (Emphasis added.)

Given that Dawn's request for parenting time impacts upon the parenting time shared by Michael and Audria, especially since Dawn, Audria and the child already reside together, the court was mindful to try and avoid conflict.[14] Parenting was awarded to Dawn on Wednesday nights for dinner as well as one week-long school recess and two weeks in the summer, with all three parties to cooperate in scheduling.

Extension and Legislation

The language in *Brooke S.B.* does not limit how a "parent" may obtain standing. To the contrary, it is essentially leaving it open for further creativity in the process of establishing standing.

That having been said the "you made your bed" aspect of *Dawn M.* presents a dilemma which needs legislative action in addressing the needs of families in the modern age, including circumstances that are created by new technology such as where "three-parent" genetic techniques are now available.[15]

"Clearly, the language in Brooke S.B. *does not limit how a 'parent' may obtain standing. To the contrary, it is essentially leaving it open for further creativity in the process of establishing standing."*

Domestic Relations Law § 70 provides, "(w)here a minor child is residing within this state, *either parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court..." (Emphasis added.)

In *Brooke S.B.*, the Court of Appeals citing to DRL § 70, noted,

> Only a "parent" may petition for custody or visitation under Domestic Relations Law §70, yet the statute does not define that critical term, leaving it to be defined by the courts.[FN3]

Importantly, however, Footnote 3 of *Brooke S.B.* states,

> We note that by the use of the term "either," the plain language of Domestic Relations Law §70 clearly *limits a child to two parents, and no more than two, at any given time*. (Emphasis added.)

Dawn M.—not applying the extraordinary circumstances test—appears then to create a three-parent exception for a non-adoptive/non-biological parent in an "extension" of *Brooke S.B.* which simultaneously conflicts with *Brooke S.B.*'s footnote. It might very well be inferred—although the decision does not so specifically state—that Audria, in supporting Dawn's application, has "consented" to share *her* custodial rights by agreement in similar fashion as is usually available and as is also referenced in DRL § 72(c), which states "Nothing in this section shall limit the ability of parties to enter into consensual custody agreements absent the existence of extraordinary circumstances." Of course, Michael was not a party to that consent, but he may still have the estoppel problem asserted by the court.

While asking for legislative action is often a fool's errand, such action would seem necessary. Push-back in the current political climate may further impede same and the courage needed to take it. The needs of *families and children* in the 21st Century, however, require that we look forward and not slip back to outdated and unrealistic views of parentage. The court in *Dawn M.* was faced with a unique set of facts which were created, encouraged, and lived out by three people, who even in a swirl of fantasy, produced a stable, healthy and loving child—a child who needed the court in *parens patriae* to ensure that he would continue to thrive and succeed in all aspects of his development. There appears to be no dispute cited among Dawn, Michael, and Audria that they were all supposed to be J.M.'s parents throughout the 10 years of the child's life to date. The circumstances and result in Dawn M. will continue to provoke reaction, including skepticism and dismay. On the heels of the Dawn M. decision, the New York Post on April 25, 2017, published an article entitled, "Couple Wants to Divorce Each Other to Marry Live-in Girlfriend,"[16] in which the wife was quoted with reference to the girlfriend: "She is going to be legally considered a parent to the children and, more importantly, it will show her that this is not a temporary thing, we both love her and it's something that's meant to be permanent." Without addressing the legal efficacy of that assertion, it is clear that extreme positions will be taken on both sides of the parentage issue.

Beware the Slippery Slope Claim

When New York's Marriage Equality Act and the Supreme Court's *Windsor* case were being debated there was much hew and cry over their effect on "traditional" families. The sky, however, did not fall and the world did not end when those milestones became law. The uniqueness of *Dawn M.* should not be used to encourage an erosion of those rights conveyed to same-sex couples who have seen their lives enhanced by *Brooke S.B*. and similar developments. The "slippery slope" claim is always made by those who seek to use hyperbole and fatalism in their arguments against progress and change. There is no assertion herein that expanding the definition of family encompasses communal living or institutional polygamy. As the winds of the political climate ebb and flow, we must continue to protect the rights of non-traditional families as was espoused by Judge Abdus-Salaam and permit them the ability to protect and parent their children.

Endnotes

1. DRL § 10-a.
2. 570 U.S. ___ (2013).
3. 756 U.S. ___ (2015).
4. 28 N.Y.3d 1 (2016), decided along with *Estrellita A. v. Jennifer L.D.*
5. *See* Order List: 580 U.S. ___, March 6, 2017, Certiorari—Summary Disposition, Docket 16-273; R. Barnes, *Supreme Court Sends Virginia Transgender Case Back to Lower Court,* Washington Post, March 6, 2017.
6. 2017 N.Y. Slip Op. 27073 (Sup. Ct., Suffolk Co. 2017)
7. *See also* J. Stashenko, *In Unique Case, Judge Grants Legal Custody of 1 Child to 3 Adults*, NYLJ, March 9, 2017; S. Jorgensen and E. Kaufman, *Judge Gives Custody of 1 Child to 1 Dad and 2 Moms*, http://www.cnn.com/2017/03/14/health/three-parent-custody-agreement-trnd/; L. Ryan, *Ex-Polyamorous Trio Granted "Tri-Custody" of Their Child by a New York Judge*, http://nymag.com/thecut/2017/03/ex-polyamorous-trio-granted-tri-custody-by-new-york-judge.html.
8. 108 A.D.3d 531 (2d Dep't 2013).
9. 125 A.D.3d 1193 (3d Dept' 2015).
10. *Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976).
11. 77 N.Y.2d 651 (1991).
12. For a further discussion of *Brooke S.B.*, *see* L. Rosenberg, *The Court of Appeals Addresses Family Law: Some Welcome Attention*, NYSBA Family Law Review, Fall 2016, Vol 48. No. 2.
13. The court did not preclude the existence of other possible methods of establishing standing going forward.
14. The record indicates that the impetus of Dawn's application was concern going forward that she might have no parenting rights if she and Audria ceased living together. It is again unclear as to the extent she participated in the prior matter between Audria and Michael which initially established the custodial arrangement.
15. *See* S. Scutti, *It's a (Controversial 3-Parent Baby Technique) Boy!*, CNN, September 28, 2016, http://www.cnn.com/2016/09/27/health/3-parent-baby/.
16. http://nypost.com/2017/04/25/couple-wants-to-divorce-each-other-to-marry-live-in-girlfriend/.

Marriage Without a License? Ending an Outdated Idea

By Hon. Richard A. Dollinger and Rachel DeHond

A marriage license is usually the first stop on the road to marriage.

But New York, curiously, does not always require the betrothed couple to have a marriage license and, under a hundred-year-old statute, permits some marriages without a license to be valid. The rising incidence of marriages without a license, often performed by internet-inspired prelates, has spawned a surfeit of legal challenges to the marriage ceremony, often raised only when the marriage dissolves and divorce—equitable distribution and support—looms.

Amidst legal uncertainties, New York's Legislature, which has recently expanded and better defined the rights of all married couples, should repeal the current law that allows couples to marry without a license, a move that would create legal clarity for the couples, the officiants and the courts.

Before 1909, New York did not have any prescribed ceremony for a marriage. Marriages were often the province of various religious communities that had their own formulae for a couple giving assent to be married. Marriages were seldom logged in public records. In addition, common law marriages—created when couples held themselves out as husband and wife even though no formal nuptial ceremony occurred—abounded, until finally abolished by the Legislature in 1933. In a 1909 reform measure, the Legislature enacted Sections 11 and 12 of the Domestic Relations Law, which set forth who could solemnize a marriage and how it must be solemnized. The Legislature also added Section 13, which mandated that "all persons intended to be married in New York state obtain a marriage license."

However, in apparent recognition of a lack of access to licenses in some communities and an understanding that pledges of love and support, before an officiant and witnesses, trumped bureaucratic compliance, the Legislature created an exception to the license rule. Section 25 of the Domestic Relations Law, enacted as part of the 1909 marriage reform, provides that "nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age."

In short, a legislatively created conundrum exists: on one hand, you need a license but, on the other hand, if you fail to get one, you can still be married, if you follow the other directions in the Domestic Relations Law. However, without a license, the proof of the "marriage" can, as a stream of cases attest, be easily challenged when marital or estate rights to property or support are at stake.

The rules for a license-bearing couple are simple. Apparently to ensure that would-be marriages actually come to pass, the license must be delivered within 60 days to the clergyman or magistrate who is officiating the marriage ceremony. Meanwhile, another clock runs in a counterclockwise direction: a marriage may not be solemnized within 24 hours after acquiring the marriage license. As one court incanted: the statute "reflects the value we [New York] as a state place on providing people with a window for reflection before proceeding to marriage."

In that case, *Devorah H. v. Steven S.*,[1] the trial proof depicts a scene worthy of a *Seinfeld* episode or, as the trial court noted, the "Rashomon effect" derived from the 1950 Japanese movie classic from director Akira Kurosawa[2] in which each person who participates in the same event recalls it in significantly different ways. Two previously married partners—one a lawyer and the other his paralegal—arranged a hasty hit-and-miss ceremony before a rabbi so they could qualify for an apartment, procured, naturally, by the rabbi. The couple never acquired a marriage license. The husband testified no *ketubah* (a Jewish wedding contract) existed while the wife, who claimed the marriage was valid, testified that the husband tore up the *ketubah* on the subway after leaving the rabbi's office. The couple, at the time they were seeking a divorce, could not even agree on the day they participated in the alleged wedding ceremony. Amidst a mass of contradictory evidence, the court held they never both consented to be married and even though DRL § 25 allows a marriage to be validated—if solemnized without a license—the court held that the husband's lack of consent voided the alleged marriage, depriving the wife of any equitable distribution or other support. In a contrary conclusion, the court in *Estate of Cyngiel*[3] upheld a 28-year marriage solemnized without a license when the wife produced a *ketubah* and witnesses even though the 92-year-old rabbi, who presided, could not remember the ceremony.

