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Continued Double Dip Dilemma: Court Must Clarify *Keane*

By Lee Rosenberg, Editor-in-Chief

Also in this issue

Members of the Family Law Section Executive Committee, l to r: Rosalia Baiamonte, Esq., Vice-Chair; Eric A. Tepper, Esq., Chair; Mitchell Y. Cohen, Esq., Immediate Past Chair; and Joan Casilio Adams, Esq., Secretary.

Section Presents Gift to New York Bar Foundation

ALBANY – The Family Law Section of the New York State Bar Association has contributed a gift of $10,000 to The New York Bar Foundation to be used to provide funding to assist organizations with Family Law-related programs through the Foundation's grant program.

The purpose of the Family Law Section is to bring together members of the New York State Bar Association who are concerned about matrimonial and family law matters.

"The Family Law Section is committed to assisting organizations that help victims of domestic violence, persons unable to afford legal services and children caught within the web of family law litigation," said Section Chair Eric A. Tepper, Esq. "We are proud to support the efforts of The New York Bar Foundation, which helps to identify worthwhile organizations that advance the cause of family law matters in our state."

New York Bar Foundation President John H. Gross said, "We are grateful to the Family Law Section for recognizing the need for this type of assistance. The Foundation receives numerous grant applications related to Family Law matters annually. This gift is one example of how the Sections of the New York State Bar Association and the Foundation can work together to make a difference to those in need of legal services related to important family matters."

The Foundation presented nearly $700,000 in grants to more than 100 programs across New York State in 2018. Funds from the Family Law Section were allocated to a range of programs including:

- Legal Information for Families of Today (LIFT) received funding to expand services for unrepresented Family Court litigants. Its pilot project aims to ensure that pro se litigants with Family Court matters in rural areas of New York State receive legal advice.
- inMotion, Inc. received funding for its Supporting Children Project, which assists mothers in obtaining child support from fathers with the ability to pay. The program's goals are to reduce the number of mothers and children living in poverty in New York City; provide mothers who are victims of domestic violence with a means of escaping abuse without becoming destitute and homeless by giving them access to child support to which they are entitled; empower mothers to become self-sufficient by helping them obtain the financial means to provide for their children; and make the processing of support matters in the courts more efficient and accessible.
- The Center for Family Representation (CFR) received funding for its Enhanced Interdisciplinary Advocacy Teams program. Team members provide parents with legal and social work services to help them achieve better outcomes in their family court cases. CFR aims to keep their clients' children out of foster care entirely, and achieve shorter lengths of stay for children who enter care.

The New York Bar Foundation, a nonprofit, philanthropic organization, receives charitable contributions from individuals, law firms, corporations and other entities. It provides funding for the following purposes: increasing public understanding of the law; improving the justice system and the law; facilitating the delivery of legal services; and enhancing professional competence and ethics. For more information about The New York Bar Foundation, visit www.tnybf.org.

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Continued Double Dip Dilemma: The Court of Appeals Needs to Clarify *Keane*

By Lee Rosenberg, Editor-in-Chief

We have been discussing "double dipping" for years. For the uninitiated, we are not talking about Seinfeld's George Costanza taking a second scoop of dip after the first bite of his chip,[1] but *McSparron*[2] and *Grunfeld's*[3] impermissible double counting of income for maintenance purposes after the income stream has been converted to an asset and distributed: "[o]nce a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout."[4]

Through the ensuing years, complicated by the Court of Appeals' later decision in *Keane v. Keane*,[5] the "if, how, and when" this prohibition applies to businesses, remains ill applied, if not plain misunderstood.[6] There also remains a dichotomy between appellate departments which requires the High Court to fix what *Keane* wrought.

The *Keane* Problem

While the facts of 2006's *Keane* were somewhat complicated and involved the distribution of an income-producing rental property and how to treat that income for spousal support purposes, *Keane* nevertheless expounded upon the prior *Grunfeld* and *McSparron* holdings and excluded tangible income-producing assets from the double-counting prohibition.

> Double counting may occur when marital property includes *intangible* assets such as professional licenses or goodwill, *or the value of a service business*. As we said in *Grunfeld*, "[i]n contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital dependant upon the future labor of the licensee" (94 NY2d at 704). It is only where "[t]he asset is totally indistinguishable and has no existence separate from the [income stream] from which it is derived" (id.) that double counting results. (Emphasis partially in original.)[7]

What causes the existing problem, particularly in the Second Department, is the subsequent application (or lack thereof) to that portion of *Keane* which referenced "service businesses." In what appeared to be unexplained misapplications of *Keane* in *Griggs v. Griggs*[8] (medical practice) and *Groesbeck v. Grosbeck*[9] (home improvement contracting business), the Second Department inconceivably ignored the "service business" aspect of the anti-double-dipping rule, and proceeded to distribute the service business value while awarding spousal support on the same income stream. The error was then corrected in *Rodriguez v. Rodriguez*,[10] which found,

> Moreover, we agree with the defendant that the Supreme Court impermissibly engaged in the "double counting" of income in valuing his medical practice, which was equitably distributed as marital property, and in awarding maintenance to the plaintiff *(Grunfeld v. Grunfeld*, 94 NY2d at 702; *Murphy v. Murphy*, 6 AD3d 678, 679). The valuation of the defendant's business involved calculating the defendant's projected future excess earnings. Thus, in valuing and distributing the value of the defendant's business, the Supreme Court converted a certain amount of the defendant's projected future income stream into an asset. However, the Supreme Court also calculated the amount of maintenance to which the plaintiff was entitled based on the defendant's total income, which necessarily included the excess earnings produced by his business. This was error.

Within 30 days of *Rodriguez*, the Second Department reverted in *Kerrigan v. Kerrigan*,[11] again ignoring any discussion of the "service business" aspect of *Keane* and only referencing "intangible" assets. While the business at issue may not have been deemed a service business, there was no discussion of the concept.

> The award of maintenance to the defendant in the sum of $1,500 per week for

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> a period of five years was appropriate (see Kriftcher v Kriftcher, 59 AD3d 392, 393-394). The plaintiff's contention that the Supreme Court engaged in "double dipping" with respect to the award of maintenance is without merit, as the *plaintiff's business constitutes a tangible, income-producing asset, rather than an intangible asset* (see Keane v Keane, 8 NY3d 115, 119; Griggs v Griggs, 44 AD3d 710, 713) (emphasis added).[12]

Palydowycz v. Palydowycz

Fast forward then to 2016's *Palydowycz v. Palydowycz*,[13] which involved medical practices and which again failed to discuss how the business interests are or are not service businesses.

> Here, the defendant's medical practices, which employ other individuals including several doctors, and his interest in an ambulatory surgical center, are not intangible assets which are "totally indistinguishable" from the income stream upon which his maintenance obligation was based (*Keane v. Keane*, 8 N.Y.3d at 122, 828 N.Y.S.2d 283, 861 N.E.2d 98), and the valuation method used by the plaintiff's expert to determine the fair market value of these assets does not change their essential nature. Accordingly, the Supreme Court erred in concluding that it had no discretion to award the plaintiff any distributive share of the value of these assets because the parties considered the defendant's entire 2010 income in reaching a stipulation as to his maintenance obligation.

The Court then added,

> To the extent that *Rodriguez v. Rodriguez*, 70 A.D.3d 799, 894 N.Y.S.2d 147 is inconsistent with our determination, it should no longer be followed.

The Court also inexplicably makes the following pronouncement:

> In cases decided by this Court subsequent to the Court of Appeals' decision in *Keane*, we have repeatedly concluded that distributing a party's business and awarding maintenance based upon the income earned from that business does not constitute impermissible double counting *because* a business *is* a tangible, income-producing asset. (Emphasis added.)

This is clearly inaccurate. It is more properly stated that there is no impermissible double counting *when* a business is a tangible, income-producing asset and *not* a service business.

The problem with this holding is not just the wholesale failure to address the service business portion of the double dip prohibition, but the focus only on the "intangible asset" portion, the blanket reference to the medical practice in *Griggs* without clarification, the failure to distinguish how the employment of other doctors and the existence of the ambulatory center affected the court's classification of the assets as tangible, income producing assets (*a la Keane*) *vis-a-vis* a service business. It also fails to address the import of the parties having settled spousal support *before* submitting the equitable distribution issue to the court for determination. There is nothing in the prior Court of Appeals' decisions which addresses the "cart coming before the horse" as was clearly existent in *Palydowycz*. Those cases and their progeny address spousal support *after* the income stream was converted as part of the asset distribution *not* the other way around as in *Palydowycz.* The court's reference to *Rodriguez* is also puzzling in that it does not completely overrule it, but cautions against "inconsistency." I would submit that the facts of *Palydowycz* are readily distinguishable.

Palydowycz went un-cited to until January 31, 2018 when the Second Department decided *Culin v. Culin.*[14]

Culin also fails to address the service business exception in *Keane*.

