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Notes and Comments

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Twenty-Five Years of Equitable Distribution: Where Have We Gone Wrong?

On July 19, 2005, the equitable distribution statute will celebrate its twenty-fifth anniversary. It is particularly interesting to note that even after the courts have struggled with the statute's complexities over these many years, which include eleven enumerated and mandatory factors for the court to consider in arriving at its decision, much has been unexplored and some portions of the statute have been totally ignored.

In looking back at these past 25 years of judicial scrutiny, it is clear that the interpretation of the statute has resulted in some injustices. More effort will have to be expended by both the bench and bar to right some of the wrongs and to forge new horizons.

For example, when the *O'Brien*[1] case was decided, many commentators initially applauded the Court of Appeals decision to adopt the principle of enhanced earnings, and thereby create a remedy by which an aggrieved spouse could receive compensation for dispensing with his or her career, or putting it on hold and devoting efforts to the spouse's career, enabling him to obtain, in the *O'Brien* case, a medical license and begin his medical practice. Interestingly, there were other commentators who postulated that there was no real tangible value to enhanced earnings and that to create such a remedy would work a grave injustice upon a professional spouse. These authors suggested that perhaps rehabilitative maintenance might be the wiser choice to compensate the deprived spouse while not creating an overwhelming and burdensome liability to the physician, attorney, accountant, or other professional.

Recently, more than nineteen years later, the Court of Appeals had the opportunity to review the *O'Brien* doctrine, and the extent to which it had been expanded, when it decided *Holterman*,[2] a case in which a physician was ordered to pay almost ninety percent of his income stream, in order to satisfy the court's award for equitable distribution, maintenance, and child support. Although the high court in the past had peripherally dealt with the issue of double and perhaps triple-dipping, directing the lower courts to take into consideration the income stream of the paying spouse, the Court, nonetheless, had the chance to overrule the doctrine of enhanced earnings. Rather than seizing this opportunity to reverse its holding in *O'Brien*, and forge a more equitable remedy for an aggrieved spouse, they failed to do so. Yet, a blistering dissenting opinion by Judge Smith, gave insights that the *O'Brien* doctrine had, at last, been recognized for its deficiencies, and perhaps its foundation had at last begun to tremble.

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NYSBA

New York is perhaps the last formidable state that still retains the doctrine of enhanced earnings despite the fact that a professional has grave difficulty in selling his or her practice, or his or her interest in a professional partnership for more than a formerly contracted amount. The majority of our high court continues, however, to believe that professional practices and licenses have tangible value, closing its eyes to the realities of the marketplace, and disregarding any professional or ethical prohibitions with respect to such sale. While only a professional litigant is subjected to dual valuation of both a license and practice, the lower courts seem to ignore the fact that a businessman, who owns a successful business may have a college degree and that the spouse of such businessman would be entitled to a valuation of his enhanced earnings achieved during his marriage compared to that of a high school graduate. To some, such valuation may seem ludicrous, yet a literal interpretation of *O'Brien* requires that any degree, whether it was from grade school, high school, college or an advanced school of learning, would have value when measured against the spouse who possessed no degree or a lesser degree, when it creates a greater ability to generate income. This column explored these conundrums and suggested in the Fall 2004 issue of the *Family Law Review* that perhaps it was time for a change.

The specific criteria contained in the equitable distribution statute Domestic Relations Law § 236 B(5)(d)(1-13) requires the court to specifically consider such provisions before rendering its decision. A similar provision exists for spousal support.[3] Domestic Relations Law § 236 B(6)(a)(1-11). Unfortunately, some of these mandatory provisions have either not been considered by the court in the past 25 years, or given mere peripheral attention. For example, Domestic Relations Law § 236 B(5)(d)(4) mandates the court to consider the loss of inheritance rights, yet there has been no decision that comprehensively discussed this factor let alone applied it. There are many injustices that arise where a spouse whose husband or wife has large sums of money and assets in separate property, that will not and cannot be shared upon divorce. Yet in a long-term marriage, if a death occurs a surviving spouse would be entitled to elect up to one-third of the net estate or an amount up to $50,000, whichever is greater, as a marital portion, if no provision was made in the decedent's will. EPTL 5-1.1-A. However, if a divorce occurs, and there are only separate assets, a spouse will receive absolutely nothing in the way of equitable distribution. If such separate assets were always maintained in separate accounts and any increases in value were due to passive circumstances, no portion of these assets would be marital. Why would the courts either refuse, or overlook, this enumerated factor in equitable distribution, that could create a financial hardship to one spouse and an economic windfall to the other? If a court would apply this factor, a judge would have the discretion to award a disproportionate share of marital assets to the non-monied spouse, if there were any, or direct maintenance to be paid for a stated period to compensate for the loss of inheritance rights.

Domestic Relations Law § 236 B(d)(4) mandates the court to determine the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution. There are not many instances where pension rights are lost because of divorce but because Qualified Domestic Relations Orders can be implemented to share the pension benefit, no prejudice would arise. However, there is no similar remedy to compensate a spouse for the loss of inheritance rights.

Domestic Relations Law § 236 B(d)(6) is interesting. Its provision permits the court to consider the contribution of a spouse, parent, or homemaker before dividing marital assets. If the courts continue to quantify the value of enhanced earnings, and this doctrine remains the law in New York, it would seem even more important to obtain a quantification of such services. There are experts who can be found who will be able to quantify these services. We all know the value of a nanny in a busy household; the cost of domestic servants, and even conjugal rights can also be quantified.

Domestic Relations Law § 236 B(d)(8) is another provision that has rarely been comprehensively commented upon by the courts in their equitable distribution decisions. How does one quantify the probable future financial circumstances of each party? It can be done simply by calling an expert in economics and employment opportunity who can offer testimony as to the reasonable expectation and value of a woman's place in the marketplace (if that be the case) as opposed to a male, and the likelihood of obtaining employment on an executive level, based upon the education and/or work experience that she had forgone during the marriage. In a marriage of long duration, where a woman is a stay-at-home mom, and has given up years of experience in the job market, this would translate into lower earnings over the course of one's working life. More attention should be given by both bench and bar to this enumerated factor.

In its wild card factor Domestic Relations Law § 236 B(d)(13), which requires the court to consider any other factors which are found to be just and proper, the court has *carte blanche* to delve into any peculiar circumstances germane to the individual case, that could affect its final decision. But this factor is discretionary not mandatory, and a salient factor can be overlooked or declined from a court's consideration.

DRL § 236 B(6)(a)(5), which provides for consideration of "reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage," seems to be misplaced. It appears that the legislature overlooked the impact this enumerated factor, contained only in the maintenance section, would have on an award of equitable distribution. Although the court can consider any factor it deems relevant, it is not mandatory to do so. Subdivision (5) is one of the few enumerated factors which is not contained in both the maintenance as well as the equitable distribution sections. In fact, subdivision (1), (2), (3), (6), (7), (8), (9), (10) and (11) are duplicative of the provisions contained in subdivision (d).

It is most troublesome that the courts in the past 25 years have yet to specifically address some of the issues we raise, and have failed to supply comprehensive decisions which would furnish advice and insights to the bar.

In another arena, even though the courts seem for the most part, to be unconcerned with marital fault (seeking in most instances to have the parties take an inquest on constructive abandonment), fault continues to remain a part of the Domestic Relations Law. It is an archaic and unreasonable requirement under the law. Although it is rare to see a contested divorce case on grounds reach trial, or for that matter a court denying the plaintiff relief for lack of proof of cruel and inhuman treatment, nevertheless published decisions continue to appear. The failure to grant a divorce, apart from causing emotional trauma to the plaintiff, compels parties to live together and remain married, imports incalculable harm to the children, and will continue to do so if such results continue to proliferate. An exception for egregious fault exists that permits the court to consider such fact in making an award of equitable distribution. No similar provision, however, appears to apply to maintenance cases. Whether egregious fault can be considered as a wild card factor or not, it is long past due for the legislature to repeal the requirement of fault to obtain a divorce, and enter the twenty-first century.

What interpretation of the equitable distribution statute will be made in the next 25 years remains to be seen. Nonetheless one thing is clear, the doctrine of enhanced earnings has outlived its welcome, and must be reversed. If the courts fail to do so, the legislature must act. In default of such occurrences, the doctrine must be applied across-the-board to non-professionals and any artisan or workman who enjoys special skills acquired during the course of an apprenticeship or actual work experience on the job during marriage. Failing to do so should cause a constitutional attack that the statute as it applies to enhanced earnings, does not permit equal protection under the law to all litigants. We should not have to wait another 25 years for such relief to be granted. It should now be done.

Endnotes

1. 66 N.Y.2d 576, decided on December 26, 1985, which resulted in quite a Christmas bonus for Mrs. O'Brien.
2. 3 N.Y.3d 1, decided on June 10, 2004, nearly 24 years to the day of the passage of equitable distribution.
3. This mandatory provision by the court cannot be waived by counsel.

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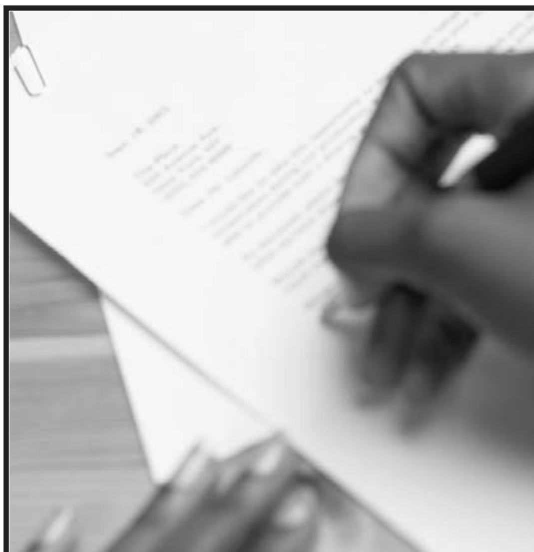

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Is the Glass Half-Empty or Half-Full—The Unused or Underused License or Degree

By Harvey G. Landau

Recently, the Court of Appeals in *Holterman v. Holterman*[1] reaffirmed its landmark decision in *O'Brien v. O'Brien*[2] that enhanced earning capacity due to the acquisition of a professional license or degree acquired during the marriage is a marital asset subject to equitable distribution.[3]

In *Holterman,* two dissenting judges argued that *O'Brien* should be limited or applied only to cases involving the student-spouse and working-spouse scenario. However, the majority of the court did not address the argument on its merit, ruling that the titled spouse had not raised this issue on appeal or in the lower court, and therefore it was not properly before the court for appellate review. New York is the only state to adhere to the view that a non-transferable advanced degree, license, or certification constitutes marital assets subject to distribution.

In some states, the equitable relief awarded to a self-supporting spouse who has contributed directly to the career of a degree-holding or licensed spouse, is an award of special or equitable maintenance. Usually, this may take the form of a lump-sum payment or a periodic payment to compensate the non-titled spouse for his or her efforts.[4]

The Court of Appeals in *O'Brien* specifically rejected as an alternative remedy an award of rehabilitative or reimbursement maintenance. The court held there is a lack of statutory authority for such a remedy. Nevertheless, some courts, most recently in *Sonnenfeld v. Sonnenfeld*, have fashioned the remedy of awarding a percentage of future earnings for a fixed period of time, in lieu of a theoretical lump sum distributive award.[5]

The focus of discussion in this article are the issues raised in cases where it is claimed that the license [or degree] did not enhance the spouse's earning capacity, or was not fully utilized.

In addition, if the titled-spouse intentionally abandons or fails to pursue a lucrative career opportunity, do such acts constitute marital waste or dissipation?

If titled-spouses can establish that their license or degree did not directly result in enhanced earnings, the asset is generally held not to have value for equitable distribution purposes. Similarly, if spouses can establish that throughout their career, their license was not utilized, it will be deemed to have no value. As the issue was framed by Justice Spolzino in *Fanelli v. Fanelli*,[6] ". . . [it is] that the value of a long-held license is determined on the basis of the holder's actual earnings, rather than its theoretic value."

The finding that there is no value to a license or degree that had no economic impact on a spouse's earnings is a reasonable conclusion when the spouse's career is well established.[7] The difficulty is presented in cases where the titled-spouse is in the early stages of his or her career and the unused license or degree may be used in the future. There is no hard-and-fast rule as to the numbers of years of non-use for the asset to "lose its value." However, the evidence must be sufficient to establish that the spouse's career change would be unlikely. In *Fanelli*, the parties were married in 1973, and the husband obtained his license as a professional engineer in 1978. For the 22-year period involved, the husband made minimal or no use of his license. His employment and earnings were found not related to his having the license. The forensic evaluator gave an opinion as to the value of the license both based upon the husband's actual earnings during the marriage and a theoretical earnings analysis of a professional engineer. The court held that the valuation should be the lesser amount because projection of future earnings should be based on the history of actual earnings, and that valuing a long-held license on the basis of its theoretical value is inconsistent with the appellate decisions as to license valuation.

Yet, the Appellate Division, Second Department in *Klutchko v. Baron*,[8] held that it was error for the court below to opine that a law license had no value because the wife had not practiced law in a number of years. The court observed that this ruling by the lower court was inconsistent with the way in which the court was willing to include the value of the husband's now suspended medical license for equitable distribution purposes. The opinion did not disclose how long the wife had not utilized her law license.