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Religious celebrations—without a valid marriage license—as a cause for contesting marriages are not unique to Judaism. In *Jackson K. v. Parisa G.*,[4] the husband flew in an Islamic official from California to preside at his wedding, which involved a lavish ceremony attended by 200 guests. The officiant, in her affidavits, denied that she had authority to marry the couple and said she told them that before the elaborate ceremony. Nonetheless, the court concluded that there was a factual issue of whether the out-of-town official could solemnize the marriage. Following the rationale of *Devorah H. v. Steven S.,* the court advocated for a repeal of DRL § 25 and substituting a requirement that all marriages proceed only with a valid license, a practice now required in 14 states.[5] In another Islamic marriage, a videotape of the exchange of vows before an Imam validated the marriage, even though no license was ever obtained.[6]

The Second Department, relying on Section 25 and seeking to validate religious marriages, embroidered a legal basis for the exception to the "no marriage without a license" rule. In *Matter of Farraj*,[7] the court held that participants in an Islamic ceremony without a license were nonetheless married because the couple had a "justified expectation" of marriage by participating in a formal ceremony in accordance with Islamic law. But, the "justified expectation" rule still relies on extrinsic proof of mutual consent to validate the license-less marriage. Without that mutual "justified expectation," the trial court in *Hasna J. v. David N*.[8] voided the marriage because the husband was already married and, therefore, the wife could not have a "justified expectation" even though she married in an authentic Islamic religious ceremony.[9]

Disputes over marriage ceremonies are not confined to divorces. In another context, a putative spouse in *Estate of Weisberg* claimed letters of administration for her alleged husband, with whom she participated in a marriage ceremony, but never had a marriage license.[10] The court held that there was insufficient proof of the officiant's "religious authority" under Islam to oversee the ceremony and no explicit description of the declaration in which the couple took each other as husband and wife. In that case, the lack of a license did not, *ipso facto*, invalidate the marriage, but the existence of a license would have provided proof of the declaration of the couple as "husband and wife."

Other problems involving officiants and their religious credentials presiding over marriages without licenses have plagued New York couples. In another *Seinfeld*-episode worthy event, a putative wife, seeking post-divorce support in *Ponorovskaya v. Stecklow*,[11] sought to validate a license-less marriage. That purported marriage was supposedly solemnized in what the court described as a "pseudo-Jewish" wedding ceremony conducted at a Mexican beach resort by a New York dentist who became a minister on the internet solely for the purpose of performing weddings for friends and relatives. The court, however, held that the alleged marriage was not valid in Mexico and there was no license to evidence the union. In reaching that conclusion, the court advocated that Section 25—which allows validation of a marriage without a license—be repealed, commenting:

> With fewer and fewer marriages being performed with the attendant ritual and weight of a traditional religious practice, the reason for requiring a marriage license is that much more compelling. DRL §25 is an anachronism, and its time has come to be repealed or amended.[12]

These cases highlight another complication: while judges and other public officials can oversee the ceremony, the recent spate of presiding internet-authorized ministers has caused consternation for the courts. The statute permits "a clergyman or minister of any religion" —a person with authority from a church to perform "spiritual affairs" in accordance with the church's rules and regulations—to officiate at a wedding.[13]

In that regard, the internet-authorized clerical status of ordinary laymen and their performance of "spiritual affairs" remains an open question in New York. The Court of Appeals has never considered the issue. Only two of the four appellate jurisdictions have ruled on the matter, and they, like occasionally combative spouses, disagree. The Second Department held marriages solemnized by internet-authorized ministers to be invalid in *Ranieri v. Ranieri*,[14] while the Third Department in *Oswald v. Oswald*[15] explicitly rejected the Second Department's reasoning and held that these marriages may be valid.

In view of these complications, a simple instruction is offered to couples seeking marriage: obtain a license and secure a recognized prelate, judge or public official to officiate. Marriage triggers significant legal responsibilities and allows property distribution and support upon divorce. New York would then be better served by the repeal of the stop-gap "love conquers all" measure incorporated into Section 25 of the Domestic Relations Law which permits marriages without licenses.

Endnotes

1. 49 Misc. 3d 630 (Sup. Ct., N.Y. Co. 2015).
2. *Rashoman* (1950), www.imdb.com/title/tt0042876.
3. NYLJ, Dec. 28, 2012 (Sur. Ct., Kings Co. 2012).
4. 51 Misc. 3d 1215(A) (Sup. Ct., N.Y. Co. 2016).
5. *Id.*, n. 8.
6. *Conteh v. William Penn Insurance Co.*, 37 Misc. 3d 1205(A) (Sup. Ct., Bronx Co. 2012).
7. 72 A.D.3d 1082 (2d Dep't 2010).
8. 53 Misc. 3d 1142 (Sup. Ct., Kings Co. 2016).
9. *See also Persad v. Balram*, 187 Misc. 2d 711 (Sup. Ct., Queens Co. 2001) (Hindi wedding ceremony without marriage license valid).
10. 2014 N.Y. Slip Op. 30833(U) (Sur. Ct., N.Y. Co. 2014).
11. 45 Misc. 3d 597 (Sup. Ct., N.Y. Co. 2014).
12. *Id*. at 617.
13. DRL § 11 (1).
14. 146 A.D.2d 34 (2d Dep't 1989).
15. 107 A.D.3d 45 (3d Dep't 2013).

Congress Overrides *Majauskas* Rule for Military Pension Division

By Mark E. Sullivan

The New Pension Division Rule

Without notice to New York or consultation with its Congressional delegation, Congress enacted on December 23, 2016 the National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) and overrode New York's *Majauskas*[1] formula for dividing pensions, as applied to military retired pay. This means that many lawyers need to know how to present testimony and evidence in contested pension division cases, as well as how to prepare a properly worded military pension division order (MPDO). This new rule will require a new set of skills for such lawyers.

The new statute contains a major revision of how military pension division orders are written and will operate throughout the nation. Instead of allowing the states to decide how to divide military retired pay and what approach to use, Congress imposed a rigid uniform method of pension division on all the states, a fictional scenario in which the military member retires on the day that the pension division order is filed. Effective December 23, 2016, the new rule up-ends the law regarding military pension division in New York and almost every other state.

The new rule applies to those still serving (active-duty, National Guard or Reserves). It is a rewrite of the terms for military pension division found in the Uniformed Services Former Spouses' Protection Act, or USFSPA.[2] From now on, what is divided will be the hypothetical retired pay attributable to the rank and years of service of the military member at the date of the decree of divorce, dissolution, annulment or legal separation. The only adjustment will be cost-of-living adjustments under 10 U.S.C. § 1401a (b) between the time of the court order and the time of retirement.

There are no exceptions for the parties' agreement to vary from the new federal rule. Everyone must do it one way, regardless of what the husband and wife decide they want the settlement to say.

How Hard Is This, Anyway?

Known as a *hypothetical clause* at the retired pay centers,[3] "frozen benefit division" is the most difficult to draft of the pension division clauses available. A government lawyer familiar with the processing of military pension orders put it this way: "…over 90% of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of…military retired pay. This legislative change will geometrically compound the problem."

Due to the difficulty of doing such orders, more expenses will be involved in the military divorce case and a whole new team of experts will appear to help ordinary divorce attorneys comprehend and implement the new frozen benefit rule. Without the right help and the proper wording, rivers of rejection letters will flow back to attorneys who submit their pension orders to the retired pay center in the hope of approval. Since the new frozen benefit rule was written by Congress, which knows next to nothing about the division of property and pensions in divorce, there will be numerous problems in applying it in the courts of most states.

Although the method of dividing pensions, as well as the date of valuation and classification of marital or community property, has always been a matter of state law, that will change in military cases. Since no time has been allowed for state legislatures to adjust to the change and rewrite state laws, lawyers will need to make adjustments "on the fly" to deal with military pension division cases which are presently on the docket or which come to trial before the state legislature can act.

Strategy for the Servicemember

The attorney for the SM (servicemember) will have an easier time than the lawyer for the FS (former spouse) in getting through a trial or settlement. The SM has control over all the evidence and testimony needed for either procedure.

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The active-duty SM needs to provide proof of the "High Three" retired pay base (i.e., average of the highest 36 months of continuous compensation) at the date of divorce.[4] That will usually be the most recent three years, and the data will be found in the pay records of the SM. The court also needs to know the rank and years of creditable service of the SM.

Once the evidence has been admitted, the court will require an order to divide the pension. The attorney for the prevailing party is often tagged with the task of preparing the MPDO, unless all the necessary language is placed in the divorce decree or in a property settlement incorporated into the decree. It will help immensely if counsel obtains "outside assistance" from a lawyer experienced in writing such pension orders, and *not at the last minute*.

"Whenever possible, the servicemember needs to request bifurcation of the divorce from the claim for equitable distribution or division of community property."

Whenever possible, the SM needs to request bifurcation of the divorce from the claim for equitable distribution or division of community property.[5] The earlier that the SM gets the court to pronounce the dissolution of the marriage, the lower his or her "High Three" figure base will be, which means the lower the dollar amount for pension division with the spouse.

Strategy for the Former Spouse

The former spouse would oppose such a request for severance of the divorce and the property division, arguing that this would double the hearings involved and detract from judicial efficiency. The FS would also argue that Congress has joined inextricably the divorce and the division of a military pension by requiring the setting of the retired pay base (the "High Three") at the time of divorce.[6] As soon as appropriate, counsel for the FS should begin discovery, seeking to determine when the member's "High Three" years were, what the figure for that period is, and how many years of creditable service the member has (or, in the case of a Guard/Reserve member, how many retirement points).

