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Notes and Comments

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Grandparent and Other Third Parties' Rights to Visitation and Custody Are Alive and Well in New York

When the United States Supreme Court decided, in *Troxel v. Granville*,[1] that a Washington statute which permitted grandparents and other third persons visiting rights was "facially invalid" and unconstitutional, some legal scholars believed that the New York courts would apply the rule to our own statute, Domestic Relations Law § 72, and no longer address grandparental visitation or custody issues. However, in a recent case, *Hertz v. Hertz*,[2] following the *Troxel* decision, it became clear that the New York statute would pass constitutional muster, and the courts would retain jurisdiction to hear such cases.

Not only have the courts continued to address applications made by grandparents for visitation but, in another recent case, *Charles v. Moreno*,[3] the Appellate Division, Second Department, affirmed an award by the Kings County Family Court awarding custody of a ten-year-old girl and a twelve-year-old boy to a paternal grandmother. Although the decision is short, it is pregnant with implications.

Factually, the two children had been in the grandmother's care continuously since 1994, a period of almost eight years. Upon trial, it was demonstrated that the mother exposed the children to excessive corporal punishment, had limited parenting skills, lacked judgment concerning the children's well-being and her conduct had caused the children to be in serious physical jeopardy. She left the children alone and unsupervised on various occasions and, perhaps of significance, suffered from a mental infirmity, diagnosed as suffering from post-traumatic stress disorder coupled with narcissistic and schizotypal personality traits. The Second Department concluded that "the existence of this mental condition combined with the protracted separation of mother from children and the attachment of the children to their grandmother . . . support the hearing court's finding of extraordinary circumstances," citing *Bennett v. Jeffreys*[4] for the proposition that before custody can be awarded to a non-parent, there must be a showing of extraordinary circumstances. The *Charles* court also noted that the children were thriving, happy and well developed in the grandmother's care, which appeared

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to be one of the controlling factors. Finally, after discussing the criteria, the court concluded that its determination was ". . . in the best interest of the children . . .," the last word, and bottom line, in all custody and visitation disputes.

The Second Department has not hesitated to award custody of children to other non-parents. For example, in *In re Benjamin B.*,[5] a four-year-old son's custody was awarded to the father's fiancé, because the court found that the "father's drug problems" and the mother's "significant psychopathology" constituted "extraordinary circumstances." There, the court noted that the trial court is in the most advantageous position to evaluate the testimony, character and sincerity of the witnesses. In reaffirming the standard of finding extraordinary circumstances before custody could be awarded to a non-parent, the court noted that the appointed forensic psychologist had found that the mother was suffering from a chronic schizoid personality disorder with depressive and impulsive features, and that such condition coupled with the fact that the mother had been separated from the child for a protracted period of time and the child had a strong affiliation for the father's fiancé, supported the trial court's finding of extraordinary circumstances.[6]

"There appears to be no doubt currently that, in an appropriate case, grandparents, as well as other non-parents, may obtain either custody or visitation from parents who are not adequately fulfilling the role of proper custodian to the detriment of a child's best interest."

In another Department, the Fourth, a similar result was obtained. In *Pamela S.S. v. Charles E.*,*7* custody was transferred from a father to an aunt and uncle because (1) there was a showing of extraordinary circumstances justifying the court's intervention and (2) the transfer to the non-parents was in the child's best interest. In that case, the court reflected: "Petitioners had the burden of establishing that respondent relinquished his superior right to parent his son based on extraordinary circumstances, such as 'surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time.'"

Here, the aunt and uncle established the neglect and unfitness of the father who had sole custody of the child. The father had engaged in bizarre and violent behavior with his son and left him unsupervised on numerous occasions. Moreover, the father, as the parents in the other cases reviewed above, had a history of mental illness requiring medication, and there was some question as to whether he would be likely to take his medication or submit to treatment for his illness. It was also determined that the father had a history of drug abuse. Once again, the court concluded that the trial court's findings must be given great deference, and affirmed the award of the transfer of custody, noting that the petitioners had met the two prong burden of first establishing extraordinary circumstances and then that the award to them would be in the best interest of the child.

In an earlier case decided in 1990, *Susan M. Hansen v. Post*,[8] the appellate court in the Third Department awarded custody to a social worker unrelated to the child where both parents had been found to be unfit and the child had a severe emotional problem which the parents were unwilling and unable to address in an appropriate manner. The court discussed the two prong test of compelling extraordinary circumstances and best interest of the child.

There appears to be no doubt currently that, in an appropriate case, grandparents, as well as other non-parents, may obtain either custody or visitation from parents who are not adequately fulfilling the role of proper custodian to the detriment of a child's best interest. What conduct will constitute extraordinary circumstances, as well as best interest, will continue to be made on a case-by-case basis. Certainly, mental illness, abuse, neglect, drug addiction or abandonment will always be considered by the courts in making these initial determinations, but such grounds are by no means limiting. It will be left to the expertise of counsel to frame a petition to satisfy the rule promulgated by the landmark decision in *Bennett v. Jeffreys, supra.*

Endnotes

1. 530 U.S. 57 (2000).
2. 291 AD2d 91, 738 N.Y.S.2d 62 (2d Dep't 2002).
3. __ AD2d __(2d Dep't 2002), 741 N.Y.S.2d 255.
4. 40 N.Y.2d 543, 544, 387 N.Y.S.2d 821.
5. 234 AD2d 457, 651 N.Y.S.2d 571 (2d Dep't 1996).
6. *See also Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 573 N.Y.S.2d 36 (1991), which held that the grandparents must show that they made sufficient effort to establish or maintain a relationship with the grandchildren before making such application.
7. 280 AD2d 999, 720 N.Y.S.2d 669 (4th Dep't 2001).
8. 167 AD2d 702, 563 N.Y.S.2d 279.

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The Valuation of Contingency Fee Cases in a Law Practice: The Game Ain't Over . . . Until It's Over—Yogi Berra

By Harvey G. Landau

The New York courts have established that an interest in a law practice is a marital asset subject to equitable distribution upon divorce.[1] If the law practice involves contingent fee cases, New York has adopted the majority view of states, that the cases are an asset and a component of the valuation of the spouse's law practice or law partnership.[2]

In a law practice, the elements of value fall into two broad categories: tangible assets and goodwill. Tangible assets are the physical assets such as furniture, fixtures, equipment, real estate, accounts receivable, costs advanced, completed but unbilled work in progress and the estimated value of earned contingent fees. The intangible asset of goodwill is the value of the firm above and beyond its tangible assets. A law firm's goodwill is based upon its demonstrated ability to attract clients and generate income in the future. Many factors contribute to goodwill, a large well-established profitable firm with a good reputation and a roster of blue-chip corporate clients, or a law firm that has successfully availed itself of public relations techniques,

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often garners considerable goodwill.[3] When valuing a small firm of only a few partners, the age and health of the partners also affect goodwill; a two-man firm with aging partners may have a fine reputation, but goodwill evaporates if the future of the practice is uncertain. Likewise, when all other factors are equal, the source and type of clients have an impact. A firm with steady, repetitive corporate clients will have considerably more goodwill than one based primarily on a one time non-retainer legal matter.

Usually, valuing tangible assets is relatively straightforward. For example, a legal-book dealer could appraise the firm's law library, although today more libraries are being reduced to mainframe computers and CD-ROMs. An office-furniture dealer can price furniture fixtures and equipment if financially justified. Similarly, a real estate appraiser values any real estate holdings or favorable leaseholds of the law firm. Billed and unbilled accounts receivable are often listed at face value, less reserves for expected delinquencies. Since most law firms operate on a cash basis, complete careful prepared lists of accounts receivable and amounts earned for a time incurred but not yet billed as of a commencement date of a divorce action, should be included in the law firm's valuation.

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One aspect of the valuation of the tangible assets of a law firm that is more problematic is calculating prospective contingency fees and other work in progress. While there is general agreement that contingency fee cases are a component of the valuation of the law practice, there is wide disagreement as to the best method to value such cases for equitable distribution purposes. In putting a value on these cases, does it make a difference if the same are considered an account receivable of the firm or a contingent interest? It could be argued that even though the value of the receivables is related to the expected future collection of those receivables and the date on which they will be received, there is generally no independent event that must occur before receivables are collected. On the other hand, an attorney may have to spend many hours, billable or not, on work in progress particularly a general liability or malpractice case, for which he or she will be paid only if the case is *successfully* concluded. The potential realization of a successful jury award is, therefore, a contingent independent event that could qualify such a case as a future interest. This distinction may be important in settling a divorce case, if a present value of contingency fee cases is utilized to determine the non-titled spouse's distributive award interest. In such cases, the valuation process must include such considerations as: (i) the likelihood of the independent event happening; (ii) assuming the event does occur, when it most likely

will occur; and (iii) assuming the event does occur, the amount of the benefit (or loss) that will result.

All of these issues may well be resolved by a jury. If no facts are in dispute in the case, if the law is extremely clear about negligence or liability, or if all parties can reasonably anticipate the outcome, then the appraiser probably can accurately value the potential value of the contingency fee case. Unfortunately, this type of situation and appraisal is extremely rare.

It is suggested that, in divorce cases, the parties or the court should in the first instance consider the valuation of the marital portion of the spouse's contingency fee cases to be analogous to the dissolution of a law partnership or the substitution of an attorney at a given point of time in a contingency fee case.[4]

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For the purposes of this article, and as most courts have concluded, contingency fee cases will be treated as a "contingent asset" of the law practice. As mentioned, it is recognized that, while it is often very difficult, if not almost impossible, to establish a present value of general liability or malpractice contingency fee cases, the fact remains, however, that such cases may have significant value as of the date of commencement.