In *Savasta v. Savasta*,[9] the physician-husband worked for 10 years as an emergency room doctor. However, he was board certified in internal medicine, although he never practiced as an internist. The wife apparently did not object to the husband's field of medical practice. At trial, there was evidence that the husband [38 years old] had expressed a desire to open his own medical office to practice internal medicine. The court held while it could not "foretell the future, it could not ignore the acquisition of this certification." [A certification in internal medicine statistically would enhance a physician's earning capacity of that of a general practitioner]. The court held that the present value of Dr. Savasta's enhanced earnings was $571,878. Despite 20 years of marriage, the court only awarded the wife a 10% interest, or $57,188 as a distributive award. The court further stated that in doing so, it was applying the specific facts of the case and was not adopting as a rule of law "best use" of a license/certification theory. The court opined as *dictum* that if the facts of the case had been one in which the marriage was of long duration, i.e., 30 years and the physician-spouse acquired an unused internal medicine board certification in the early stages of their marriage, and instead was employed for the next 25 years as an emergency room doctor, then in such a case, the earning potential of the spouse should be based only upon his actual earning capacity as a doctor practicing emergency room medicine.

Differentiated from the cases where the titled-spouse has not used his or her license [or degree] during the marriage, is the case where the titled-spouse has only worked on a part-time basis. The part-time use of a license requires further analysis. First, what is the proper projected income stream to consider for valuation purposes? Second, if the titled-spouse is seeking maintenance and/or child support should the spouse's earning capacity, for support purposes, be calculated based upon his or her potential full-time employment? Third, if the spouse refuses to engage in full-time employment, or use the license, do such acts constitute marital waste or dissipation?

In *Farrell v. Cleary-Farrell*,[10] the parties were married for nine years at the time of their divorce. During the marriage, the wife obtained an Associate's degree and was licensed as a dental hygienist. The wife was employed "part-time," working between 32 and 34 hours per week. The forensic evaluator relied on governmental data to opine that employment less than 35 hours a week is considered "part-time" employment. The court agreed that the valuation of the wife's license should be based upon the assumption that she would continue to work part-time. A strong argument can be made that the court erred in not holding that if the wife was working [part-time] 32-34 hour a week, that an additional hour or two could be available to her if the wife wanted or was required to engage in full-time employment.

If the titled-spouse is working part-time, at an early stage in his or her career, earning projections based upon anticipated full-time employment would in the author's opinion, result in a more realistic projection of future earnings. Another possibility is if the other spouse has acquiesced to an arrangement whereby the titled-spouse works part-time to be available for child rearing, a two-prong period of projected earnings may be appropriate. [Based upon earnings realized from part-time employment and another period of years based on full-time employment when the spouse's childcare role is no longer necessary.]

The forensic evaluator in these cases should be requested to consider three valuation options: (i) value the enhanced earnings on the assumption of full-time employment; (ii) value the enhanced earnings on the assumption that the spouse will only work part-time; or (iii) value based upon part-time employment earnings for a period of years and full-time employment earnings to an anticipated retirement age of 65.[11]

If a spouse is seeking maintenance and/or child support, the court, absent unusual circumstances, should impute income to the titled-spouse based upon his or her ability to be employed full-time.[12] A court can differentiate between a best use approach for equitable distribution—and for support purposes. Both spouses should be required to use their best efforts to maximize their earnings, especially to support their children.

Finally, if a slothful spouse obtains a license [or degree], but refuses to seek employment, particularly contrary to the expressed desires of the other spouse, does such act constitute marital waste? Courts have held that marital waste includes a spouse intentionally abandoning lucrative employment or refusing to pursue employment.[13] In such cases, a measure of marital waste may not just be the lost earnings of the titled-spouse to the marital partnership, but also the amount of marital funds invested in obtaining the degree or license. The offer of proof of lost earnings can be established by testimony of a vocational expert.

The valuation and distribution of enhanced earnings, based upon a license and degree to prevent inequities in a divorce, may be noble in purpose, but difficult in reality to equitably accomplish. There are an increasing number of commentators who have raised questions how the court and the legislature should address this problem. Twenty years after the Court of Appeals decision in *O'Brien*, the experience has been that the cure may be worse than the disease.

Endnotes

1. *Holterman v. Holterman*, 3 N.Y.3d 1 (2004).
2. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985).
3. *Grunfeld v. Grunfeld*, 94 N.Y.2d 696 (2000); *McSparron v. McSparron*, 87 N.Y.2d 275 (1995); *Procario v. Procario*, 164 Misc. 2d 79 (West. Co., 1994, Collabella, J.); Domestic Relations Law § 236 (B)(1)(c)(5)(c).
4. *Hamlet v. Hamlet*, 583 So.2d 654 (Fla. 1991); *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980); "The court may consider any other

fact necessary to do equity and justice between the parties." Fla.Sta.Ch 61.08 (2002). *See also Kutanovski*, *infra* note 5.

5. *O'Brien*, *id.*, at 748; *Sonnenfeld v. Sonnenfeld*, 7 Misc. 3d 1005 (A)WL 763135; *Kutanovski v. Kutanovski*, 120 A.D.2d 571 (2nd Dept., 1986) the court awarded the wife a 10% interest in the husband's (medical license) future earnings for a period of ten years.

6. *Fanelli v. Fanelli*, 191 Misc. 2d 123 (Sup. Ct. West. Co., 2002, Spolzino, J.).

7. *Dugan c. Dugan*, 238 A.D.2d 741 (3rd Dept., 1997); *Pudlewski v. Pudlewski*, 309 A.D.2d 1296 (4th Dept., 2003); *Holihan v. Holihan*, 159 A.D.2d 685 (2nd Dept., 1990); *Semans v. Semans*, 199 A.D.2d 790 (3rd Dept., 1993).

8. *Klutchko v. Baron*, 1 A.D.3d 400 (2nd Dept., 2003), citing *inter alia Finocchio v. Finocchio*, 162 A.D.2d 1044, 1045 (4th Dept., 1990); DRL §236B(1)(c)(5).

9. *Savasta v. Savasta*, 146 Misc. 2d 101 (Sup. Ct. Nassau Co., 1989, Maro, J.).

10. *Farrell v. Cleary-Farrell*, 306 A.D.2d 597 (3rd Dept., 2003); *Jafri v. Jafri*, 176 Misc. 2d 246 (Sup. Ct. Rockland Co., 1997, Miller, J.).

11. *Harrington v. Harrington*, 6 A.D.2d 789 (3rd Dept., 2004); *Hickland v. Hickland*, 39 N.Y.2d 1 (1976); *Blasdell v. Steiner*, 14 A.D.3d 898 (3rd Dept., 2005).

12. *K v. B.*, 13 A.D.3d 12 (1st Dept., 2004); Galasso, *Something Smells Like Marital Waste*, NYSBA Family Law Review, Fall 2004 Vol. 36 No. 2; citing *Southwich v. Southwick*, 202 A.D.2d 996 (4th Dept., 1994); *Gastineau v. Gastineau*, 151 Misc. 2d 813 (Sup. Ct. N.Y. Co., 1991).

13. Florescue, *The Degree Without the License*, N.Y.L.J., June 27, 1989, p. 3, col. 1; *Preventing Inequities in Divorce and Education: The Equitable Distribution of a Career Absent an Advance Degree ir License*, 9 Cardozo Women's L.J. 133,156 (2002); Scheinkman, New York Practice, *New York Law of Domestic Relations* § 14:31 (2004). *See also Sonnefeld* and *Kutanovski*, *supra* note 5.

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Tax Consequences of the Disposition of the Marital Residence

By Asher Harris

I. Introduction

The federal income tax treatment of gain recognized on the sale of a principal residence was substantially revised in 1997. Previously, the gain could be rolled over into another primary residence. Since 1997, Section 121 of the Internal Revenue Code (the "Code") has provided that a fixed amount of gain is excluded from income, regardless of whether the seller purchases another principal residence. Over the past several years, helpful guidance on the application of these rules has been promulgated. This article will discuss the application of the rules governing the exclusion of gain on the sale of a principal residence in the context of a divorce, as well as the interaction of those rules with other principles of federal, New York State, and New York City tax law.

II. Gain on Sale of Principal Residence

A. General Rule

The Code provides that gain on the sale of a principal residence is excludable from the seller's income, provided that the property has been *owned* by the seller and *used* as the seller's principal residence for periods aggregating two years or more during the five-year period ending on the date of the sale.[1] This exclusion is generally only available once every two years, although as discussed below, an exception applies in the case of divorce or separation.[2] The maximum amount of gain that can be excluded is $250,000 for a taxpayer filing individually.[3] In the case of a joint return, a maximum of $500,000 can be excluded, as long as all three of the following conditions are met: (1) either spouse meets the ownership test, (2) both spouses meet the use test, and (3) during the preceding two years, neither spouse sold a qualifying principal residence.[4] Failure to satisfy the final condition in the context of a divorce will not cause the exclusion to be forfeited—it only reduces the amount of gain that can be excluded from income.

Under Section 1041(a) of the Code, no gain or loss is recognized on a transfer of property between spouses, or between ex-spouses incident to a divorce.[5] The transferee spouse takes the property with a carryover basis, and a holding period which includes the period during which the property was owned by the transferor.[6] The manner in which these two provisions interact can be complex, and should receive careful attention.

B. Qualification as a Principal Residence

For property to be treated as a person's principal residence, it must have been owned by the seller for a total of two years or more during the five years preceding the sale (the ownership test), and it must have been used by the seller as his principal residence for a total of two years or more during the five years preceding the sale (the use test). In determining whether the ownership and use tests are satisfied, the Code makes some allowance for periods during which the residence was owned or used by a spouse or ex-spouse. For purposes of the ownership test, if a person acquired ownership of the residence in a transaction that qualified as a tax-free transfer under Section 1041(a), his ownership period is deemed to include the period that the residence was owned by the transferor. For purposes of the use test, a person is deemed to have used the property as a principal residence during any period that the person's spouse or ex-spouse is granted use of the property under a divorce or separation agreement, provided that the property is actually used as the principal residence of the person to whom use is granted.[7] The period of deemed use does not include any period of informal separation during which the residence was used exclusively by a spouse.

Example 1: Assume that a house has been jointly owned by H and W for more than five years. The house has been the principal residence of W, but H has lived separately from his family for the preceding three years, although no formal separation agreement was entered into. H and W divorce, and the house is sold at a gain. The divorce is finalized before year-end, and thus each ex-spouse reports the proper share of the gain on an individual tax return. Both spouses satisfy the ownership test, since they owned the house for more than two out of the preceding five years. W satisfies the use test, since she has used the house as her principal residence for the requisite period of time. Accordingly, her share of the gain is excludable from income, up to a maximum of $250,000. H does not satisfy the use test, however, since he has not used the house as his principal residence during the required period. Furthermore, W's use of the house as her principal residence is not imputed to H, since her use of the property was not pursuant to a separation agreement. Accordingly, the gain is fully taxable to H.

Example 2: The facts are the same as in Example 1, except that instead of selling the house, H transfers his ownership interest in the house to W in a transfer that qualifies under Section 1041(a). W later sells the house at a gain. The use test is satisfied, since W has used the house as her principal residence for the required period of time. The ownership test is also satisfied, since H's ownership of a share of the house is imputed to W. W may exclude up to $250,000 of gain.

Example 3: The facts are the same as in the previous examples, except that the house remains in joint ownership, and the separation agreement grants exclusive use of the house to W. W resides in the house for two more years, after which the house is sold. The ownership test is satisfied by both H and W, since the house has been owned by each owner for the required time period. The use test is satisfied by W, as she has used the house as her principal residence for the required time period. The use test is also satisfied by H, as W's use of the house as a principal residence pursuant to the separation agreement is imputed to him. Each of H and W may exclude up to $250,000 of gain.

C. Whose Principal Residence Qualifies for Gain Exclusion?

For federal income tax purposes, a person has only one principal residence. If a person uses more than one residence, the determination of which residence is "principal" is based on an analysis of all relevant circumstances. The home in which the person spends a majority of his time is ordinarily his principal residence, although other factors may be relevant.[8]

As each individual can only have one principal residence, and the residence of one spouse can be imputed to the other spouse, one might conclude that a couple can only have one principal residence. In fact, Section 121 addresses the principal residence of the "taxpayer", and each individual must independently analyze whether the requirements for gain exclusion are satisfied.

Example 4: The facts are the same as in Example 2, in which ownership of the home was transferred to W tax-free. In addition to the home that is W's principal residence, H has lived for the past five years in another residence that he also owned. In the same year in which W sells her residence and excludes $250,000 of gain from her income, H sells his residence and recognizes gain of $250,000. Both the ownership and use tests are satisfied by H, and accordingly H may exclude from his income up to $250,000 of gain from the sale. Although an individual can only use the income exclusion once in a two-year period, the fact that W excludes gain on the sale of her residence does not prevent H from doing so as well. This result is true despite the fact that W satisfied the ownership test by virtue of the fact that H's ownership of the property was imputed to her.

D. Limitations

The amount that can be excluded from income is limited to $250,000 in the case of a person filing a single return, and $500,000 in the case of a couple filing a joint return. This rule can eliminate some of the benefit of Section 1041(a), as the transferee of property will take a carryover basis in the property, and will also be subject to the reduced amount of income exclusion. This rule may give divorcing couples a tax incentive to sell the primary residence before the divorce is finalized, to maximize the amount of gain eligible for exclusion.

Example 5: H is the sole owner of the couple's primary residence. His basis in the property is $250,000, and the value of the property is $750,000. If H sells the property for $750,000 in a year for which the couple files a joint tax return, the entire amount of the gain will be excludable. On the other hand, if H transfers the house to W in a tax-free transfer, and W sells the property for $750,000 after the divorce is finalized, she will recognize a taxable gain of $250,000 (proceeds of $750,000, less basis of $250,000, less a maximum exclusion of $250,000).

It is important to keep in mind that, in order to qualify for the $500,000 limitation, *both* spouses must satisfy the use test. If the couple is legally separated before the sale, they may be able to take advantage of the imputed use rule discussed above. If the couple has lived apart without a formal separation agreement before the sale, the increased limit on excludable gain may not be available to them.

