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Marital Fault: Redefining Egregious Conduct in the 21st Century

By Lee Rosenberg, Editor-in-Chief

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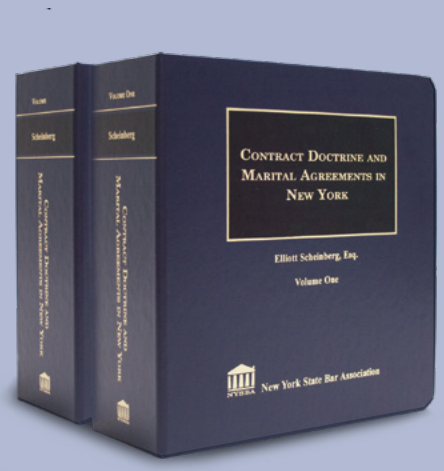

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In Memoriam

Michael Dikman

It is with great sadness that we must mourn the passing of long-time bar association leader, Michael Dikman. Mike passed away October 7, 2018 while attending a conference of the New York Chapter of the American Academy of Matrimonial Lawyers and after performing his customary magic show at the conference's end. Mike looked great at that conference and the Board of Managers meeting closed as it always did—with a motion to adjourn made by Mike Dikman.

His professional accomplishments were many beyond his skills as a matrimonial attorney, including his services on behalf of the New York State Bar Association, the AAML, and the Queens County Bar Association, where he served as Queens Bar President and Chair of its Family Law Committee for an astounding 38 years through 2018. When Mike Dikman asked if you would come and speak at the Queens Bar for him—the answer was always, "When do you want me to be there?" He commanded respect from all just by being himself. We offer our sincere condolences to his family.

Lee Rosenberg, Editor-in-Chief

Marital Fault: Redefining Egregious Conduct in the 21st Century

By Lee Rosenberg, Editor in Chief

Courts have been long circumspect regarding the use of marital fault to affect equitable distribution and spousal support. This is particularly true after the passage of the no-fault divorce law in 2010, as references to cruel and inhuman treatment claims have virtually vanished, though all previously existing grounds for divorce remain intact and viable. Cases addressing non-economic marital fault have been historically constricted by the use of the adverb "egregious" as the standard by which these claims are held— even though that word has not in actuality been defined with any great exactitude. It seems to fall into a more amorphous category of definition such as that oft-cited reference to obscenity by United States Supreme Court Justice Potter Stewart in *Jacobellis v. Ohio*[1]—"I know it when I see it." The problem we face is that egregious conduct in divorce cases are hard-pressed to be "seen" in the history of reported decisions.

While abusive behavior takes all forms and is not necessarily limited to one gender, age group, religion, race, or culture, "fault" by way of conduct should be better examined and more available than it has been. We now near almost two tumultuous years of public accusations, investigative reporting, and even senatorial hearings of alleged conduct inspiring, and resulting from, the "#MeToo" and "Time'sUp" movements. From Harvey Weinstein to Bill Cosby to Les Moonves and others, charges of abusive behavior foisted upon victims of such conduct have only recently come to light after being been hushed, unspoken, or even hidden in plain sight for prolonged periods. We have also seen how fear of reprisal, embarrassment, and feelings of shame or not being believed, keeps such conduct in the proverbial closet. It is time then that we look again at the word "egregious" and give greater voice to those on the receiving end of conduct long considered by too many to be relatively "innocuous"—when it is anything but.

A History of "Marital Fault"

Prior to the passage of the equitable distribution law in 1980, "alimony would be denied to a woman who committed adultery as such act of fault would—unless properly defended under statute—penalize her ability to receive support. Since men were not then legally able to receive support, this penalty applied only to the wife.

In 1984, the Second Department then examined marital fault under the new equitable distribution law in *Blickstein v. Blickstein*.[2] The court reversed a Nassau County trial decision which considered marital fault in awarding the wife 60 percent of the assets. The appellate court "logically" distinguished marital fault from economic fault. It also noted that the catchall "any other factor which the court shall expressly find to be just and proper" was a compromise since the legislature could not agree whether to include marital fault as a specific factor to be considered in equitable distribution. It used a "shocking the conscience" test—"egregious or outrageous"—as to fault and equitable distribution and referenced a more lenient view toward its effect when it came to spousal support.[3]

> It has been repeatedly emphasized that the marriage relationship is to be viewed as, among other things, an economic partnership and that upon its dissolution the accumulated property should be distributed on the basis of the economic needs and circumstances of the case and the parties (see *Conner v. Conner*, 97 A.D.2d 88, 107, 468 N.Y.S.2d 482; Governor's Approval Memorandum, Session Laws of 1980, p. 1863; Assembly Memorandum, NY Legis Ann 292 1980, pp. 129, 130). It would be, in our view, inconsistent with this purpose to hold that marital fault should be considered in property distribution. Indeed, it would introduce considerations which are irrelevant to the basic assumptions underlying the equitable distribution law, i.e., that each party has made a contribution to the marital partnership and that upon its dissolution each is entitled to his or her fair share of the marital estate (see *Giannola v. Giannola*, 109 Misc.2d 985, 987, 441 N.Y.S.2d 341, supra). Moreover, fault is very difficult to evaluate in the context of a marriage

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and may, in the last analysis, be traceable to the conduct of both parties (cf. Scheinkman, 1981 Practice Commentary, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law, C236B:13, p. 160, 1983–1984 Pocket Part).

Thus we conclude that, as a general rule, the marital fault of a party is not a relevant consideration under the equitable distribution law in distributing marital property upon the dissolution of a marriage. This is not to deny, however, that there will be cases in which marital fault, by virtue of its extraordinary nature, becomes relevant and should be considered. But such occasions, we would stress, will be very rare and will require proof of marital fault substantially greater than that required to establish a bare prima facie case for matrimonial relief. They will involve situations in which the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that "shocks the conscience" of the court thereby compelling it to invoke its equitable power to do justice between the parties. Thus, for example, in *D'Arc v. D'Arc*, 164 N.J.Super. 226, 395 A.2d 1270, *mod. on other grounds* 175 N.J.Super. 598, 421 A.2d 602, cert. den. 451 U.S. 971, 101 S.Ct. 2049, 68 L.Ed.2d 350), the New Jersey Superior Court considered the fact that during the pendency of the divorce proceedings the husband had offered $50,000 for the murder of his wife, even though it had previously been held by the Supreme Court of New Jersey that fault was not to be relied upon (*see Chalmers v. Chalmers*, 65 N.J. 186, 320 A.2d 478). As the *D'Arc* court stated, "where a spouse has committed an act so evil and outrageous that it must shock the conscience of everyone, it is inconceivable that this court should not consider his conduct when distributing the marital assets equitably" (395 A.2d at p. 1278, 293 *supra*). But even in the extreme case it is to be noted that fault is only one factor among ten to be considered in determining the distribution of marital assets.

A year later, the Court of Appeals in *O'Brien v. O'Brien*[4]—forever infamous for its creation of the now "enhanced earning capacity"—also addressed marital fault, citing *Blickstein* and others,

Plaintiff also contends that the trial court erred in excluding evidence of defendant's marital fault on the question of equitable distribution. Arguably, the court may consider marital fault under factor 10, "any other factor which the court shall expressly find to be just and proper" (Domestic Relations Law § 236[B][5][d][10]; see, Scheinkman, 1981 Practice Commentary, McKinney's Cons.Laws of N.Y., Book 14, Domestic Relations Law C236B:13, pp. 205–206 [1977–1984 Supp. Pamphlet]). Except in egregious cases which shock the conscience of the court, however, it is not a "just and proper" factor for consideration in the equitable distribution of marital property (*Blickstein v. Blickstein*, 99 A.D.2d 287, 292, 472 N.Y.S.2d 110, appeal dismissed, 62 N.Y.2d 802, see, *Stevens v. Stevens*, 107 A.D.2d 987, 484 N.Y.S.2d 708; *Pacifico v. Pacifico*, 101 A.D.2d 709, 475 N.Y.S.2d 952; McMahan *v. McMahan*, 100 A.D.2d 826, 474 N.Y.S.2d 974). That is so because marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues (see, *Blickstein v. Blickstein*, supra, 99 A.D.2d at p. 292, 472 N.Y.S.2d 110; *McMahan v. McMahan*, supra, 100 A.D.2d at p. 827, 474 N.Y.S.2d 974). We have no occasion to consider the wife's fault in this action because there is no suggestion that she was guilty of fault sufficient to shock the conscience.

The Court of Appeals took on the fault issue some 25 years after *O'Brien*, in 2010's *Howard S. v Lillian S.*[5] This decision came after marital fault had seen a number of cases that provided examples of conduct which fit the *Blickstein/O'Brien* definition.[6]

Although we have not had occasion to further define egregious conduct, courts have agreed that adultery, on its own, does not ordinarily suffice (*see e.g. Newton v. Newton*, 246 A.D.2d 765, 766, 667 N.Y.S.2d 778 [3d Dept. 1998]; *Lestrange v. Lestrange*, 148 A.D.2d 587, 588, 539 N.Y.S.2d 53 [2d Dept. 1989]). This makes sense because adultery is a ground for divorce—a basis for ending the marital

> relationship, not for altering the nature of the economic partnership. *At a minimum, in order to have any significance at all, egregious conduct must consist of behavior that falls well outside the bounds of the basis for an ordinary divorce action. This is not to say that there can never be a situation where grounds for divorce and egregious conduct will overlap. However, it should be only a truly exceptional situation, due to outrageous or conscience-shocking conduct on the part of one spouse, that will require the court to consider whether to adjust the equitable distribution of the assets* (*see e.g. Levi v. Levi*, 46 A.D.3d 520, 848 N.Y.S.2d 225 [2d Dept.2007] [attempted bribery of trial judge]; *Havell v. Islam*, 301 A.D.2d 339, 751 N.Y.S.2d 449 [1st Dept.2002] [vicious assault of spouse in presence of children]).2 Absent these types of extreme circumstances, courts are not in the business of regulating how spouses treat one another. (Emphasis added).