> Additionally, contrary to the defendant's contention, because Hudson constituted a tangible income-producing asset, the court did not err in awarding the plaintiff a distributive share of Hudson in addition to maintenance (see *Keane v. Keane*, 8 N.Y.3d 115, 122, 828 N.Y.S.2d 283, 861 N.E.2d 98; *Palydowycz v. Palydowycz*, 138 A.D.3d 810, 813, 29 N.Y.S.3d 479; *Sutaria v. Sutaria*, 123 A.D.3d 909, 911, 2 N.Y.S.3d 124; *Shah v. Shah*, 100 A.D.3d 734, 735, 954 N.Y.S.2d 129; *Weintraub v. Weintraub*, 79 A.D.3d 856, 857, 912 N.Y.S.2d 674).

According to its website,

> Hudson Marine Inc. is an engineering and construction company specializing in underwater services. The company has two divisions: Underwater Engineering Inspections and Underwater Construction.
>
> Hudson Marine's experience in repair design, inspection, and construction enables it to offer effective solutions to structural problems on the waterfront.[15]

While the business at hand may not be a service business, the Second Department's ongoing failure to cite the exception is problematic since, other than in *Rodriguez*, it appears not to be mentioned, even when addressing medical practices.

The Third Department

While this issue is ignored in the Second Department, it is alive and well in the Third.

In *2015's Gifford v. Gifford*, the husband was a self-employed geotechnical engineer who owned Gifford Engineering, LLC. The business was valued using capitalized earnings and the parties stipulated as to its value for purposes of equitable distribution and—unlike *Palydowycz*—left spousal support at issue for determination.

The appellate court properly considered the double dipping issue after the trial court ignored it and took note of the service business aspect of the prohibition.

> The husband contends that Supreme Court erred in utilizing his total average annual income of $332,431 for purposes of calculating a maintenance award, without making an adjustment for the distributive award of the company. We agree. As part of the stipulation, the parties agreed that the company was a marital asset for which the wife received a distributive award of $210,000. That award was based on a joint appraisal prepared by Edward Selig, a certified public accountant, who valued the business as of December 31, 2011 at $448,000, which report was received in evidence by stipulation. A review of the report confirms that the valuation was based on the husband's capitalized projected earnings, utilizing annual base earnings of $148,000. *This valuation method triggers the rule against double counting income*, which provides that, "[o]nce a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout" (*Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 705, 709 N.Y.S.2d 486, 731 N.E.2d 142 [2000]; accord *Mula v. Mula*, 131 A.D.3d 1296, 1298, 16 N.Y.S.3d 868, 871 [2015]). Further, "[d]ouble counting may occur when marital property includes intangible assets such as professional licenses or goodwill *or the value of a services business*" (*Keane v. Keane*, 8 N.Y.3d 115, 122, 828 N.Y.S.2d 283, 861 N.E.2d 98 [2006]). (Emphasis added.)

The court then makes a specific finding that the engineering company is a service business and cites a number of other Third Department cases *as well as* the Second Department's *Rodriguez* case to support its determination. It then made the calculation itself and limited income for purposes of maintenance to the baseline earnings of $148,000.

> We agree with the husband that his solely owned engineering company is a service business for purposes of the double counting rule (see id.; *Mula v. Mula*, 131 A.D.3d 1296, 16 N.Y.S.3d at 871; *Greisman v. Greisman*, 98 A.D.3d 1079, 1081, 951 N.Y.S.2d 219 [2012]; *Noble v. Noble*, 78 A.D.3d 1386, 1389–1390, 911 N.Y.S.2d 252 [2010]; *Rodriguez v. Rodriguez*, 70 A.D.3d 799, 801, 894 N.Y.S.2d 147 [2010]; *V.M. v. N.M.*, 43 Misc.3d 1204[A], 2014 N.Y. Slip Op. 50491[U], 13–14, 2014 WL 1272866 [Sup.Ct., Albany County 2014]). Since the wife already received her equitable share of the company by stipulation, an appropriate income adjustment must be made in calculating the maintenance award (see *Grunfeld v. Grunfeld*, 94 N.Y.2d at 705–706, 709 N.Y.S.2d 486, 731 N.E.2d 142). Given that the record here is sufficiently developed, in the interest of judicial economy, we opt to make the adjustment (see *Smith v. Smith*, 8 A.D.3d 728, 731, 778 N.Y.S.2d 188 [2004]) and conclude that the husband's baseline earnings of $148,000 should be utilized as the income available for maintenance purposes.

The trial court in *V.M. v. N.M.*[16] notes the discrepancy between the Departments and highlights the issue:

> In *Keane*, the Court determined that this principle did not apply to the distribution of a tangible, income-producing asset. The asset in *Keane* was a rental parcel, passively producing monthly income that was equally distributed between the parties. In so holding, the Court noted that "[d]ouble counting may occur when marital property includes intangible assets such as professional licenses or goodwill, *or the value of a service business* " (emphasis added [Id. at 122]).
>
> Several followup cases have determined that the prohibition against double counting does not apply to the distribution of a business. In *Weintraub v. Wein-*

traub (79 AD3d 856), the Second Department determined that the "prohibition against double counting did not apply to the distribution of the parties' plumbing and fire sprinkler contracting company, which is a tangible income producing asset: (Id. at 857). Consistently, in *Shah v. Shah* (100 AD3d 734), the Second Department held that the prohibition did not apply to the distribution of a business known as Hi–Tech Training (USA) Inc., which the Court characterized as a tangible, income producing asset (Id at 735).

Plaintiff is the sole owner of a closely held corporate entity engaged in the wholesale distribution of diamonds. There is no dispute that he personally is fully engaged in all aspects of this business, from the selection of inventory to the solicitation of customers and ultimate sale of the product. As such, this case falls within the category identified in *Keane*, as underscored above, involving "the value of a service business" (*Keane* at 122). It follows that the prohibition against double counting does apply. Thus, in setting the level of maintenance the Court will utilize 70% of plaintiff's business income. (Emphasis in original)

Is You or Is You Ain't a Service Business?[17]

Defining the nature of the business for purposes of avoiding double dipping is certainly within the purview of the court. It is often difficult to define.[18] In IRS Publication 334 (2017), *Tax Guide for Small Business*, at its Introduction,[19] the government gives some basic guidance.

> If you make or buy goods to sell, you can deduct the cost of goods sold from your gross receipts on Schedule C. However, to determine these costs, you must value your inventory at the beginning and end of each tax year.
>
> This chapter applies to you if you are a manufacturer, wholesaler, or retailer or if you are engaged in any business that makes, buys, or sells goods to produce income. *This chapter does not apply to a personal service business, such as the business of a doctor, lawyer, carpenter, or painter. However, if you work in a personal service business and also sell or charge for the materials and supplies normally used in your business, this chapter applies to you.* (Emphasis added.)

Other sources, such as Inc.'s "Service Businesses" classification, are also instructive:[20]

> **DEFINITION, CHARACTERISTICS, AND EXTENT**
>
> Given this still dynamically changing structure of classification, defining with any precision just exactly what a "service business" is presents some challenges. Service businesses are major movie studios, gigantic telecommunications firms, major publishers, enormous engineering concerns, the shoe repair shop down the street, the law firm, the payroll service, the auto rental organization, the apartment house, the fast food chain, the dental clinic, and so on and on.
>
> Given the very great diversity that the term "service business" encompasses, its characteristics must, by definition, be rather broad. A service business is not primarily engaged in extractive, harvesting, and goods producing activities but in delivering results, often based on symbolical processes or the rearrangement of physical environments (landscaping, redecorating, waste handling, repairing), on personal services (healing, counseling, litigating, advising, persuading, amusing, caring for, teaching, etc.), on transporting goods and messages, and in structuring and managing ongoing or future activities by others (planning, engineering, management).
>
> A service business, however, may also, if only incidentally, sell and deliver goods: people in the entertainment business sell CDs—although it is the films and the music that people are buying; in the information sector businesses sell newspapers and books—although it is the content of these media consumers are paying for; in the landscaping trade the businesses sell shrubs, plants, and decorative rock—but the buyer hires a landscape architect for the design; and in waste management, companies physically remove the waste—although the consumer is buying the absence of trash.

Clarification

This issue is ripe for clarification. For whatever reason, in the Second Department, the service business exception and factual underpinnings for its absence have been lost in the shuffle—perhaps merely by virtue of the time constraints and voluminous amount of cases in the

Second Department. The Third Department has it right—as did the *Rodriguez* case. The Court of Appeals can, and should, weigh in when such a case arises, so that we are clear on the service business exemption and how such businesses are defined. In the interim, we need our trial and appellate courts to set forth the factual information we require for guidance. Even in our current "post-truth"[21] world, facts still matter.

Endnotes

1 Seinfeld, *The Implant*, Season 4, Episode 19 (NBC 1993).

2 *McSparron v. McSparron*, 87 N.Y.2d 275 (1995).

3 *Grunfeld v. Grunfeld*, 94 N.Y.2d 696 (2000).

4 *Id*.

5 8 N.Y.3d 115 (2006).

6 The statutory elimination of enhanced earning capacity as an intangible asset to be distributed seems to have further convoluted the discussion.

7 *Keane*, *supra* at endnote 5.

8 44 A.D.3d 710 (2d Dep't 2007).

9 51 A.D.3d 722 (2d Dep't 2008).

10 70 A.D.3d 799 (2d Dep't 2010).

11 71 A.D.3d 737 (2d Dep't 2010).

