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Notes and Comments

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Calling It As It Is: *Holterman*—A Missed Opportunity

I have been a long time admirer of Thomas L. Friedman, the author and political columnist for the *New York Times.* He has the uncanny ability to reduce complex issues to understandable concepts, undertake a cogent analysis of the problem, and make recommendations that strike to the heart of a solution.

Unfortunately, the New York Court of Appeals in *Holterman v. Holterman*[1] had an opportunity to follow in the footsteps of Thomas L. Friedman, but failed to seize the opportunity to do so. *Carpe diem* was a concept that never found its way into the majority opinion authored by Judge Graffeo. At least the minority attempted to do so, and, although the dissent written by Judge R.S. Smith in which Judge Read concurred appeared to seize the moment, it too fell short of recommending that the *O'Brien* doctrine be eliminated in the State of New York. It too failed, as did the majority, to discuss whether the equal protection clause affords equal treatment to all marital litigants similarly situated, and prohibits the use of the legal fiction that enhanced earnings of professionals, but not other wage earners such as corporate executives, can be used to value exceptional wage earning ability.

New York is the only state that has adopted the enhanced earning doctrine which permits an asset that is non-saleable to be valued and distributed upon divorce. I recall cross-examining a forensic accountant in an enhanced earnings case and mistakenly asked, "What mythology did you employ to arrive at your conclusion?" The question, of course, was a Freudian slip but nonetheless was pregnant in concept. Do forensic accountants actually employ a methodology based upon reasonably accepted accounting principles? Or, do they use mythology to arrive at their ultimate conclusion that a thing of no value actually has a value . . . at least in a divorce court. In considering such conundrum, one cannot resist the conclusion that the adoption of a legal fiction by the court is no less egregious than the testimony of a forensic accountant who perpetuates such myth.

The facts in *Holterman* were not unlike those in *O'Brien*[2] with the exception that Dr. O'Brien left his wife shortly after acquiring his medical license, whereas in Dr. Holterman's case he remained married for 19 years before the divorce was granted. In *O'Brien* and *Holterman*, both wives worked to enable their husbands to finish medical school and obtain their medical licenses. However, Mrs. Holterman had the benefit of 19 years of marriage to enjoy the income stream generated from Dr. Holterman's efforts but Loretta O'Brien did not.

The holding by the majority under the financial facts and circumstances of this case is indeed troublesome. As the dissent correctly pointed out, after the payment of child support, maintenance, the monthly distributive award allotment and the counsel fee of $20,000, Dr. Holterman in the first year following the judgment of

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divorce would have but $16,389 left from gross income of $181,837 to meet his own living expenses, including food and shelter, and to attempt to maintain a standard of living that even approached his pre-separation enjoyments. Did the majority think that it was fair to do so? Apparently it did, gingerly suggesting that it was only necessary to consider the wife and children's pre-separation standard of living and not the husband's. What is even more remarkable, is that the majority failed to even discuss the cash flow problems of Dr. Holterman or more pointedly, failed to tell it like it is.

This failure by the majority to view the oppressive financial burden to Dr. Holterman, essentially ignoring his needs, rendered the result a penal sanction. These factors at least compelled the dissent to remark, "That impact is to impose a very significant burden on defendant—to require him, for several years, to pay to his ex-wife more than two-thirds of his net income, and even in the more distant future to pay her as much as he keeps for himself," and question the continued validity of the *O'Brien* doctrine. Yet, the majority failed to address whether *O'Brien* is indeed viable and whether it should be overruled. At one point in their decision, the majority stated ". . . we have adhered to the principle that both parties in a matrimonial action are entitled to fundamental fairness in the allocation of marital assets . . ." but also seemingly believe that such litigants are not entitled to fundamental fairness in the allocation of the income stream of the monied or working spouse, or the valuation of an asset that cannot be sold.

In discussing the fixation of child support, the majority concluded that it was obliged to hold that a deduction of a distributive award paid over a period of years from the licensed spouse's income for purposes of calculating child support is impermissible since there is no provision in the CSSA that permits such treatment. Although citing DRL § 240(1-b)(f) and acknowledging that the court had the right to disregard the statutory formula if the award was "unjust or inappropriate," it concluded that under the circumstances the award to Mrs. Holterman was neither unjust nor inappropriate. One must then ask what financial facts could ever justify the conclusion that an award was unjust or inappropriate, especially where almost all of the paying spouse's spendable income is consumed by the court's direction. The majority, in finding their award "just and appropriate," curtly noted "based on the aforementioned factors, including preservation, to the extent possible, of the children's standard of living, Supreme Court appropriately applied the statutory formula." There was no mention of the husband's standard of living, let alone as noted earlier, his ability to meet the bare necessities of life for food, shelter and medical expenses. If the crushing financial burdens of the husband were given consideration by the court, a different result, in fairness, should have been reached.

Holterman was further remarkable in that it was the first time in this writer's memory that a matrimonial decision contained a dissenting opinion, splitting the court by a 5-2 vote. The minority made a brave effort to tell it like it is, but fell short in recommending overruling *O'Brien*. It could have suggested that the court now reverse *O'Brien* but failed to do so. For what reason? Apparently, the dissent felt that the *O'Brien* doctrine should be retained in order to aid and compensate a spouse who helped a professional obtain a license and then is abandoned as soon as the license is obtained. However, this is not a sound reason to retain the *O'Brien* doctrine because any financial prejudice to such a spouse could be eliminated by a maintenance award over a specified period of time and render unnecessary the need to value a professional license or to compute the earnings it would afford to the recipient over his working life. If Dr. Holterman had been merely a W-2 employee without a license, earning $181,000 annually, no enhanced earning calculation could have been made. Why then should a professional's medical degree that culminates in obtaining a license be different? Treating spouses of professionals differently than spouses who are in the work force or hold undergraduate degrees still baffles this writer. No case has yet to hold that the commercial business of a spouse and his degree should be separately valued. Although the federal constitution grants equal protection under the law for all litigants, some litigants seem to be treated more equal than others. George Orwell spoke of such treatment in *Animal Farm* when he reflected "all animals are equal, but some animals are more equal than others." While such a premise might be acceptable in an animal farm, it certainly should not be acceptable in a matrimonial courtroom. That is why the dissent did not go far enough. To right the wrong of a spurned spouse, it would be far more logical, and not require the use of a legal fiction, to award maintenance in an amount and duration that would be "fair and appropriate" to both of the spouses, and at the same time, comply with the statutory formula of the CSSA, that permits the maintenance payment to be deducted from gross income.

There appears to be no logical basis to countenance the continuation of the enhanced earnings doctrine in New York. No other state has done so. New York stands alone in a quagmire of legal controversy. It is high time that the legislature acts!

Endnotes

1. No. 73, 2004 N.Y. LEXIS 1520 (June 10, 2004).
2. 66. N.Y.2d 576 (1985).

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Holterman v. Holterman: Distributive Award Payments Cannot Be Deducted from Payer's Income in Computing Child Support or *O'Brien* Strikes Again

By Charles McEvily

On June 10, 2004, the Court of Appeals rendered a lengthy decision upholding a trial court's refusal to adjust a husband's child support obligation by the amount that he must pay as a distributive award of his enhanced earning capacity. The real world result, according to the strident dissenting opinion, forces the non-custodial father, earning $183,000 a year as an emergency room physician, to live on $16,389 during the first year following entry of the judgment and to live on $36,389 the next year.

Case Summary

In *Holterman v. Holterman*,[1] the court was faced with a 19-year marriage involving a husband who was a third-year medical student at the time of marriage. While the husband completed his medical education, the wife contributed to the household income. Three years after marriage, the wife was diagnosed with chronic fatigue syndrome and fibromyalgia. The parties agreed that the wife should become a homemaker due, in part, to her condition. Two children were born during the marriage. By the year 2000, the husband was earning $181,837 and received a small additional stipend. The trial court awarded the wife 35% of the marital portion of the husband's enhanced earning capacity in the form of fifteen annual distributive award payments of $21,288, which included interest. In addition, the court awarded the wife maintenance of $35,000[2] a year for five years and then $20,000 per year for the remainder of her life and child support of $34,875 annually. Other marital assets were equally divided, with the wife receiving sole title to the marital residence which was encumbered with a mortgage and attendant carrying costs of about $26,500 per year. Out of the $91,163 in annual payments awarded to the wife, only the $35,000 in maintenance was tax deductible to the husband.

Neither the trial court nor the Appellate Division, Third Department adjusted the husband's child support obligation by the $21,288 granted to the wife as a distributive award. In fact, the issue does not appear to have been raised in the Appellate Division.[3]

On his appeal to the Court of Appeals, the husband argued that, *inter alia*, the trial court should have deducted his annual equitable distribution payments to the wife from his income and added the same amount to the wife's income in calculating child support. The husband cited the wife's expert in support of his argument. The expert had conceded during trial that his opinion, based only on intellectual honesty, was that requiring the husband to pay child support based on income that had been awarded to the wife would be to award the same income stream twice. The husband also cited the "double dipping" cases of *McSparron* and *Grunfeld*.[4]

Majority Opinion

The five judge majority concluded that the statutory language of the CSSA[5] does not permit any adjustment of child support due to a distributive award.

> [T]he CSSA does not provide for the deduction of distributive awards from income, whether based on enhanced earning capacity due to a professional license or otherwise. Nor does the CSSA authorize the inclusion of a distributive award as income to the parent receiving the award. This lack of inclusion in either the list of permissible statutory deductions or the definition of income is understandable because distributive awards "reflect, not income, but a property distribution," of the marital assets (Scheinkman, New York Law of Domestic Relations § 14.36, 2003 Pocket Part, at 131 [11 West's NY Prac Series 1996]). Indeed, the Domestic Relations Law, which defines a distributive award as "payments provided . . . in lieu of or to supplement, facilitate or effectuate the division or distribution of property," makes clear that distributive awards should not be treated as income for tax purposes (Domestic Relations Law § 236 [B] [1] [b] ["Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code"]). Had the Legislature intended to make distributive awards deductible from one parent's income and includable in the other's, it could easily have so provided. Simply put, it appears that the Legislature did

> not wish to have a child's lifestyle and support altered based on a distributive award. In sum, husband's proposed methodology conflicts with the plain language of the CSSA.[6]

While the majority stated that the express language of the CSSA does not permit the income reallocation requested by the husband, they also concluded that his argument would be

> unworkable in many instances because it fails to address situations where a licensed parent satisfies a distributive award obligation by making a lump sum cash payment or transfers a non-cash asset (such as interest in real property) rather than making periodic cash payments over a number of years. For instance, in this case, if a lump sum distributive payment had been ordered, under husband's methodology the payment would have been deducted from his income and applied to wife, offsetting all of husband's earnings or other income for that year and shifting the entire child support burden to wife, who is not employed. Wife then would necessarily have to meet the support obligation from the proceeds of her distributive award. Likewise, if a spouse satisfies a distributive award by transferring his or her title and equity in real property to the other spouse, the value of the one-time transfer would skew the transferor's income for CSSA purposes under the husband's proposal. The result in these scenarios would clearly be inequitable to the recipient spouse and the children.[7]

The majority opinion acknowledges the financial burden that the trial court's decision placed upon Dr. Holterman and opines that it agrees that the husband is correct that the reallocation of income is a factor for the trial court to consider under paragraph (f) of the CSSA.