As to documents and data, the strategy of the FS will be similar to that stated above for the SM for settlement or trial. If the SM is obstinate, it can take weeks or months to obtain this information from the source (that is, the pay center) with a court order or judge-signed subpoena.[7]

There are several ways to try to get around the division of a frozen benefit for the FS. No single approach is best, and the rules have not been written yet. The slogan is NOT "One Size Fits All." Some states may restrict or prohibit one or more of these strategies. The FS's attorney may try out the following to "even the scales" in trial or settlement:

- When the parties are in agreement, spousal support is one way to obtain payments not restricted to a retirement based on rank and years of service (and the "High Three") at the time of the order. An alimony order—which can be used by skilled attorneys to mimic a pension division—gives much more flexibility in dealing with the retired pay center, so long as the payments do not end at remarriage or cohabitation of the FS. There is, for example, no requirement for 10 years of marriage overlapping 10 years of creditable service.[8] A consent order for spousal support should suffice to obtain the payments to the FS upon retirement of the SM, and the tax consequences will be the same, namely, the FS is taxed on the payments and they are excluded from the income of the payor/retiree.
- The FS can ask the court for an award of spousal support to make up the difference, that is, the money which would be lost to the FS by division of the hypothetical retired pay of the SM. If the FS is awarded alimony while the member is still serving, the FS may try to argue that it should not end automatically at the SM's retirement, since some amount might be needed to equalize the pension division for the FS.
- The FS can always ask the court for an unequal division of the property acquired during the marriage in an attempt to even out the entire property division scheme due to the division of a truncated asset of the SM, not the final retired pay. Or the FS can ask for a greater share of the pension to make up for the smaller amount that will be divided.
- The FS can also argue for a present-value division of the pension, with an expert witness setting the likely value of the retired pay, so that it can be offset by other assets given to the FS in exchange for a full or partial release of pension division. Evaluating a pension is a complex task. These complicated computations generally demand the evaluation report and testimony of an expert.

- Another approach is to delay the divorce. The longer this is put off, the larger the "High Three" amount will be. More time means possible promotions and pay increases.
- The FS can still use the standard *time-rule* clauses pursuant to the *Majauskas* case. The new law limits the "disposable retired pay" (DRP) which the retired pay center (DFAS or the Coast Guard Pay and Personnel Center) will honor, limiting DRP to "date-of-divorce" dollars in the "High Three" (for those still serving). The court may still enter a *time rule* order if it complies with the interim guidance or, when published, the rules implementing the frozen benefit law. The court should state that at the SM's retirement only a portion of the pension-share payment for the FS will come from the retired pay center. The order would provide that the member will still be responsible for the rest and will indemnify the FS for any difference between the two amounts. The duty to indemnify is a potential remedy for the reduction in payments to the FS and there is statutory support in 10 U.S.C. § 1408 (e)(6), the "savings clause" in USFSPA, which allows the courts to employ state enforcement remedies for any amounts which may not be payable through the retired pay center.[9]

As a final note, be sure not to use "disposable retired pay" in the order to describe what is apportioned to the FS. DRP means the restrictive definition in the frozen benefit rule (i.e., the retired pay base at the date of divorce) less all of the other specified deductions, such as the VA waiver and moneys owed to the federal government. The best way to word a pension clause for the FS is to provide for division of total retired pay less only the SBP premium attributable to coverage of the former spouse. Regardless of the language used, DFAS will construe orders dividing retired pay as dividing "disposable retired pay."[10]

Resources

The final rules have yet to be published by DFAS, the Defense Finance and Accounting Service. Until there are revisions to Volume 7B, Chapter 29 of the Department of Defense Financial Management Regulation, no one will be completely sure how the division of uniformed services retired pay shakes out. The only information presently available from DFAS is a "Notice of Statutory Change" and a sample order.[11]

A complete guide to problems and pitfalls stemming from the "Frozen Benefit Rule" is in the *Silent Partner* infoletter, "Fixing the Frozen Benefit Rule." How to write acceptable military pension clauses may be found at the *Silent Partner*, "Guidance for Lawyers: Military Pension Division." For the necessary terms for the MPDO, see *Silent Partner*, "Getting Military Pension Orders Honored by the Retired Pay Center"; this guide includes the necessary elements and language for a proper hypothetical clause. All these infoletters are located at the military committee websites of the N.C. State Bar, www.nclamp.gov > For Lawyers, and the American Bar Association's Family Law Section, www.americanbar.org > Family Law Section > Military Committee.

Endnotes

1. *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984). The Court of Appeals in the *Majauskas* case held that in a marital pension division, when the pension rights have matured and are in pay status, the trial court may require that the recipient pay a portion of each payment received to his or her former spouse. The numerator of the marital or coverture fraction is the number of months of employment during the marriage before the commencement of the action, and the denominator is total months of employment.
2. 10 U.S.C. § 1408.
3. For the Army, Navy, Air Force and Marine Corps, the retired pay center is DFAS (Defense Finance and Accounting Service) in Cleveland, Ohio. Pension garnishments for the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanic and Atmospheric Administration are handled by the Coast Guard Pay and Personnel Center in Topeka, Kansas.
4. The other element for determination of retired pay is the "retired pay multiplier," which is 2.5% times years of creditable service (in an active-duty case). In a Reserve or National Guard case, the court order must also provide the applicable number of retirement points.
5. *See* Brett R. Turner, *Equitable Distribution of Property* (3rd Ed. & 2016-2017 Supp.), Sec. 3.2. In those states which have adopted the Federal Rules of Civil Procedure, the issue of separate trials under Rule 42 (b) deals with bifurcation of claims into separate hearings.
6. For an excellent summary of arguments against bifurcation of the divorce and the property division, along with case citations for state appellate decisions, *see* Brett R. Turner, *Equitable Distribution of Property* (3rd Ed. & 2016-2017 Supp.), Sec. 3.2.
7. The anticipated delay, however, may work to the FS's advantage. The longer the division of retired pay is put off, the better chance the FS will have of dividing a higher amount of retired pay. In general the FS's case usually will benefit from delay under the new rule.
8. 10 U.S.C. § 1408 (d)(2) requires this 10/10 overlap of marriage and military service for garnishment of military retired pay as property division.
9. *See also* Brett R. Turner, *Equitable Distribution of Property* (3rd Ed. & 2016-2017 Supp.), Sec. 6.4.
10. DoDFMR, Vol. 7B, ch. 29, Sec. 290601.
11. Type into any search engine, "Notice of Statutory Change" and "DFAS" to locate this. DFAS has placed the Notice at its website, www.dfas.mil > Garnishment Information > Former Spouses' Protection Act > NDAA-'17 Court Order requirements.

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The *Get* Law Revisited: Has Anything Really Changed?

The Jewish Divorce Crisis Continues

By Esther M. Schonfeld and Alexandra Weaderhorn

Under civil law, if a marriage breaks down, a spouse can bring an action for divorce in a court of law and the court will eventually grant a divorce. However, while the parties will be considered divorced under civil law, they will not necessarily be divorced under religious/Jewish law. Under Jewish law, the civilly divorced couple is still considered married until the Jewish law requirement that the husband give his wife a religious divorce, referred to in Hebrew as a *Get*,[1] is satisfied. Under Jewish law, the *Get* terminates the marriage and only after it takes place is the couple free to remarry. To obtain a *Get*, the husband must willingly appear before a rabbinical tribunal (known as a *Beth Din*) and the duty is on the husband to give the wife the *Get*; the wife is unable to unilaterally procure the *Get*. While civil statutes and case-precedent have sought to protect against the religious bondage which results when the *Get* is not forthcoming, these protections are not absolute and in the recent *Masri v. Masri*,[2] one trial court has taken a giant leap backwards in undercutting decades of civil precedent on Constitutional grounds.

The *Ketubah*

When a Jewish couple decides to enter into a marriage, they often sign a marriage contract prior to the ceremony, called a *ketubah*. *Ketubah* is a Hebrew word meaning written thing. It is a marriage agreement similar to those in other religions and is almost like a prenuptial agreement. The *ketubah* does not effectuate the marriage but traditionally contains a set of obligations to which the husband is beholden in relation to his marriage to the wife.[3] Traditionally, one of the purposes of the *ketubah* was to protect the wife in the event of the divorce, but it did not include language regarding a *Get*. It was a financial obligation and tool to prevent a husband from divorcing his wife hastily against her will. It set monetary amounts that he was obligated to pay to the wife upon a divorce or his death. It also included fundamental spousal responsibilities to the wife such as providing the wife with food, clothing, and conjugal rights. In some more modern *ketubahs*, parties prefer a more

egalitarian version of the *ketubah* which obligates both parties to the marriage. While the document traditionally obligated the husband and not the wife, the document did entitle the husband the use of the property the wife brings to the marriage and the wife's income during the marriage. Furthermore, the traditional document historically references possible "misconduct" by the wife, which could result in the wife forfeiting her rights thereunder. Another notable aspect of the traditional *ketubah* is the mention of Rabbinical Court to help resolve issues of a divorce. Again, it does not mention or obligate either party with respect to the *Get* but does note that the parties intend to consult with a Rabbinical Court in the event of a divorce. It is important to note that the effect of this *Ketubah* is not a binding arbitration agreement which would force parties to appear and attend Rabbinical Court for a determination of the divorce and ancillary issues.

Again, the modern *ketubah* may be quite different from this and can be personalized for parties, just like the other prenuptial agreements that we draft. Generally, though, possibly due to the specific nature in which a *Get* must be given and the state of mind of the parties necessary at the time of the *Get*, together with the fact that the standard *ketubah* used by most is an archaic document drafted decades, if not centuries, ago, a requirement to participate in a *Get* process is not included in the *ketubah*. That being said, there is a trend to execute a civilly enforceable prenuptial agreement that does include a promise and obligation to participate in the *Get* process upon dissolution of the marriage.

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The *Agunah*

As mentioned, there is a requirement regarding the state of mind of the parties to a *Get* which exacerbates Jewish divorce cases since Jewish law requires that a husband grant his wife a *Get* willingly, of his own free will and accord, and that the wife willingly receive/accept it. Absent her husband's willingness to give her a *Get*, the wife remains an *Agunah*,[4] the Hebrew word for chained or anchored, referring to a chained woman. Without a *Get*, a woman is unable to ever remarry. The absence of a *Get* can likewise pose serious hardships on a man. The difference between a man and a woman in this regard is that men have remedies within the Rabbinical Court system that women do not. When a wife refuses to accept a *Get*, the rabbis, at their discretion, can quash the wife's resistance by ordering her to accept the *Get*, or by simply allowing the husband to remarry upon the "dispensation of one hundred rabbis," referred to in Hebrew as a "*heter me'ah rabbanim.*"[5] A wife has no such remedy.