In his dissent, Judge Eugene F. Pigott, Jr., also addressing the majority's limitation on discovery on such claims, stated,

> It is within the court's discretion to determine whether a spouse's misconduct is so egregious to justify consideration for purposes of equitable distribution. In my view, the court should make this determination with full disclosure of the misconduct.
>
> The majority finds that discovery on the issue of fault is precluded in this case. Although neither party affirmatively moved for a ruling on the egregious misconduct claim, the majority reasons that the conduct alleged by husband is not so egregious as a matter of law to be considered for purposes of equitable distribution. In my view, this is putting the cart before the horse. Indeed, the majority has implicitly accepted the view of the First and Second Departments that a party is required to make a motion for discovery on the issue of fault (see *Ginsberg v. Ginsberg*, 104 A.D.2d 482, 479 N.Y.S.2d 233 [2d Dept.1984]; *McMahan v. McMahan*, 100 A.D.2d 826, 474 N.Y.S.2d 974 [1st Dept.1984] [two Justices dissenting]). I disagree with this approach, and rather, take the view of the Third and Fourth Departments that have no general prohibition of pretrial discovery on fault, relying on our liberal discovery rule (see *Nigro v. Nigro*, 121 A.D.2d 833, 504 N.Y.S.2d 264 [3d Dept.1986]; *Lemke v. Lemke*, 100 A.D.2d 735, 473 N.Y.S.2d 646 [4th Dept.1984]). Under that rule, husband is entitled to discovery on the issue of fault, albeit with the court overseeing and preventing abuses by asserting its protective power (see CPLR 3103[a] [authorizing the court to issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts"]). By first permitting discovery on the issue, the court may adequately consider whether the misconduct alleged does indeed "shock the conscience of the court" so as to warrant consideration for purposes of equitable distribution.[7]

In *Havell v. Islam*,[8] cited within *Howard S.*, the First Department, in affirming a finding of marital fault, sought to find context:

> It is our view that *McCann v. McCann* (156 Misc.2d 540, 593 N.Y.S.2d 917) best explains what the appellate courts mean by "egregious" and offers a framework that harmonizes those decisions with *Wenzel* and *Thompson*. The *McCann* court found a husband's conduct to be non-egregious where he deceitfully entered into a marriage based upon his promise to make every effort to have children with his wife and he subsequently refused to fulfill that promise after several years of lying, resulting in the wife, who relied on his promise, passing the age of child-bearing without having a child. *McCann*, discussing the *Blickstein* formulation, explained that "egregious" and "conscience-shocking" have no meaning outside of a specific context, and that conduct is "conscience-shocking, evil, or outrageous" only when "the act in question grievously injures some highly valued social principle." Therefore, the court concluded, conduct no matter how violent or repugnant is "egregious" only where it substantially implicates an important social value. The court further noted that the cases that have taken marital fault into consideration involved the paramount social values: preservation of human life and "the integrity of the human body" (*McCann* at 545–547, 593 N.Y.S.2d 917).
>
> Thus, the *McCann* court, unlike the *Wenzel* and *Thompson* courts, does not include

> impairment of economic independence in the definition of "egregious," but does explain the effort on the part of those courts to lend meaning to the term in the marital fault context and to identify a harm to a significant social value. Its reading of *Blickstein* also invokes the important rule in equity that a person should not be allowed to profit from his own wrongdoing, as defendant here callously seeks to do.

The *Havell* case cites back to language in *Blickstein*, "that marital fault only be taken into consideration where "the marital misconduct is *so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship*—misconduct that 'shocks the conscience' of the court thereby compelling it to invoke its equitable power to do justice between the parties..." (Emphasis added)

In 2016, *K.K. v. P.K.M.*,[9] citing back to *Howard S.*, found egregious fault to have occurred where the mother kidnaped the parties' child and refused to comply with court orders requiring return and access to that child,

> Defendant has *transgressed critical social norms and values*, and blatantly ignored every ruling of this Court, refusing to participate and cooperate in the administration of justice. Not only are defendant's actions *abhorrent to societal norms, causing plaintiff to suffer immeasurable injury and harm, they are disrespectful to this Court and the judiciary as a whole*. Defendant's conduct constitutes egregious fault and will be considered by this Court in determining equitable distribution of marital property. (Emphasis added)

Clearly, based on the language of *Howard S.*, and other cited cases such as *McCann v. McCann* and *Levi v. Levi*, acts of extreme physical violence such as existed in *Havell* and also in *Pierre v. Pierre*[10] and *Alice M. v. Terrance T.*[11] and are not the *sine qua non* for a finding of egregious conduct, as the standard is broader. In addressing issues of discovery on egregious conduct regarding the husband's commission of sexual misconduct as to his wife's daughter and granddaughter from a prior marriage, the Nassau County Supreme Court in *Eileen G. v. Frank G.*,[12] noted an important footnote in *Howard S*. and elaborated,

> ... "to the extent [the Appellate Division decision appealed from] can be read to limit egregious conduct to behavior involving extreme violence, the definition should not be so restrictive." *This clearly leaves the matter open to an individual assessment of each case in which such conduct is alleged, without a narrow reference to one particular type of conduct or injury*. The Court therefore must disagree with the defendant that because the injury to the plaintiff was solely psychological, and that the conduct was directed to a third party, such conduct never could be considered.
>
> Under *Howard S.*, the common thread is and remains whether the conduct leading to injury of the plaintiff was "outrageous" or "conscience-shocking." Further, there is nothing in the *Howard S.* decision that would have a court apply standards applicable to personal injury actions—e.g., whether the conduct was directed to a party personally—to determinations of egregious marital fault. The Court's citation to the case in which there was an attempt to bribe the trial judge indicates otherwise. It should also be noted that psychological damage caused by egregious conduct was cited by the *Havell* court as a proper basis for consideration of marital fault in the economic arena. *Havell v. Islam*, 301 A.D.2d 339, 344–345, 751 N.Y.S.2d 449, supra. Indeed, one of the cases the *Havell* court cited as sufficient concerned the rape by the husband of the wife's 17–year old stepdaughter, an act of sexual misconduct akin to what is presented here.
>
> As noted, in the present case the actions are alleged to be molestation of the plaintiff's 8 year-old grandchild. It cannot seriously be argued that this could never be a sufficient basis under *Howard S.* for a finding of "outrageous" or "conscience-shocking" conduct, no matter what disclosure of the underlying facts might reveal. The facts therefore must be developed, and this is the role of pre-trial discovery. (Emphasis added)

In 2015's *R.S. v. B.L.*,[13] the New York County Supreme Court found egregious conduct where the wife—as a lawyer and member of the bar—forwarded the husband's mail to a post office box in her name in apparent violation of several federal laws.

Shocking the Conscience

In evaluating a separation agreement the seminal *Christian v. Christian* references unconscionability where the inequity is "'so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense' " citing to *Mandel v. Liebman*, 303 N.Y. 88. *Mandel* in turn cites back to *Osgood v. Franklin*[14] in the Chancery Court from 1816 which cites back further to "Sir

Th. Clarke, in How v. Weldon, 2 Vesey, 516. Lord Thurlow, in 1 Bro. 9. Lord Ch. B. Eyre, in 2 Bro. 179, note. Lord Eldon, in 9 Vesey, 246. Sir William Grant, in 16 Vesey, 517."

Fast-forwarding, in a reference to governmental conduct which shocks the conscience in violation of due process, the Appellate Division, First Department in *Chavis v. City of New York*,[15] cited to the U.S. Supreme Court decision in *County of Sacramento v. Lewis*[16] where "the Supreme Court held that for executive action to violate substantive due process, it must be 'so egregious, so outrageous, that it may fairly be said to shock the *contemporary* conscience.'" (Emphasis added) This language, in the same context, has been cited as recently as the U.S. Supreme Court's June 18, 2018 decision in *Rosales-Mireles v. U.S.*[17]

What, then, should shock the "contemporary conscience" given the world we live in?

Discovery and a Greater Consideration of Egregious Conduct

In a recent *N.Y. Times* article, "Stress Test,"[18] the author addresses the effect of behavior which becomes the "new normal,"

> As soon as we accept something as the human condition, we stop talking about it or holding others to account; we simply adapt, admit defeat, lower our expectations.

In our divorce and family law cases, we almost daily see good people do very bad things and bad people do even worse. The problem is that we (bench and bar alike) are jaded and almost always beyond the ability to be truly shocked. This is also seen in the increased level of incivility in our courts and in society which are also now the "new normal."

While inclusion of claims for domestic tort or marital fault should certainly not be regularly offered up for consideration, courts should more often recognize that conduct less than all-out physical assault (which is often not reported) can and should constitute conduct which shocks the contemporary conscience. That collective conscience should be shocked more often than it is. As Judge Pigott suggested in his dissent in *Howard S.*, discovery on these issues, when properly raised, should be the rule, rather than the exception.

As the world hurls through 2018, with a 24/7 news/internet/social media cycle that daily exposes us to conduct regularly stretching the boundaries of previously unacceptable behavior, should such conduct be deemed "business as usual"? Have we just grown numb and accepting? Is the coordinated pushback against the public revelations of "MeToo" to be the standard or do we recognize that certain conduct, which was often part of the "run of the mill," "boys being boys," or "just another divorce case" categories, is simply unacceptable.

The light cannot shine upon conduct that occurs in the darkness unless the door is first allowed to be opened.

Endnotes

1. 378 U.S. 184 (1964).
2. 99 A.D.2d 287 (2d Dep't 1984), *appeal dismissed,* 62 N.Y.2d 802 (1984).
3. The fault in *Blickstein* was the husband's abandonment of the wife. Notably, the current versions of DRL §§ 236(B)(5-a) and (6)—as to spousal support as well as DRL § 240 as to custody now make reference to "domestic violence," albeit with limitations.
4. 66 N.Y.2d 576 (1985).
5. 14 N.Y.3d 431 (2010).
6. The appellate decision in *Howard S.* at 62 A.D.3d 187 (1st Dep't 2009) also noted several prior cases in which egregious conduct was not found. "...conduct that courts have found not to be egregious includes adultery (see *Lestrange v. Lestrange*, 148 A.D.2d 587, 588 [1989]), alcoholism (see *Weilert v. Weilert*, 167 A.D.2d 463 [1990]), abandonment (see *Wilson v. Wilson*, 101 A.D.2d 536 [1984], *lv. denied,* 64 N.Y.2d 607 [1985]), and verbal harassment coupled with several acts of minor domestic violence (see *Kellerman v. Kellerman*, 187 A.D.2d 906 [1992])."
7. Notably, this case was decided before no-fault divorce, so Judge Pigott's remarks also noted that fault was then required to be demonstrated as a prerequisite to the divorce.
8. 301 A.D.2d 339 (1st Dep't 2002).
9. 52 Misc. 3d 1220(A) (Sup. Ct. Westchester Co. 2016).
10. 145 A.D.3d 586 (1st Dep't 2016). "Here, defendant stabbed plaintiff wife two times with a steak knife, slammed her head against the toilet and put it into the bowl, causing her to enter a coma, require months of hospitalization and five surgeries, and rendering her disabled. He pleaded guilty to attempted assault in the first degree. This conduct is so egregious as to warrant a reduction in the equitable distribution award to defendant husband."
11. 50 Misc. 3d 1204(A) (Sup. Ct. Kings Co. 2015). "If the Court has ever been presented with facts and circumstances demonstrating egregious conduct by one spouse against another spouse it is the case at bar. The case at bar is not a case of "broken dreams" where one spouse merely violated the bounds of the marital relationship. The facts presented to the Court, including the credible and compelling testimony presented by plaintiff, reveal that during the marriage defendant engaged in egregious conduct against the plaintiff because he perpetrated violent attacks against her that violated the integrity of the human body, including but not limited to his attack against her that resulted in his conviction for rape in the first degree. Without a doubt, defendant's rape of plaintiff during the marriage shock the conscious of the Court and his subsequent conviction of rape in the first degree unequivocally evidences that defendant callously imperiled the value our society places on human life and the integrity of the human body."
12. 34 Misc. 3d 381 (Sup. Ct. Nassau Co. 2011). The court ordered discovery relating to the granddaughter only, based on the contents of the submissions before it.
13. 46 Misc. 3d 1218(A) (Sup. Ct. N.Y. Co. 2015), *aff'd,* 151 A.D.3d 609 (1st Dep't 2017).
14. 1 NY Ch. Ann. 275 (1816).
15. 94 A.D.3d 440 (1st Dep't 2012).
16. 523 U.S. 833 (1998).
17. U.S., 138 S.Ct. 1897 (2018).
18. N. Renner, *Stress Test*, N.Y. Times Magazine, Sept. 30, 2018 at 17.