> We agree with husband that a distributive award to be paid by one parent to the other pertains to the financial resources of the parties and therefore is an appropriate paragraph (f) factor that the trial court may consider when awarding child support. However, on this record, we cannot say that Supreme Court abused its discretion by failing to modify husband's child support obligation based on his distributive award obligation.[8]

The reader is left to wonder what factors in the record were not disclosed in the decision of the Court of Appeals which would warrant such a harsh financial result for Dr. Holterman.

Dissenting Opinion

Judge Smith, in a powerful and methodical dissent in which Judge Read concurs, rejects the majority's construction of the statute based upon the escape clause included in the CSSA, which requires the court to determine whether the non-custodial parent's pro-rata contribution for child support is "unjust or inappropriate."[9] Judge Smith finds it hard to imagine a circumstance where the result could be more unjust or inappropriate than Dr. Holterman's, since the doctor must now support himself on a mere $16,000 per year.

To emphasize the inequity that can occur under the majority's approach, dissenting Judge Smith presents examples of how the holding by the majority works a severe injustice. For example, assume that the sole source of income for a married couple is from a rental property, which was declared solely on the husband's tax return during the marriage, and the court equally distributes the rental property and income upon divorce. Under the majority decision, all of the rental income would be attributable to the husband and none to the wife, despite the fact that the husband has only half the income left post-divorce from which to pay child support.

This extreme example, argues Judge Smith, highlights the injustice of Dr. Holterman's position. Since 35% of the marital portion of his enhanced future income stream was awarded to his wife, Dr. Holterman is paying child support on income that is actually being received by his wife.

This anomaly results, argues Judge Smith, from the fictions created over the past 19 years from the seminal case of *O'Brien*.[10] The application of *O'Brien* in the *Holterman* case was performed by the wife's expert testifying that Dr. Holterman's income was comprised from two fictional computations. Out of his total income of $183,000, $69,000 related to earnings without a medical license and $114,000 flowed from the enhanced earnings from the medical license. The trial court awarded the wife 35% of the marital portion of the present value of that enhanced earning capacity. The marital portion of the enhanced earnings was 70% of $114,000, or $79,800. Thirty-five percent of this income, or $27,930, was awarded to the wife as a distributive award. Had it been awarded as maintenance, the CSSA statute would have required that amount to be deducted from Dr. Holterman's income in calculating his child support obligation. However, because it was awarded as a distributive award, Dr. Holterman lost the deduction. Thus, he must pay 25% of that now

lost income, or $6,982 (rounded to $7,000 by Judge Smith), as child support.

This grotesque distortion of logic, common sense and, perhaps, legislative intent is attributable to the fiction created in *O'Brien*. Judge Smith notes that New York stands alone among the fifty states of our Union in creating awards based upon *O'Brien* and opines it to be a failed experiment. The circuitous and frequently tortured computations involved in calculating the present value of future earnings and awarding that potential future income as a distributive award is analogous to rolling up a rug and then unrolling it again, according to Judge Smith. In effect, he observes, an expert was hired and paid to divide Dr. Holterman's income stream into two components and suggested awarding the wife 35% of each stream. Although such a roundabout approach seems to be an apparent waste of time, Judge Smith's real objection to the process resides in the inequity the *O'Brien* formula has on increasing Dr. Holterman's child support by $7,000 and ignoring the fact that 35% of one income stream has already been diverted to the wife. In addition, the rechanneling of income prevents Dr. Holterman from deducting the payment as maintenance under the CSSA formula. Lastly, the tax benefits of maintenance are impossible to achieve under an *O'Brien* reallocation of income because distributive awards are not deductible to Dr. Holterman.

The dissent notes that the inequity in the *Holterman* case is only the most recent example of how *O'Brien* creates unworkable and potentially unfair results in divorce cases. A distributive award based upon projected income from a particular professional practice is intrinsically dangerous because the future income may never materialize. Even Judge Meyer expressed concern about this in his concurring opinion in *O'Brien*. "[I]f the assumption as to career choice on which a distributable award payable over a number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hands) it should be possible for the court to revise the distributive award to conform to the fact. . . ."[11] The inequity of a false assumption is compounded by the majority decision in *Holterman*.

All these distortions convince Judge Smith that the other 49 states are correct in not following *O'Brien* and relying instead on awarding maintenance payments based upon actual future earnings.[12] While the dissent does not hold the trial court's decision wrong as a matter of law, Judge Smith would have remanded the case for consideration of the heavy financial burden placed on Dr. Holterman.

Practical Analysis

The majority holding in *Holterman* initially seems severe in failing to provide any relief to the titled spouse in divorce cases involving the distribution of enhanced earning capacities under the *O'Brien* rule. Dr. Holterman, had he known the result of his divorce, probably would have moved to a state that did not follow *O'Brien*.

However, the majority did recognize that the shifting of income, which is required under *O'Brien,* is a "paragraph (f)" factor to be considered in making adjustments to child support to prevent the amount of child support from being "unjust or inappropriate" under the CSSA. While acknowledging that a distributive award under *O'Brien* is a "paragraph (f)" factor under "the financial resources of the custodial and noncustodial parent," the majority goes on to hold that the "Supreme Court [did not] abuse its discretion by failing to modify husband's child support obligation based on his distributive award obligation."[13] The record that the court relies upon, however, is only the conclusive finding of the trial court that it "considered" both parents' incomes as well as the upper middle-class lifestyle that the children would have enjoyed had the parties not divorced. The children's frequent vacations, extravagant extra-curricular pursuits and private music lessons are explicitly cited as the trial court's findings justifying the failure to adjust the father's child support obligation.

This analysis demonstrates a major confirmation by the Court of Appeals that it wants to provide significant support to children, even if it imposes a crippling financial burden on the non-custodial parent.

One of the significant reasons for a non-titled spouse's (usually the wife) attorney to cite *Holterman* is that 100% of Dr. Holterman's $183,000 income was used to compute child support, despite the fact that he did not have 100% of his income left after the application of *O'Brien*. Wives' attorneys will also cite the case because it awarded 35% of the husband's available gross income as maintenance for five years and 20% of his income for the rest of the wife's life.

Attorneys representing a titled spouse (usually the husband) may rely on *Holterman* to argue that, under the best of circumstances, a wife should be awarded no more than 35% of an enhanced earning capacity. In *Holterman*, the wife's income contributed to the support of the family while the husband completed his medical education and the trial court found that she sacrificed her own career objectives to advance her husband's. Moreover, Mrs. Holterman's medical condition was found to be chronic. But, whatever relief a husband may find in the portion of *Holterman* which awarded the wife 35% of enhanced earnings rather than 50% is cold comfort compared to the reality of Dr. Holterman's trying to live on $16,000 in the first year following divorce.

While women's organizations may initially applaud the *Holterman* decision, a further analysis demonstrates

the danger of the holding to women who are the "titled" spouse. Suppose, for example, it was the wife who had achieved the enhanced earning capacity during the marriage. Upon divorce, she would pay the non-custodial husband $21,000 per year for 15 years as a distributive award. Under *Holterman*, she could not deduct the award from her income stream, nor add it to the non-custodial husband's income. Such an application of the rule would significantly reduce the income available for the children.

The analysis of the dissent in *Holterman* is clearly more sophisticated and accurate. Distributive awards of property *other* than enhanced earning capacity can be ignored in establishing child support. However, where future earnings are redistributed between a husband and a wife, they should be considered. The decision in *Holterman* clarifies that the Court of Appeals believes that it is the legislature, not the courts, that will have to address this issue. In addition, it appears that the legislature will also have to be the legal entity that must bury the *O'Brien* rule, which has promoted so much unnecessary and circuitous litigation in divorces.

Endnotes

1. No. 73, 2004 N.Y. LEXIS 1520 (June 10, 2004). Citations to the decision in this article refer to page numbers in the draft opinion, which can be found at <http://www.nycourts.gov/ctapps/decisions/jun04/73opn04.pdf>.
2. In order to avoid "double dipping," the marital portion (70%) of the total income stream attributable to the husband's medical degree ($114,000) or $79,800 was subtracted from Dr. Holterman's gross income of $183,000 leaving $101,200 of income deemed available for maintenance payments. The maintenance award of $35,000 constituted 34.6% of this income. After five years, maintenance payments are reduced to $20,000 for life.
3. *Holterman v. Holterman*, 307 A.D.2d 442, 762 N.Y.S.2d 152 (3d Dep't 2003.
4. *McSparron v. McSparron*, 87 N.Y.2d 275 (1995) and *Grunfeld v. Grunfeld*, 94 N.Y.2d 696 (2000).
5. Domestic Relations Law § 240 (1-b).
6. Decision, p. 7.
7. Decision, p. 7.
8. Decision, pp. 8-9.
9. "Under Domestic Relations Law § 240(1-b), the non-custodial parent must pay his or her 'pro-rata share of the basic child support obligation,' based on 'income' as defined in the statute, '[u]nless the court finds that the non-custodial parent's pro-rata share of the basic child support obligation is unjust or inappropriate. . . .' Thus, the statute expressly authorizes departure from the statutorily calculated 'pro-rata share' where a failure to depart would produce an 'unjust or inappropriate' result. The statute lists ten 'factors' to be considered in making a departure, of which the first is: '[t]he financial resources of the custodial and non-custodial parent, and those of the child.' Where an income-producing asset changes hands as part of the divorce, the 'financial resources' of one party are greater, and those of the other are less, than the statutory formula assumes. If this is not an instance where the parties' 'financial resources' render the 'pro-rata share' as calculated by statute 'unjust or inappropriate' I find it hard to imagine what such a case would be." Decision, p. 13.
10. 66 N.Y.2d 576, 588, 498 N.Y.S.2d 743.
11. 66 N.Y.2d at 600, 498 N.Y.S.2d at 751.
12. "In the other 49 states, a professional license is not itself an asset subject to equitable distribution, although in many states the enhanced earning capacity reflected by a license may be considered in awarding alimony or maintenance, or in distributing other assets (see *e.g. Downs v. Downs*, 154 Vt 161, 574 A2d 156 [Vt 1990]; *In re Marriage of Olar*, 747 P2d 676, 680-681 [Colo 1987] [en banc]; *Drapek v. Drapek*, 399 Mass 240, 246, 503 NE2d 946, 950 [1987]; *Mahoney v. Mahoney*, 91 NJ 488, 501-505, 453 A2d 527, 534-536 [1982]; *DeWitt v. DeWitt*, 98 Wis2d 44, 60-61, 296 NW2d 761, 769 [1980])." Decision, p.12.
13. Decision, p. 9.

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Egregious Marital Misconduct

"I Know It When I See It . . ."

By Harvey G. Landau

In 1964, Justice Potter Stewart, tried to explain "hard-core pornography," or what is obscene by saying "I shall not today attempt further to define the kinds of material I understand to be embraced . . . I know it when I see it . . ." This well-known quote may also be applicable to a judge attempting to define or recognize when a spouse's acts constitute egregious marital misconduct.