12 At the trial level, the record indicates that the business at issue was husband's 50 percent interest in Industrial Chem Labs & Services, Inc., in effect a pre-marital business which distributed industrial maintenance products to various industries. It purchased chemicals from various manufacturers, then repackaged and distributed the chemicals to their customers. It had minimal fixed assets with almost no inventory. Most of its employees were paid salary plus commission. The business was valued to determine the extent of its separate property appreciation for distribution purposes. *Both* experts relied on the *capitalization of income method of valuation* and the *excess earnings method of valuation* and *rejected* the asset based and market approaches. Contrast this with the court's determination in *Sutaria v. Sutaria*, 123 A.D.3d 909 (2d Dep't 2014) in which a search outside the record indicates the businesses at issue to be a drug store which served as a local retailer—not just a service business.

13 138 A.D.3d 810 (2d Dep't 2016).

14 157 A.D.3d 926 (2d Dep't 2018).

15 https://hudsonmarineinc.com/.

16 43 Misc. 3d 1204[A] (Sup. Ct., Albany Co. 2014).

17 *Is You Or Is You Ain't My Baby*, Louis Jordan Tympany Five, L. Jordan and B. Austin, Decca Records (1943).

18 *See*, *e.g.*, *Schiavoni v. Village of Sag Harbor*, 201 A.D.2d 716 (2d Dep't 1994); *Commissioners of State Ins. Fund v. R.B. Transp. Corp.*, 254 A.D.2d 157 (1st Dep't 1996).

19 https://www.irs.gov/publications/p334.

20 https://www.inc.com/encyclopedia/service-businesses.html.

21 Post-Truth: "Relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief." Oxford Dictionaries 2016 Word of the Year.

The Non-Nuclear Family: Baby Mamas (and Daddies)

By Andrew S. Katzenberg

The term "baby mama" means a mother who is not married to her child's father. It goes without saying, a "baby daddy" is a father who is not married to his child's mother. These terms have become popularized over the last 20 years in part through pop culture, most notably the Outkast song "Ms. Jackson,"[1] which was dedicated to "all the baby mamas' mamas," as well as the list of celebrities who are baby daddies—former New York Jets' cornerback Antonio Cromartie (14 children, eight women), Rolling Stones frontman Mick Jagger (eight children, five women) and former heavyweight champion Evander "The Real Deal" Holyfield (11 children, six women)—to name a few. However, the real reasons for its increased usage are the facts that 40 percent of children are born out of wedlock[2] and between 40 percent to 50 percent of marriages end in divorce.[3] Essentially, there is more than a 50 percent chance this is or will be your reality.

Single parents or parents with children from different relationships have more complex issues than married couples or issues that married couples do not have at all (*e.g.*, child support, selection of guardian, concerns about the other parent etc.). Many of these issues apply to any person in this situation, not just the rich and famous. However, there is often an additional layer of complexity when you are a "star"—publicity, wealth and image/sponsorship-ability.

Though this article cannot save you from the drama of co-parenting with a partner you are no longer dating or married to, by using examples of some of our most well-known athletes and stars it will provide insight on issues frequently experienced by baby mamas and daddies.

Is This a Bad Look?

In the age of social media and immediate access to information, everyone knows everything about everyone. This is even more true when it comes to celebrities. The number of gossip columns, magazines, websites and blogs has only increased over time, reporting not just one's highs but more often than not one's lows. The impact of negative publicity might affect you personally as well as financially.

Usually, the mainstream public initially casts a negative light on men having children out of wedlock or having children with multiple partners. The media often seizes on any opportunity when things are not going your way. In 2012, DailyMail.com called out "The Real Deal" Evander Holyfield as a "deadbeat dad" for his unpaid child support payments in excess of $550,000.[4] In 2016, *The New York Post* reported that Antonio Cromartie's baby mamas complained about how little time he spends with his children and that his children need to use Google to find out about their dad.[5]

However, the news is not always all bad. But it depends on what you are doing. Take Mick Jagger, for example. Reviews about his eighth child are fairly glowing. This is because he agreed to pay thousands of dollars a month in support and buy a multi-million dollar home for his child. He also jumped on a transatlantic flight from London to New York for the birth.[6]

Obviously we are not all in Mick's shoes, but the take away is that there are things you can do to positively impact your image in the media or in your community. You just can't sit back and let it come to you. You have to engage it and turn it in the direction you want.

What Is This Going to Cost Me?

Two words—a lot. One of the premier cases for hefty child support payments stems from former Green Bay Packer wide receiver Antonio Freeman. The standard support guidelines did not apply because he was a multi-million dollar superstar. Instead, the judge used his discretion to determine the support payments needed for Mr. Freeman's daughter to live the lifestyle one would expect her to have if she lived with her NFL dad. To make matters worse, once Antonio got his big contract, he was hauled back into court by his baby mama to increase his child support payments based on his increased income.[7]

It is reported that Antonio Cromartie's annual child support payments are $336,000. Though this might seem small in comparison to his current multi-million dollar contract, his career will end before he is 40. His cash flow will substantially slow down, but his payments might not. Plus, many athletes, though making large amounts of money by comparison to the general public, might not be

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so fortunate with their contracts that $336,000 (closer to $600,000 before taxes) is insignificant during their career.

Additionally, the child support payment is just the minimum that is required. The amount you actually spend on your child may be far greater. I recently sat down with an NFL player whose payments for his two children exceed $100,000 annually. This is a huge financial burden regardless of whether by choice or not. The numbers are just not going to add up at some point. This is one of the reasons that 78 percent of NFL players are either bankrupt or in financial distress within two years of retirement and 60 percent of NBA players are bankrupt five years after retirement.[8]

Of course, there are solutions. You might be able to modify the amount of support after your career is over, but this certainly is not guaranteed. The best option is sitting down with your financial advisor. Take a look at your income versus your expenses and figure out what needs to be done so you can continue to live your lifestyle without going broke in your early 40s. Remember, the average professional athlete retires within five years: NFL average career is 3.3[9] years, NBA is 4.8,[10] MLB is 5.6[11] and NHL is 5.5.[12] You have to take five years (or more if you're lucky) of income and make it last for the next 50.

Who Takes Care of My Children When I Am Gone?

Your baby mama or baby daddy. That's right, your child's remaining parent will automatically become the guardian of your child regardless of your wishes. If your "ex" does not want to be the guardian or is not alive, then the story gets a little more complex. If you do not have a will that names a guardian, then a court will appoint a guardian for your child. Any relative could petition the court to be the guardian. This person would not only care for your child but also control any money you leave to your child. Sometimes people you would not want to be the guardian try to become the guardian for the wrong reasons. However, if you create a will, you can name the person you want as guardian and avoid this potential disaster.

Unfortunately, even if you do have a will naming a guardian, this does not guarantee that person will become the guardian. It is possible that single parents might not name the same guardian in their respective wills. For example, you name your brother as guardian and your "ex" names her brother as guardian. In this case, preference is given to the wishes of the second to die. The best strategy to avoid this problem is to have a straight conversation with your "ex" and mutually agree on the right person. Sometimes the answer is just learning to work together as parents à la New England Patriots quarterback Tom Brady and actress Bridget Moynahan.[13]

How Do I Protect the Money I Give to My Children?

Though you cannot guarantee who the guardian might be, you can control who will have access and control of your child's inheritance. Trusts are invaluable when it comes to single parents as trusts can be used to both protect the child from others as well as him/herself.

As discussed above, the person who becomes the guardian of your child will also have control over the assets left to your child while your child is a minor. This is often not ideal when the guardian is an "ex" or some other third party. The fear is these people will use your child's money for their own benefit rather than your child's. For example, they may take lavish trips or purchase cars or homes under the guise that it is for the benefit of your child even though they also reap the benefit of those items. Alternatively, the guardian may spend the money in a manner you would not have on your children.

Of course, once your child turns 18, he or she will gain control of the assets. The concern here is that an 18-year-old with access to a large amount of money may not make the best decisions. An 18-year-old is likely to spend the money purchasing extravagant and unnecessary gifts for him or herself or others (*e.g.*, your "ex," his girlfriend or her boyfriend), which you would not have wanted. Additionally, your child may have no incentive to become a productive member of society (*e.g.*, go to college, get a job, etc.).

The solution to both these problems is to place the assets in trust for the benefit of your child. This can be for gifts during life or at death. The trust is controlled by a person you and only you appoint—the trustee. The trustee follows your wishes and instructions on how the assets should be managed and used for your child. The trustee can only use trust funds for your child's benefit (and no one else). Singer Whitney Houston did this for her daughter Bobbi Kristina. She divorced Bobby Brown in 2007, and to protect her assets left to her daughter she placed them in trust.[14]

By placing the assets in trust, the guardian has no control over your child's inheritance. So your "ex" cannot touch your money. The trust also protects your 18 year old child from him/herself and others. The trustee remains in control as long as you want. This could be age 25, 35 or forever if you so desired. Finally, the trust builds in an additional layer of creditor protection. This means if your child gets sued by someone (*e.g.*, a car accident) or gets divorced, the assets in the trust are protected.

How Do I Make Sure My Kids From Different Partners Are Treated Equally (or Unequally)?