Child Support Guidelines: Closing the "Cap" Trap

By Robert Z. Dobrish

In the 1980s there was a significant debate and no agreement in the matrimonial communities of the United States regarding the cost of raising a child and the manner in which that cost should be determined and allocated between separating parents. Federal regulations required each state to come up with a formulaic approach, which they did.

New York adopted its Child Support Standards Act (CSSA) in 1989 and was among the states that chose a family income percentage approach (a designated percentage of combined family income as being allocable to the support of children). Since 1989, the amount at which the formula is capped has been tweaked. Originally, the combined income of the family to which a percentage would be applied was "capped" at $80,000. Since then it has risen to $148,000. Because most divorce cases involve family income of less than $150,000, capping the income at $148,000 means that most matters will be decided using a strict formulaic approach. Only the remainder will be subject to discretionary, subjective standards.

In *Cassano v. Cassano,*[1] a 1995 decision written by then Chief Judge Judith S. Kaye, the Court of Appeals explained the manner in which the Child Support Standards Act was meant to be applied. At that time, the Act (which had been created to achieve some predictability in awards) was six years old, yet there was still significant uncertainty, particularly as it pertained to cases where combined parental income exceeded the "cap." Over 20 years have passed since Judge Kaye clearly and succinctly laid out the mechanism for achieving the appropriate child support number. Nevertheless, there is still significant confusion among practitioners and judges as to the correct manner for arriving at the number.

The methodology laid out in the statute and by the Court of Appeals is relatively simple to state. If the family income is at or below the specified amount of combined parental income (presently $148,000), you apply the presumptive formula—calculating the combined income to that amount multiplied by the governing percentage (17 percent for one child, 25 percent for two, 29 percent for three, 31 percent for three, and 35 percent for four or more), multiplied again by the pro-rata shares of the combined parental income for the custodial and non-custodial parents. Above that statutory amount, there is a three-step process to be followed: determine the family income, determine the portion of the family income necessary to support the appropriate lifestyle for the child(ren) and allocate the responsibility in proportion to the income of each parent by either using the formula (up to a different "cap") or arriving at the number through an analysis of statutory factors or a combination thereof. In any event, there is a requirement that there be some articulation of the methodology. In very high income cases, the court will also apply the demonstrated "needs" of the child to determine the proper amount of child support. Reviewing the cases that have been decided by appellate courts over the years, one finds that there continue to be problems. However, there is enough history to understand where the problems lie and, maybe, to clarify the law for those who are still confused.

While the statute reads clearly—the formula must be applied to combined family income up to $148,000 and thereafter the amount is to be determined as referenced above—on the formula to some stated amount, on the factors, or some combination of both—it has not consistently been applied that way. Perhaps because analyzing, determining and explaining how one gets to the resulting numbers is a difficult task, some judges have ruled that the child support formula should only go up to the "cap" unless there are special circumstances.[2] Other judges have decided that there should be a higher cap whenever there is greater income, but impose a limited range of caps based on heuristic methods.[3] Most others properly look specifically to the needs that are demonstrated.

"As a result of the differing interpretations of statutory language, there are child support cases that still go every which way—the very blight that the legislation was designed to eliminate."

As a result of the differing interpretations of statutory language, there are child support cases that still go every which way—the very blight that the legislation was designed to eliminate. Some judges and some jurisdictions are believed to "cap" at a certain number without regard to the specific facts of the case. Lawyers often negotiate their settlements by arguing whether a court would "cap" say at $300,000 or $400,000, without regard to the particular circumstances and the available evidence. Such reason-

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ing does not comport with the purpose and intention of the statute.

A review of the appellate cases (and some of the lower court decisions which address the issue) demonstrates that there is, nevertheless, some method to this madness. The well-reasoned decisions explain that in coming to the child support amount where family income exceeds the basic "cap" amount ($148,000), one needs to look at the situation of the family in terms of available income and lifestyle. In so doing, one must also consider the weight of the evidence that has been offered to demonstrate the appropriateness of the claim, as well as extenuating circumstances, which have been adequately shown to impact on the award one way or another.

Thus, in the recently decided First Department case *MM v. DM,*[4] the court affirmed a *$650,000* cap because the Referee "properly considered the lifestyle enjoyed by the children during the marriage which included country club membership, theater and other entertainment and luxury vacations." In addition, defendant in that case failed to show any actual expenses that supported his contention that the child support was higher than what was necessary to ensure that the children have an "appropriate lifestyle." At trial, plaintiff proved that the children's needs were at a certain level and that defendant was capable of earning at a level that could support those needs.[5] In another First Department case, *Klauer v. Abeliovich,*[6] a similar showing was made of a "luxurious lifestyle" and the court approved an *$800,000* cap. This high cap was calculated in order to achieve an appropriate contribution to support from a non-custodial parent who was responsible for earning only 10.5 percent of the family's combined $2.0 million income. In both cases, the trial court backed into the cap by first calculating what the payor should be contributing in dollars and then establishing the cap.

A lower court case in the First Department, *Sykes v. Sykes,*[7] established a fairly high cap—$600,000—which was achieved following a detailed analysis of proven costs of a "financially exalted life" and judicial reductions in those costs resulting in a monthly payment of $8,500 (17 percent of $600,000) together with 100 percent of very significant child support add-ons. There the father "was earning over $10 million per year" and the mother had significant income achieved through her equitable distribution award and eight (8) years of spousal maintenance.

In the Second Department, where higher cap cases at the appellate level have not been similarly found, one finds cases with caps up to only $400,000.[8] In *Doscher v. Doscher,*[9] the appellate court reduced the trial court's $600,000 cap to $360,000, reasoning that the evidence did not support the higher result. Similarly, in a case involving the rapper, "50 Cent," the Second Department in *Jackson v. Tompkins,*[10] affirmed a basic child support award of $6,750 per month (which would have been achieved with a $475,000 cap), but failed to mention a cap. There, the Support Magistrate discredited many of the mother's claimed expenses. The award was considered to be sufficient, with the appellate court finding no basis to overturn the Support Magistrate's Determination. Compare this, however, with *Brim v. Combs*[11]—involving Sean Combs—in which the claims of the mother's expenses were not contested and a monthly award of $35,000 was reduced to $19,148.74 based upon "needs" and which otherwise would have been the result of a $1.4 million cap.

In the Third Department, a $500,000 cap is reported in a case where the father earned $10 million. The court reasoned that despite a high standard of living there was limited evidence presented at trial as to the child's needs.[12]

What can be seen from these cases is that the key to obtaining high child support must be established at the trial level through a demonstration of needs and an ability to meet those needs. The recipient must present evidence to show a standard of living (where there is one to present) or evidence of real needs. The payor, who has sufficient income to pay what is requested, must present evidence that the child(ren) do not need what is being requested and/or that there are other circumstances to be considered that mitigate against a higher award.

It is immaterial whether the number selected is achieved through a cap on income or a determination of needs. The result proves to be the same. The required explanation of reasoning may be slightly different in that it might be presumed that utilization of a higher cap requires less of a justification than a mathematical determination of needs and is therefore less susceptible to a successful appeal. What must be digested by attorneys is that where there is a case with family income over the statutory "cap" there is a need to prepare the facts, understand the issues and present the case effectively. What must be digested by judges is that if needs are demonstrated and availability to meet those needs is clear, there is, in fact, no cap.

Endnotes

1. 85 N.Y.2d 649 (1995).
2. *See, e.g., Ryan v. Ryan,* 110 A.D.3d 1176 (3d Dep't 2013).
3. *See, e.g., Peterson v. Peterson*, 125 A.D. 3d 1234 (2d Dep't 2015); *Ciampa v. Ciampa*, 47 A.D.3d 745 (2d Dep't 2008); *Lazar v. Lazar*, 124 A.D. 3d 1242 (4th Dep't 2015).
4. 159 A.D.3d 562 (1st Dep't 2018).
5. The author was counsel to the plaintiff in both the trial and appeal of that case. Defendant, whose annual earnings had been reduced to $360,000 at the time of trial, was found to have imputed income of $1,625,000 based on the proof adduced at trial.
6. 149 A.D.3d 617 (1st Dep't 20 17).
7. 43 Misc. 3d 1220 (Sup. Ct., N.Y. Co., Cooper, J. 2014).
8. *Beroza v. Hendler,* 109 A.D.3d 498 (2d Dep't 2013) (a case where parental income was over $700,000).
9. 137 A.D.3d 962 (2d Dep't 2016).
10. 65 A. D. 3d 1148 (2d Dep't 2009).
11. 25 A.D.3d 691 (2d Dep't 2006).
12. *Bean v. Bean,* 53 A.D.3d 718 (3d Dep't 2008).

The Pitfalls of Appellate Practice From Family Court Dispositions and Orders

By Elliott Scheinberg

This article addresses the pitfalls when taking appeals under the Family Court Act. (This article does not address appeals from juvenile delinquency or PINS proceedings.) Since success is never assured in litigation, this article demonstrates why a party should always try to initiate a proceeding in the Supreme Court in the first instance whenever possible.

The applicable rules in the general universe of civil appellate practice, set forth in the CPLR (Articles 55, 56 and 57), which have been finely honed by a vast body of decisional authority, are, in and of themselves, an intricate minefield for the unseasoned appellant. Family Court Act [FCA] § 1112 introduces unique rules of appellate procedure for appeals arising from orders and dispositions of the Family Court:

> An appeal may be taken as of right from any order of disposition and, in the discretion of the appropriate appellate division, from any other order under this act. An appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of right to the appellate division of the supreme court.

Significantly, the rules in the CPLR do not automatically apply to the FCA except in situations where Article 11 of the FCA is silent.[1] Simultaneously navigating both appellate systems makes appellate practice from Family Court orders more challenging.

FCA § 1118, which provides; "The provisions of the [CPLR] apply where appropriate to appeals under this article ...", dovetails with FCA § 165[a]:[2]

> Where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed by this act, the procedure shall be in accord with rules adopted by the administrative board of the judicial conference or, if none has been adopted, with the provisions of the civil practice act to the extent they are suitable to the proceeding involved. Upon the effective date of the CPLR, where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed, the provisions of the civil practice law and rules shall apply to the extent that they are appropriate to the proceedings involved.

Citing FCA § 165, the Third Department emphasized that "Because the Family Ct. Act fully addresses the process of appealing from that court, other provisions from the CPLR need not be consulted."[3] *In re Deandre GG.*,[4] the Third Department, again, stressed that "Family Ct. Act article 11 is not silent as to the procedures and time limitations" for which reason "the provisions of the CPLR governing appeals upon which respondent relies are not controlling."