The general rule in New York is that marital fault should not be a factor in the equitable distribution of marital assets. The cases most often cited for this proposition are *O'Brien* and *Blickstein*, which held that DRL § 236(B)(5)(b) is a basis for the courts to consider [egregious] marital conduct with respect to awards of equitable distribution, the so-called catch-all provision "any other factor, which may be just and proper."[1]

As the court observed in *Blickstein*, marital fault may be difficult to evaluate and may be traceable to the conduct of both parties. The general consensus of both the bench and bar is that if the facts of a case do not shock the conscience of the court, it is not egregious marital misconduct. Thus the standard is very high, and usually applicable only in the most extreme acts of wrongdoing by a spouse. An example is *Wenzel v. Wenzel*, which was decided prior to *Blickstein* in where the husband, without provocation, attacked the wife with a knife and caused her serious injuries. The husband was convicted of attempted murder and sentenced to prison.[2]

It is submitted that more recently, there is evolving a series of cases to suggest that egregious marital misconduct should be analyzed in the context in which it arises or the individual attributes of the person responsible for it.[3] Simply put, when determining whether conduct is egregious "one size does not fit all."

Heinous actions come in great variety, and conduct constituting, *inter alia*, a cold, calculated and depraved indifference to the physical welfare of a spouse—actions that are product of a subtle and educated mind—may be as morally offensive and as deserving of censure as overt, thuggish brutality. In the words of relevant case law, it certainly may be "so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship," such as to shock the conscience of the court.[4]

In the case of *Havell v. Islam*, the court affirmed the trial opinion of the Hon. Jacqueline Silbermann (Justice Silbermann is now the statewide administrative judge for matrimonial matters).[5] In *Havell*, the trial court awarded the wife 90% of the marital assets, which were substantial in value. There was a specific violent episode where the husband brutally attacked the wife with a barbell causing her to lose consciousness and suffer significant physical injury. Following the assault, the wife suffered, among other injuries, pain, dizziness, headaches, post-traumatic stress disorder and neurological damage.

"The general consensus of both the bench and bar is that if the facts of a case do not shock the conscience of the court, it is not egregious marital misconduct."

Justice Silbermann posed the question in her decision as follows:

> In considering the equitable distribution of marital property, may the court properly admit evidence at trial of a pattern of domestic violence in a marriage of long duration, pursuant to DRL § 236(B)(5)(b)(13), which directs the court to consider "any other factor which the court shall expressly find to be just and proper" and the standards set forth in *O'Brien*, *supra* and *Blickstein*, *supra*? For the reasons more fully set forth below, the court answers the question in the affirmative.

The court then finds and lists 21 incidents of wrongful conduct by the husband as testified by the wife. There was one specific violent beating, and at least one other physical assault, much less severe in nature, there was, however, regular verbal assaultive or inappropriate sexual behavior by the husband, sometimes in the presence of their children. The court further held that the case presented a fact pattern that raised a question whether to expand the definition of egregious misconduct to include a **pattern** of physical or emotional abuse during a lengthy marriage **that would collectively constitute sufficient fault to impact on the equitable distribution or financial issues of the case**.

Justice Silbermann concluded that a pattern of domestic violence properly proven by competent testimony and evidence is a just and proper factor to be considered by the court in connection with the equitable distribution of marital property. In doing so, the court made reference to a New Jersey court opinion in *D'Arc v. D'Arc*.[6]

> The obligation of the court is to implement the purpose of law, and not to mechanically apply established principles of law, even when they compel an absurd result.

In *McCann v. McCann*,[7] which was cited with the approval of the Appellate Division, First Department in *Havell*, the trial Judge David B. Saxe (now an associate justice of the Appellate Division, First Department) held that lacking in *Blickstein* was a standard beyond the subjective, as to how a court was to determine whether a spouse's action is such that it shocks the conscience of the court. While courts recognize that the conduct has

"Domestic violence affects as many as six million women, children and men in the United States each year."

to be such that indicate a blatant disregard of the marital relationship, the question becomes how to differentiate between a lesser standard required to sustain a divorce on the ground of cruelty. Although in *McCann* Justice Saxe decided that the husband's misrepresentation as to his ability to have children did not constitute egregious marital misconduct, the court adopted a definition of such conduct as follows:

> Similarly, with respect to the concept of egregious behavior, marital fault may also be understood as a voluntary act in the context of the marriage that causes some social harm. The difference between ordinary marital fault and egregious marital fault, however, concerns the relevant importance of the particular social value involved. The more highly the preservation of an interest is valued by society, the more likely it is the offensive conduct in question will be deemed egregious.
>
> A judge, therefore, in determining whether any particular conduct amounts to egregious marital fault must decide whether the social interest comprised by the offending spouse's conduct is so detrimental that the court is compelled to punish the offending spouse by effecting the equitable distribution of the marital assets.

The court in *Wenzel* extended the *Blickstein* opinion to include a finding that the spouse's misconduct had an adverse physical or psychological effect on the other spouse so as to interfere with the innocent spouse's ability to be, or become, self-supporting. The Appellate Division, First Department in *Havell*, and Justice Saxe in *McCann* declined to follow the approach in *Wenzel*, that there should be a two-step finding of fault resulting in both an adverse physical or psychological condition, and which interferes with the innocent spouse being self-supporting.

There is also a developing distinction between marital fault of a physical or emotional nature, and one that relates to a spouse's economic wrongdoing, so-called egregious dissipation of marital assets. In *Basiel v. Basiel*, the distribution of 65% to 35% in favor of the wife was affirmed, where the record established that the husband wrongfully dissipated marital assets in long-standing adulterous affairs.[8] In *Maharam v. Maharam*, evidence established that the husband had secreted and squandered monies on luxury items and engaged in adulterous affairs.[9] The Appellate Division modified the trial court's award to increase the *pro rata* allocation from 55% to 65% in the wife's favor (in a marital estate valued at almost $3.5 million). In *Conceicao v. Conceicao*, the court affirmed a 70% to 30% distribution of marital property in favor of the wife where the record established that the husband incurred substantial gambling losses and secreted marital funds.[10]

It is submitted that the developing case law suggests that the courts, in a long-term marriage, will become more receptive to finding that an important social value of our society is that a pattern of domestic violence constitutes egregious marital misconduct. In short-term marriages, egregious misconduct may still require the more traditional approach of either a substantial dissipation of marital assets or extreme violent acts or murder-for-hire schemes that have been recognized by courts in various jurisdictions as constituting egregious marital misconduct.[11]

Domestic violence affects as many as six million women, children and men in the United States each year. Much work has been done in New York State and across the country in the last 25 years to educate the public regarding the nature of domestic violence. Domestic violence is a pattern of coercive, aggressive, often violent, and controlling behaviors which occur between people who have, or have had, a relationship with one another. It includes physical, sexual, economic, psychological and emotional abuse. It often escalates in frequency and severity over time. Victims come from every social and economic background and community.

The goal of this abuse is for one person to achieve and maintain power and control over the other.[12]

The establishment of egregious marital misconduct should not create an almost insurmountable burden on an abused spouse—usually, but not always the wife—to obtain compensatory relief from an abusive spouse—usually, but not always the husband. The standard opined by Justices Silbermann and Saxe, in addition to awarding a greater percentage of assets to the innocent spouse, may also be financial recompense to such a spouse and children who have been subjected to long-term domestic violence, both physical and nonphysical in nature.[13] It is to be kept in mind after all, that a matrimonial judge sits as both a court of law and equity.

Endnotes

1. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985); *Blickstein v. Blickstein*, 99 A.D.2d 287 *app. dism.*, 62 N.Y.2d 576 (2d Dep't 1984). (*See also* Scheinkman, 1999 Practice Commentary, McKinney's Cons Law of NY, Book 14, Domestic Relations Law 437-440).
2. *Wenzel v. Wenzel*, 122 Misc .2d 1001 (Sup. Ct., Suff. Co. 1984); *See also Orofino v. Orofino*, 215 A.D.2d 997 (3d Dep't 1995).
3. As an example, a physician-spouse not only knowingly breaches the physician's oath and the bounds of decency in engaging in unprotected sex with a spouse, while knowing himself or herself to be infected with a venereal disease, but also that the same is a violation of the Public Health Law. *See* PHL § 2307, which states: "A person, who knowing himself or herself to be infected with an infectious venereal disease has sexual intercourse with another shall be guilty of a misdemeanor." *Maharam v. Maharam*, 123 A.D.2d 165, 170 (1st Dep't 1986).
4. *Blickstein*, *supra*.; *Kellerman v. Kellerman*, 187 A.D.2d 906 (3d Dep't 1992).
5. *Havell v. Islam*, 186 Misc. 2d 276 (Sup. Ct., N.Y. Co. 2000), *aff'd*, 301 A.D.2d 399 (1st Dep't 2002).
6. *D'Arc v. D'Arc*, 164 N.J. Super 226, *affirm*., 175 N.J. Super 598.
7. *McCann v. McCann*, 156 Misc. 2d 540 (Sup. Ct., N.Y. Co. 1990).
8. *Basiel v. Basiel*, 199 A.D.2d 649 (2d Dep't 1993).
9. *Maharam v. Maharam*, 245 A.D.2d 94 (1st Dep't 1997).
10. *Conceicao v. Conceicao*, 203 A.D.2d 877 (3d Dep't 1994).
11. *Stover v. Stover*, 696 S.W.2d 750 (ARK., 1986); *Brabec v. Brabec*, 510 N.W.2d 762 (Wis. Ct. App. 1993); Domestic Relations Law § 236(B)(5)(11).
12. Unpublished report, Karla M. DiGirolamo, CEO Unity House of Troy, Inc., qualified as an expert in domestic violence issues and policy.
13. Lenore J. Weitzman and Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference*? 14 Fam. L.Q. 141 (1980); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Fam. L.Q. 351 (1987); Peter Nash Swisher, *The ALI Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse*? 8 Duke J. Of Gender L. & Pol'y 213.

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Child Support and "Double Dipping": A Look at Past Trends and the Court of Appeals' Recent Ruling in *Holterman v. Holterman*

By Elena L. Greenberg and Florence M. Fass

The case law of the past two decades has firmly established the prohibition of "double dipping" (i.e., the court-ordered payment of more than one financial obligation—such as a distributive award and maintenance—from the same source)[1] in establishing maintenance awards when an enhanced earning capacity is also equitably distributed as an asset.