The Appellate Division, First Department in the *Block* case, *supra*, held that a method of valuating a contingent fee case is to compare the percentage of time spent on the matter during the marriage with the total time spent reaching the ultimate recovery.[5]

It is respectfully suggested that the approach of the Appellate Division in *Block* is strewn with unnecessary pitfalls. This is especially true if the divorce involves a law practice with a substantial number of contingency fee cases.

If the valuation of the law practice involves just a few such cases, an experienced negligence lawyer or an attorney who works for an insurance company may be able to give a credible opinion as to the potential ultimate recovery of the case to affix a present value. However, in dealing with the more typical situation where there may be numerous such pending cases, it is near impossible to "cherry pick" each case with a great deal of economic reliability to determine present value.

The *Block* valuation method requires the non-titled spouse and/or court to rely on the accuracy of the time records maintained by the titled spouse, his partners or associates. Suffice it to say that members of the negligence bar do not, in the usual course of their practice, maintain time records nor are they particularly adept at keeping accurate time records, since their contractual obligations with their clients are on a percentage of the fee recovered. A second problem of the *Block* approach is the appropriate adjustment for ongoing overhead or operating expenses if the non-titled spouse is going to receive a portion of the entire fees generated in the case including the post-commencement efforts of the titled spouse (or the law firm).

The Colorado appellate court opinion in the *Vogt* case held that one approved method in that state to distribute vested but unmatured contingency payments is the "reserved jurisdiction method." The trial court can determine the division formula at the time of the decree but retains jurisdiction to distribute payment when the contingent fees are received.

The dissolution of the marital partnership, and the distribution of its assets, is akin to the dissolution of a law partnership or to the substitution of that attorney at a given point in time (in a contingency fee case).

Basically, there are two ways in which to value the interest of the outgoing attorney in a firm's dissolution or by way of substitution. The first is to establish a present fixed dollar amount based upon *quantum merit* for the reasonable value of services of the outgoing attorney, or in this case spouse; the second is to establish a contingent percentage fee based upon the proportionate share of the work performed on the whole case prior to the determination event.[6]

In New York, the trial courts are encouraged to finalize the equitable distribution of assets in such a way as to minimize the further involvement of the parties. It is suggested that this result is best obtained by the court's fixing a percentage of the contingency fees earned as of the commencement date, as the "marital portion" of the assets of the law practice.

This approach would eliminate the need for the titled spouse to maintain or reconstruct post-commencement time records. Many matrimonial attorneys, in making application to the court for an award of counsel fees, have cited the well known case of *In re Potts*.[7] In general, the court, in determining the justice and reasonableness of an attorney's claim for services, should consider the time spent, the difficulties involved in the matters in which the services were rendered, the

nature of the services rendered, the amount involved and the professional standing of counsel and the results obtained.[8]

As another court observed in the case of *Booth Lipton and Lipton v. Casseel*,[9] a partnership proceeding to recover on a *quantum merit* basis fees, the court held "items as to time actually employed and work on the case are of [not] much importance. It is the ability of the attorney and his capacity in success of handling the large and important matters and commanding large fees therefore, the amount involved and the result obtained, which are of prime importance in determining what constitutes a just and reasonable charge."

In a divorce, the non-titled spouse should be able to reap the benefits of the skill and standing of his or her attorney-spouse. Many personal injury cases are successfully settled before trial because of the reputation of plaintiff's counsel. The skill in which the investigation and discovery phase was conducted, and the trial abilities of counsel which are factored into an insurance carrier's desire to settle or not settle a case at an early stage.

The question is presented: is there a standard or formula that will be applicable to fixing the non-titled spouse's interest in these contingency fee cases as of the commencement date? While there may not be a "one size fits all" standard to apply, there are cases in which the court or experts have expressed opinions in this regard. In the recently concluded case of *Tanzman v. Tanzman*[10] in which this author represented the non-titled wife, the expert report of Joseph J. Brophy, an attorney who specializes in personal injury cases was submitted to the court.

Mr. Brophy opined the following to the court with respect to the valuation of the pending contingency fee cases as of the commencement date:

> I have reviewed the *Block* case, and I do not agree with the approach of comparing time expended before and after dissolution. Personal injury lawyers generally do not record time on contingent cases, and asking them to do so invites inaccurate reporting at best. Moreover, the value of contingent fee cases does not necessarily correspond to the time spent. Indeed, part of the value of the case is intrinsic to the facts of the case and has no relation to time spent at all. Proof of this is the fact that lawyers are willing to agree to pay referral fees, averaging one-third of the total fee just to get the case in the door. More often than not, referring attorneys do little or no work, but they customarily receive a substantial part of the fee. The logical explanation for this practice is that the case has a value before any work is done on it at all, and the market sets the value at about one third of the ultimate recovery. Individual cases, of course vary, but referral fees are remarkably uniform where they are unregulated.

In the *Tanzman* case, the valuator stated in its report that it was unable to place a value on the contingent fee cases due to lack of information and expertise in this field. In the report, the *Block* case was cited as a possible method for placing a value on the 146 cases involved. Mr. Tanzman had prepared, for the purposes of valuation, an appendix of the 146 contingency fee cases which also categorized the cases depending upon the status in the office as of the commencement date. This appendix was prepared at the discovery request of my firm and used by the forensic accountants. Using this appendix, Mr. Brophy further opined that in his opinion 33 1/3 percent of the value of the case was earned for cases accepted but not yet in suit; 40 percent was earned for cases in which a complaint had been filed; 50 percent in which a bill of particulars had been exchanged; 60 percent for cases in which an RJI had been filed; and 70 percent for cases on the calendar. Of course, 100 percent would be deemed earned for any case which had been either settled or a jury verdict had been achieved but payment was not as yet received.

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In the *Tanzman* case, the parties and their respective attorneys had specifically rejected the use of the method suggested by the rule in the *Block* case. Instead, it was stipulated that the method of verifying the fees received was for plaintiff's attorney to provide defendant's attorney with copies of closing statements and the relevant escrow ledger account to verify the amount of recovery including disbursements.

Justice John W. Sweeny, Jr., in the *Tanzman* case, adopted the opinion of the wife's expert, Mr. Brophy, as to the percentage to be assigned each of the pending contingency fee cases.

In the case of *Minzer v. Jeron*,[11] the report of the Referee in a [negligence] law partnership dissolution case was affirmed by the trial and the appellate court. As trial court (Silverman, J.) had appointed a member of

the negligence bar and Westchester County, Irving Farber, Esq., as Referee to resolve all issues related to the distribution of the assets of the law partnership. Included in the assets were about 80 contingency fee cases, then in various stages of litigation. The Referee, in his report, noted that both parties and the expert called by one party, testified and agreed that, up to the date of valuation, both attorneys were entitled to an equal allocation of the work then completed. While the testimony differed as to the applicable percentages, it was agreed that it was appropriate for the continuing partner to be compensated for the additional work to bring the case to conclusion by giving him a greater percentage. The litigants and the Referee were also of the opinion that to wait until each case is finalized to set the fee allocation might work in an isolated case or two but would be a "nightmare in the context of the number of cases involved" in their dispute. The classification as to the status of the various cases was somewhat different than in the *Tanzman* case. However, the Referee concluded that the distribution of the fees should be as follows: (1) cases up to pleadings stage, bill of particulars stage, or discovery order (stipulation stage), 40 percent of the fee; (2) cases in discovery at whatever stages up through completion of discovery and filing a note of issue, 60 percent of the fee; (3) cases after filing note of issue in which there has been a pre-trial conference or conferences and settle prior to jury selection, 70 percent of the fee; (4) cases settled during or after jury selection before trial, 60 percent of the fee; (5) cases settled during trial or verdicts rendered, 80 percent of the fee; (6) cases to which verdicts are appealed and are settled at any time during the appellate process, 90 percent of the fee; (7) settled in waiting settlement checks, 100 percent of the fee.

It is suggested that law partnership dissolution cases of this kind, offer guidelines or benchmarks for the parties' respective attorneys or the trial court to consider in the equitable distribution of contingency fee cases that are marital assets.

There are some related issues that also should be considered in connection with these equitable distribution issues. Since the receipt of the fees constitutes taxable income, the fees should be tax impacted at the actual rate of the taxpayer attorney-spouse. Similarly, any fee paid to any referring attorney should be deducted from the recovered (gross) fee. In addition, any disbursements incurred after the commencement of the divorce action would generally not be included in the calculation of the marital portion of the fee. Pursuant to applicable IRS regulations, law firms do not deduct as an expense disbursements in contingency fee cases in the year which they are incurred, but are treated rather as advances or loans to the clients. If the disbursements cannot be recovered at the conclusion of the case, the same are deductible as a business expense. Recovered disbursements thus are usually not treated as income. However, if the disbursements are being deducted in the year incurred on a cash basis and not in the year there is a non-recovery on accrual basis, the pre-commencement paid disbursements reimbursed at a later date constitute additional income which should be subject to equitable distribution.

By stipulation or court order, there should be a provision that the attorney-spouse verify from the case-closing statement what dates the disbursements were incurred in each case and when they were paid. The recovery of pre-commencement paid disbursements should be treated as income derived from the case and subject to distribution.

Another issue that arises is: should ongoing, post-commencement overhead or operating expenses be considered in reducing the ultimate marital portion of the fees recovered in these cases? In the *Tanzman* case, an expert opinion was submitted to the court on behalf of the non-titled spouse that post-commencement disbursements or operating expenses should not be deducted since the contingency fee cases are being distributed as a (contingent) account receivable, for which the overhead as of that date has been fully incurred and defrayed by that firm. Of course, the titled law firm will receive as separate property the fee and disbursements attributable to the firm's post-commencement efforts and payments.

In *Tanzman*, Justice Sweeny, while not fully adopting this rationale, held that post-commencement overhead should not be a deduction.