Unlike CPLR 5701, which generously grants the right to a direct appeal from interlocutory orders, the rights granted in FCA § 1112 are jurisdictionally restrictive as to temporary orders.[5] However, there are exceptions. A temporary order that joins issues of custody and neglect or abuse is appealable as of right where the determination of custody was contingent upon the outcome of the neglect proceeding.[6] Also, an order that is contingent upon the outcome of a proceeding involving child abuse is appealable as of right.[7]

While intermediate Family Court orders in child custody and visitation cases,[8] including modification of visitation pending a hearing[9] and child support[10] proceedings, are not appealable as of right, such temporary orders are appealable as of right from Supreme Court orders. The would-be appellant from an adverse temporary order in the Family Court must seek relief by way of a motion to the Appellate Division for leave to appeal.

Timeliness of an Appeal: FCA § 1113 v. CPLR § 5513

The practitioner accustomed to the CPLR encounters the very first trap in the timing within which to commence an appeal under the Family Court before being out of luck. CPLR 5513(a) addresses the timeliness of an appeal: "An appeal *as of right* must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from *and written notice of its entry*, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof." CPLR 5513(b), which addresses the time within which to

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move for permission to appeal, also requires prior service of written notice of its entry.

By contrast, a notice of entry is not required to start the appeal clock running under FCA § 1113 (Time of Appeal), where the clock begins ticking sooner:

> An appeal under this article must be taken no later than thirty days after the service by a party or the child's attorney upon the appellant of any order from which the appeal is taken, thirty days from receipt of the order by the appellant in court or thirty-five days from the mailing of the order to the appellant by the clerk of the court, whichever is earliest.

In *Miller v. Mace*,[11] the mother's appeal was dismissed because her notice of appeal had not been timely filed. The Appellate Division rejected her argument that her time to appeal did not start to run because she was never served with notice of entry of the order: "Aside from permitting the time for appeal to begin running upon service by the court, appeals from Family Court orders are different from appeals of other civil orders because FCA § 1113 does not state that service of a notice of entry is necessary to start the appeal time running ... service of the Family Court order alone, without notice of entry, is sufficient to start the appeal time running."[12]

The *Miller* court called attention to *In re Tynell S.*[13] where a contrary ruling was reached. In *Tynell* the Second Department underscored that notice of entry is a predicate element of service FCA § 1113:

> [T]here is no evidence in the record that the Family Court mailed the orders of fact-finding and disposition *with notices of entry* to the mother. Accordingly, it cannot be determined on the record before the court whether the mother filed her notice of appeal within the required time period following service of the notices of entry of the orders (Family Court Act § 1113).

Dispositional and Nondispositional Orders

An order of disposition is synonymous with a final order or judgment;[14] accordingly, the temporary custody and visitation and temporary support orders, discussed above, are not appealable as of right. Similarly, an order that remits a financial matter regarding child support for further proceedings is not dispositional, requiring a motion for leave to appeal.[15] Also, orders denying a motion to dismiss a petition[16] or denying a motion for summary judgment on a petition[17] are not dispositional within the meaning of § 1112[a] and accordingly no appeal lies as of right either.

There is no appeal as of right from a Family Court order denying a motion to vacate or set aside a prior order that disposed of the proceeding. Such an order is not an "order of disposition" within the meaning of FCA § 1112.[18] So that an order denying a motion to reopen a paternity proceeding based upon newly-discovered evidence (CPLR 5015[a][2]) is not an order of disposition appealable as of right.[19]

"The practitioner accustomed to the CPLR encounters the very first trap in the timing within which to commence an appeal under the Family Court before being out of luck."

A Filiation Order Linked to a Support Order

"[A]lthough a filiation order may constitute an appealable order of disposition when the paternity proceeding does not seek support, it should not be so regarded when support is sought in the paternity proceeding."[20]

A filiation order which makes no provision for support constitutes an order appealable as of right under Family Court Act § 1112 when the paternity proceeding has not sought support, but is not appealable without permission when support was sought in the paternity petition.[21]

Upon entry of a support order, a party can appeal as of right from the filiation order and may also, at that time, post an undertaking or otherwise move for a stay of enforcement of the support order pending determination of the appeal.[22]

A Party's Default Before a Support Magistrate

A party's default before a support magistrate precludes the defaulting party from filing objections.[23] This is consistent with governing law that a party cannot appeal from an order entered upon default—the proper procedure is to move to vacate the default and, if necessary, appeal from the denial of that motion.[24]

Orders Relating to Venue

A transfer order of a matter from one county to another is not dispositional and is thus not appealable as of right.[25]

Orders Directing Psychiatric Evaluations

A Family Court order directing a psychiatric evaluation is not a final order and is therefore not appealable as of right.[26]

A Non-Final Order in a Family Offense Proceeding

No appeal lies as of right from a non-final order in a family offense proceeding such as a temporary order of protection.[27]

An Order Precluding a Party from Filing Future Petitions

An order precluding a party from filing future petitions regarding custody and visitation without permission is not appealable as of right.[28]

A Finding of Contempt That Has Been Set for "Continued Dispositional Hearing"

In *Confort v. Nicolai*,[29] the mother appealed from an order of the Family Court, which, after a hearing, found her to be in contempt based on her willful violation of orders prohibiting her relocation of the children to Florida and set the matter down for "continued dispositional hearing." The order was not appealable as of right.

Recommendations by Support Magistrates Are Not Appealable

A Family Court Hearing Examiner [Support Magistrate] must refer a contempt determination to a Family Court Judge pursuant to FCA § 439(a) for confirmation and the imposition of punishment.[30] A determination or recommendation of incarceration by a Support Magistrate has no force until confirmed by a Family Court judge; such determination is not a final order and is therefore not appealable as of right[31]—furthermore, written objections to such nonfinal determinations of a Support Magistrate are improper.[32] The sole remedy to a determination of a willful violation of a support order is to await the issuance of a final order or an order of commitment of a Family Court judge confirming the Support Magistrate's determination, and to appeal from that final order or order of commitment.[33]

Support Magistrates Lack Jurisdiction to Determine Certain Defenses to a Finding of Contempt

Pursuant to FCA § 439(a), a Hearing Examiner lacks jurisdiction to determine certain defenses to a finding of contempt, such as lack of a current ability to pay. Such issues may only be determined by a Family Court judge.[34] For orders of a Hearing Examiner which do not require confirmation by a Family Court Judge, FCA § 439(e) provides that a party may file objections to such orders, but pending review of the objections "the order of the hearing examiner shall be in full force and effect and no stay of such order shall be granted."[35]

Family Court Act § 439(e)

FCA § 439(e) addresses the time and the method to file objections from the determination of a support magistrate.

> The determination of a support magistrate shall include findings of fact and, except with respect to a determination of a willful violation of an order under subdivision three of section four hundred fifty-four of this article where commitment is recommended as provided in subdivision (a) of this section, a final order which shall be entered and transmitted to the parties.
>
> Specific written objections to a final order of a support magistrate may be filed by either party with the court within thirty days after receipt of the order in court or by personal service, or, if the objecting party or parties did not receive the order in court or by personal service, thirty-five days after mailing of the order to such party or parties.
>
> A party filing objections shall serve a copy of such objections upon the opposing party, who shall have thirteen days from such service to serve and file a written rebuttal to such objections. Proof of service upon the opposing party shall be filed with the court at the time of filing of objections and any rebuttal.

Objections to a Support Magistrate's determination under § 439(e) are tantamount to appellate review requiring specific objections. Failure to raise the issues in the objections renders them unpreserved and waived for later appeal[36]—in sum, an order of a Support Magistrate is not appealable unless it has been first reviewed by the Family Court.[37] An order of a Support Magistrate is not appealable after the order is superceded by an order of the Family Court.[38]

Section 439(e) requires the Family Court to make its own findings of fact, which can only be done when a record for review is available by way of a hearing.[39] In *Baker v. Rose*,[40] the Appellate Division rejected the contention that the court erred in reviewing a matter not raised in the objections to the Support Magistrate's amended order. The Appellate Division held that FCA § 439(e) authorizes the Family Court to make its own findings based on the, "i.e., the transcript of the hearing conducted by the Support Magistrate."

FCA § 439(e), Objections and Notice of Entry

The time to file objections pursuant to FCA § 439(e) begins to run on service of the order with notice of entry.[41]

CPLR 2220(a), Entry and Filing of Orders

CPLR 2220(a) mandates: "An order determining a motion *shall be entered and filed* in the office of the clerk of the court where the action is triable, and all papers used on the motion and any opinion or memorandum in writing shall be filed with that clerk unless the order dispenses with such filing."

Although entry is irrelevant to measuring the timeliness of an appeal under FCA § 1113, what affect does it have, if any, if for some inexplicable reason it is a specific Family Court's policy not to enter its orders? Pursuant to FCA § 439(e), such court's policy will, plainly, frustrate a party seeking to file objections, where notice of entry is a predicate requirement. Peculiar as this question seems, this issue twice occurred in the Third Department.

In *Jordan v Horstmeyer,*[42] the record of the mother's appeal from the Family Court order was "devoid of proof that the order was entered." The Appellate Division stated that it had previously noted in a similar context that "appeals from orders that have not been entered are subject to dismissal...[FN1]. The record contains minimally adequate proof that the Family Court order was filed."

Ryan v Nolan[43] was the other case referenced in *Jordan* wherein the apparition of a court's non-entry of its orders first appeared on the appellate horizon. In *Ryan*, the Warren County Family Court "informed" the Third Department [without offering any explanation] "that they routinely do not enter orders and have not done so for a number of years."

Citing *Ryan, Jordan* admonished the Ulster County Family Court: "We reiterate our caution that a failure to enter a Family Court order is in no way 'the best practice.' "

> n.1 While it is true that entry plays no role in measuring the timeliness of an appeal under Family Ct. Act § 1113 (Miller v. Mace, 74 A.D.3d 1442, 1443, 903 N.Y.S.2d 571 [2010]), it is also true that "[t]he provisions of the [CPLR] apply where appropriate to appeals" filed under the Family Ct. Act (Family Ct. Act § 1118). Those provisions include requirements that "[a]n order determining a motion shall be entered and filed in the office of the clerk of the court where the action is triable" (CPLR 2220[a]) and that a notice of appeal must be "fil[ed] in the office where the [appealed-from] judgment or order ... is entered" (CPLR 5515[1]; Family Ct. Act § 1115). We accordingly reiterate our caution that a failure to enter a Family Court order is in no way "the best practice" (Matter of Ryan v. Nolan, 134 A.D.3d at 1261 n., 21 N.Y.S.3d 469).

Realizing the extreme prejudice that a strict application of CPLR 2220(a) would have on parties trapped in these courthouses, the *Jordan* and the *Ryan* courts rescued all appellants and parties seeking to file objections by "deem[ing] filing the equivalent of entry for purposes of jurisdiction and treat the filing date as the date of entry."

Appellate Decisions Are Inconsistent as to Strict Adherence to FCA § 439(e)

The First Department

In *Judith S. v. Howard S.*,[44] the First Department affirmed the Family Court's order that denied the father's motion for an extension of time to file objections. The court stated that the father relied "upon CPLR 2004," which "contains general authorization for a court to 'extend the time fixed by any statute, rule or order for doing any act.'" The *Judith S.* Court noted that, in *Matter of Powers v. Foley*,[45] "the scope of [CPLR 2004] was restricted to "extensions of time for the doing of acts in actions and proceedings and not for the doing of acts which are substantive in character *and provided for under other statutes*." The father's motion "was directed at a procedural time limitation, and not a substantive one, and thus could have been granted even if based on a statute outside the CPLR."