Ten years ago, the Court of Appeals' decision in *O'Brien v. O'Brien*[2] held that a husband's medical license constituted "marital property" within the meaning of Domestic Relations Law § 236 (B)(1)(C)[3] and, as a result, was subject to equitable distribution.[4] The Court of Appeals thereafter decided *McSparron v. McSparron*,[5] which upheld *O'Brien*[6] and agreed with the "commonsense approach that recognizes the ongoing independent vitality that a professional license may have."[7] McSparron rejected the "merger doctrine"[8] (the theory that the license "merges" with, and has no separate value apart from, a professional practice)[9] a doctrine which was first introduced in *Marcus v. Marcus*.[10]

While qualifying the license as an "active asset" (to be valued as of the day of commencement),[11] *McSparron*[12] cautioned the trial courts to "be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses,"[13] effectively prohibiting "double dipping" as we have come to know it. This rule against "double dipping," where maintenance was concerned, was again reinforced by the Court of Appeals in *Grunfeld v. Grunfeld*.[14]

The first case dealing with the issue of "double dipping" as it applies to *child support* was *Rochelle G. v. Harold M. G.*[15] In that case, Justice Friedman of the Supreme Court, New York County, opined that the "double dipping" rule did not apply to child support awards. Noting the absence of language on the matter from the Court of Appeals and the statutes, Justice Friedman wrote, "this court believes that the Court of Appeals was carefully using terms of art in its [*McSparron*] decision and the omission of reference to child support was intentional and not . . . a mere oversight."[16]

The issue was again raised by Justice Ross of the Supreme Court, Nassau County, in his opinion in *Goodman v. Goodman*.[17] Judge Ross' *Goodman* decision nurtured a creative and insightful interpretation of "income" within the meaning of Domestic Relations Law § 240 (1-b)(b)(5).[18] Noting that fringe benefits provided as part of compensation for employment are recognized as income, Justice Ross reasoned: "[I]t is only logical that a distributive award of enhanced earnings, which is a result of the compensation from that same employment, be similarly treated as 'income' to the receiving spouse, for purposes of child support."[19] Accordingly, monies received in the equitable distribution of enhanced earnings should be included as income for the non-titled spouse's share of the combined parental child support obligation, and monies paid by the title-holding spouse were to be subtracted from his income before the award of maintenance and child support.[20]

Until recently, none of the decisions at the Appellate Division have spoken directly on the issue.[21] Both the Second Department in *Sodaro v. Sodaro*,[22] and the Third Department in *Douglas v. Douglas*,[23] *rejected* the concept that "double dipping" also applied to child support, but offered little support for that conclusion. The decision that followed *Goodman*[24] in the Second Department, *Murphy v. Murphy*[25] and the Third Department's holding in *Holterman v. Holterman*,[26] also failed to adequately address the "double dipping" arguments raised in *Goodman*.[27]

The *Holterman* case involved a 19-year marriage during which the defendant-husband finished his last year of medical school, and thereafter obtained his medical license. By mutual agreement during the marriage, the plaintiff-wife failed to pursue an independent career due to her chronic health problems and the birth of the parties' two children.

At trial, the marital portion of the defendant's enhanced earnings (i.e., his medical license) was valued at $612,000 based upon the defendant's date of commencement income of $181,837. The plaintiff was awarded 35% of that marital portion (i.e., $214,200), which was to be paid over a 15-year period (measured from the date of commencement) at an annual interest rate of 6%. The annual payments to the plaintiff of her distributive share of the defendant's enhanced earnings totaled $21,288.[28]

In addition, the plaintiff was awarded lifetime maintenance of $35,000 per year for the first five years, and $20,000 per year thereafter.[29]

The plaintiff was also awarded $34,867.65 in child support for the parties' two children based upon the defendant's gross income of $181,837 (which had also been used to value his license), less allowable deductions under the Child Support Standards Act (CSSA), (which deductions included the maintenance awarded to plaintiff).[30]

In sum, the defendant was directed to pay to the plaintiff $91,163 per year, which amount thereafter varied based upon the terms of the maintenance award and the children's emancipation dates.

"Absent more definitive guidance from our higher courts, or a much-needed legislative amendment to the CSSA, the titled-payor spouse will surely suffer the burden of the Court of Appeals' restrictive interpretation of the 'double dipping' doctrine as it applies to child support awards."

On appeal, in *Holterman v. Holterman*,[31] the Court of Appeals looked squarely at the issue of "double dipping" as it applied to child support payments. In doing so, the Court determined that no "double dipping" occurs when the same income stream is distributed as an asset, and is also used in calculating the titled-spouse's child support obligations.[32]

In affirming the Third Department's holding, the majority opinion of the Court of Appeals addressed the "plain meaning" of the CSSA,[33] which provides eight categories of deductions from income when calculating combined parental income for purposes of the CSSA. Those eight deductions include: (1) unreimbursed business expenses; (2) alimony or maintenance actually paid to a non-party spouse; (3) alimony or maintenance paid to a spouse in the pending action; (4) child support obligation actually paid for a non-party child; (5) public assistance; (6) supplemental security income; (7) New York City or Yonkers taxes actually paid; and (8) FICA taxes.[34] While the list of deductions specifically includes maintenance and FICA taxes, the Court specifically noted that there is no statutory deduction for distributive award payments.[35]

Additionally, the Court's opinion noted that the receipt of distributive award payments is also not a category of "income" within the meaning of the CSSA.[36]

However, Justice R.S. Smith, in the Court of Appeals' sole dissenting opinion, (in which Judge Read concurred), noted that the trial court's total award to the plaintiff resulted in the defendant being required to pay:

> . . . more that two-thirds of his after-tax income to plaintiff for the first four years; some sixty percent in the fifth year; about half of it in years six through ten; and nearly a third of it for five years after that. It is not until fifteen years after the award that defendant's obligations (at that point consisting only of maintenance) diminish to something like twelve percent of his income (calculating both the income and the obligations on an after-tax basis).[37]

Significantly, notwithstanding the magnitude of the award to the plaintiff in *Holterman*, neither the trial court, the Appellate Division, Third Department, nor the majority opinion of the Court of Appeals found the award to be "unjust or inappropriate" under the CSSA, in that case.[38]

The issue thus becomes, under what circumstances will our trial courts find such awards "unjust or inappropriate"? Absent more definitive guidance from our higher courts, or a much-needed legislative amendment to the CSSA, the titled-payor spouse will surely suffer the burden of the Court of Appeals' restrictive interpretation of the "double dipping" doctrine as it applies to child support awards.

Endnotes

1. *Grunfeld v. Grunfeld*, 255 A.D.2d 12, 14, 688 N.Y.S.2d 77, 80 (N.Y.A.D. 1st Dep't 1999). Although the lower courts note the difference between "double counting" and "double dipping," where "double counting" refers to the "use of the same stream of income to calculate the value of more than one asset," the New York Court of Appeals uses the terms interchangeably.
2. 66 N.Y.2d 576, 489 N.Y.2d 712, 498 N.Y.S.2d 743 (1985).
3. N.Y. Dom. Rel. Law § 236 (*McKinney's* 1999).
4. *O'Brien* at 580–581.
5. 87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265 (1995).
6. *Supra* note 2.
7. *Id.* at 285.
8. *Id.* at 282.
9. *Id.*

10. 135 A.D.2d 216, 137 A.D.2d 131, 525 N.Y.S.2d 238 (N.Y.S.D. 2d Dep't 1988), *abrogated by McSparron v. McSparron*, 87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265 (1995).
11. *McSparron* at 287.
12. *Supra* note 5.
13. *Id.* at 286.
14. 94 N.Y.2d 696, 703, 731 N.E.2d 142, 145, 709 N.Y.S.2d 486, 489 (2000).
15. 170 Misc. 2d 808, 820, 649 N.Y.S.2d 632 (Sup. Ct. 1996).
16. *Id.*
17. 195 Misc.2d 204, 755 N.Y.S.2d 822 (Sup. Ct. 2003).
18. N.Y. Dom. Rel. Law § 240 (*McKinney's* 1999).
19. *Goodman* at 208.
20. *Id.* at 210.
21. However, several articles have dealt with the issue. *See* Anthony J. Falanga and Charlene Malone, *Time to Revisit Equitable Distribution of Prospective Income Streams?*, N.Y.L.J., July 7, 2003, p. 4, col. 4; Elliot D. Samuelson, *Should Enhanced Earnings Impact in the Award of Child Support?*, 35 NYSBA Family L. Rev. 1, 1 (2003).
22. *Sodaro v. Sodaro,* 286 A.D.2d 434, 729 N.Y.S.2d 731 (N.Y.A.D. 2d Dep't 2001).
23. *Douglas v. Douglas,* 281 A.D.2d 709, 722 N.Y.S.2d 87 (N.Y.A.D. 3d Dep't 2001). *See* fn. 1.
24. *Supra* note 17.
25. *Murphy v. Murphy,* 6 A.D.3d 678, 775 N.Y.S.2d 370 (N.Y.A.D. 2d Dep't 2004).
26. 307 A.D.2d 442, 762 N.Y.S.2d 152 (N.Y.A.D. 3d Dep't 2003).
27. *Supra* note 17.
28. No. 73, Slip Op. 04786, 2004 WL 126742, at *1 (N.Y. June 10, 2004). (Decision is uncorrected and subject to revision before publication in the New York reports.)
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at *3.
33. *Id.* at *4.
34. N.Y. Dom. Rel. Law § 240(1-b) (*McKinney's* 1999).
35. *Holterman,* 2004 WL 126742, at *4.
36. *Id.*
37. *Id.* at *7.
38. *Id.* at *6.

With special thanks to Kristi M. Guigliano-Breloff.

Something Smells Like Marital Waste

By Peter J. Galasso

Reminded of Justice Potter Stewart's now and forever famous definition of pornography,[1] ". . . I know it when I see it . . .," I am of the opinion that beyond the obvious, judges tend to find marital waste only when they smell it. With that in mind, this article is intended as a quick refresher on the confounding world of marital waste.[2]

Frequently raised to justify a favorable adjustment to the innocent spouse's equitable share of the marital estate, the incongruencies promulgated on the topic of marital waste by our courts leave the practitioner routinely scratching his head. Below are some brain teasers to test your marital waste IQ.

Scenario 1:

Luke loved to go fishing with his buddies. Every weekend during the summer he would cruise the Sound for hungry, overly anxious fish willing to be lured onto a hook. After a day of fishing, he could usually be found at the Marina restaurant, treating his less financially fortunate friends to a beer or two and even an occasional dinner.

All told, after five years of his passion was quantified at trial by his very spiteful wife, she urged an adjustment to her equitable distribution equivalent to one-half of the $80,000 her husband allegedly wasted on fishing, an activity she had little interest in participating.

Scenario 2:

Mike charted his business success too often on the shoestring of his shady broker deals. He earned enough, however, to purchase a palatial home in upper Westchester, which unfortunately did little to rekindle his relationship with his wife. After enduring several years of acrimony, which was balanced out by his endearing relationship with his children, his wife's habitual vituperations became too much for Mike to stomach and he left.

During the pendency of his divorce, Mike was arrested for violating various banking laws. He later pled guilty to a felony that revoked his license to sell securities. Although the underlying conduct that gave rise to the felony conviction occurred at a time when he and his wife were living together, his wife knew nothing of her husband's business dealings. While having admittedly benefited from her husband's transgressions, Mike's wife nevertheless sought to share in the value pre-conviction of Mike's now-revoked Series 7 License.

Scenario 3:

Lorraine liked to go to Atlantic City once a month to gamble. Gambling was merely an extension of her courtroom mentality, where her high-wire risk-taking had led to a $5 million marital estate. Usually, Lorraine broke even; but over the course of her 12-year marriage, she reported losses of nearly $100,000. Her husband calculated a number more in the neighborhood of $200,000, for which he sought a credit, decrying his wife's gambling as marital waste.

Scenario 4:

Jake delivered a fatal blow to the parties' already frail marital relationship when he did the inconceivable; he stole from his wife's family business. Despite an annual income of over a quarter of a million dollars, Jake duplicitiously diverted clients and other family business to his brother's competing business. Although Jake insisted that he had not personally profited, the trail of diverted profit found its way into six figures. It was therefore hardly a shock that after his betrayal was discovered, Jake was immediately fired. The surprise came when his wife added insult to injury by demanding the lion's share of the marital estate to make up for Jake's wrongdoing.

I. Wasteful Dissipation

When determining the equitable distribution of marital property, the court is to consider, among other factors, any wasteful dissipation of assets by either spouse. DRL § 236 (B)(5)(d)(11) (hereinafter "Factor 11"). "Wasteful dissipation" is a term of art that has never been defined with any real precision, however. It can apparently consist of gambling[3] and poor business judgment,[4] as well as other forms of economic misconduct.[5] Given the absence of appellate leadership in establishing a reliable equation to which we practitioners can refer, what may or may not constitute marital waste remains as much a mystery as how that waste will ultimately affect equitable distribution.