Finally, if the titled spouse is paying the non-titled spouse maintenance, should this be a factor for downward adjustment of the distributive award of the contingency fee cases? The Court of Appeals, in the recent case of *Grunfeld v. Grunfeld*, citing its prior holding in the *McSparon* case held that the lower court should be "meticulous" in guarding against duplication in the former maintenance award which are premised on earnings derived from professional licenses. To avoid this "double dip," the Court of Appeals instructed the lower courts that, if they consider the enhanced earning portion of a spouse's income of a maintenance award, the distributive award should be reduced by the amount of maintenance that is attributable to enhanced earnings. The Appellate Division, Third Department, in the case of *Erickson v. Erickson*,[12] noted in its affirming both the distributive award and award of maintenance, "our review of the records satisfies us that the Supreme Court's award of maintenance is appropriate inasmuch as plaintiff's base income—the income he would have

been expected to earn—without his license—as well as the undistributed portion of his license, is amply sufficient to support such an award."

Thus, if the award of maintenance would have been at the same amount without the enhancement of earnings considered, the award of maintenance does not create a "double dip" situation.

In *Tanzman*, this author submitted to the court various analogous cases wherein maintenance was awarded to a spouse in similar financial circumstances. The argument advanced was that the award of maintenance (agreed upon in this case), was appropriate based upon the non-enhanced earnings of Mr. Tanzman. Therefore, there should be no adjustment for his maintenance payments. Justice Sweeny found that "the argument is interesting, [but] it is unavailing." The court reasoned that since this was not a situation such as in *Grunfeld* where there were significant separate assets such as the securities which can be used by the spouse to pay maintenance, Mr. Tanzman's future earnings are almost wholly derived from his law practice including these contingency fee cases.

The valuation of contingency fee cases in a law practice involves various facets to be considered. The litigants and their respective attorneys are well advised to seek agreement on as many of these points as possible. If the issue cannot be fully settled, it would be advisable to limit the submission to the court to the issue of the appropriate distribution percentage that should be assigned to these cases.

Endnotes

1. *Lipman v. Lipman*, 93 AD2d 695 (2d Dep't 1983) *aff'd*, 61 N.Y.2d 918; *Grunfeld v. Grunfeld*, 94 N.Y.2d 696; *Stempel v. Stempel*, 143 AD2d 409 (2d Dep't 1988).
2. *Block v. Block*, 258 AD2d 324.
3. *Grunfeld v. Grunfeld, supra*.
4. For an excellent discussion on contingency fee cases in the United States, see Christopher A. Tiso, *Are Contingency Fee Cases Part of the Marital or Communal Estate?* 15 J.AM. Academy Matrimonial Law. 391, 1998.
5. Citing *In re Vogt (Vogt)*, 773 P.2d 631 (Colo. Ct. App.); *DeJesus v. DeJesus*, 90 N.Y.2d 643.
6. *Marcelli v. The United Parcel Services Inc.*, 80 AD2d 350 (2d Dep't 1981); *Lai Ling Cheng v. Mondansky*, 72 N.Y.S2d 454; *see also* 6 N.Y. Jur. 2d "Attorney's at Law" § 61.
7. 213 A.D. 59, *aff'd*, 241 N.Y. 593.
8. *In re Snell's Estate*, 17 AD2d 490.
9. 51 Misc. 2d 853.
10. N.O.R. Sup. Ct., Putnam Co., Sweeny, Jr. J., 2-27-02.
11. 261 AD2d 623 (2d Dep't 1999).
12. 281 AD2d 862 (3d Dep't 2001).

The Quagmire Problems with the CSSA

By Bruno Colapietro

Shared Custody and Child Support

The Child Support Standards Act (CSSA), when drafted, spoke of custodial and non-custodial parents in making child support determinations. Thus, where people had agreed to have equal access to the children on some alternating schedule, we all believed that the CSSA had no application.

In *Bast v. Rossoff*,[1] the Court of Appeals established a method to deal with shared custody arrangements. There, the mother had the child Sunday evenings through Wednesday evenings and then she would go with her father from Wednesday evening until Sunday; then on alternate weeks the child would be with the father from Wednesday evening until Thursday morning. The Court stated that, even though it was a shared custody arrangement, the CSSA applied.

"One can see that, under this proportional formula, an accountant, a stop watch and log book are essential parts of parenting."

The court employed the three-step method enunciated first in *Cassano*.[2]

First, determine the combined parental income; second, use the appropriate percentage (depending on number of children) on the first $80,000; third, if the combined income exceeds $80,000 then determine the amount of child support in excess of the $80,000 cap by either following the percentage or applying the factors under DRL § 240[1b][f].

1. Financial resources of the parents.
2. Physical and emotional health of child and special needs.
3. Standard of living child *would* have enjoyed had marriage not dissolved.
4. Tax consequences.
5. Non-monetary contribution that parents will make.
6. Educational needs of parents.
7. Determination that one parent's income is substantially less than the others.
8. Needs of other children for whom "non-custodial" parent is responsible.
9. Extraordinary expenses for visitation.
10. The famous catch-all: "Any other factors" which may be relevant.

After this analysis (if, in fact, it is ever done) the court must decide whether the court should go above the $80,000 cap unless "unjust or inappropriate," but the reasons must be set forth.

Thus, the Court determined that not applying the CSSA to shared custody situations was not logical; in effect it stated that the parents can call their arrangement "shared custody" but the court has a right to give its own view of the arrangement, especially if in reality one parent has the child more than the other. "Thus even though each parent has a custodial period in a shared custody arrangement, for purposes of child support, the court can still identify the primary custodial parent."[3]

The proportional offset formula was rejected.[4] For example: Mother has child 60 percent of time, father 40 percent. Mother grosses $30,000, after FICA et cetera, father $50,000. Since 17 percent of $50,000 is $8,500 and 17 percent of $30,000 is $5,100 and since the mother primarily has the child, she gets 60 percent of $8,500 or $5,100 while the father gets 40 percent of $5,100 or $2,040. The mother ends up with $5,100—$2,040 or $3,060 per year. (Unless it is just unjust or inappropriate?)

One can see that, under this proportional formula, an accountant, a stop watch and log book are essential parts of parenting. In the *Bast* case the father claimed 42.9 percent of being with the child and the mother said it was only between 32 percent and 36 percent. (I guess it all depended on whether the hockey game went into overtime).

We can recall that *Holmes*[5] tried to apply this formula, but the court quickly retreated in *Simmons v. Hyland*.[6]

Then along came *Baraby v. Baraby*.[7] There, the parties entered into a truly shared custody arrangement—one week each on an alternating basis. The trial court applied the *Holmes* formula. The mother's income as best could be determined was about $21,000 and the father's about $68,000. If the mother had traditional custody, the father would have to pay about $1,290 and the mother about $400 if the situation were reversed.

The trial court divided each parents' obligation by two and awarded the difference to the mother.

$1,290 ÷ 2 = $645.00
$384 ÷ 2 = $192.00
$453.00 per month

The Third Department redefined shared custody in what seems a Procrustean method: "[T]he parent having the greater *pro rata* share of the child support obligation . . . should be identified as the "noncustodial" parent for the purpose of support *regardless of the labels employed by the parties*."[8] Thus, the greater earning spouse must pay his or her pro rata share of child support unless the formula yields a result that is unjust or inappropriate.

Question, query or whatever? Is an award of child support ever possible in a situation where both are earning the same amount?

Then again what if both are earning the same because one is receiving overtime? If IBM stops paying overtime, has IBM then transformed the other parent as "non-custodial" for purposes of child support? Stay tuned for the next advance sheets.

College Expenses

The CSSA has in some small degree given us guidelines on child support awards. The guidelines are not always clear. Less clear are the relative college expense allocations for separated parents. When parents are living together, they have much more input as to the choice of their child's college. If they say you go to Broome Community College in unison, the student goes to Broome. However, if the parents are separated, the non-custodial parent says Broome is fine, the custodial parent asserts that Harvard is better and the parties are in court.

A court under DRL § 240 or FCA § 413 (1-b)(c)(7) has the discretion to order educational expenses for a child even in the absence of special circumstances or a voluntary written agreement.[9] Generally, the obligation for college expenses ends at age 21 unless otherwise agreed to.[10] However, never does not always mean never.[11]

One thing is clear, however. A court cannot order college expenses for the future. In *Hamza v. Hamza*[12] the court distributed proceeds which the husband was to receive under his employer's incentive agreement: one-third for the husband to do as he saw fit and two-thirds to be used for the higher education of their children. Since the children had several years to go before college became an issue, the Appellate Division reversed that order.[13] Did I say it is clear? It was until *Jarrell v. Jarrell*.[14]

In many cases, separation agreements attempt to address the issue of college costs. In *Morris v. Morris*[15] the agreement provided in part:

> The parties acknowledge that they will share equally any college expense incurred by the infant issue at any school within the State of New York University system, which may not be covered by any loans or grants which may be available to him, or provide him with the same amount of money with which he may attend the college of his choice.

When the child chose to go to a private school, the court said the father's obligation is limited to his one-half share of what a comparable SUNY college education would cost and the matter was remanded for a hearing.

"One thing is clear . . . [a] court cannot order college expenses for the future."

In *Grobman v. Grobman*[16] the parties agreed that the mother would assume a certain share of college expenses. She, thereafter, attempted to reduce her child support because of this and since the agreement had no provision for a reduction in child support, her petition was denied.

A court can reduce court ordered child support when the parent is paying substantial college expenses which include room and board.[17] However, child support is a distinct and different aspect than college contributions which can be awarded over and above regular CSSA child support.[18]

Courts have been reversed where a non-custodial parent is ordered to pay some college expenses but received no reduction in the child support.[19]

The father in *David S. v. Gail Parker S*.[20] agreed to pay "100 percent of the child's school tuition and mandatory fees, books as they became due." The mother sued to recover $13,015 in tutoring expenses and $289.24 for shipping belongings to school. The court mercifully said these items did not fit within the definition. Incidentally, the father also agreed to pay "100 percent of the minor child's fees for summer camp." The mother wanted transportation fees of $1,360 and $1,047.75 for camp gear but these items were rejected also.