When you have children with different partners you may want your children treated (i) equally or (ii) un-

equally. To achieve either result, planning steps must be taken, or the wrong result may occur.

The default law is normally that all children are treated equally. This is regardless of your actual relationship with your children. For example, if you have two children, one with an "ex" and one with your spouse, and you want one child to get a third and the other to get two thirds, your will needs to be drafted accordingly. Otherwise, each child will get half of your assets.[15] Alternatively, if you specifically name only one child in your Will, the others will be excluded. This was the case for actor Philip Seymour Hoffman who did not update his will after he had his second and third child. The result was that both were excluded from inheriting any of his estate.[16]

If you are married or thinking about getting married, that needs to be carefully taken into consideration. Spouses are usually entitled to a third of your estate regardless of what you say in your will. Moreover, there is a presumption that your spouse will favor her child (and not your children from prior relationships), and any amount your spouse's receives will be left to *her* child and not *your* children. So if you want your children to share equally, attention needs to be given to the fact that a third of your estate might be given to one child alone, resulting in an unequal inheritance.

There are various solutions here. The best is having a prenuptial agreement that waives your spouse's right to a third of your estate. This allows you to treat your children equally in your will without considering this factor. If there is no prenup, there are still options available. First, any assets left to your spouse can be placed in trust for her benefit, and upon her death those assets can pass equally to your children. This protects your children from your spouse favoring her child. Alternatively, you could leave half your assets to your spouse and her child and half to your other child. Often clients do a 60/40 split assuming the spouse will use some of the assets before they pass to her child, at which time they will be closer in value to what the other child inherited.

So What Are the Things I Should Be Doing Right Now?

All of it. Deal with the issue head-on before it handles you. This means handling any of the optics of being a baby daddy or mama so they will be favorable. Get your financial house in order and actually sit down with your financial advisor to determine the impact on your finances of having a non-marital child. Finally, speak with an attorney to create a will (and trusts) to address the estate planning issues surrounding your non-marital child before it's too late.

Endnotes

1 From the Grammy Award winning album Stankonia, Arista-RCA (2000).

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3 http://www.apa.org/topics/divorce/.

4 http://www.dailymail.co.uk/news/article-2204139/Deadbeat-dad-Evander-Holyfield-held-contempt-failing-pay-500K-overdue-child-support.html.

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6 https://www.dailystar.co.uk/news/latest-news/569115/mick-jagger-father-baby-number-eight-melanie-hamrick.

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13 See e.g., https://www.yahoo.com/news/emails-between-tom-brady-and-ex-expose-how-they-126106801202.html.

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15 N.Y. Estates, Powers & Trusts Law 4-1.1.

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Part I
The Hague Convention on International Child Abduction: A Primer

By Robert D. Arenstein

Introduction

As our society becomes increasingly globally connected through the ease of international air travel, the advent of the internet, and the strength of international commerce, it is inevitable that family relationships will also enjoy international diversity. However, when parents from diverse national origins decide to dissolve their matrimonial ties, parental preferences concerning where to raise the children of that marriage can result in conflict. In response to the growing problem of international child abduction, approximately 98 countries have now adopted the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").[1]

The attorney's job is often twofold. First, the attorney must, as always, represent his or her client vigorously. Second, the attorney is often faced with the task of educating both the bench and the bar on the provisions and the proper application of the Convention. This article endeavors to explain and elaborate upon the issues which arise and the process to be followed.

Abduction of the Child(ren)

A parent in a contracting state who discovers that his or her child(ren) has been wrongfully abducted to the United States or is being wrongfully retained in the United States usually contacts the Central Authority in the United States or in the State of the child(ren)]'s habitual residence.[2] Either Central Authority will mail the Petitioner a Request for Return form which will be filled out[3] and returned to that Central Authority.[4]

The United States Central Authority also forwards a pamphlet called "International Parental Child Abduction."[5] If the Request for Return has been filed with a foreign Central Authority it will be forwarded to the United States Central Authority.

Once the United States Central Authority has received the Request for Return, a Central Authority representative who handles cases from the child's state of habitual residence[6] will try to put the Petitioner in touch with a lawyer in the state in which the child is most likely being retained.[7]

During the initial phone contact, the Petitioner will generally relate to the attorney his or her version of the story of the abduction or retention. The attorney should then explain the Petitioner's options.[8] Often the abducting parent has obtained an *ex parte* Order of Protection, Restraint or even Temporary Custody in the United States.[9] Such *ex parte* Orders are common in Hague cases.[10] The abducting spouse often seeks the protection of the courts in his or her "new" country by alleging spousal abuse, child abuse or fear of re-abduction.[11] These Orders and proceedings may be stayed by the court entertaining the Hague Petition upon the bringing of an Order to Show Cause (discussed later). Such a stay is permitted, but not required.

Role of the Fax Machine

The International Child Abduction Remedies Act [ICARA][12] establishes the procedures for the implementation of the Hague Convention in the United States. One of the more useful provisions of ICARA can be found in § 6 whereby the rules of evidence are relaxed for Hague Convention cases.[13] Section 6 provides that documents need not be authenticated in order to be admitted into evidence in a Hague case;[14] therefore, the fax machine may be the lawyer's best friend in one of these cases. Due to distance problems and speed requirements[15] in Hague Convention cases, the United States courts have permitted documents with copies of signatures to be entered into evidence. The attorney may also fax his or her retainer agreement to the potential client and receive a signature within minutes. The client and the attorney can then make arrangements for the retainer fee to be deposited directly into the attorney's trust account by wire transfer. Representation can then start within a short period time.

Expedited Proceeding

The Convention's drafters envisioned a streamlined process that would lead to the abducted child's prompt re-

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turn to his or her habitual residence. The Convention provides that "(c)ontracting (nation-) States shall act expeditiously in proceedings for the return of children." The goal of ICARA is that the Country Addressed will reach a decision as to where the custody hearings will take place within six weeks. If a determination has not been made in six weeks, then "(t)he applicant or the Central Authority of the requested State . . . shall have the right to request a statement of the reasons for the delay(ed proceedings)." Moreover, a reply from the Country Addressed shall be provided as to the reason for the delayed proceedings.

In *March v. Levine*,[16] a case involving the return of children to a parent in Mexico, the court interpreted the term "prompt" to apply to the nature of the court proceedings. This ruling was confirmed by the appellate court. The *March* court stated that "(ICARA) provides a generous authentication rule." "No authentication of such application, petition, document or information shall be required in order for the application, petition, document or information to be admissible in court." The *March* court clarified that "the provision served to expedite rulings on petitions for the return of children wrongfully removed or retained. Expeditious rulings are critical to ensure that the purpose of the treaty—prompt return of wrongfully removed or retained children—is fulfilled."

Civil and Non-Exclusive Remedy

ICARA is intended as a civil remedy. Although the term "wrongful abduction" suggests criminal conduct, ICARA is not designed as an extradition treaty. Unlike the extradition process, where the criminal is returned to the United States to face charges, ICARA was enacted to facilitate return of the child to the nation of habitual residence.[17] Upon the child's arrival at the location of habitual residence, the courts of the habitual residence may further resolve custody disputes.

In addition, ICARA is a "non-exclusive" remedy. The Convention provides the Central Authority with "(t)he power…to order the return of the child at any time."[17] For instance, in *Zajaczkowski v. Zajaczkowski*,[18] the court ordered the prompt return of the child, adopting the writ of habeas corpus as a procedural device to be used in conjunction with ICARA remedies.

Elements of a Cause of Action Under the Convention

In order to have a cause of action for return it must first be determined that the Convention is applicable to the particular case. Certain elements must first be met in order for the Convention to apply; i.e. the children sought must be under sixteen (16) years of age[19] and have been wrongfully removed or retained away from the habitual residence of the children.[20] The Convention does not apply if either the country of habitual residence of the children or where the children are being retained is not a signatory to the Convention.[21]

Building the Case

The attorney representing the "left-behind" parent must show, by a preponderance of the evidence,[22] that a child under the age of sixteen (16) years[23] was removed from the child's state of habitual residence,[24] in breach of a right of custody attributable to the Petitioner,[25] which the Petitioner had been exercising[26] at the time of the wrongful removal.[27] Note that Article 12 permits the authority hearing the case to refuse to return a child who was wrongfully removed or retained if the Petitioner waited more than one year after the removal or retention to file the petition[28] and the child is settled in its new environment. The court, however, may still order a return, if it finds it appropriate, even if the child is settled in its new environment and more than one year has passed.