A. Intent

In *Andrea v. Andrea*,[6] the trial court took a stab at coming up with a coherent test under Factor 11 and set forth eleven factors to be considered in determining whether or not a spouse has dissipated marital assets:

a. the intent involved in the commission of the act;

b. concealment of a wasting of assets (*Lenczycki v. Lenczycki,* 152 A.D.2d 621, 624, 543 N.Y.S.2d 724 (2d Dep't 1989);

c. use of the asset by one spouse only or by both spouses for marital purposes (*Seeley v. Seeley,* 135 A.D.2d 703, 522 N.Y.S.2d 603 (2d Dep't 1987));

d. joint dissipation of property regardless of purpose (*id*.);

e. time of commission of act, i.e., before or after commencement of divorce action (*Levine v. Levine,* N.Y.L.J., June 7, 1988);

f. access to asset by one or both parties (*id*.);

g. existence of asset at time of distribution (*id*.);

h. whether act constitutes waste in hindsight only *(Willis v. Willis*, 107 A.D.2d 867, 484 N.Y.S.2d 309 (3d Dep't 1985));

i. whether "guilty" party obtained a profit by the act;

j. failure to support the family due to the alleged wasteful dissipation;

k. relationship between the alleged waste and parties' overall financial status. (Scheinkman; *Practice Commentary*, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law, C236B:25, p. 285).

The weight any one of the *Andrea* factors may be due is a veritable unknown. In *Andrea,* the husband was arrested and convicted of grand larceny, and, as a result, lost his police pension. Because there was no showing that the husband **intended** to deprive his wife of an interest in his pension, the husband's felony conviction was not considered marital waste. Hence, intent appears to be dispositive; or is it?

B. Gambling

Some examples of wasteful dissipation are seemingly easy to identify. Gambling appears to be a vice under Factor 11 where only one's winnings are shared with a spouse. Even though the gambler never intends to lose, the losses are for the unlucky spouse to bear alone.

In *Baker v. Baker,*[7] the court held that although plaintiff's gambling debts, which the wife satisfied with marital funds, had no relationship to the value of the real property left to be equitably divided, it was properly considered by the Supreme Court in fashioning its equitable distribution award. The intent to gamble is effectively treated as the legal equivalent of an intent to deprive one's spouse of those marital assets used to cover gambling losses. Not surprisingly, when the gambling produces a winning lottery ticket, Factor 11 never enters the discussion.[8]

While it would appear logical to quantify actual losses to particularize the marital funds that were wasted on this allegedly bad habit, not every loss has a trail. In such cases, the outcome appears to spring from pure judicial discretion. For example, in *Conceicao v. Conceicao*,[9] without any mathematical justification, the court awarded the wife 70% of the marital estate as an offset for her husband's gambling losses.

C. Improvident or Unaffordable Activities

What activities constitute forbidden marital waste appears to be evolving. Can any marital excess potentially justify a Factor 11 adjustment? For example, because activities such as snowmobiling and flying were enjoyed by both spouses and only seemed improvident in hindsight, the court, in *Willis v. Willis,*[10] found that those expenditures did not warrant a finding of wasteful dissipation. Had the husband in *Willis v. Willis* not brought his wife snowmobiling, would the court have reached a different conclusion? What if, like Luke, a spouse overspends on an activity in which the other spouse does not engage? Would Luke's wife's disinterest transform a lifestyle choice into a dissipation issue? What if Luke's wife objected to his overspending? Without a hard and fast rule, these variations on the original fact pattern become fodder for a law school exam and a potential headache for Luke.

D. Poor Judgment

A potential dissipater's intent is obviously not the only litmus test. A finding of marital waste can also turn on issues such as what constitutes "poor business judgment" or a "reasonable investment risk." Factor 11's business judgment rule, however, is rarely without controversy. For example, in *Fielder v. Fielder,*[11] the husband's questionable tax shelters were treated as marital waste even though there was no evidence of fraud, misconduct, or bad faith. Conversely, in *Grunfeld v. Grunfeld*,[12] the Appellate Division held that taking reasonable investment risks that fail does not constitute wasteful dissipation, where the husband's losses incurred in trading commodities resulted from his good faith belief in the profitability of the challenged transactions.

Good faith often gives way to a poor sense of timing. In *Maharam v. Maharam,*[13] the husband invested a large portion of the marital estate *after* commencement but before trial into a real estate venture and lost it all. There it was the *timing* of the investment that apparently led the court to find wasteful dissipation, not whether the husband exercised poor judgment in the investment or whether the investment was a reasonable one.

The question of dissipation appears to run the business judgment gamut between the unlucky and the reckless. In *Murray v. Murray*,[14] Justice Leonard Austin refused to adjust the value of the husband's business based on a lawsuit that could have a potentially catastrophic impact on that value. Because it was the husband who recklessly failed to maintain insurance coverage against potential accident liability, the court, citing Factor 11, held that the "resulting financial sword of Damocles which [hung] over plaintiff's head was not of her doing [and therefore] she would not be made to suffer for it."

In *Murray,* the court distinguished the Court of Appeals' decision in *Hartog v. Hartog,*[15] noting that the losses in *Hartog* resulted from the unpredictability of the real estate market and could only be discerned in hindsight, while, in *Murray*, the husband's reckless disregard of the risks connected with running a building without liability insurance could never be justified.

Because hindsight is 20-20, courts generally employ the proverbial smell test in determining whether to make a waste adjustment. For example, where commercial property has been completely mismanaged[16] to the point of it appearing to have been sabotaged, the courts are not reluctant to adjust the parties' equitable distribution accordingly. Similarly, where a husband deliberately refused to address housing code violations[17] that led to diminution in the value of the parties' commercial property and where a husband's intentional default on certain notes led to an auction and loss on heavy equipment,[18] judges were quick to impose a Factor 11 adjustment.

However, when it came to penalizing an errant spouse for refusing to refinance the mortgage on the marital residence at a lower rate, in *Graves v. Graves*,[19] the court refused to act, effectively applying a different standard to relating to personal and residential property decisions as opposed to those that affect the value of commercial property. For example, in *Corbett v. Corbett*,[20] the husband failed to apply early enough to get a disability pension from his former employer. The court found that this action was not marital waste because there was no evidence that the husband *purposefully* did not apply for the disability benefits; effectively holding that wasteful dissipation needs to be willful.[21] Similar to *Andrea v. Andrea,*[22] where there was no evidence that the husband intended to deprive his wife of his pension by getting arrested, the Court in *Corbett* elected not to penalize the husband for his clearly reckless but unintentional conduct.

E. Wasting Employment Opportunities

Marital waste can also be found where a party intentionally abandons lucrative employment or refuses to pursue employment. In *Southwick v. Southwick*,[23] wasteful dissipation was found when the husband refused to obtain employment following the commencement of the matrimonial action. In *Gastineau v. Gastineau*,[24] because the former New York Jet standout defensive end quit his otherwise lucrative employment as a professional football player without a rational explanation, Justice Leis arbitrarily awarded his wife two-thirds of the marital estate. However, when a husband sabotaged his career by diverting money away from his father-in-law's business, Justice Dana Winslow, in *Klipper v. Klipper,* held that Factor 11 did not apply.[25]

"Until an ambitious Appellate Court commits itself to developing a more reliable methodology for sniffing out marital waste, the lower courts can be assured that the litigious will continue to make a stink."

F. Transfers Without Just Compensation

While a spouse cannot transfer marital assets without fair compensation,[26] applying marital money to legitimate expenses does not constitute marital dissipation.[27] For example, in *Grotsky v. Grotsky,*[28] the husband sold $250,000 worth of shares in a Franklin Fund just four months before his divorce action commenced, which dwindled down to $33,510.44 by the date of commencement. The court held that "the husband dissipated the proceeds from the sale of the Franklin Fund shares" based upon the husband's excessive withdrawals, which reached over $1,000 per day.[29] The timing and amount of the husband's withdrawals in *Grotsky* were interpreted as a scheme to deprive the wife of her rightful share of the parties' $250,000 in savings.

Conclusion

Attorneys seeking to avoid being a waste of marital funds themselves tend to mine any negative impact on the marital estate that can be traced to the dubious conduct of the other spouse. Hopeful that an adjustment to a client's equitable entitlement might be sparked by blaming the other spouse for a decline in the overall value of the marital estate, an unpredictable Factor 11 claim all too frequently becomes an opportunity to leverage an outcome on a whim or whiff. Until an ambitious Appellate Court commits itself to developing a more reliable methodology for sniffing out marital waste, the lower courts can be assured that the litigious will continue to make a stink.[30]

Endnotes

1. *Jacobellis v. Ohio,* 378 U.S. 184 at 197, 84 S. Ct. 1676 (U.S. Ohio June 22, 1964).
2. *Sandra N. Jacobson, Gone with the Wind or the Wasteful Dissipation of Marital Assets*, Fam. L. Rev. vol. 26, no. 2 (June 1994).
3. *Conceicao v. Conceicao,* 203 A.D.2d 877, 611 N.Y.S.2d 318 (3d Dep't 1994).
4. *Wilner v. Wilner,* 192 A.D.2d. 524, 595 N.Y.S.2d 978 (2d Dep't 1994); *Fiedler v. Fiedler,* 230 A.D.2d 822, 646 N.Y.S.2d 839 (2d Dep't 1996).
5. *Grotsky v. Grotsky*, 208 A.D.2d 676, 617 N.Y.S.2d 517 (2d Dep't 1994); *Ferraro v. Ferraro,* 684 N.Y.S.2d 274, 257 A.D.2d 596 (2d Dep't 1999).
6. 152 Misc. 2d 100, 575 N.Y.S.2d 240 (Sup. Ct., Nassau Co. 1991).
7. 188 A.D.2d 710, 590 N.Y.S.2d 603 (3d Dep't 1992).
8. *Ullah v. Ullah,* 161 A.D.2d 699, 555 N.Y.S.2d 834 (2d Dep't 1990); *Campbell v. Campbell,* 213 A.D.2d 1027, 624 N.Y.S.2d. 493 (4th Dep't 1995).
9. 203 A.D.2d 877, 611 N.Y.S.2d 318 (3d Dep't 1994).
10. 107 A.D.2d 867, 484 N.Y.S.2d 309 (3d Dep't 1985).
11. 280 A.D.2d 822, 646 N.Y.S.2d 839 (2d Dep't 1996).
12. 255 A.D.2d 12, 688 N.Y.S.2d 77 (1st Dep't 1999).
13. 245 A.D.2d 94, 666 N.Y.S.2d 129 (1st Dep't 1996).
14. Index No. 93021/98 Qbs: 82702333 (Unpublished).
15. *Hartog v. Hartog*, 85 N.Y.S.2d 36, 647 N.E.749, 623 N.Y.S.2d 537 (February 14, 1995).
16. *Berrios v. Berrios,* 159 A.D.2d 401, 553 N.Y.S.2d 100 (1st Dep't 1990).
17. *Hansen v. Hansen*, 207 A.D.2d 401, 616 N.Y.S.2d 637 (2d Dep't 1994).
18. *Baker v. Baker,* 188 A.D.2d 710, 590 N.Y.S.2d 603 (3d Dep't 1992).
19. 307 A.D.2d 1022, 763 N.Y.S.2d 774 (2d Dep't 2003).
20. 6 A.D.3d 766, 775 N.Y.S.2d 774 (3d Dep't 2004).
21. *Id.* at 767.
22. *Andrea* at 241.
23. 202 A.D.2d 996, 612 N.Y.S.2d 704 (4th Dep't 1994).
24. 151 Misc. 2d 813, 573 N.Y.S.2d 819 (N.Y. Sup. 1991).
25. Unpublished (Justice Dana Winslow).
26. *Ferraro v. Ferraro,* 684 N.Y.S.2d 274, 257 A.D.2d 596 (2d Dep't 1999).
27. *Gonzalez v. Gonzalez,* 291 A.D.2d 373, 737 N.Y.S.2d 111 (2d Dep't 2002).
28. 208 A.D.2d 676, 617 N.Y.S.2d 517 (2d Dep't 1994).
29. *Id.* at 678.
30. If you opined that marital waste would be found in Scenario 3 only, you win a kewpie doll. Scenarios 1 and 2 have yet to be decided and in Scenario 4, Justice Winslow held there was no marital waste.