The parties in *Galotti v. Galotti*[21] agreed to share college expenses in proportion to their incomes. Plaintiff-father brought suit to have the mother contribute her share but refused to provide his income tax return. The court rewarded his recalcitrance by making him pay 100 percent.

In *Regan v. Regan*,[22] the agreement provided that: "The Husband shall, if the children so qualify, and his financial circumstances permit, provide the cost of a college education for each child. The Husband and Wife shall agree on the choice of college." The father claimed he did not agree as to choice of college for his three daughters. The court held that he tacitly agreed by paying for one semester and several summer courses, failed to object to the choice or to apply to be relieved of the obligation. He was ordered to pay $58,095 plus $15,000 in legal fees.[23]

In *Dujack v. Dujack*,[24] the court ordered the father to pay private school expenses. The Third Department Court reversed, holding that, without any findings or explanations for the award, the award was inappropriate. The father was paying $4,843 per month child support as it was.

As a last note, do not forget our old friend, *Roe v. Doe*.[25] There a 20-year-old woman attending the University of Louisville decided to "do it her way" in college—Frank Sinatra notwithstanding—(live off campus, experiment with drugs, not study). When her father decided to "do it his way" and cut off financial support, the woman sued her father for the $1,000 per semester tuition (yes, this number has the correct amount of zeros) plus monthly support. Such suits are always conceived to build up family harmony. The Court of Appeals affirmed the Appellate Division's reversal of the Family Court holding at page 193:

> Here, the daughter, asserting her independence, chose to assume a status inconsistent with that of parental control. The Family Court set about establishing its own standards of decorum, and having determined that those standards were met, sought to substitute its judgment for that of the father. Needless to say, the intrusion was unwarranted.

One-Time "Windfalls" (Non-Recurring Income Items) Under FCA § 413 and DRL § 249 1-b(e))

In *Bryant v. Bryant*,[26] the Third Department was faced with an issue of how to treat a one-time receipt of a $400,000 inheritance by the non-custodial parent. Family Court Act § 413(l)(e) (same as DRL § 240(1)(e)) provides that a court can examine non-recurring payments from extraordinary sources not otherwise considered as income such as gifts and inheritances in making an award of child support. In this case, Mr. Bryant received an inheritance of $400,000. Following the hearing, the court awarded $115 per week plus a lump sum of $100,000 from the inheritance. ($25,000 outright and $75,000 in trust for the children). The Appellate Division reversed and remanded for a new hearing with advice that maybe an award can be fashioned without invading the principal. It further pointed out in a footnote that the court looks upon an outright lump sum grant (here $25,000) as additional child support "with disfavor."

In a more recent case *Gluckman v. Qua*,[27] the father had substantially improved his income from $43,088 to $260,221 in five years.

The mother was seeking additional child support because of the increase. At the hearing, the Hearing Examiner found that the mother's expenses had actually decreased but applied 25 percent to all income because no proof was offered why the court should vary or not vary from the amount over $80,000. Thus an award of $1,251 weekly ($65,052 annual) was made (up from $210 a week). The Hearing Examiner included $87,937 in the calculation, this representing the increase of the father's stock portfolio. The Appellate Division rejected this and did not include it in income.

The court went on to say (finally): "To this end we note that, although children must generally be permitted to share in a non-custodial parent's enhanced standard of living and a court is not permitted to make an award based solely on actual needs (citing *Cassano*), the children's needs are nevertheless an appropriate factor to be considered when determining an award of child support on income in excess of $80,000." The court went on to say that the amount originally awarded was sufficient to cover *all* of her household expenses with her new spouse including painting and restoring her home. Still the award ended up at $843.12 per week ($43,843 annual) for two children.

In *Mitchell v. Mitchell*,[28] the non-custodial father sold his interest in a professional hockey club which gave him capital gains of $400,000 (original investment $117,000). The mother petitioned to obtain 17 percent of same or $68,000 in additional child support. The mother had given up all rights to said business interest in both a prenuptial agreement and a later separation agreement. The court rejected the mother's position holding that "a lump sum award of a percentage of the gain realized on the [father's] sale of his interest . . . would inure primarily to [the mother's] benefit and operate as a windfall to her."

Similarly in *Anonymous v. Anonymous*,[29] the Supreme Court held:

> If an award of child support covers more than the reasonable needs of the child, it effectively becomes tax free maintenance or equitable distribution. Child support may not serve primarily to benefit one of the parties rather than to pay the expenses related to raising a child since child support that exceeds the reasonable costs to raise a child in an appropriate lifestyle is disguised alimony . . . [T]he award must relate to the actual needs of the child. Otherwise child support becomes adult support."[30]

Perhaps the *Gluckman* case is a retreat from the court's decision in *Jones v. Reese*,[31] where an award of $3,532.41 per month was deemed appropriate for an infant son born out of wedlock. Judge Cardona's dissent may be breathing life. "Child support should not be perceived as a disguised source of income for the custodial parent. Therefore, the court should identify specific enhancements to the child's standard of living that will directly benefit the child."[32]

However, see *Duguay v. Paoletti*,[33] where the parties were never married. The non-custodial father received a lump sum of $250,000 from his employer (Virogenetics). The father argued that this was "seed money" or "option money" to aid future research. The $250,000 was not reported as income on his tax return. An award of $2,349 per month was made.

Imputed Income Under FCA § 413 and DRL § 240 1-b(5)(iv) and (v)

Perhaps one of the few areas where counsel can put some imagination and creativity to a support matter is in the imputation of income. Oftentimes this rich mother lode is overlooked when presenting a case.

The statute provides that you can impute income from such non-producing assets such as unimproved real estate, business perks, fringe benefits and money, goods or services provided by friends and relatives. Also, the court has the right to impute income if one or both parties are not fully using their talents to the maximum either out of indolence or to frustrate proper support.

A. Income Imputed Because Custodial Parent Is Not Employed to Capacity

In *Wheeler v. Wheeler*,[34] the custodial mother had certification to be a nurse. Although she had never worked as a nurse, the court imputed a starting nurse's salary of $30,000. The custodial parent in *Scomello v. Scomello*,[35] had a teacher's license and Master's degree but worked as a bar maid. The court imputed $25,000 of income to her despite her actual negligible earnings. In *Mitchell v. Mitchell*,[36] the custodial mother at time of trial had a small income of about $7,000 putting out a weekly newspaper. She had given up a $39,000 position working for her father to go into the restaurant business which in six months had fed few people but managed to accrue over $250,000 of debts and bankruptcy. She then found another position paying $18,000 but found that was a "dead end" position (but more successful then the restaurant). She left that job to start up her newspaper. The court imputed that $18,000 income to her.

"Perhaps one of the few areas where counsel can put some imagination and creativity to a support matter is in the imputation of income. Oftentimes this rich mother lode is overlooked when presenting a case."

B. Income Imputed Because Non-Custodial Parent Not Active in Pursuing Employment

In *Phillips v. Phillips*,[37] the non-custodial father was earning $11,000 per year. The court held that "the husband has no impediment which prevents him from working, is admittedly in good health, has been in the taxi and limousine business for 18 years, and owns his business." The court held him to an earning standard of $30,000 per year.

A non-custodial mother in *Bosshold v. Bryant-Bosshold*,[38] testified she could not work because of a disability. However, at trial she refused to answer any inquiries about her health because such problems were "personal." The court upheld a ruling that she could earn at least $6.00 per hour.

In *Lutsic v. Lutsic*,[39] the father of twins lost a $40,000 position through no fault of his own. He tried to find similar employment but could not. The court found him employable and imputed an income of $15,500 for purposes of awarding child support.

Goddard v. Goddard[40] is instructive in that a court does not need to make a finding that a parent has deliberately reduced his income to avoid child support. There the court imputed a $20,800 income to a father who voluntarily left a position paying $37,000 to take other jobs which were not "commensurate with his qualifications and experience."

In *McCauley v. McCauley*,[41] the non-custodial parent lost his position as a research scientist. The court found

that sending out 50-60 resumes with little meaningful follow-up (no interviews in the last six months) was not demonstrating much effort. His testimony was that he was busy preparing his *pro se* legal papers for various modification hearings and also trying to establish a father's rights association. The court imputed $25,000 of income.

In *Militana v. Militana*,[42] the mother stopped working after the first of her two children were born in 1985. In 1995, she left the husband and gave birth to another child fathered by another man. The court imputed $40,000 of income to her. She had received a $1,500,000 lump sum distributive award. The trial court gave the custodial father $150 per week in child support. His income was $653,000. The matter was remitted for further hearings.[43]

C. Under-Reported Income

FCA § 413 and DRL § 240 1-b(k) arm the court with a mechanism to make an award where a non-custodial parent is playing games with the finances either in under reporting income or failing to cooperate with disclosure. In such cases the court can make an award based on what the child's standard of living should be or the needs of the child, whichever is greater.

In *Klein v. Klein*,[44] the Hearing Examiner imputed an income of $70,000 to a businessman who failed to provide sufficient documentation with respect to his two cash-related businesses. The father also intermixed much of his personal expenses along with legitimate business expenses.

A total of $70,000 of income was also imputed to a father in *Casey v. Casey*,[45] and the court went on to say it should never be less than that in the future. The one-time $70,000 was upheld but it was deemed improper to project that same amount in the future.

In *Graziano v. Graziano*,[46] the trial court found the husband's account of his finances to be unbelievable and imputed $45,000 of income. The Appellate Division said that was not enough and remitted for a hearing.