Nevertheless, the Appellate Division affirmed the denial of his request for an extension to file as seen from its emphasized unfavorable disposition towards the father: "[T]he prejudice that would result to petitioner as a result of the father's delay in filing objections is obvious, given his chronic failure to meet his child support obligations in a full and timely fashion, with no effort to pay down his substantial arrears."

The First Department has, however, "decline[d] to strictly impose the filing deadlines of FCA § 439(e)" where a party had been misinformed with respect to the time period in which she was required to submit her objections and reversed Family Court's denial of her objections as untimely.[46] Nevertheless, the First Department has also held that failure to file proof of service of a copy of the objections is a condition precedent which goes to the jurisdiction of the court.[47]

The Second Department

The Second Department has held that the requirement in § 439(e) of filing proof of service upon the opposing party of the objections with the court at the time of filing of objections, and any rebuttal, constitutes a "a condition precedent to filing timely written objections to [a] Support Magistrate's order."[48] A party who fails to "exhaust the

Family Court procedure for review of [his or her] objections" to a determination waives the right to appellate review of that determination.[49]

The foregoing notwithstanding, the Second Department, like the First Department, in *Corcoran v. Stuart*, in the First Department, above, declined to impose the severity of the statute on a pro se mother where the court had misinformed her as to the timeliness and mandatory filing procedures, which instructions she had followed.[50] Also, where objections are mailed to an incorrect address the objectant has failed to fulfill a condition precedent, thereby failing to exhaust Family Court procedure for review of objections.[51]

The Third Department

The Third Department has infused discretion rather than strict adherence into FCA § 439:

> "Unlike the nonwaivable and jurisdictional time period for filing a notice of appeal, the courts need not require strict adherence" to this filing deadline [of Family Ct Act § 439 (e)] ... "Family Court has discretion to overlook a minor failure to comply with the statutory requirements regarding filing objections and address the merits."[52]

In *Ogborn v Hilts*,[53] the Third Department upheld Family Court's discretionary granting to respondent of two extensions of time for filing her objections to the Hearing Examiner's order. The extenuating circumstance was that the respondent was unrepresented in the proceedings before the Hearing Examiner and post-hearing retained counsel needed the hearing transcript in order to prepare objections and, significantly, that respondent moved for the first extension prior to the expiration of the statutory time for filing objections.

In *Hobbs v Wansley*,[54] the mother attempted to file objections on the afternoon of the final day when the objections would still be timely. She arrived at the courthouse at 4:45 p.m. to file the objections, having relied on the hours of operation for that courthouse as listed on the New York State Unified Court System (NYSUCS) website, as being from "9:00 a.m. to 5:00 p.m." Nevertheless, the courthouse was closed when she arrived. "Considering this proof establishing that the mother would have timely submitted her objections but for the inaccurate information provided by the NYSUCS website, Family Court ought to have excused her untimely filing."

The foregoing notwithstanding, the Third Department has also held it proper to enforce § 439(e); it is not "an abuse of discretion for a court to demand that a party adhere to the statutory requirements."[55]

In *Riley v. Riley*,[56] the Third Department noted the absence of extraordinary or prejudicial circumstances and held that, although Family Court has discretion to overlook the timely filing of proof of service of objections, "[f]ailure to timely file such proof of service constitutes an adequate ground to dismiss a party's objections ... [W]e have never held that it is an abuse of discretion for a court to require adherence to the statutory requirements of FCA § 439(e) or to dismiss objections upon a party's failure to adhere to that statute."

In *Treistman v Cayley*,[57] the Third Department held that it is not an abuse of discretion for Family Court to demand adherence to the filing requirements in FCA § 439(e). Although the father had timely filed objections and served a copy upon the mother's counsel, the certificate of service for the objections was not sufficient because it was improperly notarized, which was "tantamount to a complete failure to file any proof of service."

The Fourth Department

In *Onondaga Cnty. Com'r of Soc. Servs. on Behalf of Chakamda G. v. Joe W.C.*,[58] the Fourth Department declined to strictly apply the timeliness requirement in FCA § 439(e) where the objectant attempted to obtain clarification of the order and to extend his time to file objections by letter dated within the 30–day time period.

Service Upon a Party's Attorney and FCA § 439[e]

One Family Court actually dismissed the father's objections because he only served the mother's counsel but not the mother herself ["the opposing party," § 439(e)]. Needless to say, the Appellate Division tolerated none of this. In *Etuk v. Etuk*,[59] the Second Department reversed the dismissal: "Since there is no provision in Family Court Act § 439(e) addressing the issue of whether service on the attorney of a represented party will or will not constitute service on the "opposing party," the provisions of the Civil Practice Law and Rules come into play (Family Ct Act § 165[a] ...)."[60] The Appellate Division held that "the CPLR provision for service on an opposing party represented by counsel requires service on the attorney, [per CPLR 2103(b)] not the party" and no statutory provision requires otherwise:

> Pursuant to CPLR 2103(b), "papers to be served upon a party"—this includes an "opposing party" described in Family Court Act § 439(e)—"*shall* be served upon the party's attorney" [internal emphasis]. Separate procedures exist for serving a party who has not appeared by counsel (CPLR 2103[c]). ...

Family Ct. Act § 1116, Printing and Transcription of the Appellate Record

Although appeals from the Family Court record must not be printed, they must be transcribed. In *Davis v. Pegues*,[61] the Appellate Division dismissed the appeal because the appellant failed to order and settle the tran-

script of the proceedings, ruling that the exception in CPLR 5525(b) was not applicable:

> The Family Court Act dispenses with the requirement that the record on appeal be printed (Family Ct. Act § 1116). However, neither Family Court Act § 1116, nor 22 NYCRR 670.9(d)(1)(ii), the rule of this court which permits appeals from the Family Court to be prosecuted on the original record, excuses noncompliance with CPLR 5525(a), which is made applicable to the Family Court pursuant to Family Court Act § 1118. CPLR 5525(b) necessitates the transcription of the record.

A Matter Referred to the Family Court by the Supreme Court Becomes a Family Court Proceeding Subject to Its Procedures

When the Supreme Court refers a support application to a Support Magistrate pursuant to FCA § 464[a], the matter becomes a Family Court support proceeding pursuant to FCA, Article 4, and the objections to the Magistrate's order must first be reviewed by a Family Court judge before any appeal may be take.[62]

Endnotes

1. *In re Yamoussa M.*, 220 A.D.2d 138, 141 (1st Dep't 1996).
2. *See Miller v. Mace*, 74 A.D.3d 1442 (3d Dep't 2010).
3. *Id*.
4. 79 A.D.3d 1384 (3d Dep't 2010).
5. *In re Iryanna I.*, 133 A.D.3d 1048, 1049 (3d Dep't 2015); *In re Krystal F.*, 68 A.D.3d 670 (1st Dep't 2009) ("[T]his Court has jurisdiction to hear this appeal since "[a]n appeal from an intermediate or final order in a case involving abuse or neglect may be taken as of right."); *In re Melody B.*, 224 A.D.2d 1040 (4th Dep't 1996).
6. *In re Francis M.*, 279 A.D.2d 279, 279–80 (1st Dep't 2001):

   > Order [] which, in joint proceedings for custody brought by the child's father against the child's mother and for neglect brought by the Administration of Children's Services against the mother, unanimously affirmed insofar as it denied the mother's motion for modification of prior temporary custody orders so as to take temporary custody from the father and give it to the mother or the child's maternal grandparents, and the appeal therefrom unanimously dismissed insofar as it denied the mother's motion for letters rogatory to take the deposition upon written questions of the father's brother in Ireland. That portion of the order denying modification of custody is appealable as of right since the determination of custody is contingent upon the outcome of the neglect proceeding (Family Court Act § 1112(a); ...).

7. *Peter R. v. Denise R.*, 163 A.D.2d 558 (2d Dep't 1990).
8. *Porter v. Burgey*, 266 A.D.2d 552 (2d Dep't 1999):

   > The appeals from the decision [] and the order [] are dismissed ... as no appeal lies as of right from a nondispositional order in a custody and visitation proceeding pursuant to FCA article 6 (Fam. Ct. Act § 1112), and leave has not been granted, and for the further reason that no appeal lies from a decision.

   Tina X. v. John X., 134 A.D.3d 1174, 1175 (3d Dep't 2015) ("The temporary order granting the father custody of the children pending a final disposition was not a final order and, as such, it is not appealable as of right.").
9. *Harley v. Harley*, 129 A.D.2d 843 (3d Dep't 1987).
10. *Galeano v. Delaney*, 35 A.D.3d 858 (2d Dep't 2006) ("[N]o appeal lies as of right from a nondispositional order of the Family Court in a support proceeding, and leave to appeal has not been granted (Family Ct. Act §§ 439(e); 1112)."); *Daughtry v. Jacobs*, 155 A.D.3d 947, 949 (2d Dep't 2017); *Thompson v. McCabe*, 57 A.D.3d 792 (2d Dep't 2008); *McCoy v. McCoy*, 134 A.D.3d 1206, 1207 (3d Dep't 2015).
11. 74 A.D.3d 1442 (3d Dep't 2010).
12. The *Mace* court opined: "It is reasonable that the Legislature did not require service of a notice of entry with Family Court orders because the court itself is often effecting service, which it logically will do only after the order has been entered."
13. *In re Tynell S.*, 43 A.D.3d 1171, 1172 (2d Dep't 2007).
14. *In re Yamoussa M.*, 220 A.D.2d 138, 142 (1st Dep't 1996); *Koch v. Ackerman*, 142 A.D.2d 581 (2d Dep't 1988).
15. *Daughtry v. Jacobs*, 155 A.D.3d 947 (2d Dep't 2017); *Roublick v. Coulter*, 45 A.D.3d 775 (2d Dep't 2007).
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18. *In re Cote*, 127 A.D.2d 1011 (4th Dep't 1987).
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24. *Derick B. v. Catherine L.*, 155 A.D.3d 511 (1st Dep't 2017).
25. *McDermott v. McDermott*, 69 A.D.3d 1008 (3rd Dep't 2010); *Bradberry v. Robinson*, 302 A.D.2d 906 (4th Dep't 2003); *see Zimmer v. Peno*, 194 A.D.2d 928 (3d Dep't 1993), *lv. to appeal dismissed*, 82 N.Y.2d 802 (1993).
26. *Clark v. Clark*, 85 A.D.3d 1350 (3d Dep't 2011); *Chang v. Conway*, 302 A.D.2d 459 (2d Dep't 2003).
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28. *Tedeschi v. Tedeschi*, 119 A.D.3d 868 (2d Dep't 2014).
29. 9 A.D.3d 428, 429 (2d Dep't 2004).
30. *Roth v. Bowman,* 245 A.D.2d 521, 522 (2d Dep't 1997).
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32. *Dakin v. Dakin*, 75 A.D.3d 639 (2d Dep't 2010); *Flanagan v. Flanagan*, 109 A.D.3d 470 (2d Dep't 2013).
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34. *Roth v. Bowman*, 245 A.D.2d 521, 522 (2d Dep't 1997).