The Latest Nelson DeMille Mystery: Did Bloomfield Do It?

By Lee Rosenberg

Just when you thought it was safe to go back into the waters of antenuptial agreements; when you thought you deciphered enough of the Court of Appeals' decision in *Bloomfield v. Bloomfield*[1] to understand that if more than six years have expired since the execution of the pre-nup, it is probably not a good idea to commence a divorce action which seeks, as specific affirmative relief, to enforce the terms of that agreement; and when you have mastered the potential quagmire of shifting burdens set forth in *In re Greiff*,[2] best-selling novelist Nelson R. DeMille[3] and his wife have found themselves in a mystery of their own.

The question is posed: "Does initially raising a claim in an answer and counterclaim for the enforceability of a 16-year-old antenuptial agreement, permit the plaintiff to then claim unconscionability as a defense to same when the statute of limitations has expired?" Hon. Anthony J. Falanga in a decision in *DeMille v. DeMille* dated July 1, 2004[4] has answered in the affirmative and has also determined that such agreement is unconscionable, thus permitting the defendant-author to be subject to various support and equitable distribution claims, presumably including a claim of enhanced earning capacity as to his celebrity.[5]

The DeMilles were married on September 17, 1988 and have no children of the marriage. Less than four hours before their marriage, they entered into an antenuptial agreement dated September 16, 1988. Mrs. DeMille commenced the divorce action by Summons with Notice on August 5, 2002, which set forth no cause of action to set aside the agreement. She further moved on August 14, 2002 for *pendente lite* and *ex parte* temporary relief which made no reference to the existence of the agreement. Mr. DeMille cross-moved on August 27, 2002, to oppose the *pendente lite* application and the *ex parte* relief which had been granted based upon the antenuptial agreement. Mrs. DeMille then served an Amended Summons with Notice on August 27, 2007 and later a Verified Complaint dated September 5, 2002 seeking to have the agreement set aside. In his Answer and Counterclaim dated October 2, 2002, Mr. DeMille asked for specific performance of the antenuptial agreement.

On September 10, 2002, after Mrs. DeMille served her Complaint, but prior to the interposition of the answer and counterclaims, she moved for summary judgment. On October 2, 2002, in addition to serving his answer and counterclaims, Mr. DeMille opposed and cross-moved for summary judgment in which the statute of limitations issue was raised.[6] Justice Falanga, on October 24, 2002 granted summary judgment to Mrs. DeMille, finding, among other things, that her attack on the agreement was not time-barred. The Appellate Division, Second Department in its decision of March 8, 2004 reversed[7] citing the Court of Appeals in *Bloomfield.* The Second Department held that since the plaintiff-wife was the one who first pled the issue of the agreement and had done so well after the expiration of the six-year statute of limitations,[8] she was not entitled to the benefit of CPLR 203(d) which permitted the wife in *Bloomfield* as a defendant to attack that antenuptial agreement.

The Second Department in DeMille, held:

> Here, the Supreme Court improperly relied upon CPLR 203(d) to support its holding that the applicable six-year statute of limitations had not run on the third and fourth causes of action, which were to vacate and set aside the parties' prenuptial agreement (see CPLR 203[d]; Rothschild v. Industrial Test Equip. Co., 203 A.D.2d 271, 610 N.Y.S.2d 58). CPLR 203(d) permits a defendant to attack the validity of a prenuptial agreement, but only as a defense raised, for example, in a counterclaim that is asserted in an answer (see Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 7B, C203:9). The provisions of CPLR 203(d) allow a defendant to assert an otherwise untimely claim which arose out of the same transactions alleged in the complaint, but only as a shield for recoupment purposes, and does not permit the defendant to obtain affirmative relief (see Bloomfield v. Bloomfield, 97 N.Y.2d 188, 738 N.Y.S.2d 650, 764 N.E.2d 950; Rosenblatt v. Ackoff-Ortega, 300 A.D.2d 137, 752 N.Y.S.2d 621; Rothschild v. Industrial Test Equip. Co., supra; see also Sawyer v. Wight, 196 F.Supp.2d 220). In the instant case, the plaintiff could not have benefitted from CPLR 203(d) since she is a plaintiff seeking to affirmatively attack and set aside the parties' prenuptial agreement. At the time this action was commenced, the claims asserted in the plaintiff's third

> and fourth causes of action were time-barred pursuant to CPLR 213(2). Moreover, as this court has held previously there is no legal support for a tolling of the six-year statute of limitations under CPLR 213 for prenuptial agreements during the life of a marriage (see Matter of Neidich, supra; Rubin v. Rubin, supra). Furthermore, no court has the authority to create such an exception to the statute of limitations (see Scheuer v. Scheuer, 308 N.Y. 447, 126 N.E.2d 555; Dunning v. Dunning, 300 N.Y. 341, 90 N.E.2d 884; Arnold v. Mayal Realty Co., Inc., 299 N.Y. 57, 85 N.E.2d 616; Mack v. Mendels, 249 N.Y. 356, 359, 164 N.E. 248).

It would appear the Second Department determined that, based upon *Bloomfield*, the wife as a plaintiff could not avail herself of the use of CPLR 203(d) in order to contest the conscionability of the antenuptial agreement where the statute of limitations had run. It would appear further, that such a decision also now constituted, if you will, "law of the case." After the Appellate Division's ruling, the matter then proceeded in the court below.[9] Upon doing so, Mrs. DeMille moved for leave to renew the application which resulted in Justice Falanga's initial order of October 24, 2002 claiming, in substance, that at the time of the court's order and the decision of the Appellate Division, neither had considered her right to have served a reply to the husband's counterclaims, thereby rendering the summary judgment issue premature as to the husband's application and that accordingly she would have the right to "rely on CPLR 203 in said responsive pleading." In effect, the argument is that the provisions of CPLR 203(d) which the *Bloomfield* Court relied upon, were available to a plaintiff in replying to a counterclaim even where the statute of limitations had expired. As such, the defendant-husband by raising the existence and validity of that agreement in defense of the complaint, permitted the plaintiff the opportunity to invoke the doctrine that

> . . . claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced (CPLR 203[d]; 118 E. 60th Owners v. Bonner Props., 677 F.2d 200, 202-204; Rebeil Consulting Corp. v. Levine, 208 A.D.2d 819, 820, 617 N.Y.S.2d 830; Maders v. Lawrence, 2 N.Y.S. 159, 49 Hun 360; *see generally,* 1 Weinstein-Korn-Miller, N.Y. Civ Prac ¶ 203.25, at 2- 140—2-142).[10]

Justice Falanga then, finding merit to Mrs. DeMille's argument (a) granted her application; (b) held that the claim was not time-barred; (c) deemed the wife's application for leave to renew as one to serve an amended reply containing an affirmative defense that the agreement was void or voidable and granted same; (d) set aside the antenuptial agreement as unconscionable; (e) restored the wife's *pendente lite* application to the calendar for determination; (f) scheduled discovery; (g) directed the husband to continue paying the sums ordered by the Appellate Division as a condition to the stay, pending appeal; and (h) invited the parties to submit memoranda as to whether or not counsel fees may be granted to the wife in her "defense" against the validity of the agreement.[11]

The court, in rendering its said decision, found that the "husband's interpretation of the Appellate Division's decision and order is untenable in that, 1) it does not reflect the language employed by the Appellate Division's order dated March 8, 2004; 2) it is contrary to applicable pleading procedures permitted by the CPLR; and 3) it is morally repugnant and unequivocally violative of public policy."[12]

Prior to the aforementioned Court of Appeals' decision in *Bloomfield*, the First and Second Departments were divided on the issue of whether or not the six-year statute of limitations to rescind an antenuptial agreement was tolled by the existence of an intact marriage or if it was a complete bar. It was hoped that the *Bloomfield* Court would put an end to that discrepancy, however, *Bloomfield* skirted that issue and instead veered off into the murky waters of CPLR 203.

It has been long recognized that there is no exception created by statute that a statute of limitations is tolled as and between spouses while they are living together.[13] Notwithstanding the foregoing, in the more recent pre-*Bloomfield* First Department, the rule was that the statute of limitations, as it pertained to the issue of antenuptial agreements, was, nevertheless, tolled in deference to public policy considerations.[14] This was, in fact set forth in the Appellate Division, First Department's decision in *Bloomfield* of March 22, 2002[15] which was ultimately appealed and resulted in the said Court of Appeals' decision.[16] In the Second Department, the rule remained that the statute of limitations was not tolled.[17] The Second Department though, has recognized that the statute may not necessarily run from the execution of the agreement when there is fraud or duress involved[18] or as to the consideration of maintenance which must not be unconscionable as of the time a judgment of divorce is entered.[19]

The Court of Appeals in *Bloomfield* again did not address the difference between the Departments even though the tolling issue was specifically discussed in the First Department below and briefed. Mr.

Bloomfield, an attorney and his wife, a self-employed antiques dealer, were married in 1969. Prior to the marriage, Mr. Bloomfield drafted a prenuptial agreement which was then executed and which contained waivers relating to spousal property and elective estate rights. Mrs. Bloomfield was not represented. Twenty-five years later, in 1995, Mr. Bloomfield commenced an action for divorce and Mrs. Bloomfield served an answer and counterclaim seeking equitable distribution. The issue of the antenuptial agreement was not raised until Mr. Bloomfield did so some two years later during discovery. The Court of Appeals, while avoiding any discussion of the tolling issue, held that CPLR 203(d) permitted the defendant to contest the validity of the agreement when the claim arose from the same transaction as is asserted in a complaint notwithstanding that the same claim *"might have been* time-barred at the time the action was commenced" (emphasis added).

The Court of Appeals found that since Mr. Bloomfield raised the issue of the preclusion of equitable distribution by the existence of the agreement, Mrs. Bloomfield had a right to defend against that assertion, even if the statute of limitations might have estopped her from doing so otherwise. Of course, the facts indicated that Mr. Bloomfield did not raise the issue in his complaint; CPLR 203(d) specifically refers to claims asserted in a complaint being required as a condition to the use of the statute's reprieve from the time limitations imposed on the commencement of actions and proceedings; and the Court's use of the words "might have been," it may be argued, seems to leave the ultimate question of tolling unresolved.