In *William S.T. v. Anne M.T.*,[47] Mr. T was receiving $300 a week from his employer "off the books." Both the employer and Mr. T. maintained they did not keep any records of actual amounts paid. This novel defense was rejected by the court which stated "it is inappropriate for the Court to permit such illegality to be accepted as a defense to a claim for child support. This admitted conduct of 'working off the books' can only be interpreted as a loud and clear statement by the petitioner that he will not deal honestly with his financial obligations to society or his children." The Hearing Examiner's consideration of the father's lifestyle was enough to impute a proper income.

In *Mireille J. v. Ernst F. J.*,[48] a physician claimed to have income of $5,786 and $3,544 in his two previous years. He testified, however, that he could afford child support of $500 per month. The court found that clearly he "earns more than his reported income and thus his claims of indigency are unpersuasive." An income of $73,000 was imputed.

Where the non-custodial parent failed to comply with a subpoena, did not provide current evidence of income and was "untruthful and evasive in her response to questions," the imputing of $400 per week income was upheld.[49]

In *Liebman v. Liebman*,[50] the father claimed that his support obligation should be based on his tax return. However, the record revealed that prior to the marital difficulties, the parties lived a lifestyle greater than would be expected when you looked at the reported income (Surprise!). The court found that he was not declaring all of his income (Surprise!). Also, apparently the father went into the divorce syndrome symptom of cutting his work hours in half in "direct contemplation of the dissolution of the marriage" (Another surprise!). The court thus properly made an award consistent with the children's standard of living.[51]

You should note, in calculating income, that depreciation taken by a non-custodial parent is not deductible from his or her income in calculating the income subject to the CSSA.[52]

The court imputed income of $40,000 to a father who had a chance for full time employment but chose semi-retirement instead.[53]

D. Particular Items Imputed as Income

Once again the careful practitioner will examine closely financial records to discover "add-ons" to income.

One popular approach used by non-custodial parents is to hide behind depreciation deductions. The statute FCA § 413 and DRL § 240 1-b(5)(vi)(A) addresses excess depreciation (that which is greater than straight line). However, most of the cases totally discount *all* depreciation since it really is not an out-of-pocket expense (at least in the year taken).

In *Mireille J. v. Ernest F.J.*,[54] the court held that while depreciation of business assets may be legitimate for tax purposes, "they have little bearing on appellant's actual ability to pay support." The court in *Barber v. Cahill*,[55] held that, since depreciation "was not an actual out-of-pocket business expense incurred by respondent impacting his ability to pay child support," $7,958 was imputed additional income.[56]

Automobile insurance, gas and oil payments, vehicle maintenance and a personal weekly expense allowance of $200 were all imputed as income in *Skinner v. Skinner*.[57] So was $7,500 when the father's parents were providing him with a car and related expenses in *Bistrian v. Bistrian*.[58] So, too, were wrongfully claimed bad debt deductions.[59] The value of uncompensated remodeling work by self-employed husband was imputed as income in *Haas v. Haas*.[60]

E. Particular Items Not Imputed as Income

In many cases following a divorce, a new money-earning partner joins the household of the non-custodial parent. FCA § 413 and DRL § 240 1-b(b)(iv)(D) provide that money or goods or services provided by friends and relatives can be a source of imputed income. However, in *Weber v. Coffey*,[61] the court stated that where both parties have remarried and with no other special factors, it was an improvident exercise of discretion to impute to the father "any percentage of the income earned by his current spouse."[62]

Social Security benefits received by a child (even though through the non-custodial parent) are not income to be considered in reducing the support obligation.[63] However, such payments may be considered in any "unjust or inappropriate" argument.[64]

Where a Family Court considered a prospective inheritance of $100,000 to be part of her income, the Appellate Division deemed it to be error.[65]

In *Bistrian v. Bistrian*,[66] both parties were subsidized by their parents. The husband testified he lived with his parents and paid nothing for rent, utilities, laundry, automobile or insurance (George Costanza?). He also received substantial lump sum payments to assist in his support. The wife was studying massage therapy and was living in a home owned by her father, not paying rent and receiving an allowance of $200 per week as well as car insurance, gasoline, children's clothing, dental, therapy and on and on. (Where does one find parents like this?) The court said "In essence, as a result of parental assistance, the Court considers each party's good fortune regarding living expenses to obviate the need to impute income . . . to either party." The court did impute $7,500 to the husband for his automobile expense.[67]

In *Mitchell v. Mitchell*,[68] a father purchased a house in his name for his daughter and her child to live in. She paid nothing except utilities. The court did not impute this rent and tax free housing benefit to the mother, nor did it impute the contribution of her live-in boyfriend. By the same token, the court did not impute the benefit of a company vehicle to the father.

Where a mother who was a physician did not seek employment because of the health problems of the parties' child, her potential income was not imputed. However, the court did impute $150,000 as income from her investments.[69]

Endnotes

1. 91 N.Y.2d 723 (1998).
2. 85 N.Y.2d 649 (1995).
3. *Bast*, 91 N.Y.2d at 728.
4. *Id.* at 730.
5. 184 AD2d 185 (3d Dep't 1992).
6. 235 AD2d 67, 70 (3d Dep't 1997).
7. 250 AD2d 201 (3d Dep't 1998).
8. *Id.* at 201.
9. *York v. York*, 247 AD2d 612 (2d Dep't 1998) (not a settled issue with all departments).
10. *Youssef v. Cantelmo*, 278 AD2d 489 (2d Dep't 2000).
11. *See Krouner v. Urbach*, 267 AD2d 575 (3d Dep't 1999) (where the Third Department stated that "such payment may be enjoined if special circumstances exist.") A hearing was ordered.
12. 247 AD2d 444 (2d Dep't 1998).
13. *See also McNally v. McNally*, 251 AD2d 302 (2d Dep't 1998); *LaBombardi v. LaBombardi*, 220 AD2d 642 (2d Dep't 1995) (child was ten years old); *Walls v. Walls*, 221 AD2d 925 (4th Dep't 1995); *Chitayat v. Chitayat,* 247 AD2d 573 (2d Dep't 1998) (oldest child was 11 years old).
14. 276 AD2d 353 (1st Dep't 2001).
15. 251 AD2d 637 (2d Dep't 1998).
16. 251 AD2d 544 (2d Dep't 1998).
17. *See Houck v. Houck*, 246 AD2d 905 (3d Dep't 1997).
18. *Kurzon v. Kurzon*, 246 AD2d 693 (3d Dep't 1997).
19. *See Vainchenker v. Vainchenker*, 242 AD2d 620 (2d Dep't 1997) (father argued that it was error to force him to pay a *pro rata* share of college. The court rejected that argument but said he was entitled to some reduction in child support.). *See also Imhof v. Imhof*, 259 AD2d 666 (2d Dep't 1999) (father entitled to credit for son who was going to college away from home).
20. 250 AD2d 524 (1st Dep't 1998).
21. 251 AD2d 285 (2d Dep't 1998).
22. 678 N.Y.S.2d 673 (2d Dep't 1998).
23. For other recent private school cases not involving college see *Citera v. D'Amico*, 251 AD2d 662 (2d Dep't 1998) (which stated a father did not have to pay the costs of new more expensive nursery school chosen by the mother without his consent); *York v. York*, 247 AD2d 612 (2d Dep't 1998) (where the father was questioning the continuation of a Catholic school tuition even though the child had been going for five years (remanded for hearing)); *Prystay v. Avidsen*, 251 AD2d 87 (1st Dep't 1988) (where a child had been attending a private military boarding school for five previous years and had one year left, the father was ordered to pay all (expenses even though the other siblings were attending public school) since the child was doing well at the private school).
24. 221 AD2d 712 (3d Dep't 1995).
25. 29 N.Y.2d 188 (1971).

26. 235 AD2d 116 (3d Dep't 1997).
27. 253 AD2d 267 (3d Dep't 1999).
28. 264 AD2d 535 (3d Dep't 1999).
29. N.Y.L.J., Dec. 8, 1999 (p. 28).
30. *See also McFarland*, 221 AD2d 983 (4th Dep't 1995) (where the court used capital gains as a means of assessing child support because his wages were only $36,322 and he had $12,243 in capital gains from his $820,000 portfolio).
31. 227 AD2d 783 (3d Dep't 1996).
32. *Id.* at 786.
33. 279 AD2d 767 (3d Dep't 2001).
34. 261 AD2d 398 (2d Dep't 1999).
35. 260 AD2d 483 (2d Dep't 1999).
36. 264 AD2d 535 (3d Dep't 1999).
37. 249 AD2d 527 (2d Dep't 1998).
38. 243 AD2d 857 (3d Dep't 1997).
39. 245 AD2d 637 (3d Dep't 1997).
40. 256 AD2d 545 (2d Dep't 1998).
41. 172 Misc. 2d 611 (Sup. Ct., Schenectady Co. 1997).
42. 280 AD2 529 (2d Dep't 2001).
43. *See also Fendsack v. Fendsack*, 736 N.Y.S.2d 457 (3d Dep't 2002) (where court imputed income of $40,000 when the father chose semi-retirement rather than full-time employment which was available).
44. 251 AD2d 773 (3d Dep't 1998).
45. 734 N.Y.S.2d 228 (2d Dep't 2001).
46. 285 AD2d 488 (2d Dep't 2001).
47. 181 Misc. 2d 326 (Fam. Ct., Suffolk Co. 1998).
48. 220 AD2d 503 (2d Dep't 1995).
49. *Ulmer v. Ulmer*, 254 AD2d 541 (3d Dep't 1998).
50. 229 AD2d 778 (3d Dep't 1996).
51. *See also Kosovsky v. Zahl*, 257 AD2d 522 (1st Dep't 1999) (manipulation of finances to reduce income and unreported cash receipts); *Askew v. Askew*, 700 N.Y.S.2d 594 (3d Dep't 2000) (additional $29,460 imputed to husband because he used business to pay many of his personal expenses); *Mancini v. Borowicz*, 271 AD2d 789 (3d Dep't 2000) (income property imputed).
52. *Calabrese v. Johnston*, 274 AD2d 971 (3d Dep't 2000).
53. *Fendsack v. Fendsack*, 736 N.Y.2d 457 (3d Dep't 2000).
54. 220 AD2d 503 (2d Dep't 1995).
55. 240 AD2d 877 (3d Dep't 1997).
56. *See also Westchester Co. v. Jose C.*, 204 AD2d 795 (3d Dep't 1994) ($191,340 of real property depreciation imputed as income); *Dane v. Dane*, 688 N.Y.2d 754 (3d Dep't 1999).
57. 241 AD2d 544 (2d Dep't 1997).
58. 176 Misc. 2d 556 (Sup. Ct., Suffolk Co. 1998). *See also Marino v. Marino*, 229 AD2d 971 (4th Dep't 1996).
59. *Carlson-Subik v. Subik*, 257 AD2d 859 (3d Dep't 1999).
60. 695 N.Y.S.2d 684 (4th Dep't 1999).
61. 230 AD2d 865 (2d Dep't 1996).
62. *See also Mitchell v. Mitchell*, 264 AD2d 535 (3d Dep't 1999).
63. *Graby v. Graby*, 87 N.Y.2D 605 (1966).
64. *Zevotek v. Zevotek*, 257 AD2d 888 (3d Dep't 1999).
65. *Scomello v. Scomello*, 260 AD2d 483 (2d Dep't 1999).
66. 176 Misc. 2d 556 (Sup. Ct., Suffolk Co. 1998).
67. *See also Huebscher v. Huebscher*, 206 AD2d 295 (1st Dep't 1994).
68. 264 AD2d 535 (3d Dep't 1999).
69. *Kosovsky v. Kosovsky*, 257 AD2d 522 (1st Dep't 1999).