Example 6: Assume that a house has been jointly owned by H and W for more than five years. The house has been the principal residence of W, but H has lived separately from his family for the preceding three years, although no formal separation agreement was entered into. H and W sell their home prior to the year in which the divorce is finalized, and report the gain on a joint income tax return. Both spouses satisfy the ownership test, since they owned the house for more than two out of the preceding five years. W satisfies the use test, since she has used the house as her principal residence for the requisite period of time. H does not satisfy the use test, however, since he has not used the house as his principal residence during the required period. Furthermore, W's use of the house as her principal residence is not imputed to H, since her use of the property was not pursuant to a separation agreement. Accordingly, the maximum amount of gain that can be excluded on the joint income tax return is $250,000.

E. Failure to Satisfy the Two-Year Test as a Result of Divorce or Separation

Gain on the sale of a principal residence can generally only be excluded from income once every two years. A prorated amount of gain is excludable, however, if the second sale is the result of unforeseen circumstances.[9] Regulations clarify that, for this purpose, divorce or legal separation is treated as an unforeseen circumstance.[10] Thus, a reduced amount of gain can be excluded if a couple divorces or separates within two years after selling a previous residence.

The prorated amount of the exclusion is calculated in the following manner. First, determine which of the following three time periods is shortest: (1) the amount of time the taxpayer owned the second property during the five years preceding its sale; (2) the amount of time the taxpayer used the second property as his principal residence during the five years preceding its sale; or (3) the time that elapsed between the first sale and the second sale. The lowest of these three numbers, expressed in days or months, is divided by 730 days or 24 months, as the case may be. The resulting fraction is multiplied by $250,000 (or $500,000, if the sale will be reported on a joint return).

Example 7: On July 1, 2003, H and W sold their residence and jointly purchased a new home for $300,000. They moved into the new home on January 1, 2004, moved out on July 1, 2004, and divorced before year-end. The home was sold for $500,000 during the second half of 2004, and the sale proceeds were split equally. The shortest of the three factors is the six-month period in which the home was their principal residence, so each of H and W can exclude up to $62,500 of gain on their 2004 income tax return (6/24 x $250,000). Since each of them had a basis in the property of $150,000 and proceeds of $250,000, they will each recognize taxable gain of $37,500.

F. Property Used as for Residential and Business Purposes

Because Section 121 applies only to property used as a residence, further analysis is required if property was used partly as a principal residence and partly for business purposes. If the residence and the business portions are in the same dwelling unit, the entire property can be treated as a residence.[11] If the property includes a separate dwelling unit that was used for business purposes, gain allocable to the property used for business purposes cannot be excluded under Section 121. This issue can come up if a separate building was rented out to a tenant, or used as an office or other workplace. In that case, the owners of the property should consider disposing of the property in a transaction that qualifies both as a sale of a primary residence and a tax-free exchange of the business property. Section 1031 of the Code provides that no gain or loss is recognized if property used in a trade or business is exchanged for like-kind property that will also be used in a trade or business. The IRS has clarified that if a person sells a property used partly as a principal residence and partly in a business, both Section 121 and Section 1031 can be used to exclude gain on the sale of the property.[12]

III. New York State and City Tax

A. Gain on the Disposition of Property

Taxable gain recognized on the disposition of real property located in New York State is subject to New York State income tax, regardless of whether the seller of the property is a New York State resident.[13] If the property qualifies as the seller's principal residence, the gain is only subject to New York State income tax to the extent that it is taxable for federal purposes under the rules discussed above. In contrast, New York City does not impose income tax on gains recognized by nonresidents on the sale of property located in New York City. Thus, if a person is no longer a tax resident of New York, the taxable portion of gain on the disposition of a residence located anywhere in New York State will be subject to New York State income tax. If the residence is located in New York City, the taxable component of the gain will be subject to New York State income tax, but not New York City income tax.

B. Other Taxes

New York State imposes real estate transfer tax whenever real estate located within New York State is transferred.[14] The tax rate is .40% of the value of the property, and in the case of residences, a mortgage to which the property is subject is generally excluded. Residences are subject to an additional tax of 1% of the value of the property if the consideration for the transfer is over $1,000,000.[15] Regulations clarify that a transfer of property between spouses incident to a divorce or separation agreement is subject to real estate transfer tax, and that the consideration for the transfer is presumed to be the fair market value of the property.[16] Thus, despite the fact that a transfer between spouses is exempt from federal *and* state income tax under Section 1041, real estate transfer tax still applies. By statute, real estate transfer tax is imposed on the grantor of the property, although the grantee has joint and several liability for the tax if the grantor fails to pay.[17] Liability for the additional tax is imposed on the grantee, although the grantor is liable to pay the tax if the grantee is exempt.[18]

New York City imposes real property transfer tax whenever real property located in New York City is transferred for consideration in excess of $25,000.[19] For residential real property with a value of less than $500,000, the rate is 1% of the total consideration; if the value is greater than $500,000, the tax rate is 1.425% of the total consideration. A transfer of property between spouses pursuant to a separation agreement is subject to real property transfer tax, and the consideration for the transfer is presumed to equal the fair market value of the property.[20]

Any mortgage recorded in New York State is subject to a mortgage recording tax.[21] The rate of tax varies from county to county, from a minimum level of .75% to a high of 2.125% on mortgages securing residences in New York City. Although an assignment of an existing mortgage is not subject to mortgage recording tax if the principal amount of the debt is not increased, any increase in principal is subject to tax.

Example 8: H is the sole owner of the couple's primary residence. His basis in the property is $250,000, and the value of the property is $750,000. If H sells the property for $750,000 in a year for which the couple files a joint tax return, the entire amount of the gain will be excludable. On the other hand, if H transfers the house to W in a tax-free transfer, and W sells the property for $750,000 after the divorce is finalized, she will recognize a taxable gain of $250,000 (proceeds of $750,000, less basis of $250,000, less a maximum exclusion of $250,000). Although such a transfer will be free of federal and state income tax, it will be subject to New York State real estate transfer tax if the property is located in New York State. The transfer will also be subject to New York City real property transfer tax if the property is located in New York City.

For residents of New York, the advisability of a Section 1041 transfer will require an analysis of a number of issues, including the value of the property, the tax basis of the property, the likelihood that the home will be sold in the near future, the possible need to re-record the mortgage, and the tax rates that will apply. In addition, each party needs to understand who will bear the economic burden of the tax, who has contingent liability for the tax, and what indemnification will apply if one party is required to pay a tax that should have been borne by the other.

IV. Summary

The regime for excluding gain on the sale of a principal residence raises many complex issues that must be taken into account when planning for a divorce. The issues are even more complex for New York residents, as transfer taxes and mortgage recording taxes may be incurred, even if the transfer is free from income tax. Careful, thorough and timely analysis of all relevant tax considerations can help prevent unanticipated tax costs from disturbing the financial arrangements agreed to by the parties.

Endnotes

1. Internal Revenue Code § 121(a) (IRC).
2. IRC § 121(b)(3).
3. IRC § 121(b)(1).
4. IRC § 121(b)(2).
5. IRC § 1041(a).
6. IRC § 1041(b)(2), § 1223(2).
7. IRC § 121(d)(3), Income Tax Regulations § 1.121-4(b) (Regulations).
8. Regulations § 1.121-1(b).
9. IRC § 121(c)(2).
10. Regulations § 1.121-3(e)(2)(iii)(D).
11. Regulations § 1.121-1(e).
12. Revenue Procedure 2005-14, 2005-7 Internal Revenue Bulletin (Jan. 27, 2005).
13. N.Y. Tax Law § 631(b)(1)(A) (NYTL).
14. NYTL § 1402(a).
15. NYTL § 1402-a(a).
16. N.Y. Comp. Codes R. & Regs., tit. 20, § 575.11(a)(10).
17. NYTL § 1404(a).
18. NYTL § 1402-a(b).
19. N.Y.C. Admin. Code § 11-2102.a.
20. Regs. C.N.Y. § 23-03(d)(3); *In re Smith-Hoffman*, TAT(E)93-2341(RP), TAT(E)93-3863(RP) (N.Y.C. Tax Appeals Tribunal Mar. 7, 2003).
21. NYTL § 253-a.

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Biases in the Computation of Enhanced Earnings for Individuals Whose Income is Not "Average" and a Proposed Solution

By George Palumbo, Ph.D.; Richard A. Shick, Ph.D. and James P. Renda, Esq.

Introduction

The landmark decision of *O'Brien v. O'Brien*[1] established as a currently immutable rule of law the enhanced earnings doctrine. As a result, thousands of divorce cases have acquired forensic experts, usually accountants or economists, to render opinions regarding the calculation of the value of the enhanced earnings. *O'Brien* and its progeny have given birth to a number of legal issues, which have required forensic experts to apply the principles of their academic disciplines to a multitude of factual variations addressed by the courts in applying the *O'Brien* doctrine.

From an economist's viewpoint, valuation issues include, *inter alia,* what are the appropriate earnings to be utilized in the analysis, how long should the "work life" be, and what are the proper growth and discount rates?

The standard approach utilized in calculating the value of the enhanced earnings is to compute the present value of the yearly after-tax differences between the individual's earnings with the education and/or license (sometimes called "topline earnings") and the income the individual would have earned had there been no further education (baseline earnings).

Not long after *O'Brien* the concept of merger arose in *Marcus v. Marcus,*[2] and the variant of the merger concept was articulated in *Finocchio v. Finocchio.*[3] In *McSparron v. McSparron,*[4] the Court of Appeals rejected the argument that the defendant's law license "merged" with his law practice. The Court of Appeals, noting the concepts arising from *Marcus*[5] and *Finocchio,*[6] and then articulating its rationale as to why it was rejecting the concept of "merger," concluded that *O'Brien* and the underlying principles of the Equitable Distribution Law were promoted by ". . . a common-sense approach that recognizes the ongoing independent vitality that a professional license may have and focuses solely on the problem of valuing that asset in a way that avoids duplicative awards."[7] Thus when an individual has embarked on a career or profession, that individual's actual earnings, rather than some hypothetical earnings, should be used as the "topline" earnings. What has not received much attention is the determination of the "baseline" earnings or the earnings had the individual not furthered his or her education during the marriage. The commonly accepted approach is to determine the baseline earnings from averages computed by degree and age that are published by various governmental and non-governmental sources.[8] However what happens if the actual earning capacity of the individual is not average? If, for example, an individual earns more than the average in a profession, should all of this be attributable to the education or license obtained during marriage? Or is part of the enhanced earning power due to some non-marital factors and abilities therefore making a portion of the enhanced earnings separate property and not eligible for equitable distribution purposes? Alternatively, what if the individual's actual earnings with the education and/or license are below the average for the baseline? Are the education and/or license obtained during the marriage worth nothing or worse do they have a negative value that reduces the couple's assets?

We opine that when an individual's actual earnings are significantly above or below the average of those with similar educational attainment and this fact is not recognized, a substantial bias is created in the calculation of the value of the enhanced earnings. This bias will either overstate or understate the value of the enhanced earnings and in some cases lead to nonsense results. This article describes a method for dealing with this bias.

O'Brien and the Valuation Issues That Followed

At the time of the *O'Brien* action for divorce, Dr. O'Brien had graduated from medical school, but was still in residency. Since he did not have a medical practice, the forensic expert did not have an established earnings history to utilize in the valuation process. Consequently, Mrs. O'Brien's expert calculated the value of the enhanced earnings:

> by comparing the average income of a college graduate and that of a general surgeon between 1985, when the plaintiff's residency would end, and 2012, when he would reach age 65.[9]

Because the calculations were based on hypothetical earnings rather than actual earnings, no problem was extant regarding the differences between "actual earnings" and "average earnings."

Writing in the *Family Law Review* shortly after the *O'Brien* decision, Sandra M. Jacobson[10] observed that the valuation technique used in *O'Brien* was significantly different from the methods used prior to the case. Earlier work had combined the value of licenses and practices and used generally accepted valuation methods for businesses or professional practices. A commonly used business valuation approach is the "excess earnings" method, which basically capitalizes any earnings above a reasonable compensation for the owner of the practice.[11]

The differences between the two valuation approaches are quite striking. The business valuation method says that there is only value to a professional practice if it generates income in excess of a reasonable level of compensation for the owner/manager. The *O'Brien* method says that there is value if the individual earns more than what could have been earned without the further education and/or certification—two completely different baselines. In addition, there have been vastly different discount rates used for the two methods. Due to variations in risk, size, volatility and market structure, the discount rate in the "excess earnings" method can be as much as 100%, while the *O'Brien* case used a real discount rate net of growth of 3%! The difference in discount rates alone can lead to wide variations in value.

The option to use a business valuation method was not open in the *O'Brien* case since there were no actual earnings. Therefore an alternative valuation method had to be used. Although the *O'Brien* approach may have been new to matrimonial law, it was not new to the field of economics. It simply built on the concept of the formation of human capital and used valuation methods that had been employed in stock and bond pricing for many years.