Returning then to the lower court's recent decision in *DeMille,* as it relates to the *Bloomfield* Court's use of CPLR 203(d), the statute states:

> A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim *asserted in the complaint depends*, it is not barred *to the extent of the demand in the complaint* notwithstanding that it was barred at the time the claims asserted in the complaint were interposed" (emphasis added).

It has been held that a "tight nexus" has generally been required before CPLR 203(d) will save a time-barred counterclaim from an otherwise applicable statute of limitations[20] and that "otherwise time-barred counterclaims" may only be interposed to offset claims contained in the complaint.[21]

Inasmuch as courts have interpreted CPLR 203(d) to be limited to time-barred claims raised *in response to a complaint*; and the language of the statute only references same; and the Second Department in *DeMille* has established the law of the case, it would appear that the remedy for Mrs. DeMille's dissatisfaction would have been asking for leave to appeal to the Court of Appeals[22] and not leave to reargue in the court below. This is particularly so as, although not stated in the Second Department's decision, Mr. DeMille's answer and counterclaims according to the court below, were served simultaneously with the motion for summary judgment and presumably would have been part of that application and contained in the Record on Appeal. Even so, the Second Department was quite clear that CPLR 203(d) could not be used by Mrs. DeMille under the circumstances and that the statute of limitations was not tolled during the marriage. It would seem then, that prior to reaching the issue of unconscionability, the court below was required to defer to the procedural issues which were resolved to the contrary in the Second Department's decision as set forth above. The court below cites no authority for the proposition that CPLR 203(d) may relate back to a counterclaim.[23] Accordingly, while the court may be repulsed by the terms of the subject antenuptial agreement or the circumstances surrounding its execution, whether or not then the husband should have waited to move for summary judgment after a reply was served becomes inconsequential to this issue.[24] As it presently stands, however, the DeMille antenuptial agreement has been set aside.

The author and his wife (as well as the matrimonial bar) now having been plunged back into the abyss, will presumably seek to solve the mystery of the disappearing statute of limitations back at the Appellate Division. As I am sure Mr. DeMille can now truly confirm, "truth *is* stranger than fiction."[25]

Endnotes

1. 97 N.Y.2d 188 (2001).
2. 92 N.Y.2d 341 (1998).
3. *E.g.*, *Gold Coast* (1990), *The General's Daughter* (1992), *Plum Island* (1997), *The Lion's Gate* (2000), *Up Country* (2002).
4. N.Y.L.J., July 14, 2004, p. 20 col. 1 (Sup. Ct., Nassau Co.).
5. *Golub v. Golub*, 139 Misc. 2d 440 (1988); *Elkus v. Elkus*, 169 A.D.2d 134 (1991), *lv. dismissed*, 79 N.Y.2d 851 (1992).
6. The court noted that, as with Mrs. DeMille's summary judgment application, Mr. DeMille's motion was served prior to the service of the responsive pleading. This issue ultimately became one of the linchpins in Justice Falanga's reasoning.
7. 5 A.D.3d 428 (2004).
8. CPLR 213(1).

9. Proceedings in the court below were conditionally stayed pending determination of the appeal by order of the Appellate Division, dated October 22, 2002.

10. *Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 191 (2001).

11. Counsel fees are not recoverable in a plenary action to set aside an agreement. *See Anonymous v. Anonymous,* 258 A.D.2d 547 (1999) They are recoverable in this context only in a matrimonial action or proceeding as defined in Domestic Relations Law §237. Courts have repeatedly denied counsel fees in non-defined matrimonial-related claims. *See Zeitlin v. Zeitlin,* 250 A.D.2d 606 (1998) citing *Lucci v. Lucci,* 227 A.D.2d 387 (1996*), Silverman v. Silverman,* 91 A.D.2d 609 (1982)*, Weseley v. Weseley,* 58 A.D.2d 829 (1977), *Maloney v. Maloney,* 114 A.D.2d 440 (1985), *Mattana v. Mattana,* 79 A.D.2d 702 (1980), *Murena v. Murena,* 75 A.D.2d 640 (1980).

12. N.Y.L.J., July 14, 2004, p. 20 co.l 1, p. 21, col. 2 (Sup. Ct., Nassau Co.).

13. *Dunning v. Dunning*, 300 N.Y. 341 (1950); *Schuer v. Schuer*, 308 N.Y. 447 (1955)—both of which pre-date the CPLR and the Equitable Distribution Law.

14. *Bloomfield v. Bloomfield*, 281 A.D.2d 301 (2001); *Lieberman v. Lieberman*, 154 Misc. 2d 749 (1992); *Zuch v. Zuch*, 117 A.D.2d 397 (1986).

15. 281 A.D.2d 301 (2001).

16. It is of note that Justice Falanga in *Dubovsky v. Dubovsky*, 188 Misc. 2d 127 (2001) issued prior to the Court of Appeals' decision in *Bloomfield*, proclaimed agreement with the underlying First Department position in that case as to the tolling of the statute of limitations.

17. *Rosenbaum v. Rosenbaum,* 271 A.D.2d 427 (2000); *Djavaheri-Saatchi v. Djavaheri-Saatchi*, 236 A.D.2d 583, (1997); *Anonymous v. Anonymous*, 233 A.D.2d 350 (1996); *Pacchiana v. Pacchiana*, 94 A.D.2d 721; *Freiman v. Freiman*, 178 Misc. 2d 764 (1998) although the court in *Freiman* noted the "modern trend" being set in the First Department and in other states. *Also see Rubin v. Rubin,* 275 A.D.2d 404 (2000).

18. *Rubin v. Rubin,* 275 A.D.2d 404 (2000); *Trisci v. Trisci*, 251 A.D.2d 494 (1998); *Zoe G. v. Frederick F. G.*, 208 A.D. 2d 675 (1994).

19. *Freiman v. Freiman*, 178 Misc. 2d 764 (1998) citing to DRL § 236(B)(3).

20. *Macaluso v. United States Life Insurance Co.*, __ F.Supp. 2d __ (S.D.N.Y. 2004); *Messinger v. Mount Sinai Medical Center*, 279 A.D.2d 344 (2001).

21. *Sawyer v. Wight*, 196 F.Supp. 2d 220 (2002); *Town of Amherst v. County of Erie*, 247 A.D.2d 869 (1998).

22. The decision of the Second Department was unanimous.

23. While the court states that a counterclaim is in essence a complaint and the pleader of same is in effect a plaintiff, under CPLR 203(d) the counterclaim is nevertheless reliant upon the timeliness of the claim in the complaint and Mrs. DeMille's claim as a plaintiff for rescission was necessarily time-barred.

24. Further, it was the wife who first moved for the same relief in advance of the husband's serving his answer.

25. Mark Twain, *Following the Equator, Chapter XV, Pudd'nhead Wilson's New Calendar* (1897).

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Selected Case

Editor's Note: It is our intention to publish cases of general interest to our readers which may not have been published in another source and will enhance the practitioner's ability to present proof to the courts in equitable distribution and other matters. The correct citations to refer to in cases that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, *e.g.*, Fall 2004) New York State Bar Association

We invite our readers and members of the bench to submit to us any decision which may not have been published elsewhere.

***Donna J.S. v. William C.S.*, Supreme Court, Onondaga County (Hedges, Bryan, December 23, 2003)**

Order and Decision

I have before me a contract rescission action, which has as its genesis a matrimonial cause of action. Although there is a strong presumption of regularity, the factual and legal issues here show a substantial variance *vis a vis* most cases presented to this Court.

It is this Court's finding after several days of trial, and upon assessing submission and the credibility of all of the witnesses, that Mrs. S. did not receive fair and full disclosure of the full calculation of all marital assets from Mr. S., that the terms and effects of the separation agreement were not fully explained to her, to a level acceptable in this particular situation, and that, in this Court's opinion after trial, there still exist questions regarding the actual value of the marital estate.

Separation agreements are subject to a much closer scrutiny than ordinary contracts, and may be set aside "upon the demonstration of good cause, such as mistake, fraud, duress or overreaching. . . . or when found to be unconscionable" (Cantamessa v. Cantamessa, 170 A.D.2d 792, 793 [citations omitted]; see, Vandenburgh v. Vandenburgh, 194 A.D.2d 957, 958; Yuda v. Yuda, 143 A.D.2d 657, 658; Battista v. Battista, 105 A.D.2d 898, 898-899). c.f. Christian v. Christian, 42 N.Y.2d 63; Sheridan v. Sheridan, 202 A.D.2d 749).

Although much has occurred since the Court of Appeals decided the *Christian* case (*supra*) in 1977, equity principles still prevail. In this particular case, unfortunately, both these parties were not represented by independent competent counsel of their own choice during negotiations and the execution of this agreement, and Mrs. S. was not represented by an attorney acting solely in her interests. While this Court does not have before it the severed cause of action regarding attorney malpractice, nor will this Court address that issue, it is clear from the exhibits, the testimony at trial and the undisputed facts and records that Mrs. S.'s acumen, her knowledge of financial affairs in general, and specifically those of her marital estate, was not equal to that of her husband, nor did it even begin to approach her husband's level of expertise or understanding.

Although this Court is loathe to overturn or put aside a separation agreement, or a provision of a separation agreement, the principles of contracts, equity and fairness are controlling herein and, after several days of testimony, cannot be ignored.

Under the circumstances, and based upon the credibility of the witnesses and the law, the parties' Separation Agreement, Opting-Out and Property Settlement Agreements are hereby declared null and void, subject to a forthwith remission to the Supreme Court Matrimonial Term for a hearing, and/or fact finding, on the allegations raised by the Plaintiff.

Furthermore, for the purpose of clarity, it is the opinion of this Court that the remittal to Supreme Court Matrimonial Term for a hearing to review certain of the financial provisions in the parties' separation agreement does not mandate a reversal of the judgment of divorce at this time. The separation agreement and the issue of severability will be left to Supreme Court, Matrimonial Term's review.

This decision will constitute the order of the Court.

Recent Decisions, Legislation and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

New York

On July 2, 2004, the American Civil Liberties Union and the New York Civil Liberties Union filed a motion on behalf of 13 same-sex couples before an Albany trial court to strike down the state's ban on same-sex marriage, arguing that the ban violates the state constitution and denies them equal protection of the law and the fundamental right to marry. New York State Assemblyman Danny O'Donnell (Rosie O'Donnell's brother) and his partner John Banta are included in the lawsuit. The state will most likely respond to the request for a ruling at the end of July, and written arguments will most likely be completed by the end of September.

Ban on Same-Sex Marriage Determined to Be Unconstitutional

***People v. Jason West*, N.Y.L.J., June 17, 2004, p. 3, col. 4 (Ulster Co.) (J. Katz)**

The mayor of New Paltz was charged with multiple counts of the crime of solemnizing marriages to same-sex couples without licenses in violation of DRL §§13 and 17. The mayor argued that the DRL licensing requirement is unconstitutional as applied because it has the effect of preventing same-sex marriage. The court found no legitimate state purpose (historical, cultural or religious) in prohibiting same-sex marriage under the "rational basis standard" of the equal protection clause of the state and federal constitutions, and therefore dismissed the lawsuit. The court noted that neither the attorney general nor the district attorney articulated any legitimate state purpose in preventing same-sex marriage, and merely claimed that the mayor violated the law on its face. The court cited Justice Brandeis' admonishment that, "We must be ever on our guard lest we erect our prejudices into legal principles."