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Finding, Proving, and Obtaining Proper Credits

By Donald M. Sukloff

Just as newspapers tell us there are millions of dollars not claimed, many attorneys fail to recognize amounts for credits or offsets in equitable distribution cases. Hopefully this article will alert the reader to planning and obtaining maximum credits.

A Home Is Purchased with One or Both Spouses Contributing Separate Funds

Normally, upon proper proof, a person is given dollar-for-dollar credit on separate contributions rather than a proportionate amount against the ultimate value.[1] Sometimes a credit is delayed until the subject house is sold.[2]

However after the credit is given the balance need not be divided equally. Where one party contributed most of the down-payment, the court credited each party with the amount of his or her separate contribution and then divided the balance 75 percent to the greater contributor and 25 percent to the other.[3] But in *Diaco v. Diaco*,[4] where the husband's separate property was put in joint names with his wife, no valuation was made; the Appellate Court concluded an award of two-thirds to the husband and one-third to the wife was appropriate.

Dedication of Separate Property to Marital Property

The Third Department permitted a wife who made a contribution of $8,900 in home improvements from separate property to claim a credit.[5] A credit was likewise given in *Cunningham v. Cunningham*,[6] where separate property was utilized toward repairs.[7] Also a credit was given on a dedication of separate property toward the expenses and upkeep of the marital home in *Baiera v. Baiera*.[8]

Where the husband lived in the marital home after the separation and sought a credit for carrying charges but was unable to prove he used non-marital funds, his claim was denied.[9] Had he used earnings after commencement of the divorce to reduce the mortgage, he would have received a credit of one-half.[10] Frequently payments are made against marital liabilities with separate funds during the pendency of the action. For example, in *King v. King*,[11] the wife paid the mortgage, taxes, insurance, household expenses, credit cards and preschool expenses during the pendency of the divorce from separate funds before any order of support was granted. She was given a 50 percent reimbursement credit even though the husband argued she was getting tax benefits as well.

Likewise in *Burns v. Burns*,[12] the husband was given credit for payments from separate property to pay loans on the marital property.[13] In *Finkelstein v. Finkelstein*,[14] credit was given to the husband for his payment from separate funds of $150,720 in income taxes and $84,135 in capital gains taxes on the sale of the parties' residence. Payment of mortgage and taxes after commencement of an action with non-marital funds affords a credit.[15] This reasoning applies to granting a credit on the reduction of the mortgage principal during the exclusive occupancy and after the divorce.[16]

Dedication of Marital Funds to Separate Property

The payment of marital funds to reduce debts on separate property would result in an unjust enrichment to the owner of the separate property. As a result, the courts will give credit to the extent of one-half of all marital funds utilized toward separate property. In *Carny v. Carny*,[17] where capital gains taxes on the sale of separate property were paid from the proceeds of the sale of marital property, a credit of one-half was given.[18] In *Micha v. Micha*,[19] marital funds were used to pay off the husband's separate property obligations and a credit was given to the wife for one-half. In *Vail-Beserini v. Beserini*,[20] the wife, instead of claiming a credit of marital funds used toward paying the husband's separately owned mortgage, argued that the payment on the separate property mortgage resulted in a portion of the property becoming marital. The court denied this claim since she presented no proof that the payments were made for improvements to enhance the value so that an enhanced value of a separate property claim could be made. Presumably, a simple claim of one-half of these funds would have been more successful.

The Credit Is Limited to the Value of the Asset Against Which It Is Taken

Where a party claims a credit on separate property invested in marital property and the proceeds from the marital property are insufficient, a deficiency cannot be recovered from a different asset.[21] In *Lawson v. Lawson*,[22] a corporation created during the term of the marriage had a negative value and the lower court gave credit to the defendant husband for the negative value against other marital assets. On appeal, this was reversed

because the husband created the corporation, borrowed money, leased equipment, all without consultation with or approval from the plaintiff wife. Under these circumstances the court held he should not receive this credit and the business should be distributed as if it had a zero value. In *Dewell v. Dewell*,[23] the husband incurred significant debts in attending medical school before the marriage. Despite having separate and substantial assets, he used marital funds to pay off over $200,000 worth of debt. Under these circumstances, the plaintiff wife was held entitled to a credit in the amount of one-half of the marital funds used to reduce these debts since these debts were incurred to acquire his medical license which constituted separate property. However even if the pre-marital debts were not used to acquire separate property, such a credit would have been appropriate.[24]

Credits Relating to Maintenance and Housing

Support awards are retroactive to the date of commencement or when first claimed. What kind of credit does the husband receive when the wife has an order of exclusive occupancy and she is paying the mortgage and taxes and improvements from the husband's maintenance? In *Donnelly v. Donnelly*,[25] the court specifically provided in its order of exclusive occupancy that the wife was to receive a credit for mortgage and real property taxes as well as capital improvements. The husband maintained that the credit was inappropriate because he was paying maintenance which covered these housing costs. The court pointed out that maintenance is designed to maintain the wife's standard of living rather than simply providing a housing subsidy. Because she utilized her maintenance to offset housing does not change its character so the credit to the wife was affirmed. In *Yunis v. Yunis*,[26] the lower court denied the husband's request for a full credit for the *pendente lite* payments of mortgage, taxes and insurance against the retroactive maintenance award. It determined that these payments were child support. The Court of Appeals, in affirming, admonished the courts to avoid these issues by indicating how these third party payments are to be allocated between maintenance and child support for proper calculation on retroactive support.[27]

If the divorce or stipulation does not give credit for the payment of carrying charges to the wife during exclusive occupancy, no credit is appropriate.[28] There the wife had exclusive occupancy and was paying the carrying charges, but received no credit because the judgment had no provision for such credit.

For a credit against retroactive support to be obtainable, the money must come out of separate and not marital funds. In *Block v. Block*,[29] the husband took out a home equity loan to pay a *pendente lite* award of maintenance. He was held to be exclusively responsible for that debt. Similarly in *Papandrea v. Papandrea*,[30] the wife obtained judgments against the husband for his defaulted *pendente lite* support payments. On the sale of the marital residence, she used her share of the proceeds to satisfy these judgments and then sought the husband's half of the proceeds for reimbursement. The court, on appeal, ordered the husband to pay his half as reimbursement.[31]

After commencement and before any *pendente lite* order, credits are given for payments made up to the award.[32] However after the date of the *pendente lite* order until the date of judgment, credits are only for those payments made pursuant to the *pendente lite* order and up to the amounts awarded.[33] No credit is granted for temporary maintenance ordered and paid and then eliminated on appeal.[34] Similarly no credit is awarded for overpayment where the final order sets a lower rate.[35]

A recovery of maintenance is permitted where the overpayment resulted from a concealment or breach of conditions that would have terminated the obligation (*Vigliotti v. Vigliotti*).[36] There the parties entered into an agreement which provided for maintenance to terminate on the wife's sharing the principal residence with an unrelated male for a substantially continuous period of three months or more. The wife did so surreptitiously. The husband however was unable to prove that he made any further maintenance payments after the three-month period. But in *Stimmel v. Stimmel*,[37] where the separation agreement reduced the alimony in the event the defendant earned in excess of $10,400 in any calendar year, the husband received a credit for his overpayment due to her concealment. In *Jacobs v. Patterson*,[38] the husband was entitled to recover what he paid in alimony for four years after the wife's remarriage because as a matter of law in the absence of an agreement to the contrary, alimony terminates upon remarriage. The credit after remarriage is mandatory.[39] Of course, there is no credit for maintenance paid after a remarriage if the agreement so provides.[40]

During the pendency of the action, the husband lived in one apartment of a two-family house and rented the other out. The court credited the wife with half the rent he collected, plus half the fair rental value of the apartment he occupied, and the husband was credited with half the mortgage payments.[41]

After the commencement of the action, the wife was occupying the marital residence and receiving child support. She failed to pay the mortgage which was her responsibility. To avoid a foreclosure the husband borrowed the money and paid the mortgage balance. He

was given a credit for the amount of the loan plus interest from the net proceeds on the sale of the residence.[42]

During the informal separation of the parties, the wife incurred over $20,000 in debt. She was given a credit of over $10,000 for half this debt because it was incurred during the separation to which the husband had consented, and which separation was precipitated by a job transfer and not in anticipation of the divorce. Moreover, the money was spent on normal living expenses and not on purely personal pursuits.[43] The wife was also given a credit for a tax refund which was considered marital property to the extent of 25 percent because the action was commenced in March of the applicable year.