Analyzing a Case

The primary thing to remember when dealing with alleged international child abduction cases is that a proceeding under the Hague Convention and ICARA is *not* a custody proceeding—it is a proceeding to compel the return of the child to his or her "country of habitual residence" so that the courts *of that country* can determine questions relating to custody of that child. Article 3 of the Hague Convention provides that, in order to prevail on a claim, a petitioner must show:

1) That the child was habitually resident in one nation and has been removed to or retained in a different country;

2) That the removal or retention was in breach of the petitioner's custody rights under the law of the country of habitual residence; and

3) That the petitioner was exercising those rights at the time of the removal or retention. The petitioner must establish these requirements by a preponderance of the evidence.[29]

Once wrongful removal is shown, return of the child is "required" unless the respondent establishes one of four defenses:

1) The proceeding was commenced in the responding state more than one year after the wrongful removal or retention, and "the child is now settled in its new environment";[30]

2) The party now seeking return of the child was not actually exercising custodial rights at the time of the wrongful removal or retention of the child; or there was consent to the removal; or there was acquiescence to the retention;[31]

3) The return of the child would expose him or her to physical or psychological harm "or otherwise place the child in an intolerable situation"; or the child objects to being returned and is of such age and maturity that it is appropriate to take account of his views;[32] and/or

4) That human rights and fundamental freedom would be abridged if the return were permitted.[33]

Habitual Residence: Circuits Disagree

Article 35 of the Convention states that a petitioner cannot invoke the protection of the Hague Convention unless the child to whom the petition relates is "habitually resident" in a State signatory to the Convention and has been removed to or retained in a different signatory State. Once this is established, the petitioner must then show that the removal or retention was "wrongful." However, Article 4 of the Convention limits its application only to children less than 16 years old who have been "habitually residing" in a contracting state immediately before the breach of custody or access rights, and ceases to apply on the day when the child attains the age of 16.

This article might at first seem clear enough, but because interpretation of the term "habitual residence" was left to the courts and not defined by the Convention, there has been a constant flow of litigation over its definition. A number of U.S. Circuit Courts have held that "habitual residence" should not be confused with "domicile."[34] A look at the developing case law in the United States is necessary since the Circuits have not agreed on a test for defining a child's "habitual residence."

A Child-Centered Inquiry

In *Friedrich v. Friedrich*,[35] the Sixth Circuit opined that the British courts had provided the most complete analysis of "habitual residence," in absence of guidance in the Convention. The *Friedrich* court was referring to *In re Bates*,[36] in which Great Britain's High Court of Justice concluded that there is no real distinction between "ordinary residence" and "habitual residence." That court offered a word of caution with regard to decisions as to habitual residence: "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common-law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions." Of course, this offers the attorney representing a party to a Hague Convention proceeding little guidance.

The *Friedrich* court agreed with the *Bates* court that habitual residence must not be confused with domicile. It concluded that to determine the habitual residence, the court must focus on the child, not the parents, and examine past experience, not future intentions. On its face, habitual residence pertains to customary residence prior to the removal, so the court must look back in time, not forward. The child's habitual residence can be "altered" only by a change in geography and the passage of time, not by changes in parental affection and responsibility. The change in geography must occur *before* the questionable removal. *Friedrich* has been followed by the Fourth and Eighth Circuits.[37]

In *Feder v. Evans-Feder*,[38] the Third Circuit took note of the *Friedrich* and *Bates* decisions, pointing out that in *Friedrich*, the court focused on the child, "look[ing] back in time, not forward." It also considered and found *In re Bates* instructive for the principle that there must be "a degree of settled purpose." The purpose may be one or there may be several and might include education, business or profession, employment, health, family or merely love of the place. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as "settled." The Third Circuit established the rule in *Feder* that a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization and which has a "degree of settled purpose" *from the child's perspective*. A determination of whether any particular place satisfies this standard must focus on the child and consist of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there.[39]

A Parent-Centered Inquiry

In *Mozes v. Mozes*,[40] the Ninth Circuit engaged in a detailed analysis of the problem. It held that the first step toward acquiring a new habitual residence is forming a settled intention to abandon the one left behind. One need not have this settled intention at the moment of departure; it could coalesce during the course of a stay abroad that was originally intended to be temporary. Nor need the intention be expressly declared if it is manifest from one's actions. Indeed, one's actions may belie any declaration that no abandonment was intended. If you have lived continuously in the same place for several years on end, for example, the court would be hard-pressed to conclude that you had not abandoned any prior habitual residence. On the other hand, one may effectively abandon a prior habitual residence without intending to occupy the next one for more than a limited period. Whether there is a settled intention to abandon a prior habitual residence is a *question of fact*. In those cases where it is necessary to decide whether an absence is intended to be temporary only, the *Mozes* court found that the intention that has to be taken into account is that of the person or persons entitled to fix the place of the child's residence—in most cases, the parents or parent with custody. Although the Hague Convention is interested in the habitual residence of only

the child, the Ninth Circuit recognized in *Mozes* that it would seem illogical to focus on the child's intentions, as, "[c]hildren ... normally lack the material and psychological wherewithal to decide where they will reside." When the persons entitled to fix the child's residence no longer agree on where it has been fixed, the representations of the parties cannot be accepted at face value, and courts must determine from all available evidence whether the parent petitioning for return of a child has already agreed to the child's taking up habitual residence where it is. The Seventh and Eleventh Circuits have adopted the reasoning of the Ninth Circuit in *Mozes*.[41]

Despite a willingness to determine "habitual residence" by the parents' intent, the Second Circuit took the inquiry a step further to find that evidence of acclimatization may suffice to establish a child's habitual residence, despite uncertain or contrary parental intent. If the child's life has become so firmly embedded in the new country as to make the child habitually resident there, that finding will trump even lingering parental intentions to the contrary as was held in *Gitter v. Gitter.*[42] The *Gitter* court held that in determining a child's habitual residence, a court should first inquire into the shared intent of those entitled to fix the child's residence (usually the parents) at the latest time that their intent was shared. In making this determination, the court should look at actions as well as declarations. Normally, the shared intent of the parents should control the habitual residence of the child. Second, however, the court should inquire whether the evidence unequivocally points to the conclusion that the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' last shared intent.

While the shared intent of the parents normally controls the habitual residence of the child, courts must also inquire whether the available evidence "unequivocally points to the conclusion that the child has acclimatized to [a] new location and thus has acquired a new habitual residence" notwithstanding the parents' intentions.[43] To determine if a child has acclimatized to her new location, courts "must consider if requiring return to the original forum would now be tantamount to taking the child out of the family and social environment in which its life has developed. Only in relatively rare circumstances will the child's acclimatization to a new location be so complete that serious harm to the child can be expected to result from compelling [her] return to the family's intended residence."[44]

Conclusion

In sum, *Friedrich* and *Feder*, and the circuits that follow them, engage primarily in a fact-based analysis, focusing on the customary residence of the child prior to his removal. In these circuits, the court's analysis focuses on the child. The Eighth Circuit followed this reasoning in *Silverman v. Silverman*,[45] which held that habitual residence is to be determined by focusing on the settled purpose from the child's perspective immediately before the removal or retention, although parental intent is also taken into account.

In contrast, the Second and Ninth Circuits, and the circuits that follow them, do not equate habitual residence with customary residence. Instead, they focus on the importance of intentions (normally the shared intentions of the parents or others entitled to fix the child's residence) in determining a child's habitual residence. When the persons entitled to fix the child's residence no longer agree on where it has been fixed, courts must determine from all available evidence whether the parent petitioning for return of a child has already agreed to the child's taking up habitual residence where it is.

While the decision to alter a child's habitual residence depends on the settled intention of the parents, it requires an actual change in geography, and requires the passage of an appreciable period of time—one that is sufficient for acclimatization. The Second Circuit takes this further by holding that courts should inquire into the shared intent of those entitled to fix the child's residence at the latest time that their intent was shared. However, although this should normally control, courts should also inquire as to whether the child has acclimatized to the new location and thus has acquired a new habitual residence, notwithstanding any conflict with the parents' latest shared intent.

In Part II of this article, I will address the establishment of habitual residence and the right of custody.

Endnotes

1 Hague Convention on the Civil Aspects of International Child Abduction, October 25, 1980, *reprinted in* 19 I. L. M. 1501 [hereinafter Hague Convention].

2 Hague Convention, *supra* note 1, Article 8 ("Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.").

3 Hague Convention, supra note 1, Art. 8 (lists all information that must be included on the "Request for Return" form).

4 Alternatively, the petitioner may apply for return directly to the United States Central Authority, the United States Department of State *Bureau of Consular Affairs* in Washington, D.C. or contact an attorney in the United States directly to assist in filing a "Request for Return" in the United States.

5 Available from the U.S. Department of State.

6 The term "habitual residence" will be discussed in depth under the heading "Building the Case."

7 It is of course preferable to retain an attorney who has experience with the Hague Convention, but this is not always possible. Although the Department of State is in contact with many attorneys who have handled Hague cases throughout the country, there is a shortage of attorneys who are comfortable taking a Hague case. Often attorney's network with each other for quick Hague educations.

8 Such options may include the following: trying to obtain a voluntary return which can be negotiated by the Central Authority or an attorney; trying to settle out of court, which is easier on the

children and less expensive; or filing a formal "Notice of Petition Under the Hague Convention and Petition for Return of Children to Petitioner Under the Hague Convention."

9 Hague Convention, *supra* note 1, Article 17 (The sole fact that a decision relating to custody has been given or entitled to recognition in the requested state is not grounds for refusing to return the child[ren] under the Convention.); *Meredith v. Meredith*, 759 F. Supp. 1432 (D.Ariz1991), *Mahoney v. Mahoney* 02 CIV 981 (So. Dist NY, Brieant, J. 2002).