35. *Id.*

36. *Hubbard v. Barber*, 107 A.D.3d 1344 (3d Dep't 2013); *Kasun v. Peluso* 82 A.D.3d 769 (2d Dep't 2011); *Redmond v. Easy*, 18 A.D.3d 283 (1st Dep't 2005); *White v. Knapp*, 66 A.D.3d 1358 (4th Dep't 2009)); *Stoll v. Stoll*, 132 A.D.3d 1004 (2d Dep't 2015) (The father's contention that the Support Magistrate improperly made a finding of willfulness before he submitted evidence as to his inability to pay is unpreserved for appellate review, as he never filed an objection to the Support Magistrate's finding of willfulness on this ground.)

37. *Baltes v. Smith*, 111 A.D.3d 1072, n. 1 (3d Dep't 2013).

38. *Jordan v. Horstmeyer*, 152 A.D.3d 1097 (3d Dep't 2017).

39. *McAdams v. Pinckney*, 15 A.D.3d 955 (4th Dep't 2005).

40. 23 A.D.3d 1112 (4th Dep't 2005).

41. *Belolipskaia v. Guerrand*, 65 A.D.3d 932 (1st Dep't 2009); *Oneida County Dept. of Social Services v. Hurd*, 295 A.D.2d 70 (4th Dep't 2002); *Geary v. Breen*, 210 A.D.2d 975 (4th Dep't 1994); *Commr. of Social Services on Behalf of Obremski v. Dietrich*, 208 A.D.2d 474 (1st Dep't 1994).

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43. 134 A.D.3d 1259, n.1 (3d Dep't 2015).

44. 46 A.D.3d 318 (1st Dep't 2007).

45. 25 A.D.2d 525 (2d Dep't 1966).

46. *Corcoran v. Stuart*, 215 A.D.2d 340 (1st Dep't 1995).

47. *Dallas C. v. Katrina J.*, 121 A.D.3d 456, 456–57 (1st Dep't 2014); *see also Cynthia B.C. v. Peter J.C.*, 161 A.D.3d 423 (1st Dep't 2018), re condition precedent.

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50. *Worner v. Gavin*, 112 A.D.3d 956 (2d Dep't 2013); *see also Nash v. Nash*, 106 A.D.3d 740 (2d Dep't 2013).

51. *Hamilton v. Hamilton*, 112 A.D.3d 715 (2d Dep't 2013).

52. *Alberino v. Alberino*, 154 A.D.3d 1139 (3d Dep't 2017); *Fifield v. Whiting*, 118 A.D.3d 1072 (3d Dep't 2014); *Latimer v. Cartin*, 57 A.D.3d 1264, 1265 (3d Dep't 2008) ("Strict adherence to the deadlines of FCA § 439(e) is not required ..."); *Hobbs v. Wansley*, 143 A.D.3d 1138 (3d Dep't 2016).

53. 262 A.D.2d 857 (3d Dep't 1999). The problem in *Albertino* was similar to that in *Hobbs* regarding misinformation by the court as to its hours of operation.

54. 143 A.D.3d 1138, 1138–39 (3d Dep't 2016).

55. *Fifield v. Whiting*, 118 A.D.3d 1072 (3d Dep't 2014).

56. 84 A.D.3d 1473 (3d Dep't 2011).

57. 155 A.D.3d 1343 (3d Dep't 2017); *Simpson v. Gelin*, 48 A.D.3d 693 (2d Dep't 2008), *cited in Treistman*:

> [T]he purported affidavit of service filed by the father did not identify the person who allegedly served the mother with the objections. Further, the form affidavit was not signed and notarized, as required. This was tantamount to a complete failure to file any proof of service.

58. 233 A.D.2d 908 (4th Dep't 1996), *citing Corcoran v. Stuart*, 215 A.D.2d 340, 341 (1st Dep't 1995).

59. 300 A.D.2d 483 (2d Dep't 2002); cf. *Perez v. Villamil*, 19 A.D.3d 501, 501–02 (2d Dep't 2005).

60. *Masse v. Masse*, 273 A.D.2d 928, 929 (4th Dep't 2000).

61. 266 A.D.2d 288 (2d Dept 1999); *Meier v. Meier,* 204 A.D.2d 328 (2d Dep't 1994).

62. *Reynolds v. Reynolds*, 92 A.D.3d 1109 (3d Dep't 2012).

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The High Stakes of International Custody Disputes

By Robert Stephan Cohen and Taylor Paige Fish

It may not be bloody, but it can get ugly. Child custody disputes can last for years, especially when fought internationally. Unfortunately for *Gossip Girl* actress Kelly Rutherford, after seven years of custody litigation and 70 flights from New York to Monaco, she lost custody of the children to their father and filed for bankruptcy, accumulating $1.5 million of debt in legal fees.[1]

Ms. Rutherford's situation was a nightmare. In August of 2012, a California State court granted the father, Daniel Giersch, known for successfully suing Google for trademark infringement, his request to temporarily relocate the children to Monaco.[2] Three years later, California and New York declined to exercise jurisdiction over the matter.[3] Feeling as though "[n]o state in this country is currently protecting my children," Ms. Rutherford took matters into her own hands.[4] In August of 2015, she very publicly refused to board the children on a plane to Monaco in direct violation of a Monaco court order.[5] Within days, a New York State court ordered her to return the children to Monaco and her custody case never recovered.[6]

When her ex-husband filed for divorce in California in 2008, she never could have imagined litigating in Monaco.[7] Her ex-husband was German, but had resided with her and the children in Los Angeles for years.[8] California clearly had jurisdiction over custody matters as the children's home state.

"Home State" Defined

In California, and in New York, only the home state of a child may make an initial custody determination, unless special circumstances apply.[9] The home state of the child is where he or she resides for at least six months before commencement of a custody action.[10] Until 2002, it was unclear whether a foreign country could be considered a "home state."[11] "Whether a given foreign nation's decree was recognizable was questionable; whether a foreign country would be deemed an appropriate jurisdictional forum was difficult to predict."[12]

For example, in 1982 a New York State appellate court held Canada could not maintain jurisdiction over a custody matter despite the fact that the child had resided in Canada for approximately two years because "[s]ubdivision 10 of section 75-c of the Domestic Relations Law defines 'State' as 'any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.' Thus, Quebec, Canada, is not a 'State' within the meaning of the statute."[13] But in 1995, a New York State trial court made the opposite finding, holding that Israel could properly maintain jurisdiction over a custody matter where the child had resided in Israel with her parents for three years preceding the action.[14] The court held:

> [T]here is no jurisdiction because New York was not the home State of [the child] at the time the action was commenced, nor was it the home State six months prior to the time the action was commenced. [The child] had moved to Israel with her parents, approximately three years prior to when the plaintiff commenced the divorce action, and returned for only one summer in 1988.[15]

The years of contradicting case law concluded once the New York legislature adopted Domestic Relations Law (DRL) § 75-d, effective in 2002. Pursuant to DRL § 75-d(1), "A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying [the UCCJEA]." As the statute's Practice Commentaries explained:

> Section 75-d effectively internationalizes the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and Article 5-A. The breadth is enormous. From a national act designed to assure fairness and uniformity within the United States, the Act is transmuted into one designed to promote uniformity throughout the world, at least from an American court's perspective.[16]

Since then, it is undisputed that a child's "home state" under the UCCJEA may be a foreign country.[17] Consequently, in 2012, the Second Department held that Bangladesh was the child's home state because the child had lived with the mother in Bangladesh for more than six months preceding the custody action.[18]

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Typically, the child's home state is where he or she has resided for six months preceding the custody action.[19] But unless an exception applies, a child's six-month residency will not create home state jurisdiction if the child was wrongfully removed or withheld from the country.[20]

Wrongful Removal and Its Consequences

A child is wrongfully removed from a country if the parent removed the child without the other parent's consent.[21] If the child was wrongfully removed without the other parent's consent, the court will consider the removed parent and child to be temporarily absent rather than permanently removed from the state.[22] Pursuant to DRL § 75-a(7), a period of temporary absence remains part of the requisite time period.

Thus, for example, in *Insanally v. Insanally*, where the father wrongfully withheld the child in Guyana for more than six months preceding the action, the court held "[New York] was clearly the home state of the child, who was born an American citizen in this state and raised here until removed under false pretenses by the father."[23] Similarly in *Padmo v. Kayef*, the court held New York would remain the child's home state if the father wrongfully withheld the child in Bangladesh for more than six months preceding the action.[24]

New York will claim home state jurisdiction even if the child was wrongfully removed from New York *less* than six months preceding the action. In *Krymko v. Krymko*, the court held:

> Assuming that Chava was removed from New York less than six months after her arrival with her parents, New York is still her "home state." Since the Ontario Court of Justice found that Chava was wrongfully removed from New York to Toronto and directed her return, Chava's stay in Toronto was nothing more than a "period of temporary absence," which is considered part of the six-month period. The appellant may not decide the timing and forum of the custody proceeding through wrongful removal of the child from the jurisdiction.[25]

The Short Reach of the UCCJEA

In *Krymko*, the aggrieved parent had filed in two jurisdictions contemporaneously to seek relief: New York, under the UCCJEA, and Canada, under the Hague Convention (Hague).[26]

Under the Hague, a parent can seek the return of a child to his or her country of habitual residence if the child was wrongfully removed in violation of the petitioner's custody rights.[27] In December of 2015, the popstar Madonna filed a petition under the Hague in London, England, claiming her ex-husband, director Guy Ritchie, was wrongfully withholding their son, Rocco.[28] Rocco was supposed to return to New York in early December pursuant to the parties' custody agreement.[29] When he didn't return, Madonna sued Guy Ritchie in England and New York.[30] The New York State court quickly ordered Guy Ritchie to return the child to New York and Madonna withdrew her petition from England.[31]

"It is easier to ignore court orders when they are a continent away. This is precisely the reason the Hague is such a powerful and important tool in international child abduction cases."

Yet, the conflict between the parties continued. Rocco, who was 15 years old at the time, refused to comply with New York's court order and remained in England with his father.[32] Madonna filed for contempt, but the court denied her motion and sought a resolution by the parties.[33] Ultimately, the parties settled and the child remained in England with his father.[34]

Both Guy Ritchie and Kelly Rutherford refused to follow court orders entered in foreign countries. Guy Ritchie ignored New York's order to return the child to New York and Kelly Rutherford ignored Monaco's order to return the children to Monaco. It is easier to ignore court orders when they are a continent away. This is precisely the reason the Hague is such a powerful and important tool in international child abduction cases. In instances where a child has been wrongfully removed outside the United States, only the Hague, as opposed to the UCCJEA, provides a method to obtain orders from the foreign country where the parent and child are located. But those orders are limited.