The question of how to value an education or a license for an individual with an established earnings record immediately arose after *O'Brien* and this gave rise to the concept of merger in *Marcus v. Marcus*,[12] and *Finocchio v. Finocchio*.[13] The idea of merger was that once the earnings stream for an individual with a professional practice had been established, the value of the license or education became a part of the professional practice and could not be evaluated separately. Interestingly this concept was also interpreted to hold where the individual did not have a professional practice but was an employee.[14]

The merger concept was fraught with many problems, which created dissonance in the reported decisions at the trial and appellate division levels. Ultimately, the Court of Appeals addressed this issue in *McSparron,*[15] and the Court stated, *inter alia:*

> If, as we held in *O'Brien*, a currently valid professional license as a distributable item of economic value, it should logically retain that quality throughout its existence. It would be anomalous to suggest that a marital asset may "merge" or disappear, and perhaps even "reemerge" or reappear depending upon the vicissitudes of the licensee's professional career.[16]

The Court of Appeals provided cautionary guidelines to what it denoted "the valuation inquiry" and articulated that

> . . . care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets that are derived from the license such as the licensed spouse's professional practice. The Court must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses.[17]

In 2000, the Court of Appeals revisited *McSparron* in *Grunfeld v. Grunfeld*.[18] The Court of Appeals modified the Appellate Division's Order since it determined that the court had "double counted" income in determining the amount of maintenance and the amount of the distributive award regarding the plaintiff's law license. The Court of Appeals stated that ". . . once a Court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout."[19] However, *Grunfeld* did not disturb the valuation methodology referenced in *McSparron*.[20]

In the *Grunfeld* case, Mr. Grunfeld, an attorney, was the founder and managing partner of a firm. He had a bachelor's degree at the time of his marriage, earning his law degree, license, and establishing his firm during the marriage. In round numbers the court accepted the following values:

Actual earnings for Mr. Grunfeld:	$1,200,000
Replacement salary for Mr. Grunfeld:	$295,000
Salary of average lawyer:	$94,000
Average salary of bachelor's degree holder:	$50,000

Three different valuations were computed. The "bare license" was determined as the present value of the difference between the $50,000 earned by a bachelor's degree holder and the $94,000 earned by the average lawyer. A second license calculation, representing the "enhanced earnings potential," was calculated as the present value of the difference between the replacement salary of $295,000 and the average lawyer salary of $94,000. It is unclear why this distinction was made, but the total of the two values was approximately $1,547,000.

While eliminating the merger problem, the *Grunfeld* case created another problem that this article addresses. Clearly Mr. Grunfeld was an above average earner in his profession. His earnings of $1,200,000 are almost 13 times those of an average lawyer and his replacement salary of $295,000 is more than 3 times that of an average lawyer. By calculating the value of the enhanced earnings from the license as the present value of the difference between $295,000 and $94,000, the valuation assumes that all of this difference is due to the license to practice law obtained during the marriage. But is that a reasonable assumption? The answer to this question can be found by going back to the theory underlying the enhanced earnings concept—human capital theory.

In 2004 the Court of Appeals ruled in *Holterman v. Holterman*[21] that the husband's ". . . claims that the courts below erred as a matter of law in violating the anti-duplication principles enunciated in *McSparron v. McSparron* . . . and *Grunfeld v. Grunfeld*"[22] were without merit. The Court held that:

> husband's proposed reallocation formula—or any formula that requires a deduction of a distributive award paid over a period of years from the licensed spouse's income for the purpose of calculating child support—is impermissible under the CSSA.[23]

The Court of Appeals stated *inter alia* that "CSSA does not provide for the deduction of distributive awards from income."[24]

Once again, the Court of Appeals in *Holterman* left undisturbed the underlying valuation methodology.

Human Capital Theory

The modern origins of human capital are found in the work of Gary S. Becker,[25] Jacob Mincer and Solomon Polachek,[26] and Theodore W. Schultz.[27] Under human capital theory an individual creates capital by acquiring skills and knowledge through education, training, or experience associated with work. The acquisition of these skills and knowledge then increases the individual's earnings over what would have been earned without the acquisition of the human capital. While generally the formation of human capital is an investment process, it can also be the result of the improvements in productivity that naturally occur on the job.

Under the theory, a family can be viewed as an economic unit where education is treated as an investment in human capital that will yield a future return in the form of higher lifetime earnings, more job satisfaction, or an improved sense of self for the individual who receives the education, training or degree. The investment in human capital is often made in terms of direct tuition payments, forgone earnings and the time and support of other household members. However there is another part to this investment that comes from the individual. This includes native abilities such as intelligence, work habits, personality, family values, etc. Thus the return from the human capital investment, i.e., the enhanced earnings, is a product of two factors and a complementary relationship is formed.

This complementary relationship is confirmed in the work of Arias *et al.*[28] Using instrumental variables quartile regression analysis and data on identical twins, Arias found that the returns of education were greater for people with greater abilities, though there were still positive returns for those at lower ability levels.

While the degree of complementarity between education and inherent abilities is not directly measurable, it is reflected in the enhanced earnings of the individual that has obtained the education. Thus a person with high intellectual capabilities who can commit to task completion may increase his or her earnings with an investment in education. Absent the educational investment it is likely that the same attributes which made obtaining a degree possible would elevate lifetime earnings over the pool of labors with lower endowments. The absence of these abilities may well place an individual in the lower portion of the distribution of earnings without an education, and below the earning levels of people with comparable educational investments.

Carrying this concept over to the measurement of enhanced earnings, one can see how the bias for an above average individual arises. If the actual earnings of an individual with additional education and above average abilities are directly compared with the earnings of individuals of average native abilities and a lower level of education, the difference (enhanced earnings) will encompass two factors—the value of the education and the difference in native abilities. If these native abilities were not acquired during the marriage, then assigning that portion of the enhanced earnings that they generate to the marriage is not fair to the individual with the enhanced earnings and represents a windfall to the other party.

In his critique of the *O'Brien* case, Robert B. Moriarty[29] raised this same issue. Moriarty says "for the professional, the degree and license are the crowning result of an arduous path that began in grade school, or even sooner in his or her family background."[30] He goes on to say

> in my view, the trial court's failure to view the doctor's license as the product of his life's experience, and not just the product of his marriage, is grossly inequitable. To look at the license as marital property *only* is to ignore reality. *O'Brien* was not a clean slate when, at the age of 24, he married. He was an elementary and high school graduate with three and one half years of college behind him. . . . It takes intelligence, drive, hard work and an aptitude for the natural sciences to successfully pursue and obtain a license to practice medicine.[31]

This same line of reasoning is contained in *Lesman v. Lesman*,[32] and we are aware that the Court of Appeals rejected it in modifying the Second Department's holding in *O'Brien v. O'Brien*.[33] Query: In view of the work of Arias *et al.* and the refinements contained in the progeny of *O'Brien*, is it time to revisit this issue and adopt this line of reasoning as a factor to be considered in the valuation process?

Career choice and interests should also be considered in an enhanced earnings calculation. To see this point, turn the facts in the *Grunfeld* case around. Assume that Mr. Grunfeld had decided to pursue social justice issues in his law career and represent the needy. As a result, suppose his earnings were not $1,200,000 but were $40,000. Under this set of assumptions, the value of his education and license would be negative using the standard approach because his actual earnings would be $10,000 below those of a bachelor's degree holder. Would this mean that the value of his education and license was zero or negative, in which case his spouse would owe him money? Such a conclusion is illogical because education should always be an enhancement even if the individual chooses not to make use of its benefits or if it can't be measured quantitatively. To attribute no value to the license is unfair and biased against the spouse.[34]

Thus, while the elimination of the concept of merger and the use of actual earnings as part of the valuation process resolves certain issues, it creates new valuation problems for those who earn significantly more or less than the average. In the material that follows we will propose a solution to these new problems.

A Proposed Solution to the Problem

To address the problems discussed above, we propose that the baseline earnings be adjusted to reflect the extent to which an individual's earnings exceed or fall short of the average earnings in the profession he/she is currently working.

To illustrate how the approach works, assume that Ms. X is a high school graduate at the time of her marriage. Following the marriage she completes a bachelor's degree and an advanced professional degree. At the time of her divorce in 2001 she is 40 years of age and is earning $170,000 per year. She is an employee of a large international corporation. Data published by the U.S. Bureau of the Census[35] show that the median earnings for a 40-year-old female with a professional degree were $71,700. The median earnings for a 40-year-old high school graduate were $24,500. Assuming a future growth rate of 3%, a remaining work life of 22 years, constant tax rates of 35% for earnings with a professional degree and 20% for the high school graduate, and a discount rate of 7%,[36] Table 1[37] shows that the present value of her enhanced earnings is $1,419,000 using the standard approach.[38]

However, Ms. X makes considerably more than the average for holders of professional degrees. Her earnings in 2001 were 2.37 times the average. If Ms. X had the capabilities to earn 2.37 times the average with a professional degree, then following the findings on human capital research, we argue that had she not furthered her education during the marriage, her earnings would have been greater than the average. The amount that her earnings would have exceeded the high school average is an assumption to be made in the analysis. The most straightforward approach is to assume a direct proportional multiplier of 2.37 times. It is also possible that the multiplier would not be proportional because the range of earnings possibilities may not be as great for a high school graduate. This decision must be left to the judgment of the expert; however, the assumption that the multiplier is 1 seems clearly unreasonable.

Using the proportional approach we advocate here, the baseline earnings for Ms. X are increased 2.37 times to a beginning value of $58,136. Table 2 shows the calculations with the revised baseline earnings and gives a present value for the enhanced earnings of $999,000.

As a point of comparison, Table 3 calculates the generic value of Ms. X's enhanced earnings. It compares average earnings with a professional degree to average earnings of a high school graduate.[39] The present value of the enhanced earnings is approximately $421,000. Thus if Ms. X were an average earner, the value of her education would be 30% of the value calculated in Table 1.

By adjusting the baseline earnings, the value of Ms. X's enhanced earnings is reduced from $1,419,000 to $999,000 or $420,000. That is, it separates the total of $1,419,000 into two components—$999,000, which is due to the education obtained during the marriage, and $420,000, which is due to Ms. X's native abilities that are not part of the marital assets.

The baseline adjustment process says that if an individual with additional education earns more than the average of those with the additional education, then it is likely that the person would have earned more than the average had the additional education not been obtained. Making the adjustment separates the value of the education from the value of the native abilities and provides for a more equitable distribution of the enhanced earnings resulting from a marital investment in human capital. In addition, the adjustment process allows for individuals with enhanced abilities to earn more with additional education than those with lower abilities and is consistent with the empirical research.

Conclusion

A compelling argument can be made for the economic benefits of marriage as a partnership, and this has clearly been recognized by the courts. When two individuals make an investment in human capital during the marriage and that marriage is subsequently dissolved it is clearly just and equitable that the returns to that investment should be divided between the partners. This principle was established in *O'Brien* and reaffirmed in numerous cases that followed. The real issue is how to divide the enhanced earnings.

The methodology in the *O'Brien* case drew from human capital theory, but it did not deal with the returns from education that come from abilities and talents that the individual brought to the marriage. Since the calculations were based on hypothetical earnings, the failure to deal with the effect of these abilities was not as apparent. However once the calculations began using actual earnings, the issue of how to deal with individuals who earn significantly more or less than the average must be confronted. To do otherwise is to introduce a substantial bias into the calculations.

Using human capital theory, this article proposes a method to separate the earnings effects of native abilities that are not marital from the earnings effects of education that was acquired during a marriage. By partitioning the enhanced earnings as suggested, a better identification of the returns to the human capital investment is made and a better distribution of marital assets will result.

Endnotes

1. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985).
2. *Marcus v. Marcus*, 135 A.D.2d 216 (2d Dept. 1988).
3. *Finocchio v. Finocchio*, 162 A.D.2d 1044 (4th Dept. 1990).
4. *McSparron v. McSparron*, 87 N.Y.2d 275 (1995).
5. *Marcus v. Marcus*, 135 A.D.2d 216 (2d Dept. 1988).
6. *Finocchio*, 162 A.D.2d 1044.
7. *McSparron*, 87 N.Y.2d at 285.
8. The U.S. Bureau of the Census and the U.S, Bureau of Labor Statistics are commonly used sources of this type of data.
9. *O'Brien v. O'Brien*, 66 N.Y.2d 576, 582 (1985).
10. Sandra M. Jacobson, *O'Brien: Picking Our Way Through the Bramble Bush of Valuation*, Fam. L. Rev., Mar. 1987, at 7.
11. The term "excess earnings" is used as a generic term in this case. There are in fact a number of valuation methods that make use of excess earnings for valuation purposes. See Shannon P. Pratt, et al., Valuing A Business (1996).
12. 135 A.D.2d 216 (2d Dept. 1988).
13. 162 A.D.2d 1044 (4th Dept. 1990).
14. *Tessler v. Tessler* (Sup. Ct. 1986), Fam. L. Rev., Aug. 1986, at 11.
15. *McSparron*, 87 N.Y.2d 275 (1995).
16. *Id.* at 284.
17. *Id.* at 286.
18. *Grunfeld v. Grunfeld*, 255 A.D.2d 12 (1st Dept. 1999).
19. *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 705 (2000).
20. *McSparron v. McSparron*, 87 N.Y.2d 275 (1995).
21. *Holterman v. Holterman*, 3 N.Y.3d 1 (2004).
22. *Id.* at 9.
23. *Id.* at 9.
24. *Id.* at 11.
25. Gary S. Becker, *A Theory of Marriage: Part II,* 82 J. Pol. Econ., S11, Part 2: Marriage, Family, Human Capital, and Fertility, Mar.-Apr., (1974); Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. Pol. Econ. 385 June (1993).
26. Jacob Mincer and Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, 82 J. Pol. Econ. S76 Part 2: Marriage, Family, Human Capital and Fertility, Mar.-Apr., (1974).
27. Theodore W.S. Schultz, *Nobel Lecture: The Economics of Being Poor*, 88 J. Pol. Econ. 639 June (1980).
28. Omar Arias, et al., *Individual Heterogeneity in the Returns to Schooling: Instrumental Variables Quartile Regression Using Twins Data*, 26:7 Empirical Econ. 7 (2001).
29. Robert B. Moriarty, *The Controversy Over O'Brien: The Problem and a Proposed Solution*, Fam. L. Rev., Aug. 1986, at 3.
30. *Id.* at 4.
31. *Id.* at 6.
32. *Lesman v. Lesman,* 88 A.D.2d 153 (4th Dept. 1982).
33. *O'Brien v. O'Brien*, 106 A.D.2d 223 (2d Dept. 1985).
34. This argument begs the question of how to evaluate the enhanced earnings potential of an individual who simply refuses to work at all or refuses to work at a position that employs the additional education. In this case equity would suggest that hypothetical earnings be used for both the topline earnings and baseline earnings.
35. U.S. Bureau of the Census, *Earnings in 2001 by Educational Attainment for People l8 Years Old and Over, by Age, Sex, Race, And Hispanic Origin: March 2002.*
36. Some experts do not use separate growth and discount rates; instead they specify the difference between the two rates (the real rate) and discount the yearly earnings differences at the real rate. This approach was used in *Holterman.*
37. These rates are chosen strictly for illustrative purposes. In cases where there is a great difference between the top and baseline earnings it is more appropriate to use two tax rates. A single tax rate will increase the value of the enhanced earnings, especially if it is the one applicable to the topline earnings.
38. This illustration raises an interesting question. Should the baseline earnings for a woman pursuing a professional career be the average of a female high school graduate? The data on which the median income is based includes single and married career women as well as those who enter and exit the workforce a number of times due to events such as marriage, childbirth and rearing, and supplementing the family income for various purposes. An individual who enters and exits the workforce on a number of occasions may not earn the same salary as one who is continually active. Thus if Ms. X is continually in the workforce with her profession the value of her education will be overstated if she is compared with a sample of women with different work patterns. The same concern could apply to men but it is much more unlikely since their work history is typically more continuous.
39. The entire valuation process raises the issue of whether the marital asset is the generic value of the earnings enhancement or what the person does with it. The courts have clearly come down on the side that the value of the enhancement is in the hands of the holder, at least for the above average earner. How would the courts rule on the value of enhanced earnings if the individual had the opportunity but never did anything with education and/or license? We suspect that some value would be attributed in such a case, which leads to an asymmetric situation. Our suggested approach can be viewed as restoring some of the symmetry to this issue.