10 Oftentimes the Petitioner has not been served with these *ex parte* orders, so the attorney should make a diligent effort to determine what procedural moves the abducting parent has taken in the United States. This will be most important if the left behind parent comes to the United States and attempts to see the child[ren]. If there is an order keeping the petitioner away from the abductor and/or the child[ren], the police may become involved and thereby complicate matters even further.

11 One judge sitting on a Hague case said he would be surprised to find a case involving children and parents where there was *no* accusation of abuse.

12 International Child Abduction Remedies Act, 22 U.S.C 9001 et seq. Public Law 100-300 100th Congress [H.R. 3971, 29 April 1988].

13 *Id*., 22 U.S.C. 9005, § 6 ("With respect to any application to the United States Central Authority, or any petition to a court under section 4, which seeks relief under the Convention, or any other documents or information included with such application or petition or provided after such submission which relates to the application or petition, as the case may be, no authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.").

14 *Id.*

15 Hague Convention, *supra* note 1, Article 1 (It is the purpose of the Convention to secure a *prompt* return of abducted children.); *see also* Hague Convention, *supra* note 1, Article 11 ("The judicial or administrative authorities of Contracting States shall act *expeditiously* in proceedings for the return of children."); *see also,* Hague Convention, *supra* note 1, Article 11 (A Hague Convention case should not exceed a six-week period from the date of commencement of the action until the proper authority has decided the case.).

16 249 F.3d 462 (6th Cir. 2001).

17 Hague Convention, *supra* note 1, Article 18.

18 932 F. Supp. 128 (D. Md. 1996).

19 Hague Convention, *supra* note 1, Article 4.

20 Hague Convention, *supra* note 1, Article 3.

21 *Grimer v. Grimer*, 1993 WL 142995 (USDC Kan. 19930), *Currier v. Currier*, 1994 WL392606 (D.N.H. 1994).

22 ICARA, *supra* note 12, 22 U.S.C. 9003(e), § 4.

23 Hague Convention, *supra* note 1, Article 4. It is important to note that the Convention ceases to apply once the child[ren] attains the age of sixteen (16) years regardless of a pending petition.

24 Hague Convention, *supra* note 1, Article 1.

25 Hague Convention, *supra* note 1, Articles 3 and 5.

26 Hague Convention, *supra* note 1, Article 3.

27 Hague Convention, *supra* note 1, Article 1.

28 This one-year time period does not bar a petitioner from bringing a case, but instead adds to the respondent's defense that the child[ren] is well settled in his or her new state. This will be discussed *infra*.

29 22 U.S.C. § 9003(e)(1)(A).

30 Hague Convention, *supra* note 1, Article 12.

31 Hague Convention, *supra* note 1, Article 13(a).

32 Hague Convention, *supra* note 1, Article 13(b).

33 Hague Convention, *supra* note 1, Article 20.

34 *See, e.g., Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993); *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001). Several foreign courts have even held that the subject children in cases brought before them did not have a habitual residence. *W and B v. H* (2002) 1 FLR 1008 (United Kingdom—Family Division—2002); *see also Robertson v. Robertson* (1997) 1998 SLT 468, 1997 GWD 21-1000, Inner House of the Court of Session (Second Division) (Scotland); *Dickson v. Dickson*, 1990 SCLR 692, 1990, Inner House of the Court of Session (Scotland).

35 983 F.2d 1396, 1401-1402 (6th Cir. 1993).

36 High Court of Justice, Family Division, Royal Courts of London, No. CA.122/89.

37 *See Miller v. Miller*, 240 F.3d 392, (4th Cir. 2001) and *Rydder v. Rydder,* 49 F.3d 369 (8th Cir. 1995), respectively.

38 63 F.3d 217 (3rd Cir. 1995).

39 *See also Delvoye v. Lee*, 329 F.3d 330 (3rd Cir. 2003), *cert. denied*, 124 S. Ct. 436 (U.S. 2003); *Whiting v. Krassner*, 391 F.3d 540 (3rd Cir. 2004); *Application of Adan*, 437 F.3d 381 (3rd Cir. 2006).

40 239 F.3d 1067 (9th Cir. 2001).

41 *See Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004) and *Koch v. Koch*, 450 F.3d 703 (7th Cir. 2006), respectively.

42 396 F.3d 124 (2nd Cir. 2005).

43 *Id.*

44 *Daunis v. Daunis*, 222 Fed. Appx. 32, 34 (2nd Cir. 2007) (internal citations and quotation marks omitted). Therefore, "courts should be 'slow to infer' that the child's acclimatization trumps the parents' shared intent." *Gitter*, 396 F.3d at 134, citing *Mozes v. Mozes*, 239 F.3d 1067, 1079 (9th Cir. 2001).

45 338 F.3d 886, 898 (8th Cir. 2003).

Marital Lifestyle: Is It Still the Most Important Factor in Setting Maintenance?

By Adam W. Schneid

The 2015 Session Laws of New York Chapter 269[1] imposed wholesale changes to post-divorce maintenance ("2015 Amendment"). Domestic Relations Law (DRL) § 236 was amended to provide a guidelines calculation for awards of post-judgment maintenance.[2] Those guidelines are now well known and operate to streamline post-judgment maintenance awards where the payor spouse earns income up to the income cap.[3] Where the payor's income exceeds the income cap, the amount of additional maintenance awarded, if any, is based on the 15 factors set forth in DRL § 236B(6)(e).

The 1986 Amendment and the *Hartog* Effect

While most practitioners' focus has been on the applicability of the post-divorce guidelines, the changes to the maintenance *factors* should also result in a profound shift in post-divorce maintenance. Beginning in 1986, DRL § 236 directed courts to award maintenance having regard for the "standard of living" the parties established during the marriage. The 1986 amendments to DRL § 236 removed the standard of living *factor* from the then lengthy list of enumerated factors and added it instead to the *preamble* of the maintenance section.

In *Hartog v. Hartog*,[4] the Court of Appeals examined the legislative history of § 236 and the import of removing the lifestyle factor from the list of enumerated maintenance factors and moving it to the preamble. *Hartog* explained that the legislative "history makes clear that the purpose of the amendment was to 'require[] the court to consider the marital standard of living' in making maintenance awards."[5] By removing the predivorce standard of living from the other enumerated factors it "has been placed by the Legislature in a markedly distinct category . . . ."[6]

As a result of the 1986 amendment as interpreted by *Hartog*, the pre-commencement standard of living became the backbone of the maintenance analysis serving as the lens under which the 20 other enumerated factors were determined. For more than 20 years, *Hartog's* emphasis on the standard of living of the marriage continued to be reiterated by all four Appellate Departments.[7]

The Impact of the 2015 Amendment

While *Hartog* previously operated to emphasize the importance of the marital standard of living, it must now be read to *minimize* the importance of the marital standard of living. The 2015 Amendment *removed* the reference to the marital standard of living from the preamble of the maintenance factors and demoted the consideration to one of the enumerated factors. While *Hartog* held that the escalation of the lifestyle factor into the preamble caused marital lifestyle to have outsized significance, the demotion of the factor back into the list of enumerated factors must now reduce the importance of marital lifestyle. But, since most families have income at, or below, the income cap, the removal of the lifestyle factor from the preamble will have minimal impact. For those families, maintenance will predominantly be set at the guideline obligation. The reality is, and always was, that the lifestyle consideration never actually controlled the award of maintenance for families of modest means. This is because "[s]imple mathematics and common sense dictate that it costs more to maintain two households than one."[8] Families of modest means simply do not have sufficient resources to maintain both parties' standard of living after a divorce.

Where the payor's income substantially exceeds the income cap, the demotion of the lifestyle factor will have enormous significance. The 2015 Amendment not only decreased the importance of the marital lifestyle, it increased the importance of the distribution of assets when setting maintenance. Prior to the 2015 Amendment, factor "15" was "the equitable distribution of marital property." Factor "15" was replaced with factor "m" which is "the equitable distribution of marital property *and the income or imputed income on the assets so distributed*."[9] The consideration of income or imputed income on distributed assets is now also part of the definition of income in DRL § 236B(6)(b)(3)(b). Thus, because the references to income and imputed income now appear twice, that consideration will have an outsized consideration. It is premature to fully understand how courts will interpret the meaning of imputed income on distributed assets. A practitio-

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ner may now argue that rental income should be imputed to the assets (homes, cars, boats, securities, etc.) being distributed. Certainly to the extent courts interpret the current statutory framework to increase the income of the less monied spouse through such imputation, and minimize the need to consider the marital lifestyle, this combined shift may reduce maintenance awards.

A Look to the Future

Despite the 2015 Amendment, *Hartog* has not yet been cited for the proposition that the 2015 Amendment is intended to de-emphasize the marital standard living. The majority of decisions citing *Hartog* following the 2015 Amendment with respect to the marital standard of living relate to matters commenced before the effective date of the amendment.[10] Certainly matters commenced following the 2015 Amendment have gone to trial, but the change in the consideration of the marital standard of living has not yet been compared to the prior iteration of the law in a publicly available decision.[11] Instead, to the extent decisions rely on the statutory factors modified by the 2015 Amendment, those decisions do not give an indication how the change in the law resulted in a change in outcome.