A petition under the Hague cannot request orders relating to jurisdiction or custody; it can only request orders for the return of a child. In *Katz v. Katz*, the court held,

> A decision under the Convention is not a determination on the merits of any custody issue, but leaves custodial decisions to the courts of the country of habitual

> residence. Here, it is undisputed that the United States was the child's country of habitual residence, and that, at the time the petition was filed, New York was the child's "home state." Thus, the Family Court had jurisdiction to determine the father's petition for custody. Moreover, the denial, by the court in the Dominican Republic, of the father's application for a return of the child pursuant to the Convention, did not preempt his custody proceeding.[35]

Defenses to Claims Under the Hague and the UCCJEA

In *Katz*, the Dominican Republic denied the father's petition under the Hague due to evidence of domestic violence.[36] Domestic violence is one of several defenses to a petition under the Hague.[37] Defenses to claims under the Hague are intended to protect a child from returning to a country where he or she may be harmed. Hence, a child will not be forced to return to a country where he or she may suffer physical or psychological abuse.[38] A child will also not be forced to return to a country after a year has passed since he or she resided there.[39] After a year of living in another country, the child is considered to be settled in the "new environment."[40] Accordingly, in *MG v. WZ*, the court denied the father's petition filed more than one year after the mother allegedly wrongfully retained the child in the United States, holding that "Petitioner has demonstrated by a preponderance of the evidence that the Child is now settled, indeed thriving in his new environment."[41]

A petitioner's delay in filing is also a defense to a petition for custody under the UCCJEA.[42] In *Sanjuan v. Sanjuan*, the court dismissed the mother's petition for custody filed more than a year after the father allegedly wrongfully removed the child to the Philippines.[43] The court held:

> Even if the father's conduct had been unjustifiable, the mother acquiesced to the jurisdiction of the Philippines. According to the mother, she filed a summons with notice about a month after the father left for the Philippines, but that action "expired" because she was unsuccessful in effecting service. The mother did not recommence her action until almost one year later. By waiting, the mother acquiesced to the jurisdiction of the Philippines.[44]

Certainly, no one can argue Kelly Rutherford acquiesced to Monaco's jurisdiction over the parties' custody matters. The parties litigated for seven years before the Monaco court awarded the father custody.[45] She may have made some poor decisions, such as refusing to board the children on a plane to Monaco, but her persistence in litigating such important matters—matters relating to one's children—was truly impressive.[46] And, from a family lawyer's perspective, her persistence was necessary. Absent settlement, litigating an international custody dispute requires time, money, and strategy, especially in instances of child abduction.

Conclusion

As demonstrated above, if a child was wrongfully removed to a foreign country, the aggrieved parent must take action swiftly. Two petitions should be filed, one in the foreign country under the Hague and the other in New York under the UCCJEA.[47]

Each step of the process will be complicated. The foreign court will analyze whether the child has been wrongfully removed under the international treaty laws of the Hague. The New York State court will analyze whether New York has subject matter jurisdiction over custody matters under the UCCJEA. If New York maintains jurisdiction, the court then has the very difficult responsibility of awarding custody between parents who are essentially worlds apart, applying the best interests of the child standard.

For obvious reasons, the stakes are high in international custody disputes. Family lawyers must take swift action or risk losing their client's child to a parent potentially a continent or farther away.

Endnotes

1. Sheila Weller, *Inside Kelly Rutherford's Brutal, Globe-Spanning Custody Battle*, Vanity Fair, Nov. 2015, https://www.vanityfair.com/hollywood/2015/10/kelly-rutherford-custody-battle; Laura Collins, *Exclusive: Kelly Rutherford will never be able to bring her children to the US. Monaco judge makes final ruling and grants full custody to her ex after bitter years-long case*, Daily Mail, Dec. 15, 2015, http://www.dailymail.co.uk/news/article-3361080/Kelly-Rutherford-NEVER-able-bring-children-Monaco-judge-makes-final-ruling-grants-custody-ex-bitter-years-long-case.html.
2. Weller, *supra* note 1; *Giersch v. Giersch* (Super. Ct. Los Angeles County, 2013, No. SD026864).
3. Weller, *supra* note 1.
4. Michelle Corriston, *Kelly Rutherford Refuses to Return Her Kids to Monaco: My Children Have a Right to Remain, Once and For All, in the United States*, People, Aug. 7, 2015, https://people.com/tv/kelly-rutherford-refuses-to-return-kids-to-monaco.
5. *Id*.
6. Weller, *supra* note 1.
7. *Id*.
8. *Id*.
9. *See* DRL § 76(1); Cal. Fam. Code § 3421(a)(1).
10. DRL § 75-a(7).
11. Prof. Merril Sobie, McKinney Practice Commentary, DRL § 75-d.
12. *Id*.
13. *Massey v. Massey*, 89 A.D.2d 566, 567 (2d Dep't 1982).

14. *Zwerling v. Zwerling*, 167 Misc. 2d 782, 789 (Sup. Ct. Queens Co. 1995).
15. *Id*. (citations omitted).
16. Prof. Merril Sobie, McKinney Practice Commentary, DRL § 75-d.
17. *Id*.
18. *Malik v. Fhara*, 97 A.D.3d 583, 583-584 (2d Dep't 2012).
19. *See, e.g.*, *Karen W. v. Roger S.*, 8 Misc. 3d 285, 286-287 (Fam. Ct. Dutchess Co. 2004) (where the court held New York, not Germany, was the home state of the children since the children had resided in New York for one year prior to the custody action).
20. *Michael McC. v. Manuela A.*, 48 A.D.3d 91, 96 (1st Dep't 2007).
21. *See id*. (where the court held the mother's fleeing to Italy with the child in the middle of the custody proceedings without the father's consent was wrongful).
22. *Id*.
23. 228 A.D.2d 251, 252 (1st Dep't 1996).
24. 134 A.D.3d 942, 943–44 (2d Dep't 2015).
25. 32 A.D.3d 941, 942 (2d Dep't 2006) (citations omitted).
26. *Id*.
27. *MG v. WZ*, 46 Misc.3d 372, 377-378 (Fam. Ct. Bronx Co. 2014).
28. *Ciccone v. Ritchie (No 1)* [2016] EWHC 608 (Fam).
29. *Id*.
30. *Id*.
31. *Ciccone v. Ritchie (No 2)* [2016] EWHC 616 (Fam).
32. *Id*.
33. *Id*.
34. Jeff Nelson, *Madonna, Guy Ritchie Settle 8-Month-Long Custody Battle Over Son Rocco*, People, Sept. 7, 2016, https://people.com/celebrity/madonna-and-guy-ritchie-settle-custody-battle-over-son-rocco/.
35. *Id*. (citations omitted).
36. *Id*. at 1054.
37. *Id*.
38. *Id*.
39. *MG v. WZ*, 46 Misc.3d at 380-381.
40. *Id*.
41. *Id*.
42. *Sanjuan v. Sanjuan*, 68 A.D.3d 1093, 1094-1095 (2d Dep't 2009).
43. *Id*.
44. *Id*. (citations omitted).
45. Weller, *supra* note 1.
46. Corriston, *supra* note 4.
47. A petition under the Hague should only be filed if a child was wrongfully removed from the country.

Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Appellate Divisions Enact New Statewide Practice Rules

On June 29, 2018 and effective September 17, 2018, all four Appellate Departments enacted revised Practice Rules set forth at 22 N.Y.C.R.R. Part 1250. The new Rules will be applicable statewide and include cases in which a Notice of Appeal was already filed so that all pending appellate matters are governed by the Rules unless it can be shown that application of the new Rules will be manifestly unjust, impracticable or substantially prejudicial. Local Rules of each Appellate Department are also amended as of September 17, 2018 and will remain to supplement and be read in conjunction with the Statewide Rules. Notably, each set of Local Rules provides that in the event of a conflict with the Statewide Rules, the Local Rules will control when practicing within each Department.

E-Filing Now Mandatory in Second Department's Westchester and Suffolk Counties

On March 1, 2018, the Second Department began requiring e-filing of all appeals through the New York State Courts Electronic Filing (NYSCEF) system for all matters originating in Supreme and Surrogate Courts in Westchester County.

On July 2, 2018, Suffolk County followed suit, as the Second Department expanded mandatory e-filing to include all appeals of matters originating or electronically filed in Supreme and Surrogate's Courts in Suffolk County. E-filing is required in appeals where (1) the notice of appeal is dated on or after July 2, 2018, and (2) the notice of appeal is dated prior to July 2, 2018, and the appeal is perfected on or after August 15, 2018.

Practitioners with questions about the Second Department's new e-filing regulations can call the clerk's office at (718) 722-6324 or e-mail AD2-ClerksOffice@nycourts.gov. If you have a technical question about e-filing, contact the NYSCEF Resource Center at (646) 386-3033 or e-mail efile@nycourts.gov.

22 N.Y.C.R.R. § 202.50(b) Amended, Effective May 31, 2018

22 N.Y.C.R.R. § 202.50(b) has been amended, and now requires that the following provision be included in all divorce judgments:

> ORDERED AND ADJUDGED that pursuant to the parties' Settlement Agreement dated_____ (OR the court's decision after trial), all parties shall duly execute all documents necessary to formally transfer title to real estate or co-op shares to the Plaintiff (OR Defendant) as set forth in the parties' Settlement Agreement (OR the court's decision after trial), including, without limitation, an appropriate deed or other conveyance of title, and all other forms necessary to record such deed or other title documents (including the satisfaction or refinance of any mortgage if necessary) to convey ownership of the marital residence located at _____, no later than _____; (OR Not applicable); and it is further

Recent Cases

Assignment of Counsel When Deciding Whether Party Is Eligible For Court-Appointed Representation, Court Must Not Impute Income to a Party

Carney v. Carney, 160 A.D.3d 218 (4th Dep't 2018)

The divorced father brought an application to modify the order of supervised visitation to unsupervised. While in Family Court, the indigent father was provided with a court-appointed attorney. Two months later, the mother moved the case back to Supreme Court by an order to show cause, requesting that the court declare the father in contempt for violating court orders, incarcerate him, and

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eliminate his rights of visitation and communication with the children.

The father, a Ph.D. student with almost no income except for a few tutoring jobs, who had been living with his parents for 6.5 years, requested court-appointed counsel. The Supreme Court rejected his request, citing the father's "high level of skills" and the requirement that parties be "unable to retain counsel." The court reasoned that inability to retain counsel means "incapable" of earning the funds necessary to retain counsel, and a party with a Ph.D. was clearly capable of earning the required funds. Despite an assertion by the public defender's office that the father was eligible for assigned counsel, the court ordered a hearing to determine his eligibility, imputed $50,000 in income to the father, and declared him ineligible.

The appellate court reversed, ruling that the lower court abused its discretion in directing a hearing on the appellant's imputed income. The court ruled that "unable," refers to a party's current ability to pay for counsel, not a party's capability to earn the necessary funds**.** The appellate court noted the broad protections provided by the FCA, given that parties involved in certain family court proceedings "may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings." FCA § 261; *Bly v. Hoffman*, 114 A.D.3d 1275 (4th Dep't 2014). The court noted that unlike child support and maintenance statutes, where the court may consider imputing income to a parent or spouse, FCA 262(a) is silent on the issue of imputation of income, and therefore the legislature did not intend for the court to consider this factor. Therefore, the appellant was assigned counsel, and the case was remanded to a new Supreme Court judge.