Unfortunately, the *Get* process has been subject to abuse, whereby the *Get* is used as a bargaining chip; it is used as a weapon whereby a party can extract something from the other in exchange for cooperation in the process or seek a benefit which the party would not otherwise be entitled to receive under civil or religious law. As esteemed author and professor, Irving Breitowitz, wrote, in 1992, "Jewish religious divorces require mutual consent and participation, and thus give rise to the possibility that parties will refuse to cooperate in order to obtain pecuniary or non-pecuniary advantages, or simply to inflict pain."[6] This same exploitation still permeates today.

Many *Agunah* situations develop because the husband sees delaying the *Get* as a risk-free negotiating tactic, which is tantamount to blackmail. Other reasons include abuse, control, and spite. What begins as a negotiation tactic often turns into spite by the end of an antagonistic civil divorce process. While there are some Civil Court remedies, including the New York laws commonly referred to as the "*Get*" laws, they often fall short as a solution. In analyzing the remedies available in cases that involve the withholding of a *Get*, the court does take into consideration the reason that is being proffered for the withholding. Specifically, the court has to assess whether their civil involvement will cause impermissible interference with the Free Exercise Clause of the First Amendment of the Constitution and be a violation of the established doctrine of separation of church and state. For example, if a spouse is using the *Get* as a strategic weapon and the purpose is to extort financial benefit then the court may be more likely to involve itself in the religious matter and apply punitive consequences as it is considered taking advantage of a religious law and abusing the religious law as a means in order to secure purely secular ends. This would justify the court applying secular remedies to a religious issue.[7] Courts also find that it may be permissible for a civil court to compel a person to submit to religious authorities/practices if it is part of a contractual obligation, even if imposed by a religious writing.[8] As a family law practitioner, I have personally witnessed parties refuse to participate in the *Get* process as an act of sheer malice. Sadly, over the past few years I have even seen an increase in cases involving the refusal of one party to willingly participate in the *Get* process, citing a myriad of excuses. There is no excuse. In one particularly egregious case, the husband swore he would not give his wife a *Get* until she was past child bearing age. In another, the husband swore he would never give a *Get* until his wife gave him full legal and physical custody of the parties' children. These married couples come from all walks of life, all socioeconomic backgrounds and a wide variety of religious backgrounds. To our chagrin, no one is immune. One has to agree with Professor Breitowitz' statement that "each case carries its share of human misery and serves as a sad reminder of how noble religious teachings can be manipulated to serve immoral individual purposes."[9] So what is happening in our society now is that as the civil divorce rate continues to grow in the country, so does the *Get* crisis.

"For several decades, Jewish women have sought relief in civil courts all over the country to assist them with obtaining religious divorces."

New York *Get* Laws

For several decades, Jewish women have sought relief in civil courts all over the country to assist them with obtaining religious divorces.[10] New York leads the nation in its awareness of the *Get* crisis as evidenced by its passage of the two New York *Get* Laws.[11] In 1983, the New York Legislature enacted Domestic Relations Law § 253, known as the "*Get* law," which denies a civil divorce to any party who refuses to remove barriers to the other party's remarriage.[12] Recognizing the "tragically unfair condition," the first *Get* law was signed into law by Governor Mario M. Cuomo on August 9, 1983.[13]

Even prior to the enactment of the first *Get* law, New York was at the forefront of the problem by attempting to formulate different approaches to remedy the situation. In 1983 the New York State Court of Appeals issued a strong statement about the enforceability of an agreement to give a *Get*. In the landmark 1983 case of *Avitzur v. Avit-*

zur,[14] a couple signed a *ketubah* as part of their religious wedding. Following the civil divorce, the wife sought an order compelling the husband's specific performance of the provision in the *ketubah* which required the husband to appear at a Rabbinical Court for a *Get*. In *Avitzur*, in enforcing the *ketubah*, the New York Court of Appeals found no impermissible interference with the constitutionally protected freedom of religious and no excessive entanglement between state and religion.[15] Shortly after *Avitzur* was decided, the New York Legislature enacted the 1983 *Get* law in the form of DRL § 253.[16]

The 1983 *Get* Law, as enacted, barred a party commencing an action for divorce from obtaining a civil divorce until he/she affirmed to the court that he or she would remove barriers to the other party's remarriage. This, of course, meant giving or accepting a *Get*, as the case may be. Unfortunately, there was a loophole in that the application of the law was a limited protective measure because it only applied to the party seeking the divorce, the plaintiff. Thus, in the far more common situation in which the recalcitrant husband was the defendant in the divorce action, he would not be required to file an affidavit before receiving his divorce. Thus, the 1983 *Get* Law was not helpful where the recalcitrant party was the defendant in the divorce action.

In 1992, the legislature made a second attempt to alleviate the problem when it amended the laws which govern property distribution in divorce proceedings and the laws relating to maintenance. These laws apply to both the plaintiff and the defendant.[17] The second New York *Get* Law passed in 1992, allows a judge to "consider the effect of a barrier to remarriage"[18]—i.e, the fact that a spouse refuses to remove barriers to remarriage, as a factor in distributing marital assets and as a factor in awarding or denying a request for spousal maintenance.[19] This new law codified the then-seminal supreme court decision of *Schwartz v. Schwartz*,[20] which characterized the husband's refusal to give a *Get* as a factor that should be considered in the equitable distribution of marital assets. In *Schwartz*, the court acknowledged the limitations placed on the wife due to refusal of the husband to grant the *Get*. While the court in *Schwartz* would not stay the trial on the economic issues until the husband granted the wife the *Get*, at the trial of the economic issues, the court did allow the parties to introduce evidence concerning the parties' actions in relation to the *Get* in order for the court to reach a decision with regard to equitable decision.The 1992 law was passed unanimously by both the Assembly and the Senate, and was signed into law by Governor Cuomo later that year.[21]

The *Get* Law represents the legislature's attempt to alleviate the social and religious problems faced by Jewish men and women whose spouses refuse to cooperate in the *Get* process or seek to hold the *Get* ransom in exchange for some desired benefit. The statute was created precisely to respond to this conundrum. The 1992 New York *Get* Law proved far more effective than its 1983 predecessor in addressing individual cases in which a recalcitrant husband refused to give his wife a *Get;* however it, too, was limited in its ability to systemically solve the *Agunah* problem. For example, the 1992 law would do nothing to assist an *Agunah* who had no significant marital assets at issue. Without a marital estate to hold over a recalcitrant husband's head, there would be no economic impetus for him to grant his wife a *Get.* One problem is that despite the desire of New York courts and legislators to attempt to alleviate the plight of the *Agunah*, judicial intervention in the *Get* process can raise constitutional questions. In fact, although the law has been praised by many, there are those who would argue that the *Get* law is unconstitutional.[22] Nevertheless and despite the critics, New York courts have not yet struck down the *Get* Law as unconstitutional.[23]

The Issue of Force/Coercion

Moreover, given the complexities of Jewish law, civil courts must exercise caution so as not to unknowingly create a situation where the *Get* may be considered having been given by force or coercion. As we explained above, the *Get* must be given by free will and not court order. As noted previously, one aspect of obtaining a valid *Get* is that the husband gives the *Get* willingly. If a *Get* is considered or found to be forced or coerced, it can be rendered invalid. So it can be argued that a husband, who gives his wife a *Get* in order to avoid losing assets in equitable distribution or being forced to pay maintenance, is acting under duress and lacks the free will necessary to effectuate a valid *Get*.

Civil Penalties

A recent appellate case indicates that courts are still taking the refusal to remove barriers to remarriage very seriously and are being proactive about this dilemma. In *Mizrahi-Srour v. Srour*,[24] the Second Department affirmed the lower court's decision to award increased maintenance to the wife due to the husband's failure to remove barriers to the wife's remarriage. The wife was awarded durational maintenance of $100 a week to be increased to $200 per week if the husband failed to give the wife a *Get* within 60 days. So, the maintenance would be doubled. In so holding, the court reasoned that the provision increasing the maintenance was "to adjust for the adverse economic consequence which would result to her from the defendant's refusal to grant her a *Get*" and the court noted that such increased maintenance based on the consideration of that factor was not an "impermissible interference with religion." The second important point in this case was that the court awarded the wife 70 percent of the marital estate based upon the "economic misconduct of the defendant and his frustration of any attempt to value the family business." I was not surprised to read of the husband's "economic misconduct." Unfortunately, as

matrimonial practitioners, we often see that spouses who have the mindset to refuse to give a *Get* sometimes also engage in some other forms of misconduct to frustrate the case such as the party's failure to allow a business to be valued—a regular practice in cases where one or both litigants possess a business interest. For example, in *Mizrachi v. Mizrachi*,[25] the Second Department affirmed the lower court's decision which distributed the marital residence to the wife. The appellate court relied on the *Get* law in so doing. The husband in that case was also held in civil contempt for a willful violation of a support order; again, exhibiting abusive patterns that often go hand-in-hand with someone who refuses to give a *Get*.

There are several older cases that are worth noting and are still important and relied upon in cases involving the *Get* Laws. In *Pinto v. Pinto*,[26] the appellate court affirmed the judicial hearing officer's award which would grant 100 percent of the assets listed on the parties' statements of net worth to the wife if the husband did not grant the wife a *Get* within a specified time period. Likewise, in *Schwartz v. Schwartz*,[27] the court determined that the husband forfeited his right to any distributive award based upon his refusal to give the wife a *Get*.