For example, in *Allison B. v. Edwards A.*,[12] a decision on a *pendente lite* motion in a matter filed after the effective date of the 2015 Amendment, the decision notes the parties' high standard of living but does not provide an indication as to how the outcome differed from the prior version of the statute. In *Barlik v. Barlik*,[13] the court considered the high standard of living during the marriage in awarding temporary maintenance. While the decision suggests the standard of living controlled the award of temporary maintenance, the award was for a period of four months based on a short duration marriage. In *Al E. v. Joann E.*,[14] the standard of living factor was one of several factors relied upon in awarding temporary maintenance.

While these recent decisions may stand for the proposition that the 2015 Amendment will not alter maintenance awards, such an interpretation is likely shortsighted. Certainly a change in the law *should* cause different outcomes. While it remains to be seen how the 2015 Amendment will be interpreted when analyzed under *Hartog*, the current statutory language *should* produce different maintenance awards as compared to the prior version of the statute.

Endnotes

1 A7645; S5678.

2 *See* DRL section 236B(6).

3 The current cap on the payor's income is $184,000. See https://www.nycourts.gov/divorce/legislationandcourtrules.shtml.

4 85 N.Y.2d 36 (1995).

5 *Hartog*, *Id*. at at 51.

6 *Id*.

7 *See Cohen v. Cohen*, 120 A.D.3d 1060, 1064 (1st Dep't 2014) ("the determination of maintenance is within the sound discretion of the trial court upon consideration of the relevant factors enumerated in Domestic Relations Law § 236(B)(6)(a) and the parties' pre-divorce standard of living"); *Naik v. Naik*, 125 A.D.3d 734, 734 (2d Dep't 2015) ("In awarding maintenance, the court must consider the reasonable needs of the recipient spouse and the preseparation standard of living in the context of the other factors enumerated in Domestic Relations Law § 236(B)(6)(a)"); *Orioli v. Orioli*, 129 A.D.3d 1154, 1155 (3d Dep't 2015) ("The amount and duration of a maintenance award is left to the sound discretion of the trial court that has considered the statutory factors and the parties' predivorce standard of living"); *Belkhir v. Amrane-Belkhir*, 118 A.D.3d 1396, 1397 (4th Dep't 2014) ("In deciding whether to award maintenance, the court "must consider the payee spouse's reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors.").

8 *Scott M. v. Ilona M.*, 31 Misc. 3d 353, 363 (Kings Co. Sup. Ct. 2011).

9 DRL section 236B(6)(e)(m) (emphasis added).

10 *See S.M. v. M.R.*, 56 Misc.3d 1219(A), No.50/2013 (Rich. Co. Aug. 29, 2017) (citing to *Hartog* for the proposition that the "court is directed to consider the parties' established standard of living"); *D.D. v. A.D.*, 56 Misc.3d 1201(A), No. 5****/** (Richmond Co. Sup. Ct. June 16, 2017) (citing *Hartog* for importance of standard of living in setting maintenance for case commenced in 2013); *Maddaloni v. Maddaloni*, 142 A.D.3d 646 (2d Dep't 2016) (affirming maintenance award for matter commenced prior to 2015 Amendment; citing the standard of living of the parties as a factor in setting maintenance without specifying whether it is given the same or greater weight as other maintenance factors); *T.S. v. J.S.*, 54 Misc.3d 1202(A), No. 6718/2012 (Orange Co. Sup. Ct. April 7, 2016) (citing *Hartog* in matter commenced in 2012 for proposition that pre-divorce standard of living is an essential component in setting maintenance); *B.C. v. R.C.*, 50 Misc.3d 1228(A), No.xxxxx/12 (Kings Co. Sup. Ct. Feb. 24, 2016) (2012 matter citing *Hartog* for proposition that pre-separation standard of living must be considered in context of statutory factors); *E.R.S. v. B.C.S.*, 51 Misc.3d 1210(A), No. XX/16 (West. Co. Sup. Ct. March 31, 2016) (citing *Hartog* in connection with pre-2015 Amendment factors).

11 *See Shine v. Shine*, 148 A.D.3d 1665 (4th Dep't 2017) (affirming maintenance award and stating court "properly considered plaintiff's reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors set forth in the statute" without identifying when the underlying matter was commenced (citations and internal quotations omitted)).

12 54 Misc.3d 1226(A), No. 305190/16 (N.Y. Co. Sup. Ct. March 9, 2017).

13 56 Misc. 3d 1221(A), No. 10314/2016. (Queens Co. Sup. Ct. Aug. 31, 2017).

14 55 Misc. 3d 1212(A), No. XXXX (Kings Co. Sup. Ct. April 18, 2017).

Recent Decisions, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Maintenance cap increased, effective January 31, 2018: Administrative Order A/O/117/18

Pursuant to an Administrative Order A/O/117/18, effective January 31, 2018, the temporary and permanent maintenance cap of the support payor's income was increased from $178,000 per year to $184,000 per year. The increase is based on the CPI increases required by the 2015 Maintenance Guidelines statute. The court's forms and calculators for contested and uncontested divorces have both been revised to reflect the new maintenance cap.

Child support cap increased, effective March 1, 2018

For purposes of determining basic child support, the cap on the combined parental income has increased from $143,000 to $148,000. The 2018 poverty income guidelines amount for a single person as reported by the United States Department of Health and Human Services is $12,140 and the 2018 self-support reserve is $16,389.

Court of Appeals Roundup

Family Court has jurisdiction to issue permanent order of protection for violation of a temporary order that is dismissed

***In the Matter of Lisa T. v. King E. T.*, 30 N.Y.3d 548 (2017)**

The wife filed a family offense petition against her husband and obtained a temporary order of protection *ex parte*, barring the husband from communicating with her, except in an emergency and in regards to arranging visitation of their child. The husband violated the order by e-mailing his wife about an unrelated matter. Family Court found there was insufficient evidence to sustain the family offense petition and dismissed it; however, since the husband violated the temporary order of protection, the court issued a one-year final order of protection.

The husband appealed, asserting that the Family Court lacked jurisdiction to enter a final order of protection once it denied the family offense petition. The Appellate Division rejected the husband's argument and affirmed the lower court's ruling. The Court of Appeals affirmed.

Pursuant to Family Court Act §846-a, "Powers On Failure to Obey Order," if it is proven that the respondent wilfully violated a court order, the court may "modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order, make a new order of protection in accordance with section [842] [or] may commit the respondent to jail for a term not to exceed six months." The Court of Appeals rejected the husband's contention that the Family Court's dismissal of the family offense petition deprives the Family Court of the powers enumerated above, given that the Family Court Act does not contain any language tying the Family Court's authority to impose specific penalties to its determination of whether a family offense has been committed. Once Family Court obtains jurisdiction over the parties by virtue of a petition facially alleging a family offense, the court may issue a temporary order of protection, and any violation of that order is a separate matter from the original family offense petition, over which FCA § 846-a gives the court authority to act.

Recent Cases

Child Custody

Child born to same-sex married couple given same legitimacy as one born to a heterosexual couple

***Matter of Christopher YY v. Jessica ZZ*, 159 A.D.3d 818 (3d Dept. 2018)**

Jessica ZZ and Nichole ZZ, a married lesbian couple, had a baby with assistance from petitioner Christopher YY, a male family friend who provided a sperm donation for artificial insemination. The parties crafted a written agreement in which the petitioner waived any right to custody or visitation, and the respondents waived any claim to child support. The relationship between the parties later broke down, and the couple did not want the petitioner visiting with the child. The petitioner's partner admitted in sworn testimony to destroying the only copy of the agreement. (The legality of that agreement was not

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before the court, although it was determined to be relevant to the parties' understanding, intent and expectations at the time that petitioner donated his sperm and the wife impregnated the mother.)

When the petitioner filed a paternity petition, the mother of the child, Jessica ZZ, moved to dismiss, based on the presumption of legitimacy accorded to a child born of a marriage pursuant to DRL § 24[1] and Family Court Act § 417. Family Court denied the motion to dismiss, and the mother appealed.

The Third Department reversed, finding that a child born to gay married parents is entitled to a presumption of legitimacy, just as a child born to heterosexual married parents is afforded that presumption. Thus, the lower court erred in denying the motion to dismiss.

The court viewed this novel marital issue as a battle between legal principles—on one hand, the presumption of legitimacy for offspring of married couples, and on the other, the court's duty to dismiss that presumption if the petitioner presents "clear and convincing evidence tending to prove that the child was not the product of the marriage" (*Beth R. v. Ronald S.*, 149 A.D. 3d at 1217, 52 N.Y.S.3d 515). Given that a same-sex married couple cannot biologically produce offspring, the presumption of legitimacy would appear to be overcome. However, the appellate court concluded that the "presumption of parentage is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same-gendered parents." *Christopher YY* at 4. To presume differently would be an act of gender discrimination and would violate the dictates of the Marriage Equality Act, which guarantees to such couples the same "legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage as exist for different-gender couples." A court's commitment to the presumption of legitimacy must be "unaffected by the gender composition of the marital couple."