Sometimes it is advisable to accept voluntary post-commencement payments rather than seek a *pendente lite* award. For example, in *Wexler v. Wexler*,[44] the husband was paying $80,000 annually voluntarily and the court ordered *pendente lite* maintenance of $68,000 and $22,000 child support so that after taxes the husband actually fared better.

Child Support Credits

A *pendente lite* order required the husband to pay taxes, water, electricity, telephone, cable, television, real property, insurance and garbage removal. The court gave the husband a partial child support credit of one-half of these expenditures during the time he occupied the marital residence with the wife and children, and two-thirds of these expenditures during a time he did not occupy the marital residence.[45]

No credit is given for child support paid directly to the children even where the husband claimed there was an oral agreement with the mother.[46] Generally on a downward modification, no credit is given for payment of the higher amount of child support.[47] But where the mother sought and obtained an increase in child support which was reversed on appeal because there was no basis for a modification, recoupment was granted.[48] Where recoupment is permissible, however, it cannot be recovered by reducing future support.[49] In the absence of agreement, any child support payments after age 21 are reimbursable.[50]

Credit is generally given by way of reduction in court ordered child support where the parent is also contributing toward the child's away-at-college expenses. Such credit is not mandatory but usually granted at least during the period of time the child is away. The courts consider the total circumstances as represented by the following cases:

- *Guiry v. Guiry*[51]—granted reduction.
- *Parrow v. Parrow*[52]—granted in stating any reduction depends on the needs of the custodial parent to maintain the household and provide certain necessaries.
- *Reinisch v. Reinisch*[53]—error not to reduce.
- *Imhoff v. Imhoff*[54]—error not to reduce.
- *Jablonski v. Jablonski*[55]—error to order payment of a share of college expenses without a corresponding credit or reduction during periods away from home.
- *Haessly v. Haessly*[56]—although reduction can be sought, it is discretionary and in this case was refused because of the large amount of financial aid.
- *Finkelstein v. Finkelstein*[57]—also refused given the father's financial resources and because the mother had been previously paying educational expenses alone.

Where the parties entered into a stipulation which made no mention of any future college contribution, the mother moved to compel the father to pay a portion of the children's college education expenses. This was denied and affirmed by the Third Department because the mother had the means to adequately support the children and failed to show any unanticipated change in circumstances warranting modification of the stipulation on child support. The court concluded, therefore, that it would not be fair to require the father to contribute.[58]

Marital Debts

The liability for debts is allocated according to equitable distribution principles.[59] Normally marital debts are equally shared.[60]

The general rule is . . . "Outstanding personal obligations incurred during the marriage which are not solely the responsibility of the spouse who incurred them may be offset against the total marital assets to be divided."[61] "Where however, the indebtedness is incurred by one party for his or her exclusive benefit or in pursuit of his or her separate interests, the obligation should remain that party's separate liability, *Jonas v. Jonas*.[62] Here the wife successfully moved for partial summary judgment holding the husband solely responsible for the debt which was financed through his separate asset. This was reversed on appeal because it was not the source of the funds, but the nature of the debt to determine if the debt is marital. The Appellate Court merely indicated that there was sufficient dispute to raise a question of fact on whether the debts were marital. It would seem that once it is established these debts

are marital, the husband could obtain credit for his separate property payments.

In *Liepman v. Liepman*,[63] an inspection of the husband's handwritten notations identifying each expense on credit card purchases resulted in a determination that only 30 percent of the credit card debt was due to marital expenses. In *Douglas v. Douglas*,[64] where there were no marital assets to pay the debts, the court ordered them to be paid out of separate funds. Where separate funds were used to pay marital obligations on the marital boat and airplane, a credit was given to the husband.[65]

Any debts incurred after the commencement of the action are generally the responsibility of the party who incurred them.[66] An offer of proof must be made that the debts constitute marital expenses (*Feldman v. Feldman*).[67] The court there remitted the case to the lower court for the husband to establish that the money judgments represented debts incurred for marital purposes. Conclusory statements on the payment of marital debts are insufficient.[68]

The courts will also grant a credit for any unilateral familial gifts and transfers before the commencement, but not in contemplation of the commencement of the divorce.[69] It would appear that the spouse who seeks to offset a debt incurred during the marriage has the burden of proving that said debt was in fact a marital obligation.[70]

Proof

All of the above credits are of no value without adequate proof. If the testimony is vague and without documentary support such as proving that the source of the funds was non-marital, no credit can be given.[71] In *Soule v. Soule*,[72] the husband sought a credit for providing the wife with rent-free housing and for added expenses incurred for the children. During the separation, each party resided in a marital asset. The plaintiff resided in the marital residence and the defendant in one of the apartments owned by the parties. No credit was given to the plaintiff for the alleged loss of rental income. As for money spent on the children, no substantiation of the expenditures was shown in spite of the defendant's failure to contest certain of the items allegedly paid. This still did not excuse plaintiff's failure of proof.

A credit was sought for contribution of pre-marital funds to pay for a condominium, but this was denied because of insufficient documentation.[73] In *LaBarre supra*, the court refused to order equitable distribution of the cash surrender value of plaintiff's life insurance policy even though some of the payments were paid during the marriage because of a failure to submit sufficient evidence to allow the court to make a determination as to the percentage of the policy that would be treated as marital.

Conclusion—Suggestions

1. Trace separate funds contributed to marital assets. Compile other contributions such as personal labor or services. Prepare to avoid any presumption from commingling with joint assets. Look to a credit for separate funds contributed and/or a possible uneven division.

2. Once the divorce is commenced, deposit earnings and separate income to a non-joint account. Keep a record of all household support and debt payments.

3. Trace any marital funds devoted to separate property such as paying the mortgage, taxes, improvements, etc. on the other spouse's separately owned property. This is a commonly overlooked credit.

4. On a *pendente lite* order, be sure there is an allocation between child support and maintenance. Even with a less than favorable allocation, it will avoid frustrating litigation. If any voluntary excess payments are being made, prepare an agreement for proper credit.

5. Where you have an order or agreement of exclusive occupancy and you represent the person in possession, include a credit for reduction of the mortgage.

6. Try negotiating that temporary support pending a decision is to be credited whether the decision is for more or less than the temporary amount.

7. Draft or stipulate to specific termination events on support and provide for a penalty for nondisclosure.

8. Establish the nature of marital debts through discovery. If you are seeking either a credit or a disallowance of credit, identify the nature and purpose of the debt.

9. Take advantage of the other side's lack of proof, which is more common than it should be. Sustain your burden of proof where at all possible.

Credits can easily be overlooked. Finding, proving and obtaining proper credits can avoid an injustice and please your clients.