Dr. Palumbo is professor of economics and Dr. Shick is professor of finance in the Department of Economics/ Finance at Canisius College in Buffalo, New York. Both individuals are active as forensic economists and have prepared an extensive number of enhanced earnings valuations. Mr. Renda is in private practice in Buffalo, New York. He is a Certified Fellow of the American Academy of Matrimonial Lawyers and is listed in the *Best Lawyers in America*.

Table 1							
Computation of Present Value of Enhanced Earnings							
Standard Approach/Actual Earnings							
Year	**Age**	**Earnings Professional Degree**	**Earnings High School Graduate**	**Earnings Difference**	**After Tax Earnings Difference**	**Present Value**	**Cumulative Present Value**
2001	40	$ 170,000	$ 24,530	$ 145,470	$ 90,876	$ 90,876	$ 90,876
2002	41	$ 175,100	$ 25,266	$ 149,834	$ 93,602	$ 87,479	$ 178,355
2003	42	$ 180,353	$ 26,024	$ 154,329	$ 96,410	$ 84,209	$ 262,563
2004	43	$ 185,764	$ 26,805	$ 158,959	$ 99,303	$ 81,061	$ 343,624
2005	44	$ 191,336	$ 27,609	$ 163,728	$ 102,282	$ 78,030	$ 421,654
2006	45	$ 197,077	$ 28,437	$ 168,640	$ 105,350	$ 75,113	$ 496,767
2007	46	$ 202,989	$ 29,290	$ 173,699	$ 108,511	$ 72,305	$ 569,073
2008	47	$ 209,079	$ 30,169	$ 178,910	$ 111,766	$ 69,602	$ 638,675
2009	48	$ 215,351	$ 31,074	$ 184,277	$ 115,119	$ 67,000	$ 705,675
2010	49	$ 221,811	$ 32,006	$ 189,805	$ 118,573	$ 64,496	$ 770,171
2011	50	$ 228,466	$ 32,966	$ 195,500	$ 122,130	$ 62,085	$ 832,255
2012	51	$ 235,320	$ 33,955	$ 201,365	$ 125,794	$ 59,764	$ 892,019
2013	52	$ 242,379	$ 34,974	$ 207,405	$ 129,567	$ 57,529	$ 949,548
2014	53	$ 249,651	$ 36,023	$ 213,628	$ 133,454	$ 55,379	$ 1,004,927
2015	54	$ 257,140	$ 37,104	$ 220,036	$ 137,458	$ 53,309	$ 1,058,236
2016	55	$ 264,854	$ 38,217	$ 226,638	$ 141,582	$ 51,316	$ 1,109,552
2017	56	$ 272,800	$ 39,363	$ 233,437	$ 145,829	$ 49,397	$ 1,158,949
2018	57	$ 280,984	$ 40,544	$ 240,440	$ 150,204	$ 47,551	$ 1,206,500
2019	58	$ 289,414	$ 41,761	$ 247,653	$ 154,710	$ 45,773	$ 1,252,273
2020	59	$ 298,096	$ 43,014	$ 255,083	$ 159,352	$ 44,062	$ 1,296,335
2021	60	$ 307,039	$ 44,304	$ 262,735	$ 164,132	$ 42,415	$ 1,338,750
2022	61	$ 316,250	$ 45,633	$ 270,617	$ 169,056	$ 40,829	$ 1,379,579
2023	62	$ 325,738	$ 47,002	$ 278,736	$ 174,128	$ 39,303	$ 1,418,882

Table 2

Computation of Present Value of Enhanced Earnings

Adjusted Baseline Approach

Year	Age	Earnings Professional Degree	Earnings High School Graduate	Earnings Difference	After Tax Earnings Difference	Present Value	Cumulative Present Value
2001	40	$ 170,000	$ 58,136	$ 111,864	$ 63,991	$ 63,991	$ 63,991
2002	41	$ 175,100	$ 59,880	$ 115,220	$ 65,911	$ 61,599	$ 125,590
2003	42	$ 180,353	$ 61,676	$ 118,677	$ 67,888	$ 59,296	$ 184,886
2004	43	$ 185,764	$ 63,527	$ 122,237	$ 69,925	$ 57,080	$ 241,966
2005	44	$ 191,336	$ 65,433	$ 125,904	$ 72,023	$ 54,946	$ 296,912
2006	45	$ 197,077	$ 67,396	$ 129,681	$ 74,183	$ 52,892	$ 349,803
2007	46	$ 202,989	$ 69,417	$ 133,571	$ 76,409	$ 50,914	$ 400,718
2008	47	$ 209,079	$ 71,500	$ 137,579	$ 78,701	$ 49,011	$ 449,729
2009	48	$ 215,351	$ 73,645	$ 141,706	$ 81,062	$ 47,179	$ 496,908
2010	49	$ 221,811	$ 75,854	$ 145,957	$ 83,494	$ 45,415	$ 542,323
2011	50	$ 228,466	$ 78,130	$ 150,336	$ 85,999	$ 43,717	$ 586,041
2012	51	$ 235,320	$ 80,474	$ 154,846	$ 88,579	$ 42,083	$ 628,124
2013	52	$ 242,379	$ 82,888	$ 159,491	$ 91,236	$ 40,510	$ 668,634
2014	53	$ 249,651	$ 85,375	$ 164,276	$ 93,973	$ 38,996	$ 707,629
2015	54	$ 257,140	$ 87,936	$ 169,204	$ 96,792	$ 37,538	$ 745,167
2016	55	$ 264,854	$ 90,574	$ 174,280	$ 99,696	$ 36,134	$ 781,301
2017	56	$ 272,800	$ 93,291	$ 179,509	$ 102,687	$ 34,784	$ 816,085
2018	57	$ 280,984	$ 96,090	$ 184,894	$ 105,768	$ 33,483	$ 849,568
2019	58	$ 289,414	$ 98,973	$ 190,441	$ 108,941	$ 32,232	$ 881,800
2020	59	$ 298,096	$ 101,942	$ 196,154	$ 112,209	$ 31,027	$ 912,827
2021	60	$ 307,039	$ 105,000	$ 202,039	$ 115,575	$ 29,867	$ 942,694
2022	61	$ 316,250	$ 108,150	$ 208,100	$ 119,042	$ 28,750	$ 971,444
2023	62	$ 325,738	$ 111,395	$ 214,343	$ 122,614	$ 27,676	$ 999,119

Table 3

Computation of Present Value of Enhanced Earnings

Standard Approach/Average Earnings

Year	Age	Earnings Professional Degree	Earnings High School Graduate	Earnings Difference	After Tax Earnings Difference	Present Value	Cumulative Present Value
2001	40	$ 71,700	$ 24,530	$ 47,170	$ 26,981	$ 26,981	$ 26,981
2002	41	$ 73,851	$ 25,266	$ 48,585	$ 27,790	$ 25,972	$ 52,953
2003	42	$ 76,067	$ 26,024	$ 50,043	$ 28,624	$ 25,001	$ 77,955
2004	43	$ 78,349	$ 26,805	$ 51,544	$ 29,483	$ 24,067	$ 102,022
2005	44	$ 80,699	$ 27,609	$ 53,090	$ 30,367	$ 23,167	$ 125,189
2006	45	$ 83,120	$ 28,437	$ 54,683	$ 31,278	$ 22,301	$ 147,490
2007	46	$ 85,614	$ 29,290	$ 56,323	$ 32,217	$ 21,467	$ 168,957
2008	47	$ 88,182	$ 30,169	$ 58,013	$ 33,183	$ 20,665	$ 189,622
2009	48	$ 90,827	$ 31,074	$ 59,754	$ 34,179	$ 19,892	$ 209,514
2010	49	$ 93,552	$ 32,006	$ 61,546	$ 35,204	$ 19,149	$ 228,663
2011	50	$ 96,359	$ 32,966	$ 63,393	$ 36,260	$ 18,433	$ 247,096
2012	51	$ 99,250	$ 33,955	$ 65,294	$ 37,348	$ 17,744	$ 264,840
2013	52	$ 102,227	$ 34,974	$ 67,253	$ 38,468	$ 17,080	$ 281,920
2014	53	$ 105,294	$ 36,023	$ 69,271	$ 39,623	$ 16,442	$ 298,362
2015	54	$ 108,453	$ 37,104	$ 71,349	$ 40,811	$ 15,827	$ 314,189
2016	55	$ 111,706	$ 38,217	$ 73,489	$ 42,036	$ 15,236	$ 329,425
2017	56	$ 115,057	$ 39,363	$ 75,694	$ 43,297	$ 14,666	$ 344,091
2018	57	$ 118,509	$ 40,544	$ 77,965	$ 44,595	$ 14,118	$ 358,209
2019	58	$ 122,064	$ 41,761	$ 80,304	$ 45,933	$ 13,590	$ 371,799
2020	59	$ 125,726	$ 43,014	$ 82,713	$ 47,311	$ 13,082	$ 384,881
2021	60	$ 129,498	$ 44,304	$ 85,194	$ 48,731	$ 12,593	$ 397,474
2022	61	$ 133,383	$ 45,633	$ 87,750	$ 50,193	$ 12,122	$ 409,596
2023	62	$ 137,385	$ 47,002	$ 90,383	$ 51,698	$ 11,669	$ 421,265

Selected Cases

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., Summer 2005) 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.

Layne G. G. v. Kevin P. D., Family Court, Ulster County (Mizel, Marianne O., April 13, 2005).

For Petitioner:	*Pro Se*
For Respondent:	Ulster County Public Defender's Office Paul Gruner, Esq. Ulster County Public Defender by Stephen F. Brucker, Esq. Assistant Public Defender

MIZEL, M. O., J.: Layne G filed a violation petition on June 17, 2004, alleging that Kevin D had failed to pay child support since May 3, 2004. The order concerned Lara J. D, born February 5, 1982, who had turned 21 on February 5, 2003. Support Magistrate Beisel found Mr. D wilfully failed to pay child support, found him to be $3,638.22 in arrears and directed entry of a money judgment in that amount plus $10.00 costs, for a total judgment of $3,648.22. Support Magistrate Beisel recommended that Mr. D be committed to the Ulster County Jail, such commitment to be suspended on condition that Mr. D finds employment and commences payment on the support obligation prior to any confirmation by this part of the court. Also included in this Order, signed September 1, 2004, was a provision that "IT IS ORDERED that the order of support, dated April 5, 1994, is hereby continued." The proceeding was referred to this court for confirmation of the finding of willfulness and imposition of an appropriate disposition. The willfulness hearing was conducted on January 21, 2005, at which time the parties agreed on the facts but not on the interpretation of the facts. The court received an accounting prepared by the Support Collection Unit as to Mr. D's payment history.

Mr. D's attorney argued that Mr. D cannot be committed to jail for failure to pay support arrears which have been reduced to judgment after the support order has been terminated. In his view, there had to be some order directing payment which was violated and that, once the obligation to pay child support ended, there had to be a separate order directing payment on the arrears. Asked if the language in Support Magistrate Beisel's September 1, 2004 order that the order of support continued was a direction that Mr. D pay the amount which he had been paying for current support towards the arrears, Mr. D's attorney said he thought that that paragraph had just been boilerplate, retained by mistake, because no one thought to take it out since orders terminating support are so rare.

Family Court Act § 451 provides that Family Court has continuing jurisdiction over any support proceeding "until its judgment is completely satisfied," which would indicate that the court could continue enforcement until the last dollar is paid. Family Court Act § 460(3) provides that "the relief provided for herein [i.e., entry of a money judgment] is in addition to any and every other remedy which may be provided under the law," including the provisions under FCA § 454, which includes commitment. Under the statutes addressing violations of support orders, entry of a money judgment does not preclude commitment.