In addition, the court determined that the petitioner was equitably estopped from claiming paternity since the petitioner knew that he was donating his sperm for the purpose of allowing this same-sex couple to conceive and be the parents of the child, and took steps to disavow his paternity and being responsible for child support. He was not present for prenatal care or at her birth, did not know her birth date, never attended doctor appointments and did not see her for at least one or two months after her birth. By contrast, the wife was present at the child's birth, gave the child her surname, was recorded as a mother on the child's birth certificate, and was listed as a parent for purposes of government benefits. There was no dispute that the wife played a significant role in raising and nurturing the child, and there was a strong psychological bond between the child and the wife. Therefore, it was in the child's best interest to equitably estop the sperm donor from claiming parental rights.

Another sperm donor case, ***Joseph O v. Danielle B.***, 158 A.D.3d 137 (2d Dep't 2018) is substantially similar in facts to *Christopher ZZ* and yielded a similar result. The parties previously entered into a "Three-Party Donor Contract" where they agreed to provide the respondents, a same-sex married couple, with his sperm for purpose of artificial insemination, and agreed he would not have any parental rights/responsibilities with respect to the resulting child, and would not request any guardianship, custody or visitation. After the child was born, the biological father visited with the child approximately four times per year, and sent gifts on the child's birthday. Three years after the child's birth, the biological father petitioned for paternity and visitation. The Family Court erred in denying the mother's motion to dismiss the petitioner's petition. It is an established legal presumption that every child born during marriage is the legitimate child of both spouses, even if they are of the same gender. In addition, equitable estoppel applies here, since the petitioner acquiesced in the child establishing a close relationship with the non-biological mother.

Incarceration does not constitute reasonable excuse for default in custody proceeding

***Kathy C. v. Alonzo E.*, 157 A.D.3d 503 (1st Dep't 2018)**

The Family Court granted sole legal and physical custody of a child to the maternal grandmother and granted her permission to relocate to South Carolina. The child's father had a history of domestic violence, was incarcerated when the custody proceeding began, and defaulted in the custody proceeding.

The father sought to vacate his default, citing his incarceration, but the court rejected his motion, ruling that incarceration does not constitute excusable default, and in any event, the father waited until six months after his release from prison to bring the application. The appellate court affirmed. The court found that even assuming at a rehearing that the father established evidence regarding a strong bond between him and the child, the fact that he had relinquished parenting responsibilities for the entirety of the child's life, coupled with his history of significant domestic violence, would nonetheless have merited a finding of extraordinary circumstances, and thereafter a determination that it was in the child's best interest for the grandmother to have sole custody.

Excessive corporal punishment constitutes neglect and a sound basis for custody removal

***Jackson v. Jackson*, 157 A.D.3d 694 (2d Dep't 2018)**

A boy who had lived most of his life in his father's custody was removed from the father's home after ACS alleged neglect based on an allegation that the father had used excessive corporal punishment. (No facts were provided as to what actions constituted excessive corporal punishment.) The boy's mother was granted temporary custody of the child, and after Family Court found that the father had indeed abused the boy, she was awarded

sole legal and physical custody. The father appealed the Family Court's ruling, and the appellate court affirmed.

The appellate court found that excessive corporal punishment constitutes neglect, which in turn constitutes a "sound and substantial basis" for a change in custody to the mother.

Change of circumstances that occurs after the custody order appealed from may warrant remittal

***Latham v. Savage*, 158 A.D.3d 629 (2d Dep't 2018)**

After a couple separated, the Family Court awarded custody of their child to the father, and the mother was granted supervised visitation. Almost seven years later, the mother filed a petition for modification of custody, based on a change in circumstances. The Family Court denied the mother's petition, and the mother appealed. The appellate court reversed and remitted to Family Court for further proceedings.

The appellate court concluded that, in light of the serious allegations raised by the child's attorney, there had been a change of circumstances *after* the date the order appealed from was issued. (The decision fails to reveal what that key piece of information was.) Changed circumstances is a particularly powerful argument in child custody matters, so much so that it "may render the record on appeal insufficient to [determine] whether the Family Court's determinations are still in the best interest of the children" (*Leval B v. Kiona E.*, 115 A.D. 3d 665). The mother was granted temporary custody of the child by Family Court just before the appeal was determined. The appellate court determined that temporary custody should remain with the mother, and remitted the matter to the Family Court for a new expedited determination as to whether it is the child's best interest for custody to remain with the father.

Child Support and Maintenance

Award of non-durational maintenance and denial of child support based on constructive emancipation

***Tiger v. Tiger*, 155 A.D.3d 1386 (3d Dep't 2017)**

The parties were married 24 years and were in their early 50s at the time of their divorce. The husband earned $125,000/year, plus extensive benefits, and had an inheritance of approximately $1.1 million. The wife was a housewife and raised the parties' two children. At the time of trial, she was disabled from a progressively debilitating neurological condition, leaving her unable to work and required assistance for daily living tasks. She received Social Security disability of $685/month. At the time of trial, the parties' older child was emancipated but living with the father, and their younger child was a 20-year-old college student, who lived with the father during college breaks.

The Supreme Court ordered the husband to pay the wife non-durational maintenance of $794/week. The husband appealed, claiming that the wife's maintenance should have been terminated or reduced upon the wife's receipt of one-half of his Social Security benefits at age 62. The appellate court affirmed, reasoning that the wife's eventual combined monthly income at age 62 of $5,373—from SSD ($685), Social Security ($1,245.50) and maintenance ($3,442.50)—is not excessive or unreasonable in view of her marital standard of living, degenerative health, lengthy marriage and lack of any other assets or earning potential.

The husband requested child support for their 20-year-old daughter. The Supreme Court rejected the request, and the appellate court affirmed, reasoning that the child was constructively emancipated since she refused all contact with her mother due to no fault of the mother, and despite the mother's efforts to maintain a relationship.

Awarding child support based on the income stream used to determine the value of a law practice is not impermissible double-counting

***Kimberly C. v. Christopher C.*, 155 A.D.3d 1329 (3d Dept. 2017)**

The wife filed for divorce and a temporary order of protection following 23 years of marriage that produced two children. The wife was awarded sole custody of the parties' children, and the husband received supervised visitation one day per week. The wife was awarded child support from the father, a partner in a successful law firm.

The husband appealed, claiming that the child support award constituted impermissible double-counting of his assets, given that his partnership interest in his law firm was equitably distributed as marital property, while the child support award was based on his income from the same law firm.

The appellate court rejected the husband's argument, reasoning that the rule against double-counting does not apply to child support, since the CSSA does not authorize the deduction of a distributive award from a parent's income.

The husband also appealed the order of supervised visitation. The lower court determined that the father was remorseless over his repeated physical abuse of his wife, violence that was witnessed by their children and left one child hospitalized for depression and post-traumatic stress. Therefore, supervised visitation was appropriate and in the children's best interests to protect their safety. However, the court's determination that the wife had the authority to determine when visitation no longer needed to be supervised was error, since only a court (and not a parent or therapist) has such authority.

Equitable Distribution

Inheritance as a factor in dividing marital assets

***Culen v. Culen*, 157 A.D.3d 926 (2d Dep't 2018)**

After 26 years of marriage, the parties divorced. The husband had a successful diving services company, and the wife was a full-time mother and homemaker. The parties agreed on the valuation of the marital assets, but entered into a protracted legal battle over the equitable distribution of assets.

Following a non-jury trial, the Supreme Court awarded the marital residence (net equity of $508,000) to the husband, with a credit to the wife of $254,000. The husband appealed, claiming the court erred by granting the wife an outsized portion of the marital estate due to the court's improperly factoring into its division of property the husband's right to a significant inheritance from his aunt.

The appellate court affirmed, and emphasized the lower court's broad discretion in dividing the marital assets. One of the factors to be considered in equitable distribution is the catch-all discretionary factor, i.e. "any factor which the court shall expressly find to be just and proper" pursuant to DRL § 236[B][5][d][4], [9].

Prenuptial Agreements

Prenuptial agreement set aside as unconscionable

***Taha v. Elzemity*, 157 A.D.3d 744 (2d Dep't 2018)**

The parties signed a prenuptial agreement where 1) each party waived their right to the other's separate property, including property acquired from the proceeds of each party's separate property, 2) each party would keep separate bank accounts, and 3) the husband's maintenance obligation would be limited to one lump sum payment of $20,000.

At the time of the divorce, the parties were married six years. The husband was a doctor who earned $300,000 annually. The wife was a stay-at-home mother, caring for the parties' three children, including a special needs child. The wife moved to set aside the prenuptial agreement on the grounds that the agreement was unconscionable. The husband cross-moved, seeking summary judgment, declaring the prenuptial agreement valid and enforceable. The trial court denied the wife's motion and granted the husband's cross-motion.

The wife appealed, and the appellate court reversed. A prenuptial agreement is unconscionable and unenforceable if "no person in his or her senses would make [it] on one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience" (*Sanfilippo v. Sanfilippo*, 137 A.D.3d 773, 774, 31 N.Y.S.3d 78). Even if a prenuptial agreement does not "shock the conscience" when drafted, it could be determined to be shocking when it is later enforced. Here, the enforcement of the agreement would result in the risk of the wife becoming a public charge since she is unemployed, largely without assets and, as the primary care giver for the parties' young children, would only receive $20,000 in full satisfaction of all claims. By contrast, the husband earns approximately $300,000 annually as a physician.

Publication of Articles

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