In *Mojdeh M. v. Jamshid A.*,[28] the Supreme Court, Kings County, applied the *Get* law as a basis to unequally distribute the marital assets in the divorce case. In that case, the wife was considered the more monied spouse, there was a large disparity in the parties' income and earning capacity, and the husband was initially awarded maintenance and his share of equitable distribution with one caveat: if he failed to remove barriers to the wife's remarriage within a set period of time, he would forfeit his maintenance and equitable distribution award. The wife, a Muslim woman, testified that if she does not obtain a religious divorce, she will be unable to remarry. The court gave the husband 45 days to take all steps necessary to remove all barriers to the wife's remarriage, stating, "In the event that the husband fails to comply, he shall forfeit the maintenance and equitable distribution award made herein …"

In another matrimonial case in Kings County, *S.A. v. K.F,*[29] the trial court applied the *Get* Law, holding that the award of maintenance to the husband along with the award to the husband of 50% of the wife's pension was contingent on the husband voluntarily giving the wife a *Get* within 45 days. Relying on the *Get* law, the wife, who commenced the divorce action, argued that her husband should be barred from receiving any marital assets or maintenance due to his failure to give her a *Get*. The court was not persuaded by the husband's argument that the *Get* Law is coercive and, therefore, not available because the *Get* must be voluntarily given. As the court stressed, "the Court is not requiring the husband to deliver a *Get*, rather the Court is economically distributing property and determining maintenance in conformity with the statutory scheme established by the legislature by the Domestic Relations Law 236 B[5] [h]…." The facts of the case and the words of the court are very compelling: "the wife deserved the right to move on in her life, free from the control of the husband. She has endured long enough and the Court urges the husband to accept this decision and its consequences, and to cooperate in the voluntary granting of the *Get* and closing this chapter in their lives; to do otherwise would be unjust and unfair."

A Dangerous Step Backward

A very recent Supreme Court, Orange County decision, *Masri v. Masri*,[30] strayed from the above-mentioned decision and refused to award a young *Agunah* maintenance until such time as the husband gave his wife a *Get* and freed her to date, remarry, have children, and otherwise move on with her life. In that case, as distinguished from the *Schwartz* case, the court found no evidence that the husband was trying to leverage the *Get* and use it in order to extract a benefit in the matrimonial litigation. The court cited *Aflalo v. Aflalo*,[31] a New Jersey court's analysis of how civil involvement into such a religious issue can pass muster under the free exercise clause of the First Amendment. The *Aflalo* court stated that in order to pass muster, "a law must have both a secular purpose and effect." It went on to state that a law "must not be aimed at impeding religion"[32] and it ultimately concluded that religion would be corrupted by a court/law crafting loopholes to religious doctrines. The court in *Masri* ultimately ruled in line with the court in *Aflalo* and declined to apply the portion of Domestic Relations Law allowing a court to consider the effect of a barrier to remarriage (withholding a *Get*) in determining spousal support.[33] The *Masri* court noted, "To apply coercive financial pressure because of a perceived unfairness of Jewish religious divorce doctrines to induce Defendant to perform a religious act would plainly interfere with the free exercise of his (and her) religion and violate the First Amendment."[34]

Alternative Relief and Remedies

Another civil remedy that a party who is chained to his/her ex-spouse has tried is suing under the intentional tort of intentional infliction of emotional distress. Unfortunately, this has not been a successful route. In *Perl v. Perl*,[35] the court affirmed the dismissal of the wife's claim for tort damages based on intentional infliction of extreme emotional distress suffered as a result of the husband refusing the grant the wife a *Get*. In so holding, the court there reasoned, "To hold otherwise would fasten the risk of liability in tort upon any spouse who refused to furnish a Get, upon religious grounds in whole or in part, and thereby entangle the courts in an exploration of both the validity and sincerity of a position grounded in ecclesiastical law." Recognizing the doctrine of separation between church and state, the court went on to explain that such religious terrain and consideration of religious doctrines must remain *terra incognito*, or unexplored territory, to the civil court. In that case, the court did allow the lower court to revisit the equitable distri-

bution agreed to by the parties in a stipulation of settlement, which disproportionately gave all of the marital estate to the husband and which the wife sought to vacate. The wife explained that she agreed to same only in the hopes of receiving her *Get*.

Since the *Get* law is not effective in all cases, especially where there are no assets at issue or the litigant is unable to take the case to trial for lack of funds, couples are turning to prenuptial agreements to remedy the *Agunah* crisis. Since 1994, Beth Din of America Prenuptial Agreement (the "RCA Prenup")[36] has become the most widely used Jewish prenuptial agreement with the goal of avoiding the creation of any *Agunot* (plural for *Agunah*). In the RCA Prenup, the parties sign a binding arbitration agreement obligating them to appear at the Beth Din of America[37] for the giving and receiving of a *Get.*[38] The RCA Prenup also obligates a husband, upon notice, to pay support to his wife until the *Get* is given. The support obligation of $150 per day attempts to redress the problem of the *Agunah* by imposing a support obligation on a recalcitrant spouse. Through the strong support of the Rabbinical Council of America (the RCA) and its membership, the RCA Prenup has become a mainstay for brides and grooms in the modern orthodox community. The RCA has mandated that its membership not officiate weddings without the execution of a prenup which protects the parties with respect to the *Get*.

In the absence of any prenuptial agreement, a spouse may refuse to give or take a *Get*. Ideally, you will never need to invoke any prenuptial agreement, but like any other type of insurance, if you do end up needing it, it can save you significant time, money, pain, and anguish. While the RCA Prenup might fit the needs of many couples, there are far too many not using it. The arbitration agreements, such as the RCA, have been upheld by various courts but are still subject to possible attack in the future.[39] For example, the RCA prenup is often handed to the bride and groom on the date of the wedding and the forms are incomplete or improperly filled out or lack proper contract formation.[40] The bigger problem is that for a variety of reasons, the signing of any prenuptial agreement at all is still not common outside of the modern orthodox community, and certainly still not used often enough even within the modern orthodox community. There are those who would argue that the language addressing this "support obligation" is really a penalty which would render a forced *Get*, not given of free will, referred to in Hebrew as a *Get Meusah* (and thereby invalid). There is concern here that rabbinic tribunals will invalidate a *Get* if there is financial duress, and some rabbis will not encourage signing an agreement designed to produce a *Get* under financial duress. Further, since a secular/civil court can enforce the penalty provision, some would argue it can be rendered coercion. Some rabbis are also concerned that focusing on the possible dissolution of a marriage when it is just beginning is not conducive to a healthy marriage.

Civility by Education

Despite civil laws enacted to address the failure of a party to participate in the *Get* process and religious leaders attempts to find avenues within the Jewish law to facilitate the obtaining of a *Get*, the scope of the crisis continues to grow. We must educate those entering into a marriage, whether it is our children, or clients coming to us for prenuptial agreements, on how to build good, solid committed relationships, the smart way to enter into a relationship, and, at the same time, they must also learn that there is a right way to say "good-bye."

Endnotes

1. A *Get* is a written bill of divorce that a husband must hand over to his wife in the presence of witnesses. See *Deuteronomy*, chapter 24:1, which provides in pertinent past that when a man wants to divorce his wife he writes for her a bill of divorce and places it into her hand, and sends her away from his house.
2. 2017 N.Y. Slip Op. 27007 (Sup. Ct. Orange County 2017).
3. Marc Feldman, *Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get*, Berkeley Journal of Gender, Law & Justice, September, 2013.
4. The term "*agunah*" appears in the Talmud and is derived from the word "agun" or anchor, and refers to the former spouse being chained to the other spouse.
5. There are stringent grounds for this procedure which is both costly and time consuming.
6. Irving Breitowitz, *The Plight of the Agunah: A Study In Halacha, Contract, and The First Amendment*, 51 Md. L. Rev. 312 (Winter, 1992).
7. *Schwartz v. Schwartz*, 235 A.D.2d 468 (2nd Dept. 1997).
8. *Avitzur v. Avitzur,* 58 N.Y.2d 108 (N.Y. 1983). "The fact that the agreement was entered into as part of a religious ceremony does not render it unenforceable. Solemnization of the marital relationship often takes place in accordance with the religious beliefs of the participants, and this State has long recognized this religious aspect by permitting duly authorized pastors, rectors, priests, rabbis and other religious officials to perform the ceremony (Domestic Relations Law, § 11, subds 1, 7). Similarly, that the obligations undertaken by the parties to the Ketubah are grounded in religious belief and practice does not preclude enforcement of its secular terms. Nor does the fact that all of the Ketubah's provisions may not be judicially recognized prevent the court from enforcing that portion of the agreement by which the parties promised to refer their disputes to a nonjudicial forum (see *Ferro v Bologna*, 31 N.Y.2d 30, 36). The courts may properly enforce so much of this agreement as is not in contravention of law or public policy."
9. Irving Breitowitz, *The Plight of the Agunah: A Study In Halacha, Contract, and The First Amendment*, 51 Md. L. Rev. 312 (Winter, 1992).
10. *See, e.g., Koeppel v. Koeppel,* 138 N.Y.S.2d 366 (Sup. Ct. Queens County 1954) aff'd, 3 A.D.2d 853 (2d Dept 1957) *Pal v. Pal*, 45 A.D.2d 738 (1974); *Waxstein v. Waxstein*, 90 Misc.2d 784 (Sup. Ct. Kings County 1976) *aff'd*, 57 A.D.2d 863 (2d Dept 1977). See also, *Golding v. Golding*, 176 A.D.2d 20 (1st Dept 1992).
11. DRL §§ 253, 236B(5)(h), 236B(6)(d) (McKinney 2010).
12. See DRL § 253 which provides, in pertinent part, as follows:

    > 2. Any party to a marriage defined in subdivision one of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (i) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment,

all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

3. No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

13. *Governor Signs Bill to Aid Jews in Divorce Cases*, NY Times, August 10, 1983.
14. 58 N.Y.2d 108 (1983), *cert. denied*, 52 U.S.L.W. 3262 (U.S. Oct 4, 1983).
15. See also *Minkin v. Minkin*, 180 N.J. Super. 434 A.2d 665 (Ch. Div. 1981) (finding that requiring the husband to specifically perform under the *ketubah* did not constitute a First Amendment violation).
16. DRL § 253.
17. DRL § 236 (B)(5)(h) and DRL § 236 (B)(6)(d). In 1992 the legislature enacted DRL § 236[B][5][h], which states that:

    [i]n any decision made pursuant to this subdivision the Court shall, where appropriate, consider the effect of barrier to remarriage as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision.