The question before this court on this case is whether the court can commit a respondent for failure to pay accrued arrears when the underlying order of support is no longer active. While there is no case directly on point, *Arlene W. v. Robert W.*, 70 Misc. 2d 1041 (Fam. Ct., Schenectady Co., 1972), provides some guidance, even though it deals with superseded statutes. There, Family Court terminated the support order when the parties moved out of county but "held arrears in abeyance." Family Court determined that the significance of holding the arrears in abeyance was that

> . . . jurisdiction was reserved and continued for the purpose of future disposition of the liquidated obligation to pay arrears as the later circumstances of the parties might require. This is obviously what the court intended to do and what it had the right to do under section 451 of the Family Court Act, which provides that the court has continuing jurisdiction over any support proceeding "until its judgment is completely satisfied."

(p. 1044; *See also Connors v. Connors*, 103 Misc. 2d 288 (Fam. Ct., Nassau Co., 1980)). Another case, *Frances B. v. Robert B*, 66 Misc. 2d 227 (Fam. Ct., Kings Co., 1971) also finds that the court, after an order has been terminated, has the power to set arrears which accumulated while the order was in effect. However, that case does not discuss enforcement of those arrears. The case before this court is distinguished from *Carroll v. Scott*, 12 A.D.3d 670 (2nd Dept., 2004). In *Carroll*, the Second Department said that Family Court did not have subject matter jurisdiction to hear a petition to enforce a money judgment derived from a judgment of divorce because there was no ongoing support proceeding or order granting maintenance or support before Family Court. In that case, it does not appear that the money judgment was related to a support issue. In this case, the money judgment is derived from a Family Court support order and directly concerns the enforcement of a Family Court child support order.

While the power to establish arrears after the order itself has terminated is clear, the power to jail the respondent is not as clear. Family Court Act § 454(3) and § 461 provide that the issuance of a money judgment does not foreclose the other enforcement remedies. Family Court Act § 454(3) states that, upon a finding that a party willfully failed to pay child support, the court has not only those powers provided in § 454(2) but also additional powers set out in § 454(3). Included in the remedies available to the court, Family Court Act § 454(2) provides

(a) the court shall enter a money judgment under section four hundred sixty of this article; and

(b) the court may make an income deduction order for support enforcement under section fifty-two hundred forty-two of the civil practice law and rules; . . .

The CPLR states that the court can order a judgment debtor who is supporting other children, as Mr. D is, to pay up to 55% of his disposable income towards the money judgment (CPLR § 5242(c)(2)(i)). Mr. D has not raised objection to the Support Magistrate's September 1, 2004 order on the basis that the amount ordered to be paid exceeds the amounts permissible under the CPLR. Clearly, upon a finding of violation of a child support order, this court not only can issue a money judgment fixing arrears but can also enter an order directing payment of those arrears. The additional remedies available under Family Court Act § 454(3)(a) upon finding that the violation was willful includes commitment to jail for up to six months.

Committing people to jail for failure to pay child support has been distinguished from being a debtor's prison on the basis that commitment is imposed for willful disobedience of the court's order and not for failure to pay a civil debt (*Fuller v. Fuller*, 31 A.D.2d 587 (3rd Dept., 1968)). Determination of whether the "willfulness" was Mr. D's failure to pay before or Mr. D's failure to pay after Lara turned 21 is not crucial to this court's authority to commit Mr. D for his failure to pay. If the Support Magistrate's willfulness finding was that Mr. D was able to pay the support when it accrued, *i.e.*, when the support order was active, this court would still have the authority to commit Mr. D to jail for willfully not paying it when it was due. Otherwise, the payor could escape jail by dragging his heels until the child aged out.

If the Support Magistrate's willfulness finding was that Mr. D did not pay the amount of his child support order towards arrears after the child aged out, the wording in the September order that "the order continues" becomes crucial. No one objected to the wording of that order, and the inclusion of that phrase became controversial only in hindsight. The behavior of the parties indicates that they understood it to mean that the same amounts would continue to be paid and would be credited on arrears. The accounting prepared and presented by the Support Collection Unit shows that the bulk of arrears accrued during the period from 1995 to 2002. At the end of 2002, Mr. D was $12,712.38 in arrears. Because Lara turned 21 on January 31, 2003, only $675.00 current child support was due in 2003 while $7,319.16 was deducted from his pay, $6,644.16 of which was applied to his arrears. Money continued to be deducted in 2003 and 2004 from Mr. D's paycheck and from unemployment after Lara turned 21 and Mr. D did not object to the continued deductions. Under the reasoning advanced by Mr. D's attorney, there would have been no reason for these deductions to have continued. Failure to follow the Support Magistrate's September 1, 2004 direction to pay the equivalent amount formerly paid on child support, to now be applied to arrears, is a failure to obey an order of the Family Court. This court can commit Mr. D to jail for willfully failing to pay on arrears after Lara turned 21.

At the time Ms. G filed her violation petition against Mr. D, the mother of Mr. D's other children, Lisa L, also filed a violation petition against Mr. D, alleging that he had failed to pay support for their two children for an extended period of time. This court found Mr. D to have willfully violated the order for support of Ms. L's children and committed him to the Ulster County Jail for a period of six months with a purge amount of $22,251.25. Willful violation of Ms. D's order, which is separate from the order requiring payment for other children by a different mother, is contempt of a different order. Failure to pay for Child A under Order A is independent from failure to pay for Child B under Order B and can be dealt with independently, even if the failures occurred during the same time period. Because Mr. D violated two independent orders, any order of commitment for the two separate violations can be served separately, *i.e.*, consecutively rather than concurrently.

However, this court determines it is appropriate for Mr. D to serve the six-month commitment for violating the G order concurrently with the time he is serving the L violation, with a separate purge amount on the G order of $3,648.22. According to the Support Collection accounting on each file, the last support check received by income execution was received on November 3, 2003; payments beginning November 10, 2003 and ending May 3, 2004 were received by execution on unemployment insurance benefits. Support Magistrate Beisel based his finding of willful failure to pay upon a finding that Mr. D had not proven adequate efforts to find replacement employment. Keeping Mr. D in jail for a total of twelve months, six months on each violation, served consecutively, does not further Mr. D's search for employment. The court hopes that by serving six months in jail, unless shortened by payment of the purge amount, the court will impress upon Mr. D how seriously the court takes its directions that children be supported and that that support is determined by earning capacity, not actual income. Any further violation of either order to pay support can result in further orders of commitment.

This shall constitute the decision and order of this court. A separate order committing Mr. D to the Ulster County jail for six months, to be served concurrently with his commitment on the L order with credit for time served, shall be issued by this court. The order of commitment shall contain a provision that Mr. D may be released from jail upon payment of the $3,648.22 purge amount.

* * *

Eileen K. v. Kristopher K., Family Court, Dutchess County (Sammarco, Valentino T., December 21, 2004)

For Petitioner:	Douglas Drazen, Esq. 20 Hawley Street East Tower, Suite 200 Binghamton, NY 13901
For Respondent:	Robert Ostertag, Esq. 17 Collegeview Avenue Poughkeepsie, NY 12603
	Diana Kidd, Esq. 97 Cannon Street Poughkeepsie, NY 12601
Law Guardian:	Paul Mollica, Esq. 4 Liberty Street Poughkeepsie, NY 12601

The petitioner (hereinafter the grandmother) is the paternal grandmother of A. (DOB 9/19/91) and J. (DOB 8/14/96). The respondent Elizabeth N. is the children's mother and Kristopher F. is the children's father.

The grandmother has filed this petition for grandparent visitation pursuant to Domestic Relations Law § 72, which provides that a grandparent has standing to make an application for grandparent visitation where either or both of the parents of a minor child are deceased or "where circumstances show that conditions exist which equity would see fit to intervene."

The mother moves: 1) to dismiss the grandmother's petition for lack of standing; 2) to strike the father's name from the caption and remove him from the case because he has no standing; and (3) to deny the father the right to have assigned counsel. She has also requested that counsel fees be awarded to her.

The Law on Standing

In determining the threshold issue of standing under Domestic Relations Law § 72, the court is required to examine all relevant facts, including the nature and basis of the parent's objection to visitation and the nature and extent of the grandparent-grandchild relationship (*In re Emanuel S. v. Joseph E.*, 78 N.Y.2d 178). The grandparent must establish an existing relationship with the grandchild or if the relationship has been frustrated by the parent, the grandparent must allege a sufficient effort to establish a relationship (*see In re Emanuel S. v. Joseph E.*, 78 N.Y.2d 178). The Court of Appeals in *Emanuel* stated that "the evidence necessary will vary in each case but what is required of grandparents must always be measured against what they could reasonably have done under the circumstances" (*id*. at 183).

In this case there is animosity between the mother and the grandmother, as evidenced by the affidavits and exhibits submitted by both parties. Animosity, alone, is not enough to deny standing (*Lo Presti v. Lo Presti*, 40 N.Y.2d 522). However, if the animosity stems from the grandparents' behavior or attitudes, then standing will not be conferred. New York courts have denied standing where the grandfather was domineering and critical of the parents (*In re Coulter v. Barber*, 214 A.D.2d 195); where there was emotional and physical abuse by the grandfather (*In re Luma v. Kawalchuk*, 240 A.D.2d 896); and where the grandmother failed to respond appropriately to domestic violence by her son against the mother of the children (*In re C.M. v. MM.*, 176 Misc. 2d 644).

In this case, the grandmother's petition alleges only that "without any cause related to the children's best interests, the petitioner has been denied visitation for nearly three years when she had previously enjoyed frequent visitation" with her grandchildren. The grandmother's petition omits any mention of the history of this case or of the reasons that she has not had contact with the children in the past three years.

The Facts

The Court takes judicial notice of its own records (*see* Richardson, Evidence § 2-209, 11th edition; *In re Solomon D.*, 152 Misc. 2d 7). The Court has also reviewed the orders of the Supreme Court, Dutchess County (Brands, J.) that have been provided to the Court as exhibits to the mother's motion to dismiss. These exhibits have not been disputed. This Court must consider the history of this case in order to determine if the grandmother has standing.

The parents and children moved to Dutchess County from Binghamton in July 1998. The mother started a divorce action in August 1998. In December 1998, the father moved back to Binghamton and resided with the grandmother.[1] The Court bifurcated the case and tried the custody separately from other aspects of the divorce.

During the pendency of the custody trial, the children resided primarily with their mother in Dutchess County. The father resided with his parents in Binghamton and the children visited with the father at his parents' home two out of three weekends. The Court awarded custody to the mother on April 19, 2000 (Brands, J.).

In July 2000, the father took the children for a week-long visitation. The father failed to return the children from the visit on the appointed day and disappeared with them. For a period of nine months, the father kept the two children, ages three and eight, away from the mother. He apparently moved from place to place to avoid discovery. During this time, the school-age child was not enrolled in school and neither child was permitted contact with the mother or any other family member. A neighbor in a mobile home park in California wondered why the older boy was not in school and reported the father to police. The father was arrested and the children were returned to their mother in April 2001.

The father, who now resides with the grandmother, was convicted of custodial interference, an "E" felony, for his abduction of the children. He was sentenced to six months in jail and placed on probation until August 2006. Two Orders of Protection, one from County Court stemming from the criminal proceeding and one from Supreme Court, prevent him from having any contact with the children.[2]

The mother alleges that the grandmother knew or had reason to know the whereabouts of the children during the time when they were with the father. She alleges that the grandmother assisted the father in his preparation for flight with the children. The grandmother denies any involvement.

After the children's return, the mother moved in Supreme Court for a restraining order preventing the grandmother from having contact with the children. A copy of the mother's application has been provided to the Court as Exhibit F. In settlement of that matter, the parties agreed that the grandmother would not contact the children without the consent of the mother or permission of the Supreme Court. This agreement was "So Ordered" by the Supreme Court (September 25, 2001, Brands, J.).

In May 2002, slightly more than six months after the entry of that Order, the mother filed for an Order of Protection in Family Court against the grandmother based on events that occurred in the months after the grandmother stipulated that she would not contact the children. The mother alleged that the grandmother hired a private investigator to spy on the children and that she rented a billboard to communicate with the children in violation of the Supreme Court order prohibiting contact with the children without permission of the Court or the mother. The mother claimed that these acts constituted the family offense of aggravated harassment in the second degree.

The grandmother acknowledged, in a Reply Affidavit dated April 12, 2002, that during December 2001, she rented a billboard on the main road leading to the children's home to display a holiday greeting. The greeting stated the children's names and the message "We love you." The grandmother also acknowledged hiring a private investigator who followed one child's school bus and took photos of the children outside of their home. The grandmother acknowledged these acts and stated that no reasonable person could believe that she intended to annoy or alarm the children or the mother.

In settlement of the family offense petition of May 2002, the grandmother consented to an Order of Protection preventing contact with the children. This Order of Protection expired in May 2003. As part of this settlement the Supreme Court vacated, on consent, its order prohibiting contact without consent of the mother or of the Court (Brands, J., entered May 17, 2002).

Standing

After review of the history, the Court concludes that the grandmother has failed to show any basis for equity to intervene to order visitation against the will of the mother. Although the mother does not dispute that the grandmother had a relationship with the children prior to their abduction by the father, it is clear that no relationship now exists. The grandmother's inability to have a relationship is due to her son's actions, her own failure to recognize the traumatic impact the kidnapping had on the children and the Order of Protection issued, on consent, against her.

Although the grandmother denies any direct part in the abduction, she minimizes the traumatic impact of the abduction on the children. The grandmother states in her Affidavit in Opposition to the Motion to Dismiss: "I do believe their removal from New York and not seeing their mother for nine months was not good for them, but as far as I know, the children suffered no physical injury. . . ." Use of a private detective to spy on the children and the rental of a billboard on a major thoroughfare shows a troubling lack of sensitivity to the children's needs. The mother's opposition to visitation is reasonable in light of the grandmother's statements and actions.