Massachusetts

On June 29, 2004, the First Circuit Court of Appeals rejected claims by a coalition of conservative groups that the Massachusetts Supreme Court in *Goodridge v. Department of Public Health*, infringed on the powers of the state legislature to create law when it struck down an anti-marriage law that has led to the licensing of same-sex marriages in the state. Currently, Massachusetts is the only state in the nation that grants marriage licenses to same-sex couples.

Washington, D.C.

Rally for Marriage Equality

The National Rally for Marriage Equality is scheduled to take place on October 11, 2004 at the United States Capitol in Washington, D.C.

Constitutional Amendment to Define Marriage Thwarted

On July 14, 2004, the United States Senate voted 48-50 to block a White House-backed constitutional amendment to bar same-sex marriages, which is 19 votes short of the two-thirds majority that is required to amend the constitution. This debate will no doubt spill into the upcoming elections.

New Matrimonial Commission Formed

New York State Chief Judge Judith S. Kaye, formed a commission to examine every aspect of the divorce process in New York and recommend reforms to correct existing problems. The Matrimonial Commission will be chaired by Associate Justice Sondra Miller of the Appellate Division, Second Department and will consider issues such as the role and qualifications of forensic experts and law guardians, interim counsel fees, enforcement of court orders and custody resolution. As part of the study, the Commission will host a series of public hearings at various locations throughout the state concerning the divorce process. The Commission plans to report their findings to the Chief Judge in approximately one year.

The formation of the new Commission is the latest in the state court system's matrimonial reform efforts commenced by the Committee to Examine Lawyer Conduct in Matrimonial Actions, which findings led to the adoption of the 1993 rules governing attorney-client relationships and matrimonial case management. The effectiveness of the rules was assessed in a January 2004 report issued by Justice Jacqueline Silbermann, the statewide administrative judge for matrimonial matters, which indicated considerable advancements including reduced time in case resolution, but pointed out persistent problems, particularly in custody litigation.

Court Assisted Parenting Program (CAPP)

The Education and Assistance Corporation (EAC) established CAPP, a program endorsed by the Nassau County Supreme and Family Courts for parents who need assistance with following through on custody and visitation orders. If the parents agree to CAPP, the court will issue an order assigning a specially trained profes-

sional called a "parent coordinator," who will help parties resolve parenting conflicts. The parenting coordinator may assist in creating a stress-free plan for the pick up and drop-off of children during visitation, resolving scheduling conflicts (including holidays and special events), and resolving parental decision-making disputes. The meetings with the parent coordinator are confidential.

Court of Appeals Update

Three cases of interest have been decided by the high Court since January, 2004.

Counsel Fees

***Frankel v. Frankel*, No. 100, 2004 N.Y. LEXIS 1599 (June 29, 2004)**

The Court of Appeals, in a unanimous decision, held that a divorce attorney discharged without cause has standing to recover counsel fees from the more affluent adversary spouse under DRL 237(a), and that the statute is not limited to current counsel. The Court reasoned that public policy and the legislative intent dictate preventing the more affluent spouse from having the upper hand in a litigation. "The spouse with ready and ample funds would have a wide choice of counsel, and the financial wherewithal to maintain the litigation, while the non-monied spouse would struggle to find a lawyer who might have to go unpaid."

Grandparent Visitation

***In re Wilson v. McGlinchey*, No. 109-SSM-14, 2004 N.Y. LEXIS 1037 (May 13, 2004)**

The grandparents were estranged from their daughter since before her marriage. When the first granddaughter was an infant, the grandparents filed a petition for visitation under DRL § 72. Although the parents opposed the petition, they reached an agreement that provided the grandparents with eight hours of visitation every month and that the parties would begin family counseling. After several months had passed, the parents sought to terminate visitation based on a change in circumstances. They claimed that the visits were an "unmitigated disaster" including one incident where they had to call the police for aid in removing the grandparents from her home at the end of the visit with the grandchild. Also, the situation had worsened over time and the grandparents threatened further court action to bully the parents into acquiescing with their demands.

The Court of Appeals held that once a visitation order is granted, it may be modified only upon a showing that there has been a subsequent change of circumstances affecting the child's best interest, and extraordinary circumstances are not a prerequisite. Factors to be considered in determining such a change are the fitness of one of the parties, the nature and quality of the relationships between the child and the parties, and the existence of a prior agreement.

The initial visitation order resulted from an agreement, and not from a hearing assessing the standing issue or the best interests of the child. The Court reviewed the entire record, and determined that the worsening relations between the litigants and the strenuous objection to grandparent visitation by both parents rendered the continued visitation by the grandparents not in the child's best interests. Rather, the child's best interests are served by shielding her from the animosity and dysfunction between the parties and reducing what the mother's therapist testified as the "paralyzing stress experienced by the child's mother" which affected her ability to parent and could be sensed by the child. The Court relied on the United States Supreme Court decision in *Troxel v. Granville*, 530 U.S .57 (2000), for the proposition that a state must give deference to the child-rearing decisions of fit parents. Although DRL § 72 acknowledges the value to children of a grandparent relationship, it does not create an "absolute or automatic right of visitation."

Enhanced Earnings and Child Support

***Holterman v. Holterman*, No. 73, 2004 N.Y. LEXIS 1520 (June 10, 2004)**

The Court of Appeals, by a 5-2 divided Court, determined that the trial court did not err in declining to adjust the child support obligation to account for the distributive award he was obligated to pay the wife for her share of the future enhanced earnings attributable to his medical license. The high Court simply reasoned that the CSSA did not provide for the deduction of distributive awards from income.

The parties were married for 19 years and had two children. At the time of the marriage, the husband was a third-year medical student and the wife had an MBA and was employed as a program analyst. Two years later, the wife was diagnosed with chronic fatigue syndrome and fibromyalgia, and therefore was a homemaker and full-time mother throughout the remainder of the marriage.

The wife was awarded lifetime maintenance, child support, and a distributive award of the husband's medical license.

The husband argued that the payment of the annual installment of the wife's distributive award of her share of the husband's enhanced earnings from his medical license should be deducted from the computation of his income in determining his child support obligation under the CSSA, and should be considered income to the wife. He claimed that the failure of the trial court to reassign this income resulted in improper

"double dipping" from the same income stream of his salary as a physician.

The high Court reasoned that *McSparron* and *Grunfeld* only address preventing "double dipping" between the license and maintenance, and not child support, and that the CSSA does not specify that enhanced earnings should be deducted from income.

In a well-reasoned dissent by Justice R.S. Smith (with a concurrence by Justice Read), he points out that the majority's decision is flawed because (1) it fails to consider the total financial burden placed on the husband; (2) it adopts an illogical and unfair method of allocating the parties' income for purposes of calculating child support payments; and (3) its application of the *O'Brien* decision is flawed because the facts are materially different in this case, and instead creates an unjust result.

The Justice reasoned that when an income-producing asset is transferred from the husband to the wife, it does not make sense to calculate child support as though no such distribution had occurred, as though the transferring spouse still owned the asset and received the income it generated. Therefore, it is nonsensical for child support to be calculated as if the husband owns 100% of the medical license, when he has to give the wife 35% of it. The majority failed to consider that the "escape clause" of the CSSA is that the Court does not have to apply the *pro rata* share of the husband's income where the "basic child support obligation is unjust or inappropriate." In addition, the *Goodman* case should have been followed, where Nassau County Supreme Court's Judge Ross calculated child support by attributing the income from the distributive award for enhanced earnings capacity to the non-titled spouse (the wife), and by reducing the income of the titled spouse (the husband).

Justice Smith also pointed out that only New York State holds that a professional license is marital property. The *O'Brien* rule is troublesome and "it may be doubted whether an innovation which has attracted so little imitation, and so little praise, will endure forever." The Justice also suggests that *O'Brien* only be applied in those situations involving "the student spouse/working spouse syndrome, or some reasonably analogous situation" and not where "the enhanced earning capacity associated with the professional license is already fully reflected in the license holder's earnings."

Other Cases of Interest

Double Dipping

***Miklos v. Miklos*, __ A.D.3d__, Docket 2002-06923 (2d Dep't, July 12, 2004)**

The case was remanded to the trial court for a more detailed determination because the appellate court could not determine from the record whether the trial court impermissibly engaged in the "double counting" of income when it determined the value of the husband's enhanced earning capacity from his law license and the value of his interest in his law firm for purposes of equitable distribution, and his income for purposes of maintenance and child support. The appellate court alluded to the recent Court of Appeals decision in *Holterman v. Holterman, supra*, and the admonition against double counting from the same income stream.

The appellate court reduced the trial court's award to the wife of 50% of the husband's enhanced earning capacity to 30% because the husband worked full-time during the entire time he attended law school and had a full scholarship, and there were no children of the marriage at that time. Therefore, even though the wife provided a portion of the parties' joint income while the husband attended law school, the trial court abused its discretion by awarding 50% to the wife.

In addition, the trial court improperly imputed over $11,000 of income to the husband for telephone charges where the wife failed to prove that the charges were for personal use as opposed to business.

Downward Modification of Child Support

***Pollack v. Pollack*, 3 A.D.3d 482, 770 N.Y.S.2d 435 (2d Dep't 2004)**

At the time of the judgment of divorce, the former wife was unemployed and was granted an award of child support by the trial court. When she obtained a job and became self-supporting, the former husband applied for a downward modification of his child support obligations. Such relief was granted since the husband was able to show a "substantial change in circumstances" as a result of the ex-wife's increase in income and ability to be self-supporting.

Where the former wife made unilateral decisions regarding the selection of the children's summer camp and private school, the court did not compel the husband to pay for these expenses since the judgment of divorce directed the parties to " mutually confer and decide upon all important issues related to the children's health, education and welfare."

Prenuptial Agreements

***Cron v. Cron*, No. 5782, __ A.D.3d__, No. 3807 (1st Dep't, June 24, 2004)**

The wife's request for rescission of the parties' 13-year old prenuptial agreement was denied because she failed to prove that it was the product of fraud, duress or overreaching. The wife signed the agreement over the objections of her counsel, and she was fully aware of the husband's substantial earnings and assets. The court held that the wife's waiver of maintenance was

not unconscionable because she was not in danger of becoming a public charge.

The child support provisions were held to be invalid and severable from the remainder of the agreement. The court determined that the agreement's housing provisions limiting the wife to a $200,000 house "inequitable," when considered in light of the wife's current responsibilities as custodial parent of two children ages 10 and under who have been raised in "luxurious accommodations" and attend school in an "affluent community" in the North Shore of Long Island. The court reasoned: "In view of the overwhelming need to maintain a sense of continuity in the children's lives, including (the wife's) need to live in close proximity of the children's school, and the sharp rise of real estate values in that area since the 13 year old prenuptial agreement was executed, there is virtually no prospect that (the wife) will be able to find suitable housing within the $200,000 cap imposed by the prenuptial agreement." Therefore, the court modified to increase the amount of the wife's reasonable housing needs to $2 million, and directed the husband to maintain the home until the children are emancipated or have moved elsewhere. The house will be titled in the husband's name, and cannot be sold until the children's emancipation. In addition, the court reasoned that the wife has been out of the work force for over ten years, since the birth of the parties' first child, whereas the husband earns approximately $4 million a year and has assets over $10 million.

Author's note: *Does it appear that the court re-wrote the parties' agreement?*

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