18. DRL § 236 (B)(5)(h); N.Y. CLS Dom. Rel. § 236 (B)(6)(o).
19. Specifically, New York Domestic Relations Law § 236(B)(6)(d) provides as follows: "In any decision made pursuant to this subdivision the Court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph a of this subdivision."
20. *Schwartz v. Schwartz*, 153 Misc. 2d 789 (Sup. Ct., Kings County 1992).
21. Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law*, Pace L. Rev., Spring 1995.
22. Marc Feldman, *Jewish Women and Secular Courts: Helping a Jewish Woman Obtain a Get*, Berkeley Journal of Gender, Law & Justice, September, 2013.
23. *Id. See also* Myrna Felder, *Are the "Get" Statutes Constitutional?* NYLJ April 13, 1998, p. 25, col. 5.
24. 138 A.D.3d 801(2nd Dep't 2016).
25. 82 A.D.3d 1178 (2nd Dep't 2011).
26. 260 A.D.2d 622 (2nd Dep't 1999).
27. 235 A.D.2d 468 (2nd Dep't 1997).
28. 36 Misc. 3d 1209(A)(Sup. Ct., Kings County. 2012).
29. 22 Misc. 3d 1115(A) (Sup Ct., Kings County. 2009).
30. *Masri v. Masri*, 2017 N.Y. Slip Op. 27007 (Sup. Ct., Orange County 2017).
31. *Aflalo v. Aflalo,* 685 A.2d 523 (NJ Super. Ct., App. Div. 1996).
32. *Id.* at 534.
33. DRL § 236B(6)(o).
34. *Masri*, *supra* at 19.
35. *Perl v. Perl*, 126 A.D.2d 91 (1st Dept 1987)
36. www.bethdin.org. The Beth Din of America was founded in 1960 by the Rabbinical Council of America (also referred to as the RCA). Since its inception over fifty years ago, the Beth Din of America has been recognized as one of the nation's pre-eminent rabbinic courts. It serves the Jewish community of North America as a forum for arbitrating disputes.
37. The parties may choose a different Beth Din by substituting the name of the Beth Din they agree on in the body of the document prior to executing the agreement.
38. The parties can opt to arbitrate additional end-of-marriage issues at the Beth Din as well.
39. Michelle Greenberg-Kobrin, *Religious Tribunals and Secular Courts: Navigating Power and Powerlessness*, Pepperdine Law Rev. (5-15-2014) *citing Light v. Light*, 55 Conn. L. Rptr. 145 (Conn. Super. Ct. 2012).
40. Michelle Greenberg-Kobrin, *Religious Tribunals and Secular Courts: Navigating Power and Powerlessness*, Pepperdine Law Rev. (5-15-2014).

Pitfalls of Matrimonial Appellate Practice

By Glenn S. Koopersmith

Matrimonial practice presents so many ways to stumble or self-destruct. Appeals from judgments or orders in matrimonial matters can be especially problematic for the average practitioner because they are relatively infrequent and can be governed by a different set of rules and/or procedures. I have watched some of my colleagues, including highly experienced attorneys, act (or fail to act) in ways that create the potential for malpractice. While some of these acts (or omissions) are simple, others are complex and occasionally, surprising. In short, these are the types of things that can keep you up at night. Hopefully, this article will allow you to avoid these potentially dangerous situations... and sleep through the night.

Contents of the Notice of Appeal

Let us start with the basics. Perhaps the most common error to cross my desk occurs when attorneys file a Notice of Appeal which specifies—and, in effect, *limits*—the issues to be raised on appeal, rather than appealing from the *entire* judgment or order.

Pursuant to CPLR 5515(1), the Notice of Appeal must designate: (1) the party taking appeal; (2) the order or judgment (or part thereof) appealed from; and (3) the court to which the appeal is taken. It does *not* require that you specify the issues to be raised. This is of particular importance because a Notice of Appeal is jurisdictional.[1] Thus, since the Appellate Division has no jurisdiction to address issues which have been omitted from the Notice of Appeal, such omissions cannot be remedied by motion or stipulation of the parties.[2] If the Court has no jurisdiction over the issue, it has been *waived*.

The lesson here is simple—never, ever limit the scope of the appeal; *appeal from each and every part of the order or judgment*.

Time Limits for filing the Notice of Appeal

Contrary to popular belief, the time within which to file a Notice of Appeal does *not* run from date the order or judgment is signed or entered. Pursuant to CPLR 5513, the Notice of Appeal must be filed *within 30 days of service by a party of the order or judgment with notice of entry.*[3] This applies regardless of whether you have served the order or it has been served upon you by your adversary. Since the time limit for filing a Notice of Appeal is also jurisdictional, it can neither be waived[4] nor extended by stipulation of the parties.[5]

It is imperative to serve the order with an accurate notice of entry. For those of you who use the date of the order or judgment as the entry date, be aware that the "clock" does not begin to tick until a valid notice of entry is served. If information regarding the entry date is incorrect, the time for filing the Notice of Appeal will not commence to run. "The party seeking to limit the time of another to take an appeal must be held strictly to the rules of practice and failure to comply therewith may not be overlooked."[6] Thus, a motion to dismiss the appeal for failure to file within the statutory period will be denied in the absence of a valid notice of entry.

A significant, albeit hidden, danger of malpractice is posed where neither party has *formally* served a copy of an order or judgment with notice of entry, but a copy of the order or judgment, stamped with the entry date, has been served by either party upon the other. The Court of Appeals has held that a cover letter enclosing a copy of an order upon which the date of entry was stamped was sufficient notice to trigger the 30-day period within which a Notice of Appeal must be filed.[7] Similarly, the 30-day period may be triggered against both parties where an order, upon which the date of entry was stamped, is served as an exhibit to a motion.[8]

The lesson in this situation is also clear. Any substantial delay in serving an order with notice of entry—which is usually designed to extend the time within which a Notice of Appeal can be filed—should be viewed with great caution. If you intend to appeal, once the order or judgment is entered, serve it with notice of entry and file your Notice of Appeal.

Failure to Withdraw a Notice of Appeal

A substantial danger of malpractice is also posed where a Notice of Appeal from an interim order is neither perfected nor withdrawn, leaving it subject to dismissal by the court.

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This situation may be all too familiar. After filing a Notice of Appeal from an interlocutory order, you decline to perfect the appeal, but forget to withdraw it from the Court's docket—which would prevent any judicial determination on the merits. The impact of this critical omission can be *devastating*. If the appeal is neither perfected nor withdrawn, it will be dismissed by the court. Thus, any issue (or issues) that could have been raised on a prior (dismissed) appeal generally cannot be reviewed on an appeal from the final judgment.[9]

For obvious reasons, you do not want to be the attorney who failed to withdraw the prior appeal. While the Appellate Division does retain discretion to permit consideration of such issues on a subsequent appeal,[10] the danger posed by the failure to withdraw an appeal from an interlocutory order should be self-evident.

There is yet another important lesson—if a Notice of Appeal is filed from a non-final order, be sure to withdraw the appeal as soon as you have decided not to perfect it, and certainly *before* perfection of the appeal is required by the court's rules.

Potential Waiver of Appellate Rights by Accepting a Court-ordered Payment

This rule makes me twitch. If a trial court directs the payment of a sum certain and you (or your client) negotiate a check remitted in satisfaction of the obligation, you *may have waived your right to appeal the issue*.

As a general rule, a party who accepts a court-ordered payment of a specified sum has waived the right to appeal that issue.[11] The rationale underlying this rule is that a party who has accepted the court-ordered payment is not aggrieved and lacks standing to appeal the determination.[12]

However, there is an exception to the general rule. There is no waiver of the right to appeal if a party accepts payment and the only possible issue on appeal is whether the amount may be *increased*—presumably because the recipient *is* an aggrieved party. "This exception appears to be limited to those instances where the appellant's right to the amount awarded by the original judgment is absolute, making it possible to obtain a more favorable judgment without the risk of a less favorable result upon retrial (citation omitted)."[13]

Thus, for example, if the Court awards counsel fees to the wife and *both* parties appeal from the counsel fee determination, the wife's negotiation of the check is likely to be deemed to be a waiver of any right to appeal that issue because the amount of the award could be increased *or* decreased on appeal. In contrast, if only the wife appeals and the husband's time within which to file a Notice of Appeal (or cross appeal) has expired—thereby eliminating the possibility that the award could be *reduced* on appeal—the wife's negotiation of the check would *not* constitute a waiver because the amount could only be *increased* on appeal.

This presents another compelling lesson—acceptance of any court-ordered payment that could potentially be reduced on appeal will generally constitute a waiver of the right to appeal that determination. Notably, I see no reported decisions on this issue in a matrimonial case and it would appear inequitable, to say the least, for the wife (or her attorney) to not deposit a counsel fee payment or a child support payment in fear of an appellate waiver. The existing decisions, though, are clear on this point and danger certainly lurks without a stipulation between the parties on this issue unless and until an appellate court addresses this issue in a matrimonial case.

"Any attempt to appeal the Referee's order directly to the Appellate Division without first seeking review from the appointing Court generally will result in the dismissal of the appeal."

Appeal from the Order of a Discovery Referee

If you attempt to take a direct appeal to the Appellate Division from an order issued by a discovery referee, it is likely that the Appellate Division decision will contain two of the words which I most dread— "appeal dismissed."

Where a discovery referee is appointed pursuant to CPLR 3104, the referee's issuance of an order determining a written motion, on notice, is *not* appealable to the Appellate Division as of right pursuant to CPLR 5701(a)(2). By its express terms, CPLR 3104(c), limits the appealability of such an order by stating that "(a)ll motions or applications made under this article shall be returnable before the judge or referee, designated under this section" [CPLR § 3104(c)] which "shall be by motion made in the court in which the action is pending within five days after the order is made."[14]

Any attempt to appeal the referee's order directly to the Appellate Division without first seeking review from the appointing court generally will result in the dismissal of the appeal. The Second Department has held that "the

specific language of CPLR 3104(d) mandating review in the court in which the action is pending precludes this court from entertaining a direct appeal from an order of a judicial hearing officer designated as a referee to supervise disclosure."[15] While in certain unusual circumstances the Appellate Division can exercise its discretion to grant leave to appeal from such a determination,[16] the only safe practice is to seek review of such discovery orders from the appointing court before seeking relief from the Appellate Division.

Conclusion

If you are clutching your chest, looking for your heart medication, and screaming "Elizabeth, I'm coming to join you honey!!" like television's Fred Sanford in *Sanford & Son*[17]—I apologize. I understand this feeling all too well as I have learned several of these "lessons" the hard way. Hopefully, once you regain a sense of calm, they can help to minimize your sleepless nights and guide you to a more peaceful future.