Measuring the grandmother's acts against what she reasonably could have done, under the circumstances, and based upon the record and exhibits before the Court, the Court finds that the grandmother has failed to show circumstances in which equity would see fit to intervene. Accordingly, the grandmother has no standing to bring this petition for grandparent visitation. The petition is dismissed.

Other Requested Relief

The mother has also asked that the father be denied assigned counsel. The Court assigned Diana Kidd-Murphy, Esq., to represent the father, but no papers were submitted in opposition to this motion. Although unaware of the father's situation or financial ability at the outset of this case, the Court is now aware through exhibits submitted as part of the record that the father has privately retained counsel in Supreme Court to represent him on several applications to Judge Brands to allow him visitation with the children. Accordingly, the Court finds that the father is not entitled to assigned counsel. Diana Kidd-Murphy, Esq. is relieved of this representation, effective immediately.

As the grandmother's petition has been dismissed, the Court need not address whether the father is a proper party in this proceeding.

The Court denies the mother's request for counsel fees, as the Court has no authority to award counsel fees on this application (Domestic Relations Law § 237; *Coulter v. Barber*, 214 A.D.2d 195).

The foregoing shall constitute the decision and order of this court.

SO ORDERED.

In making this decision, the Court has read and considered the following papers: Notice of Motion, 2 pp.; Supporting Affirmation, 11 pp.; Affidavit in Support, 22 pp.; Exhibits to the Affidavit in Support, A-V; Affirmation in Opposition, 2 pp.; Affidavit in Opposition, 8 pp.; Exhibits to the Affidavit in Opposition, A-C; and Reply Affidavit, 12 pp.; Petitioner's Memorandum of Law. The Court is disappointed that the Law Guardian failed to submit any papers, however, the record is fully developed and sufficient for the Court to make a decision without the Law Guardian's submission.

Endnotes

1. The mother obtained a Temporary Order of Protection in Dutchess County Family Court that vacated the father from the marital residence. He moved back to Binghamton, the petition for the Order of Protection was adjourned in contemplation of dismissal and the divorce proceeded.
2. The father has filed, without success, in Supreme Court and Family Court at least four separate times to obtain custody and visitation with the children. The most recent filing was in August 2003 in Supreme Court. As a result of that application, in December 2003, the Supreme Court (Brands, J.) ordered evaluations of the parties at the expense of the father. No information has been provided as to the status of these evaluations, although the parties agree that the father does not have visitation at this time.

* * *

Karen W. v. Roger S., Family Court, Dutchess County (Amodeo, Damian J., December 22, 2004)

For Petitioner: Philip Kenny, Esq.
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Poughkeepsie, NY 12601

For Respondent: Gary E. Lane, Esq.
219 Church Street
Poughkeepsie, NY 12601

Michael S. Belohlavek
Deputy Solicitor General
Office of the Attorney General
120 Broadway
New York, NY 10271

By petition filed on May 19, 2004, petitioner (mother) seeks custody of the parties' minor children, D. (DOB: 6/8/02) and J. (DOB: 12/5/03). The mother is a United States citizen and resides in Poughkeepsie, New York and the respondent (father) is a citizen of Germany and resides in Mechenheim, Germany. At the time the petition was filed the older child, D., had lived in Poughkeepsie for one year and J., who was born in the state of New York, had lived here his entire life. On June 24, 2004, the mother appeared with counsel and the father appeared through his attorney, who stated that he was making a special appearance to challenge the jurisdiction of the Court.

On that date the Court entered a temporary order of custody on behalf of the mother. Thereafter, counsel for the father submitted a written motion to dismiss the custody petition on the following grounds: (1) the Court does not have "*in personam*" jurisdiction over the father; (2) there is a pending divorce action in Germany; and, (3) the provisions of Domestic Relations Law § 75(d), as applied to the father, violate the New York, federal and German Constitutions.

The mother's attorney submitted an affidavit of service which shows service of the custody petition and order to show cause on the father on May 20, 2004 in Poughkeepsie, New York. The father acknowledged that he was personally served in New York with these papers.

Counsel for the father also concedes that there has never been an order of custody with respect to the parties' children in any other country or state. Although the father asserts that there is a divorce action pending in Germany, it is undisputed that the mother has not been served with any papers in that divorce action. It is also undisputed that the mother has been in New York with the children for more than one year prior to the commencement of this custody proceeding.

The Court first turns to the issue of subject matter jurisdiction. This proceeding is governed by the provisions of the Uniform Child Custody Jurisdiction Enforcement Act (DRL Article 5-A; § 75 *et seq.* (hereinafter UCCJEA)). Of paramount importance for the determination of jurisdiction under this statute is ascertaining the "home state" of the children. "Home state" is defined in relevant part as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned." (DRL § 75-a(7)). New York is clearly the home state of the children as the older child lived here for a year prior to the commencement of the proceeding and the younger child was born in New York.

Moreover, by its terms, the UCCJEA applies to international disputes. Foreign countries are deemed to be American states for the purposes of the Act (DRL § 75-d). Therefore, DRL § 76, which governs jurisdiction, "applies fully" to international cases (NY Practice Series, Sobie, Merril, Chapter 10, 11/2004).

Thus, New York has subject matter jurisdiction (DRL § 76(1)) to make an initial custody decision. Indeed, the father does not seriously dispute this.

Having determined that subject matter jurisdiction lies in New York, the court must determine whether the exercise of that jurisdiction is precluded or must be declined based upon inconvenient forum (DRL § 76-f); because of unjustifiable conduct of the person seeking to invoke its jurisdiction (DRL § 76-g) or because *at the time* the proceeding was commenced there was a simultaneous proceeding in another state or country (emphasis added, DRL § 76-e). The Court finds that none of these factors apply, which would preclude the Court from exercising jurisdiction or warrant the Court declining to exercise jurisdiction.

The father argues that the Court does not have personal jurisdiction over him because the criteria of CPLR § 302 are not met. This argument is without merit. While the CPLR does provide a basis for the exercise of personal jurisdiction, it is not the only and exclusive basis. Here, the UCCJEA provides the basis for the Court's exercise of personal jurisdiction.

The father next argues that the Court does not have personal jurisdiction over him. However, he concedes he was personally served in the state of New York. If the summons is personally delivered to a litigant in New York, "the several requirements of due process are fulfilled simultaneously. The reason is that local service is its own basis for jurisdiction" (Siegel, New York Practice, Third Edition, p. 79).

There is absolutely no indication that the father, who was in this country for business and to visit his children, was enticed into the jurisdiction by fraud and deceit for the purpose of obtaining service upon him (*see Hammett v. Hammett*, 74 A.D.2d 540). Indeed, the father has not submitted an affidavit in support of his motion that would place any facts in issue concerning personal service. In contrast, the mother has submitted an affidavit in which she asserts that the father was coming to the United States on business and that while he was here he wanted to see the children.[1] The Court therefore has personal jurisdiction over the father.

The Court likewise finds no merit to the father's argument that this Court may not exercise jurisdiction because there is a divorce action pending in Germany. Based on the submissions, the divorce action was commenced in Germany on June 15, 2004 and acknowledged by the German Court on June 16, 2004. The mother commenced her custody proceeding in New York on May 19, 2004, approximately one month earlier. Family Court, which has jurisdiction over the issue of custody, is not divested of that jurisdiction by the subsequent filing of a divorce action by the other party (*see Rubenstein v. Yosef*, 198 A.D.2d 359, 360).

Finally, the father argues that the UCCJEA as applied in this context is unconstitutional in that it violates his rights to due process. He argues that were this Court to exercise jurisdiction, he would be deprived of an inherent right, i.e., his parental rights, without due process. He also asserts, without supporting authority, that subjecting him to the jurisdiction of the Court without his having substantial contacts with the United States is unconstitutional.[2] The father does not make clear whether he is asserting that the UCCJEA as applied to him violates his substantive[3] or procedural due process rights. In any event, the children have "substantial contacts" with New York State and the Court has jurisdiction over the father. No procedural due process claim exists as all the procedures of the Family Court Act and CPLR apply equally to both parties, who will have a full and fair opportunity to litigate in this Court. No substantive due process claim exists because the UCCJEA rationally and neutrally determines which forum is most appropriate to hear the custody issue. There clearly is a rational basis for New York's assumption of subject matter jurisdiction and the father's constitutional rights are not violated by its doing so. At least 38 states have made the same policy choice by adopting the UCCJEA, further evidencing its legitimate government purpose, i.e., providing a "mechanism to obtain and enforce orders of custody and visitation across state lines and to do so in a manner that ensures that the safety of the children is paramount" and that there is an opportunity for the fair and efficient adjudication of custody issues between parents residing in different states or countries.

In determining the father's constitutional claim, the Court is mindful that "the courts should not strike down a statute as unconstitutional unless such statute clearly violates the Constitution (Statutes § 150(a)). It has often been stated that "nothing but a clear violation of the Constitution will justify the court in overruling the legislative will" and a court of original jurisdiction should not set aside a statute "unless such conclusion is inescapable" and the "invalidity of the act is apparent on its face." (McKinney's, Cons Laws of New York, Book 1, Statutes, pp. 311-312). "Statutes are presumed valid and constitutional and the one challenging the statute has the burden of showing the contrary" (Statutes § 150(b)).

The father has not demonstrated any violation of his procedural due process rights, which requires (1) notice and (2) an opportunity to be heard appropriate to the case (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306). He has actual notice of the proceedings. And, he will have an opportunity to be heard as the UCCJEA has incorporated "liberal and, in some respects, remarkable provisions permitting out-of-state examinations, hearings before out-of-state courts, telephonic testimony," and interstate probation, home studies, to be conducted under the auspices of out-of-state courts[4] (Sobie, Practice Commentaries, McKinney's, Cons Laws of New York, Book 14, DRL §§ 75-j, 75-k). Should the father choose not to come to New York, he will have an opportunity to appear through his attorney and testify telephonically or by audiovisual means, which are available to this Court (DRL § 75-j). Alternatively, this Court could arrange for the father to testify in the German court and have a transcript forwarded to this Court (DRL § 75-k(d)). It does not offend notions of due process and fundamental fair play to require him to proceed in this manner, as any other out-of-state litigant would. Clearly, one of the parties may be somewhat inconvenienced by whatever Court assumes jurisdiction of this case. In this Court's view it is far more practical to have the issue of custody litigated where the children have lived the majority of their lives, than to have the children and mother go to Germany to litigate the issue of custody. That is consistent with the notion that "jurisdictional priority under the UCCJEA is always conferred to a child's 'home state'" (*see Hector G. v. Josefina P.*, 2 Misc. 3d 801)—the state or county which typically has the most significant contact with the children and the most evidence and information regarding their care and custody.

It is axiomatic that because the father resides in Germany and the mother and children in New York, the issue of custody of these children must be litigated in one of those two locations. As New York is the home state of the children, it defies logic to have the issue litigated in Germany. Were this Court to find that it is unconstitutional to litigate the issue of custody in New York, how would it be constitutional to require the mother to litigate the issue in Germany? Taking the father's argument to its logical conclusion would result in the untenable situation that no court has jurisdiction, leaving the parties in limbo with respect to the issue of custody.

Based upon the foregoing, the father's motion to dismiss is denied and the matter is set down for further proceedings on February 7, 2005 at 10:00 AM. The father shall have to and including January 14, 2005 to serve and file a written answer to the petition. Counsel for the father shall communicate with the Court on or before February 1, 2005 as to the manner in which the father wishes to appear.

The Court has read and considered the following papers on this motion to dismiss the mother's petition: notice of motion (2 pp.), affirmation in support (7 pp.); affirmation in opposition dated July 8, 2004 (2 pp.), exhibits (1-3); and, affirmation dated August 2, 2004 (2 pp.), exhibits (A-B).

The foregoing shall constitute the decision and order of this court.

SO ORDERED

Endnotes

1. For purposes of this motion to dismiss, the Court accepts the allegations of the petition as true and the Court may consider any affidavits submitted.
2. Pursuant to Executive Law § 71, the Court has given notice of the father's constitutional challenge to the UCCJEA to the Attorney General. The Court received a letter from Michael S. Belohlavek, Deputy Solicitor General, indicating that the Office of the Attorney General would not be participating in this matter.
3. The father has failed to demonstrate that applying the provisions of the UCCJEA to the facts of this case is "wholly without legal justification" (*see generally Bower Assoc. v. Town of Pleasant Valley*, 2 N.Y.3d 617, for a discussion of substantive due process).
4. As used in this context, "out-of-state" also refers to a foreign country.

Recent Decisions, Legislation and Trends

By Wendy B. Samuelson

New Rules of Practice of the Court of Appeals

The Court of Appeals has rescinded in its entirety 22 N.Y.C.R.R. Part 500 and approved a new part 500, entitled "The Rules of Practice of the Court of Appeals," effective on September 1, 2005.

These new Rules apply to civil and noncapital criminal appeals, motions, criminal leave applications, and certified questions from the Supreme Court of the United States, United States Courts of Appeals, and state courts of last resort. In addition to substantive changes, the new Rules are organized into broad categories to eliminate duplication and provide a more logical sequence. Rules 500.1 through 500.8 set out requirements applicable to all filings under these Rules. Rules 500.9 through 500.19 relate to civil and noncapital criminal appeals. Motions are addressed in Rules 500.2I through 500.24. Orders to show cause and certified questions are addressed in Rules 500.25 and 500.27, respectively.