Custody and Visitation

Fact-Finding Hearings Are Not Required in Contested Custody Cases When Extraordinary Circumstances Exist

Strobel v. Danielson, 159 A.D.3d 1287 (3d Dep't 2018)

After the father assaulted and fatally injured the mother, as their child watched, the maternal grandmother filed a petition for sole custody. Soon after, the paternal aunt filed a cross-petition for custody. Family Court awarded the grandmother temporary custody. After a home study of the aunt's residence was completed, the court awarded the aunt visitation. The father was then convicted and incarcerated for the mother's murder. Family Court, on consent of the grandmother and aunt, granted the grandmother sole custody and awarded visitation to the aunt.

Because the court did not hold a fact-finding hearing before making its ruling, the father contended that his due process rights had been violated. The appellate court rejected the argument, noting that while fact-finding hearings are "generally necessary" to determine contested custody, the right to such hearing is "not absolute." Under extraordinary circumstances, the court can submit a final custody ruling without conducting a fact-finding hearing. Here, the fact that the father was convicted for the murder of the child's mother was sufficient to establish extraordinary circumstances.

The appellate court noted that the Family Court should have obtained the father's consent before approving the parties' custody stipulation, but ruled that its failure to do so was harmless error.

Equitable Estoppel Prevents DNA Testing in Paternity Claim

Bernard S. v. Vanessa A.F., 160 A.D.3d 750 (2d Dep't 2018)

In April 2005, when Vanessa F. gave birth, no father was listed on the child's birth certificate. More than eight years later, Michael S. commenced a paternity proceeding against the mother to establish his paternity of the child, despite knowing immediately after the birth of the child that he may be the child's father. Soon after, a second man, Bernard S., asserted paternity and commenced a paternity proceeding. Bernard moved for leave to intervene on Michael's proceeding, seeking to equitably estop Michael's paternity petition and have his custody and visitation petition dismissed for lack of standing. Vanessa and the child's attorney supported Bernard's motion to dismiss Michael's petitions.

The boy had been raised by Bernard and Vanessa, and the child was held out publicly as Bernard's son. Evidence established that the boy had always lived with Bernard, even when Vanessa did not, that Bernard had been the boy's sole financial support, and that they had a strong father-son bond.

Michael, by contrast, was aware of Vanessa's pregnancy and knew that he might be the boy's biological father. Michael also knew that the child was being publicly presented as Bernard's son. Yet Michael waited more than eight years to file a paternity petition.

The Family Court held a hearing on the issue of equitable estoppel and whether genetic testing for paternity would serve the best interests of the child. The court ruled that genetic testing was not in the child's best interests, denied Michael's petitions, and dismissed his proceedings. Michael appealed, and the appellate court affirmed.

While parties in a paternity proceeding generally have the right to a DNA test, the Family Court can deny such a test by equitable estoppel. See FCA § 532[a]. The court can justifiably apply estoppel to preclude a man who claims to be a child's biological father from asserting

his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man. Here the Family Court ruled that the child's best interests were served by denying a DNA test and equitably estopping Michael from asserting his paternity claim. The appellate court agreed and denied Michael's appeal.

Parties' Frozen Embryo Agreement Must Be Strictly Construed

***Finkelstein v. Finkelstein*, 162 A.D. 3d 401 (1st Dep't 2018)**

The parties were married in 2011, and shortly thereafter signed a Consent Agreement in the hopes of conceiving a child by artificial insemination. A section of the Consent Agreement states that consent remains in effect unless one of the parties withdraws their consent. After many ongoing, unsuccessful attempts at IVF, the husband filed for divorce and asked for custody of the one remaining embryo. He then acquired a temporary restraining order against the wife to ensure that she could not use the last embryo, which relief was denied. The husband then signed a revocation of his consent to the use of any of his genetic material. The Supreme Court referred the matter to a special referee to determine equitable distribution of the embryo. The special referee awarded the embryo to the wife, reasoning that it was her last chance at becoming a biological parent. The special referee also stated that the husband had no right to revoke consent.

On appeal, the First Department reversed. The special referee interpreted the Consent Agreement contradictory to its plain meaning. The Consent Agreement stated that participation is voluntary and can be revoked at any time. It also stated that the court does not have authority to decide ownership of the embryo in the event of divorce. Since one party has withdrawn consent, the other party may not use the embryo for any purpose. Therefore, the appellate court awarded the embryo to the husband for the sole purpose of destroying it.

Child Support

Failure to Pay Child Support Does Not, in Itself, Amount to Willful Disregard of a Court Order

***Lisa D. Mosher v. Jody L. Woodcock*, 160 A.D.3d 1085 (3d Dep't 2018)**

A Family Court order required the father to pay the mother $277/week in child support. He failed to do so and was in arrears of $20,000. In 2017, following a hearing, the court found that the father's failure to abide by the order was willful and ordered him incarcerated for four days or until he paid $20,000, whichever occurs first. The father appealed, and the appellate court reversed.

The father lost his job due to his injury, where he suffered two strokes, which compromised both his memory and his ability to conduct heavy lifting. The father presented medical evidence to document his significant injuries and his total disability. He was receiving Social Security disability, food stamps, and government assistance to pay his heat.

While failure to pay child support constitutes *prima facie* evidence of willful violation pursuant to FCA § 454[3](a), the non-complying party must be given the opportunity to present evidence that he was unable to pay. At the hearing, the Family Court gave the father the opportunity to introduce evidence of his physical incapacity, but the court's ruling made no mention of the father's claims of physical incapacity, and focused entirely on his failure to pay. Consequently, the appellate court concluded that the lower court did not properly consider the incapacity claim. The appellate court reversed the Family Court's commitment order and remitted the case back to the lower court to fully address the father's incapacity claim.

In Altering Out-of-State Child Support Orders, FFCCSOA Preempts UIFSA

***Reynolds v. Evans*, 159 A.D.3d 1562 (4th Dep't 2018)**

The parties lived in New Jersey, had a child, then split up. The New Jersey court issued a child support order. Thereafter, the mother and child moved to Tennessee, and the father moved to New York. For enforcement, the New Jersey child support order was registered in New York. Several years later, the father filed a petition in New York for a downward modification of his child support obligation.

The Family Court dismissed his petition for lack of subject matter jurisdiction.

The Fourth Department reversed and remanded. The Family Court erred in dismissing the father's petition on jurisdictional grounds. The appellate court conceded that the father could not seek a modification of the New Jersey order under the Uniform Interstate Family Support Act (UIFSA), adopted in New York as FCA § 5B. Under UIFSA, the order must be registered in the state where the petition is filed and three additional conditions must be fulfilled: "(I) neither the child, nor the obligee nor the obligor resides in the issuing state; (ii) a petitioner who is a nonresident of this state seeks modification; and (iii) the respondent is subject to the personal jurisdiction of the tribunal of this state" (FCA § 5B [580–611]). Here, the order was registered in New York, and neither the child nor the obligee (father) nor the obligor (mother) resided in the issuing state of New Jersey, but the petitioner (father) was a resident of the state in which he was seeking modification (New York), and the respondent (mother) was not subject to the personal jurisdiction of New York.

The appellate court ruled that a petition that is permissible under the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) even if the petition is impermissible under the strict requirements laid out in the state's UIFSA. Under this federal statute, a New York

court can modify an out-of-state child support order if "the court has jurisdiction to make such a child support order" and "the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant" (28 U.S.C. § 1738B [e][1], [2][A]).

The father's petition is permissible under the FFCCSOA, given that neither the parties nor the child live in the issuing state of New Jersey, and therefore New Jersey does not have continuing, exclusive jurisdiction over the order.

15% Decrease in Income Does Not Guarantee Success in Petition for Support Modification

***Valverde v. Owens*, 160 A.D.3d 873 (2d Dep't 2018)**

The Family Court directed the father to pay $1,000/month in child support for the parties' two children. He failed to do so, and the mother filed a petition claiming willful violation. The father, in turn, filed a petition seeking a downward modification of his child support obligation. Following a hearing, the Family Court denied the father's petition for downward modification and ruled that he had willfully violated the court's order. The father appealed, and the appellate court affirmed.

FCA § 451(3)(a) gives the Family Court the power to decrease a parent's child support obligation upon a showing of a "substantial change in circumstances," and FCA § 451[3][b][ii] specifies that "a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted" can constitute a "substantial change." However, to qualify as an actionable "substantial change" worthy of a downward modification, the drop in income must be "involuntary," and the party must have made "diligent attempts to secure employment commensurate with his or her education, ability, and experience." FCA 451(3)(B)(ii).

Here, while the father's income may have declined and the decline may have been involuntary, the father failed to show that he had made diligent attempts to secure employment commensurate with his education, ability, and experience. Consequently, the Family Court properly denied the father's petition for downward modification.

Equitable Distribution

Wife's Stock Remained Her Separate Property, Despite Withdrawal of Funds to Pay Marital Expenses

***Giannuzzi v. Kearney*, 160 A.D.3d 1079 (3d Dep't 2018)**

Before the couple married, the wife inherited over $1 million in IBM stock from her grandfather. The husband argued that her stock, originally separate property, was transmuted into marital property because the couple filed joint tax returns and sold portions of the stock to pay for marital expenses. While the Supreme Court acknowledged that transmutation of separate property is possible, the court ruled that transmutation does not occur simply because the couple filed joint tax returns or because the spouses sold stock to pay for marital expenses.

The appellate court affirmed. The "mere reporting of income earned from the separate assets of one spouse on a joint return does not transmute the separate property to marital property." On a joint return, both spouses are required to report all of their income, whatever the source. The court reasoned that ruling that joint filing transmutes separate property "would force married persons to file separate income tax returns, and to pay higher income taxes, simply to protect the non-marital status of their separate property." *Id.* at 1081. The court distinguished income reported as dividends and/or capital gains from ordinary income reported from the sale of corporate stock, stating that even if corporate stock was separate property, once sold and reported as ordinary income, it would be considered marital property.

Likewise, using funds withdrawn from an account that is separate property to pay marital expenses does not magically morph the account into marital property. The wife's IBM stock remained separate property, even if withdrawals were made for marital expenses.

On another issue, the wife argued that the husband engaged in wasteful dissipation via the unauthorized sale of stock. The husband countered that the stock sales were merely an effort to diversify the portfolio, and each sale was done with the wife's knowledge. Here the Supreme Court found incredible the wife's claim that she was unaware of the stock sales not to be credible/incredible, and the appellate court deferred to the lower court's assessment.

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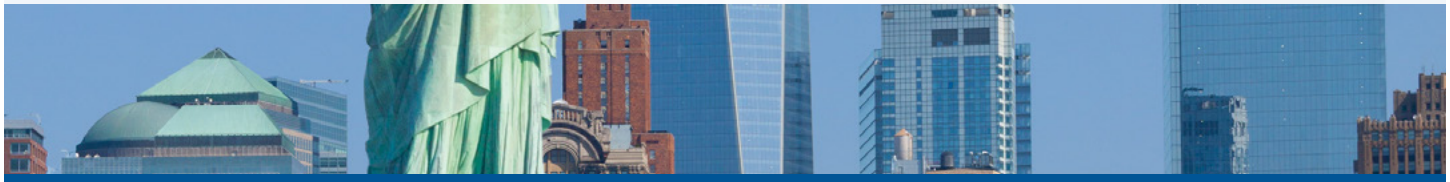

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