Endnotes

1. *Rich v. Manhattan Ry. Co.*, 150 N.Y. 542, 546 (1896); *Long Island Pine Barrens Society, Inc. v. Cent. Pine Barrens Joint Planning & Policy Com'n.*, 113 A.D.3d 853 (2d Dep't 2014).
2. *City of Mount Vernon v. Mount Vernon Housing Auth.*, 235 A.D.2d 516 (2d Dep't 1997); *Boyle v. Boyle*, 44 A.D.3d 885, 886 (2d Dep't 2007).
3. These service rules do not apply to Family Court proceedings. An appeal from a Family Court order must be taken (1) within 30 days after service by a party or a law guardian upon the appellant of the order sought to be reviewed, (2) within 30 days after receipt by the appellant of a copy of the order in open court, or (3) within 35 days after mailing of the order to the appellant by the clerk, whichever is earliest. FCA § 1113.
4. *Xander Corp. v. Haberman*, 41 A.D.3d 489 (2d Dep't 2007); *Ogborn v. Hilts*, 262 A.D.2d 857 (3d Dep't 1999).
5. *Haverstraw Park v. Runcible Properties Corp.*, 33 N.Y.2d 637 (1973).
6. *Nagin v. Long Island Sav. Bank*, 94 A.D.2d 710 (2d Dep't 1983); *see Garcia v. City of New York*, 72 A.D.3d 505 (1st Dep't 2010).
7. *Norstar Bank of Upstate NY v. Office Control Systems, Inc.*, 78 N.Y.2d 1110 (1991).
8. *Matter of Xander Corp. v. Haberman*, 41 A.D.3d 489 (2d Dep't 2007); *Meyer v. Meyer,* 228 A.D.2d 955 (3d Dep't 1996).
9. *Bray v. Cox*, 38 N.Y.2d 350 (1976); *Montalvo v. Nel Taxi Corp.*, 14 A.D.2d 494 (2d Dep't 1985).
10. *Farincelli v. TSS Seedmans Inc.*, 94 N.Y.2d 772 (1999).
11. *Burkhardt v. Acker, Merrall & Condit Co.*, 226 N.Y. 560 (1919); *Webber v. Webber*, 145 A.D.3d 1499 (4th Dep't 2016).
12. *Mid-State Precast Sys. v. Corbetta Constr. Co.*, 223 A.D.2d 776 (3d Dep't 1996).
13. *Kriesel v. May Dept. Stores Co.*, 261 A.D.2d 837 (4th Dep't 1999).
14. CPLR 3104(d).
15. *Etzion v. Etzion*, 84 A.D.3d 1014 (2d Dep't 2011).
16. *Ploski v. Riverwood Owners Corp.*, 255 A.D.2d 24 (2d Dep't 1999).
17. Sanford & Son (1972–1977), http://www.imdb.com/title/tt0068128/.

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Court of Appeals

Statutory procedure allowing for early expungement of reports relating to alleged child abuse does not apply to FAR track pursuant to SSL § 427-a despite that SSL § 422 permits same

Corrigan v. New York State Office of Children & Family Services, 2017 N.Y. Slip Op. 01020 (2017).

When the Office of Children and Family Services (OCFS) received a telephone call alleging educational neglect by the petitioners, pursuant to SSL § 422(2)(a), the report was referred to the Offices of Child Protective Services (CPS). CPS decided that the case was eligible to proceed under the non-traditional CPS investigation, the Family Assessment Response track (FAR) pursuant to SSL § 427-a. FAR offers flexibility for CPS to provide immediate assessment and social services for some cases without investigating whether abuse existed, while the traditional investigative track under SSL § 422 is required for reports where a child's safety is of serious concern, including physical and sexual abuse.

The CPS case worker closed the case and did not recommend services. The petitioners sought to have their names formally cleared by writing a request to CPS to request the expungement of the FAR report and the records (which would stay sealed for 10 years). The request was denied since the statute does not provide for expungement.

Petitioners then brought an Article 78 proceeding challenging the ruling. The petitioners argued that a process for seeking early expungement of a report (before 10 years has expired) is available to parents who have been investigated by OCFS where there is no finding of abuse and neglect under SSL § 422[5][c], and that the statute governing the FAR track must be interpreted to include the same. The petition contained no challenge to the FAR statute on constitutional grounds. Respondents moved to dismiss, and Supreme Court granted the motion on the ground that no statutory authority exists for early expungement of a FAR report.

The Appellate Division affirmed, reasoning that the legislature's failure to include expungement under the FAR statute, SSL § 427-a, was intentional, especially where the stated purpose in enacting the differential response approach was "to avoid any consideration of the truth or falsity of the allegations of abuse or maltreatment in appropriate cases."

The petitioners appealed to the Court of Appeals, and the high court affirmed. The Court reasoned that SSL § 427-a and SSL § 422 were not adopted together and do not deal with the same subject matter. Rather, "the FAR track was created as a new and entirely separate means of addressing certain allegations of child abuse in a program geared toward the provision of social services, rather than an investigation assessing blame." Only the legislature can change this apparent inequity. Finally, the petitioners failed to preserve for appeal that SSL § 427–a is unconstitutional as applied because the absence of an early expungement provision is not rationally related to a legitimate government objective.

Custody and Visitation

Tri-custody arrangement granted after parties engaged in a three-way relationship

Dawn M. v. Michael M., 47 N.Y.3d 898 (N.Y. Sup. Ct. 2017)

This is the first case of its kind in New York awarding tri-custody of a child. Plaintiff Dawn M. and defendant, Michael M., were married and thereafter had multiple unsuccessful attempts to have a child. Later, Audria G. moved in with the couple where the three began to engage in sexual relations, considered themselves a family, and decided to have a child together. It was agreed by the three parties, beforehand, that defendant and Audria would engage in sexual relations and that all three would raise the child together as parents.

Audria became pregnant and gave birth to baby J.M. in 2007. The parties continued to live together for over

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18 months and all three raised J.M. Specifically, plaintiff accompanied Audria during most of her doctor's appointments during the pregnancy, she used her medical insurance to cover Audria's pregnancy and delivery, and plaintiff and Audria shared motherly duties when the parties lived together. J.M. was raised to believe that he has two mothers and one father.

In 2008, the relationship between the married couple started to deteriorate and plaintiff and Audria moved out of the marital residence and lived together. In 2011, plaintiff commenced a divorce action against defendant. Defendant commenced a custody case against Audria, and thereafter they agreed to joint custody with residential custody to Audria and visitation to defendant.

Plaintiff Dawn, who is the non-biological and non-adoptive parent of 10-year-old J.M., brought this action to secure her custody rights (despite that she was still living with Audria) in order to legally remain in J.M.'s life without being solely dependent on obtaining defendant's or Audria's consent. Defendant opposed, claiming that plaintiff has no standing to seek custody as the non-biological or non-adoptive parent.

The Court of Appeals in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016), held that where a partner shows that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing as a parent to seek visitation and custody. In this case, the court relied on *Brooke S.B.*, and held that it was within the best interest of J.M. to continue the loving relationship that he has had with the three parties since birth. Plaintiff and defendant raised J.M. in a loving environment, the three parties have gotten along to maintain a psychologically healthy life for J.M., and it is evident that they will be able to cooperate in making decisions for J.M. in the future. The parties created an unconventional family dynamic when all three agreed to raise a child together, so it is in J.M.'s best interests for him to continue a relationship with his *de facto* mother. The court reasoned,

> Reason and justice dictate that defendant should be estopped from arguing that this woman, whom he has fostered and orchestrated to be his child's mother, be denied legal visitation and custody. As a result of the choices made by all three parents, this ten-year-old child to this day considers both plaintiff and Audria his mothers. To order anything other than joint custody could potentially facilitate plaintiff's removal from J.M.'s life and that would have a devastating consequence to this child.

The court found that joint custody with the defendant is appropriate, which effectively becomes a tri-custody relationship. The court granted visitation to the plaintiff as follows: dinners on Wednesday evenings, one school recess, and two weeks during the summer.

Mother awarded custody despite financial struggles and past history of substance abuse

Snow v. Dunbar, 147 A.D.3d 1242 (3d Dep't 2017)

The unmarried parties had two children together. The parties lived together until the mother moved out to live with her now husband. The mother petitioned for custody of the children. The father cross-petitioned for joint legal custody and primary physical custody.

"The Court of Appeals in Brooke S.B. v. Elizabeth A.C.C. *held that where a partner shows that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing as a parent to seek visitation and custody."*

The mother was the primary caretaker for the children when she resided with the father and took care of most of the housework. When she moved out to live with her new husband, she provided her children with a suitable household and maintained a close relationship with them. The mother had financial issues, but her struggles did not rise to the level of "chronic financial difficulties" that negatively affected the children. She had a history of substance abuse for which she received treatment. Her substance abuse was found by the court to be too remote in time to be relevant.

There was disputed evidence regarding the father's behavior toward the children. The father testified that he was a devoted father who read books, played, danced and watched movies with the children. However, the mother testified that the father would often sleep or watch television when he was at home with them and that he was controlling when the parties resided together. The mother also testified that the father's new home wasn't sanitary and that he made false statements about the mother's new husband to his daughter.

Following a trial, the Family Court awarded the parties joint legal custody of the children, granted primary physical custody of the children to the mother, and set forth a visitation schedule for the father. The father appealed.

The Third Department affirmed. The Family Court's determination of the father's control issues did not make shared custody practical. It was in the best interests of the children for primary custody to remain with the mother because she took care of the children's day-to-day needs and better promoted their intellectual and emotional development.

Maternal aunt demonstrates extraordinary circumstances warranting her to have guardianship of the children

In re Sofia S.S., 145 A.D.3d 787 (2d Dep't 2016)

The mother of two children, Keilah and Sofia, sent her daughters to stay with their maternal aunt. Thereafter, the maternal aunt filed petitions to be appointed the guardian of the children. The Family Court appointed the maternal aunt as permanent guardian of one child, Keilah and temporary guardian of the other child, Sofia. The mother then filed to modify the order, requesting that the aunt be appointed as temporary guardian of Keilah, and to terminate guardianship of Sofia. The Family Court denied the relief. The mother appealed, and the Second Department affirmed.