Notable changes include the following: substitution of a court-promulgated preliminary appeal statement for the jurisdictional statement (see Rule 500.9); use of scheduling letters to set due dates for appeal papers (see Rule 500.12[a]) and elimination of the automatic 20-day extension for filing dates for appeals; reduction of the time period for perfecting appeals from 80 days to 60 days, unless an extension is granted (see Rule 500.16[a]); and set filing dates for all applications for amicus curiae relief (see Rule 500.23). The number of copies to be filed on appeals and motions for leave to appeal in civil cases has been changed—a party must serve an original and 24 copies of a brief, with proof of service of three copies on each other party. (See Rule 500.12.)

Matrimonial Committee Proposes No-Fault Divorce

At the New York State Bar Association's Executive Committee meeting on November 5, 2004, the committee approved, as one of its legislative priorities for 2005, the Family Law Section's proposed legislation to include as grounds for divorce the "irretrievable breakdown of a marriage," i.e., no-fault divorce. If this legislation is passed, it will limit litigation costs and the confrontation between spouses. Almost every state except New York currently has some form of divorce that does not require the finding of fault.

If this legislation passes, cases such as *E.D. v. M.D.,* 7 Misc. 3d 1013A (Suffolk County, April 11, 2005, J. Pastoressa) will become a nullity. In that case, a jury verdict of cruel and inhuman treatment was vacated as against the weight of the evidence. The allegations complained of in that 11-year marriage consisted of a failure to speak or communicate for periods of time, a strained relationship with the defendant's mother-in-law, a refusal to join in certain planned activities, and an accusation of marital infidelity, none of which rises to the level of serious misconduct which so endangered plaintiff's physical or mental well-being as to render it unsafe or improper for him to cohabit with the defendant.

Same-Sex Marriage Update

Summary of State Status

Massachusetts is currently the only state in the United States that issues marriage licenses to same-sex couples. California, the District of Columbia, Hawaii, Maine and New Jersey have domestic partnership laws that provide some limited rights to same-sex couples. Vermont licenses civil unions, which provide all of the state-level rights and responsibilities of marriage, but none of the more than 1,100 federal protections. Connecticut is now the most recent state to license civil unions.

Same-Sex Couples Permitted Marriage Licenses in New York County

Hernandez v. Robles, 794 N.Y.S.2d 579 (New York County, February 4, 2005, J. Ling-Cohan)

On February 4, 2005, New York County Supreme Court Justice Doris Ling-Cohan ruled that same-sex couples must be allowed to marry. Lambda Legal filed the lawsuit last year, representing five same-sex couples seeking marriage licenses in New York City, and argued that denying marriage to same-sex couples violates the state Constitution's guarantees of equality and liberty for all New Yorkers. In a 62-page decision, Judge Ling-Cohan ruled that the New York State Constitution guarantees basic freedoms to lesbian and gay people, and that those rights are violated when same-sex couples are not allowed to marry. Therefore, the state Constitution requires same-sex couples to have equal access to marriage, and that the couples represented by Lambda Legal must be given marriage licenses. City attorneys asked the New York Court of Appeals to take the case directly, but on March 31, 2005, the high court refused and sent it to the Appellate Division. *Hernandez v. Robles*, 2005 LEXIS 752 (2005), Mo. No. 225 SSD 11.

Nassau County

***Funderburke v. Uniondale Union Free School District* (case pending)**

On April 20, 2005, Lambda Legal filed a lawsuit in Nassau County Supreme Court on behalf of a gay couple who were legally married last year in Canada, but were denied spousal health benefits from Uniondale Union Free School District on Long Island. The plaintiffs argued that New York law is clear that when couples get validly married somewhere else, their marriages are recognized in New York. Stay tuned for this decision.

N.Y. Adoption Law

Pursuant to DRL § 110, New York law permits an adult or a married couple to petition to adopt. The state regulation specifically provides, "[a]pplicants shall not be rejected solely on the basis of homosexuality." 18 N.Y.C.R.R. § 421.16 (h)(2).

Additionally, the adoption law "does not prohibit adoption by a couple, neither of whom is a biological parent." *In re Adoption of Emilio R.*, 293 A.D.2d 27, 30, 742 N.Y.S.2d 22 (1st Dep't 2002) nor does it prohibit an unmarried couple from doing so. *In re Jacob*, 86 N.Y.2d 651, 636 N.Y.S.2d 716 (1995).

Author's note: In order to avoid the unjust consequences of *Janis C v. Christine T*, 294 A.D.2d 496, 742 N.Y.S.2d 381 (2d Dep't 2002), where the nonbiological mother of a lesbian partnership was denied standing to petition the court for visitation, it is important for same-sex couples to have a written agreement while going though the pregnancy, and when the child is born, finalize the adoption.

Connecticut Civil Unions Bill—Second State to Offer Civil Unions to Same-Sex Couples

On April 20, 2005, Connecticut Republican Gov. M. Jodi Rell signed into law a civil unions bill. Connecticut became the second state to offer civil unions to gay couples, and the first to do so without being forced by the courts. (Vermont offers civil unions, but only after court intervention. Massachusetts permits same-sex marriage, but also after court intervention.) Although same-sex couples may now enjoy many of the rights and privileges of married couples, the state included in its measure that the definition of marriage under Connecticut law is a union between one man and one woman. This was considered "a slap in the face" to civil rights advocates.

Civil unions offer less than half of marriage's full protections and obligations; they don't trigger any of marriage's federal rights and responsibilities, and it is not clear whether the rights travel beyond the state's borders.

Massachusetts' Gay Marriage Law Challenge to be Heard

The Supreme Judicial Court, which paved the way for same-sex marriage in Massachusetts, is preparing to hear a case to have its ruling set aside. On May 2, 2005, the court will hear oral arguments on an appeal by the Catholic Action League, which argues that same-sex marriage should be halted until residents vote on a proposed constitutional amendment that would ban gay nuptials, and failure to do so interferes with the constitutional right to vote. The legislature has since passed the constitutional amendment, but it must get approval again in this session of the legislature before going to voters in 2006.

Author's note: This column was submitted in May 2005. By the time the column goes to print, some of the information may be outdated.

Recent Court Cases

Custody and Visitation

***Pedreira v. Pedreira*, 793 N.Y.S.2d 393 (1st Dep't, April 19, 2005)**

The trial court's award of custody of the parties' daughter to the father was affirmed on appeal. The appellate court reasoned that the trial court's determination was supported by the testimony of the neutral court-appointed forensic psychologist, and corroborated by the trial court's observations of the parties' testimony and the evidence of the mother's interference with the father's visitation. The father was found to be the more skilled and nurturing parent and the child had a problematic relationship with her mother.

***Author's note*:** Parental alienation has become a key factor in determining custody. In addition, the courts are becoming more gender-neutral in determining custody. *See also Vann v. Vann*, 14 A.D.3d 710, 789 N.Y.S.2d 261 (2d Dep't, January 6, 2005), where the father was awarded custody of his two daughters, ages 12 and 7.

Grandparent Visitation

***E.S. v. P.D.* 6 Misc. 3d 1030A (Suffolk County, December 1, 2004, J. Sgroi)**

When the child's mother died, the father refused to permit the maternal grandparents visitation with their grandchild. Pursuant to DRL § 72, the court must first determine whether the grandparents have standing to make an application for visitation, based on the death of the parent or equitable circumstances. Since the child's mother died, the grandparents were granted automatic standing. Then, the court must determine whether such visitation would be in the child's best interests. A determination of best interest includes the nature and extent of the grandparents-grandchild relationship, the nature and basis of the parent's objection to visitation, and the degree of animosity that exists between the parent and grandparents. Animosity alone is not the basis to deny visitation. The court found that the animosity that existed between the parties is mostly attributable to the father's unreasonable behavior towards them over the last two years.

The court awarded a generous visitation schedule to the grandparents, including but not limited to, every fourth weekend from Friday through Sunday; alternate weekends and one ten-day extended period during July and August; one Wednesday dinner visitation during each month; one weekend during Winter break from Friday through Sunday; and Jewish holidays in the event that the father does not celebrate a particular holiday; along with a telephone contact schedule in which the father shall not tape record the conversation nor eavesdrop.

Electronic Discovery

Etzion v. Etzion, 2005 N.Y. Slip Op. 25115; 2005 N.Y. Misc. LEXIS 519 (Nassau County, February 17, 2005, J. Stack)

In one of the first reported New York state court cases on electronic discovery, the court granted the wife's order to show cause for an order (1) permitting plaintiff and her computer forensic experts to "impound, clone and inspect the computer servers, hard drives, individual workstation PCs, laptops and other items containing digital data" or electronic data from the defendant's home and office computers. The plaintiff showed that the defendant had transferred millions of dollars out of their jointly owned business to his father, and wastefully dissipated marital assets. In order to prevent an overbroad discovery, the court directed that the referee meet with the parties' respective data forensic experts and review the hard drive files first to prevent any disclosure of attorney-client privileged information. Since defendant's data forensic expert would be present during the cloning of the hard drives, the defendant's request for a bond to be posted by the plaintiff for reimbursement of any potential damage to the computer systems was denied.

Author's note: The plaintiff-wife was represented by Samuelson Hause & Samuelson, LLP.

Equitable Distribution

Enhanced Earning Capacity: Medical Internship and Residency

Flanigan-Roat v. Roat, 794 N.Y.S.2d 264 (4th Dep't, April 29, 2005)

The appellate court found that the trial court abused its discretion in awarding the husband only 5% of the wife's enhanced earnings of her medical license because the husband made both economic and significant noneconomic contributions to the marriage while the wife attained her medical license, and therefore modified the judgment to award him 20% of the enhanced earnings.

Although the wife had finished medical school at the time the parties were married, she had a one-year internship and then a three-year residency to complete while the parties were married. The parties moved to Detroit for the wife to begin her residency. At the time of the move, the husband had been working in an accounting firm for several years, and his career track was interrupted by the move. He could not find a job in auditing in Detroit, so he accepted a job in taxation. During her three years of residency, the wife worked long hours and was often on call. Although the husband was working full-time, he did the bulk of the household duties since the wife was often absent from the home. The parties decided that the husband would stay home to care for the parties' first child. When the parties moved back to their hometown, the husband eventually returned to work full-time.

Failure to Assess Risk in Determining Enhanced Earnings

Sonnenfield v. Sonnenfield, 7 Misc. 3d 1005A (Nassau County, March 31, 2005, J. Ross)

At trial, despite the parties' stipulation to enter into evidence their respective forensic reports of the value of the husband's law license, Judge Ross rejected both reports, finding that the forensic accountants' wooden approach by blindly applying a 3% risk-free discount rate was erroneous and caused a grossly inflated value. The parties were directed to appear in court to select a neutral appraiser.

The court reasoned:

> In my view, the Court must be vigilant and fervent in identifying and rejecting the expert report that fails to adequately detail facts unique to the license holder, which may impact the inherent risk of his/her career and stability of earnings stream therefrom. The greater the risk, the more that value is affected.

> The report/opinion that does not sufficiently address this, will cause an overstatement of value and flaw the equitable distribution to be had. When assessing risk, the court espoused that consideration should be given to client location, demographics, client persistence, direct as opposed to referral business, contractual relationships, reputation, facilities, work habits, managed care and other factors as may be appropriate.

Post-commencement Asset Accumulation Is Separate Property

Sinha v. Sinha, 793 N.Y.S.2d 347 (1st Dep't, April 7, 2005)

The court below erred by awarding the wife 50% of the husband's Merrill Lynch deferred compensation, retirement and employee stock ownership, which were assets funded from compensation at Merrill Lynch where he began working after the commencement of the action, and therefore, were his separate property. In addition, gold statues bought by the husband from his Merrill Lynch bonus received 1 1/2 years post-commencement constitutes his separate property.

The court also held that the husband's payment for basic living expenses, the court-appointed forensic accountant, and divorce lawyers from separate property post-commencement earnings do not constitute dissipation.

The wife's pre-marital student loans (separate property debts) were repaid from cash wedding gifts and her earnings during the parties' marriage (marital assets); therefore, the husband was credited with half of the amount repaid ($29,000).

Legal Fees

Soiefer v. Soiefer, 794 N.Y.S.2d 20 (1st Dep't, April 26, 2005)

The court below properly awarded the wife's attorney *pendente lite* counsel fees in the sum of $178,647, including payment to the wife's attorneys of $59,156 for outstanding legal fees, reimbursement to the wife for $44,490 she paid to her attorneys, and $75,000 as an advance on anticipated future services. The appellate court did not state any of the facts of the case, and reasoned that the award was to address the economic disparity of the parties.

The legal fees incurred for a separate FCA Article 10 proceeding are not authorized by DRL § 237, and therefore, the wife was not entitled to an award of fees for that proceeding. However, when the Article 10 matter was transferred to the Supreme Court and joined with the divorce action, the wife was entitled to legal fees for that matter.

Author's note: This case provides a sigh of relief for counsel representing a nonmonied spouse in a divorce action, since more often than not, the court forces counsel to carry the case by deferring the issue of counsel fees to trial. This creates substantial prejudice to a nonmonied spouse, and may cause him/her to be without representation.

Wendy B. Samuelson is a partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, LLP, and has written literature for the Continuing Legal Education programs of the New York State Bar Association and the Nassau County Bar Association. She authored two articles in the *New York Family Law American Inn of Court's Annual Survey of Matrimonial Law*. She has also appeared on the local radio program, "The Divorce Law Forum." Ms. Samuelson may be contacted at (516) 294-6666 or WBSesq1@aol.com. The firm's websites are www.matrimonial-attorneys.com and www.newyorkstatedivorce.com.

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar. Authors interested in submitting an article should do so on a 3½" floppy disk (preferably in WordPerfect or Microsoft Word), which includes the word processing program and version used, along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

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