State intervention is warranted with respect to the custody of a parent's child if there is a finding of

> surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstances which would drastically affect the welfare of the child.

Here, the maternal aunt demonstrated extraordinary circumstances, by providing evidence that the mother continued to live with her husband after he was arrested for committing domestic violence against her, the husband continued to verbally abuse the mother and her children, and the mother failed to fulfill her children's physical and psychological needs. Based on the totality of the circumstances, the court determined that it was in the best interests of the children to award permanent guardianship of them to the aunt.

Father's visitation rights terminated where he failed to contact or visit with his children for five years

Licato v. Jornet, 146 A.D.3d 787 (2d Dep't 2017)

The parties are the parents of two children. In 2007, the father was awarded supervised visitation on alternate Saturdays. In 2013, the mother sought to modify the order because the father had failed to contact or visit his children for five years. The Family Court suspended the father's visitation rights. The father appealed, and the Second Department affirmed.

The mother showed a sufficient change in circumstances to warrant a modification of visitation. Since the father failed to visit and contact his children for five years, such abandonment is a change in circumstances warranting a suspension of his visitation.

Custody award modified where parents failed to work cooperatively in treating child's ADHD

Andrea C. v. David B., 146 A.D.3d 1104 (3d Dep't 2017)

In 2007, the parties stipulated to an order granting joint legal custody of the child with primary physical custody to the mother. In 2013, the mother had the child evaluated for ADHD, and the doctors recommended a combination of medication and counseling. The mother was interested in trying medication for her child, while the father was completely opposed to it. In 2014, the mother petitioned for a change in custody, seeking sole legal custody of the child on the grounds of the father's lack of cooperation and obstruction with her medical care. The father then cross-petitioned for sole legal custody, alleging that the mother lacked the ability to manage the child's behavioral issues and that she placed the child on medication without his consent. The father refused to accept the child's diagnosis of ADHD, failed to follow the recommended treatment of specialists, and did not want to enroll the child in special education classes. He believed that he alone could treat the child.

The Family Court determined that a change of circumstances existed that warranted a change in custody from joint custody to sole custody to the mother, particularly where the parties' relationship deteriorated and they were unable to work together to raise their child. The father appealed, and the Third Department affirmed.

Denial of 17-mile relocation

Lipari v. Lipari, 146 A.D.3d 870 (2d Dep't 2017)

The parties entered into a stipulation of settlement upon their divorce, where they agreed to joint legal custody of their two children, with the mother having primary residential custody and the father having alternate weekend visitation, as well as some overnight visitation during the week, holidays and school breaks. The mother obtained exclusive occupancy of the marital residence in Valley Cottage, Rockland County and the father rented a condominium located about five minutes away. After the mother informed the father that she intended to move 17 miles away to Rye, located in Westchester County, the father sought to enjoin her from relocating.

The father testified that he was very close to his children and involved in their everyday lives, and if the mother relocated, the amount of time he would be able to spend with his children would be significantly decreased. The father worked in New Jersey, and on an almost daily basis, picked up the children from school and cared for them until the mother was able to pick them up. He also

coached many of their sports teams and attended their extracurricular activities. The mother contended that she wanted to move to Rye because it would reduce her commute to work as a school librarian, that she believed the Rye school district was better than the children's current school district, and that she would save money by moving to an apartment.

The trial court enjoined the mother from relocating. Upon the mother's appeal, the Appellate Division affirmed.

A party seeking relocation must demonstrate that the proposed relocation would be in the child's best interests. Here, the evidence displayed that a relocation of only 17 miles would significantly impact the father's relationship with the children, considering the father's frequent contact with them during the week. If the children moved to Rye, it would be difficult for the father to pick them up after school due to the demands of his work schedule and the commute during rush hour. Moreover, the mother failed to demonstrate that the move to Rye would benefit the children's lives, in any way, rather than benefiting herself.

Equitable Distribution

Egregious marital fault found

Pierre v. Pierre, 145 A.D.3d 586 (1st Dep't 2016)

The husband stabbed his wife with a steak knife twice, smashed her head against the toilet, and pushed her head into the toilet bowl. As a result of his actions, the wife entered into a coma, was hospitalized for months, received five surgeries, and thereafter was disabled. The husband pleaded guilty to attempted assault in the first degree. Despite this, the trial court awarded the husband 50% of the marital home.

On appeal, the court modified the wife's award to 95% of the marital home on the grounds of egregious marital fault due to the husband's abuse. According to DRL § 236(B)(5)(d)(14), marital fault is considered where the spousal misconduct is so egregious that it "shocks the conscience of the court," including conduct that imperils "the value [that] society places on the human life and 'integrity of the human body.'"

Support

Imputation of income

Pfister v. Pfister, 146 A.D.3d 1135 (3d Dep't 2017)

The parties were married 13 years and have three children. The husband, who owned a property maintenance business, claimed that he earned approximately $63,000/year two years before trial and $43,000/year before trial. The wife, who has two Master's degrees and is a certified school counselor, worked part-time and earned approximately $18,000/year two years before trial and $16,000/year before trial. The trial court, when determining child support and maintenance for the wife, imputed income of $44,447/year to the wife and $85,000/year to the husband and directed the husband to pay the wife $200/ week for three years in spousal support and $340/week in child support. The husband appealed, and the Appellate Division affirmed.

The husband argued that the court should not have imputed additional income to him and should have imputed more income to the wife. The husband claimed he earned less than $65,000 prior to trial. However, the court found that the husband earned more than $120,000/year in the past, until he changed the way he kept his financial records, and that he paid for the family's expenses from the business accounts. The court observed that his business' gross profits were "extremely disproportionate" to his net income. In addition, there was evidence at trial that the wife had another part-time job earning about $25,500/year.

The trial court properly did not award the husband a credit for marital funds used to pay the wife's pre-marital student loans for her Master's degree because there was no evidence that the wife's Master's degree conferred an economic benefit, and the court cited *Mahoney–Buntzman v. Buntzman*, 12 N.Y.3d 415 (2009) for this proposition. On the other hand, the wife was properly awarded a credit of one-half of the marital funds for the payment of the loans on the husband's pre-marital boat.

Child support awarded regardless of validity of marriage

Commissioner of Social Services ex rel. N.Q. v. B.C., 147 A.D.3d 1 (1st Dep't 2016)

The parties were married through an Islamic religious ceremony. Two years later, they had a child together. There was no written contract and the parties did not obtain a marriage license. After the mother applied and received Medicaid health care, the Commissioner of Social Services filed a petition seeking an order for the child's father to provide support in the form of health insurance on the basis that a ceremonial marriage had taken place and therefore, the child is presumptively the legitimate child of the father.

Family Court Act § 117 provides that

> (a) child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of [support proceedings] regardless of the validity of such marriage.

The father denied that a ceremony took place and claimed he had married another woman.

At trial, the mother testified that they appeared before an imam, she wore traditional wedding garb, and they recited several wedding verses to each other in front of friends. The father gave her a series of gifts which included earrings, a ring, clothing and $100 "haq mehr," which is money the groom gives to the wife, to symbolize their marriage. After the ceremony, the parties celebrated at a restaurant with their friends.

The Family Court found that petitioner met its burden of demonstrating a ceremonial marriage had taken place, and referred the matter to a support magistrate. The father appealed, and the Appellate Division affirmed. Since the parties swore that they intend to be married in the presence of a religious figure or magistrate, the court found that a ceremonial marriage had taken place.

Stipulations

No award of maintenance where postnuptial agreement is silent regarding waiver of maintenance

Herskovitz v. Herskovitz, 145 A.D.3d 549 (1st Dep't 2016)

The parties entered into a postnuptial agreement, which states in the "Whereas" clause the following:

> WHEREAS, they make this Agreement with the understanding that they are hereby settling their marital affairs with respect to, among other things, question[s] of separate property, marital property, *maintenance payments*, inheritance rights, undergraduate and postgraduate degrees, professional licenses and/or practices, pension benefits, equitable distribution of property and distributive awards (emphasis supplied).

Nowhere else in the agreement is there a provision regarding a mutual waiver of maintenance. (The reported decision did not provide any facts regarding the disputed language of the postnuptial agreement; therefore, I reviewed the appellate briefs to obtain more information.)

The husband moved for summary judgment on the issue that the postnuptial agreement prevents the wife from seeking maintenance, which was granted. The Appellate Division affirmed, reasoning that the parties' "Whereas" clause clearly states that all issues are resolved, and therefore, no maintenance is to be awarded to the wife.

Author's note: It seems to me that there was a typographical error in the "Whereas" clause in the agreement. If the parties intended to waive maintenance, surely there would have been an article in the agreement clearly stating such waiver.

Father entitled to deduct son's college room and board fees even though child support paid to mother was only for the parties' daughter

Meshel v. Meshel, 146 A.D.3d 595 (1st Dep't 2017)

Upon divorce, the parties entered into a stipulation of settlement which provided that the mother would have sole legal and primary residential custody of their two children, and that the father would pay $6,000/month in child support for both children. The father was entitled to a room and board credit against his child support payments for all amounts that he pays towards the cost of his son's room and board while at college, provided the credit did not exceed $24,000.

In July of 2013, the parties amended the stipulation of settlement, which provided the father with sole legal and physical custody of their son and the father's child support for the daughter was reduced to $5,000 per month. When the son commenced college, the father began deducting the son's room and board fees against the child support for the daughter.

The mother brought a motion against the father to cease deducting the parties' son's college expenses for room and board from the child support payments for the parties' daughter and to direct him to pay the resulting child support arrears. The father cross-moved for counsel fees. The Supreme Court denied the mother's motion and granted the father's motion. The Appellate Division affirmed, except modified the provision granting the father counsel fees.

The court found the revised stipulation to be unambiguous on its face, as the only modification to the original agreement was that there was a $1,000 reduction in child support payments. Even though the $5,000 monthly child support payment paid by the father was for the daughter only, the court held that the father was entitled to the room and board credit deduction.

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