Endnotes

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2. *Fogarty v. Fogarty*, 284 AD2d 300 (2d Dep't 2001).
3. *Butler v. Butler*, 171 AD2d 89 (2d Dep't 1991); *accord McAlpine v. McAlpine*, 176 AD2d 285 (2d Dep't 1991).
4. 278 AD2d 358 (2d Dep't 2000).
5. *Strong v. Strong*, 222 AD2d 975 (3d Dep't 1995).
6. 105 AD2d 997 (3d Dep't 1984).
7. *Lauricella v. Lauricella*, 143 AD2d 642 (2d Dep't 1988).
8. 240 AD2d 341 (2d Dep't 1998).
9. *Cooper v. Cooper*, 217 AD2d 904 (4th Dep't 1995).
10. *Martusewicz v. Martusewicz*, 217 AD2d 926 (4th Dep't 1995).
11. 258 AD2d 717 (3d Dep't 1999).
12. 193 AD2d 1104 (4th Dep't 1993), *aff'd*, 84 NY2d 369 (1994).
13. *Vullo v. Vullo*, 231 AD2d 864 (4th Dep't 1996).
14. 239 AD2d 174 (1st Dep't 1997).
15. *Jones v. Jones*, ___ AD2d ___, 734 N.Y.S.2d 796 (4th Dep't 2002); *Ramsey v. Ramsey*, 226 AD2d 989 (3d Dep't 1996).
16. *Gundlach v. Gundlach*, 223 AD2d 942 (3d Dep't 1996).
17. 202 AD2d 907 (3d Dep't 1994).
18. *Markopoulos v. Markopoulos*, 274 AD2d 457 (2d Dep't 2000).
19. 214 AD2d 956 (3d Dep't 1995).
20. 237 AD2d 658 (3d Dep't 1997).
21. *Cronin v. Cronin*, 155 Misc. 2d 678 (Sup. Ct., Warren Co. 1992); *Parsons v. Parsons*, 115 AD2d 289 (4th Dep't 1985).
22. 288 AD2d 795 (3d Dep't 2001).
23. 288 AD2d 252 (2d Dep't 2001).
24. *See Carny*, *supra; Markopoulos*, *supra*.
25. 144 AD2d 797 (3d Dep't 1988).
26. 94 N.Y.2d 787 (1999).
27. *See Magyar v. Magyar*, 272 AD2d 941 (4th Dep't 2000).
28. *Codd v. Codd*, 270 AD2d 880 (4th Dep't 2000).
29. 258 AD2d 324 (1st Dep't 1999).
30. 264 AD2d 767 (2d Dep't 1999).
31. *Sivigny v. Sivigny*, 213 AD2d 243 (1st Dep't 1995).
32. *Meyer v. Meyer*, 173 AD2d 1021 (3d Dep't 1991).
33. *Verdrager v. Verdrager*, 230 AD2d 786 (2d Dep't 1996); *Vicinanzo v. Vicinanzo*, 210 AD2d 863 (3d Dep't 1994); *Stempler v. Stempler*, 143 AD2d 410 (2d Dept 1988); *Horne v. Horne*, 22 N.Y.2d 919 (1968).
34. *Samu v. Samu*, 257 AD2d 656 (2d Dep't 1999).
35. *Vicinanzo v. Vicinanzo*, 210 AD2d 863 (3d Dep't 1994) (an exception is made when an appeal in which a credit is given for payments made under the judgment exceeds the Appellate result), *Chasin v. Chasin*, 182 AD2d 862, 868 (3d Dep't 1992).
36. 260 AD2d 470 (2d Dep't 1999).
37. 163 AD2d 831 (4th Dep't 1990).
38. 143 AD2d 397 (2d Dep't 1988).
39. *Schneider v. Schneider*, 124 Misc. 2d 1084 (Sup. Ct., Richmond Co. 1984).
40. *Quaranta v. Quaranta*, 212 AD2d 683 (2d Dep't 1995).
41. *Welch v. Welch*, 233 AD2d 921 (4th Dep't 1996).
42. *Hapeman v. Hapeman*, 229 AD2d 807 (3d Dep't 1996).
43. *LaBarre v. LaBarre*, 251 AD2d 1008 (4th Dep't 1998).
44. 162 AD2d 326 (1st Dep't 1990).
45. *Southwick v. Southwick*, 214 AD2d 987 (4th Dep't 1995).
46. *Gleason v. Gleason*, 247 AD2d 835 (4th Dep't 1998).
47. *Simons v. Hyland*, 235 AD2d 67, 71 (3d Dep't 1997).
48. *Tuchrello v. Tuchrello*, 233 AD2d 917 (4th Dep't 1996).
49. *Maksimyadis v. Maksimyadis*, 275 AD2d 459 (2d Dep't 2000).
50. *LaBlanc v. LaBlanc*, 96 AD2d 670 (3d Dep't 1983).
51. 159 AD2d 556 (2d Dep't 1990).
52. 215 AD2d 965 (3d Dep't 1995).
53. 226 AD2d 615 (2d Dep't 1966).
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55. 275 AD2d 692 (2d Dep't 2000).
56. 203 AD2d 700 (3d Dep't 1994).
57. 268 AD2d 273 (1st Dep't 2000).
58. *Cannata v. Cannata*, 274 AD2d 537 (2d Dep't 2000).
59. *George v. George*, 155 AD2d 336 (1st Dep't 1989).
60. *Bogdan v. Bogdan*, 260 AD2d 521 (2d Dep't 1999).
61. *Feldman v. Feldman*, 204 AD2d 268, 270 (2d Dep't 1994).
62. 241 AD2d 839 (3d Dep't 1997).
63. 279 AD2d 686 (3d Dep't 2001).
64. 132 Misc. 2d 203 (Sup. Ct., Suffolk Co. 1986).
65. *Burns v. Burns*, 193 AD2d 1104 (4th Dep't 1994) *aff'd*, 84 N.Y.2d 369 (1994).
66. *Prince v. Prince*, 247 AD2d 457 (2d Dep't 1998).
67. 204 AD2d 268 (2d Dep't 1994).
68. *Phillips v. Phillips*, 249 AD2d 527 (2d Dep't 1998).
69. *Buchsbaum v. Buchsbaum*, N.Y.L.J. Apr. 4, 2002; *Matwijczuk v. Matwijczuk*, 261 AD2d 784 (3d Dep't 1999) (plaintiff transferred his interest in real estate to his brother shortly before commencement). *Niland v. Niland*, 291 AD2d 876 (4th Dep't 2002).
70. *Reiner v. Reiner*, 100 AD2d 872 (2d Dep't 1984).
71. *LaBarre v. LaBarre*, 251 AD2d 1008 (4th Dep't 1998); *McNally v. McNally*, 251 AD2d 302 (2d Dep't 1998).
72. 252 AD2d 768 (3d Dep't 1998).
73. *Askew v. Askew*, 268 AD2d 635 (3d Dep't 2000).

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New York State Judges Holding PINS in Contempt: Can They and Should They?

By Tabitha Croscut

At 15 years old, Naquan J. is adjudicated a PINS and he is placed in a residential treatment center.[1] A total of thirty warrants for Naquan's arrest are ordered for the period both before and after his placement, resulting from his "failure to stay in various placement facilities."[2] The family court then initiates proceedings against Naquan for criminal contempt of court resulting in his commitment to the New York City Department of Corrections.[3]

I. Introduction

Naquan J.'s situation is an example of the way New York judges "bootstrap" a Family Court Act Article 7 person in need of supervision (PINS) proceeding into an Article 3 juvenile delinquency proceeding.[4] "Bootstrapping" is a tool judges may use in order to expand the available dispositional options they can impose on the youth.[5] Specifically, "bootstrapping" provides the judge with the option of placing the youth in a secure detention facility as a juvenile delinquent.[6] Alternatively, with PINS, judges can only order a non-secure placement.[7] Therefore, with PINS, judges' hands are tied, as a child who is adjudicated a PINS and continuously runs away from placement can only be returned to that placement or sent to a different non-secure placement.[8] This is an issue that progressively frustrates judges. By using criminal contempt as a basis for a finding of juvenile delinquency, judges' hands are no longer tied.

As one can glean simply from the existence of the "bootstrapping" method, judges have been compelled to resort to creative methods in order to enforce their orders.[9] Judges are given the responsibility to deal with the behavior of PINS, but they "are denied the judicial tools to effectively deal with such conduct."[10] Although the ability to "bootstrap" PINS sounds appealing on its face, the ultimate question must be whether the New York Family Court Act authorizes a New York court to compel PINS compliance by issuing criminal contempt orders allowing the court to commit the PINS to a secure detention facility?

Part II of this article will look at the current use of "bootstrapping" in New York State courts. Part III will explain the historical development of the New York State family courts in relation to PINS and delinquents and the law that governs the family courts.[11] Part IV will analyze the different characteristics between PINS and delinquent juveniles. This will be followed by a look at the federal Juvenile Justice and Delinquency Prevention Act of 1974 that requires states to deinstitutionalize status offenders in order to receive federal grant money. Then by looking at the Family Court Act and its legislative history, I will discuss whether New York law provides the family courts with statutory authority to place PINS in secure facilities using a charge of contempt for violating a family court dispositional order. Lastly, I will look at the possible changes that could be made to clarify the use of "bootstrapping" for judges, attorneys and parents.

II. The Current Status of PINS Held in Contempt

The Supreme Court, Appellate Division, Second Department, is the highest court in New York State to have ruled on family courts' implementing the "bootstrapping" technique, holding the Family Court Act precludes the use of criminal contempt orders to compel compliance by a person in need of supervision.[12] In direct contrast, the Jefferson County Family Court, which falls within the Fourth Department, upheld the use of criminal contempt orders.[13] This split in the lower courts of the four judicial departments[14] makes it unclear, in the absence of a Court of Appeals decision, whether the Family Court Act precludes or provides for the use of criminal contempt orders with PINS.

III. Historical Development of the New York State Family Court

A look at the development of the family court in New York is necessary in order to understand why the New York Family Court Act separates delinquents and PINS adjudications, and the results that flow from that separation. In 1899 the Illinois legislature created the first juvenile court.[15] The juvenile court developed as a specialized court recognizing that children are different from adults.[16] Children are dependent on adults, their cognitive and emotional development is different than adults, and they have different needs than adults.[17] An early supporter of the juvenile court summarized the differences of the juvenile court early on from other adult courts.

> Children are to be dealt with separately from adults. Their cases are to be heard at a different time and preferably, in a different place; they are to be detained in separate buildings, and if institutional guidance is necessary, they are to be

> committed to institutions for children. . . . Taking children from their parents is, when possible, to be avoided; . . . parental obligations are to be enforced. The procedure of the court must be as informal as possible. Its purpose is not to punish but to save.[18]

Therefore, the juvenile court was delegated very different goals from the adult criminal justice system.[19] The juvenile court was set up to rehabilitate and to treat the child, not as a system of punishment, and therefore it was set up as a non-criminal court.[20] The goal of rehabilitation versus punishment also required that children have separate confinement, when confinement was necessary, from adult criminals.[21]

The state justified the intervention and intrusion of the juvenile court into the child's family using the doctrine of *parens patriae* (Latin for "the state as parent").[22] *Parens patriae* assumes that children are generally under their parents' control, however, if that control fails, the state can intervene to provide guidance and rehabilitation for the child, even where the parents disagree.[23] Thereby, the judge was not to act as the punisher, but to play the role of a "wise and merciful father," as if he were handling the misconduct of his own child before the authorities were alerted.[24] In this way the state believed the child would be more likely to be rehabilitated and become a productive member of society.[25]

In 1962, New York enacted the Family Court Act which established the family court as an attempt to unify the court system.[26] The family court was another attempt, following many prior attempts, to consolidate juvenile proceedings so that every "legal facet of family dysfunction" could be heard in one specialized court.[27] At the same time, the Family Court Act separated status offenses[28] from the definition of delinquency,[29] and adopted the term "persons in need of supervision" (PINS) to apply to juvenile conduct that was not a crime if committed by an adult.[30] This change was made for two principal reasons; to avoid the stigma associated with the term "juvenile delinquent" and to define the powers of the courts in relation to the two separate classifications of "juvenile delinquent" and "PINS."[31]

The Joint Legislative Committee on Court Reorganization believed that "an 'adjudication of delinquency' as a practical matter may have a damaging effect on a child and on his career as a citizen," as the term had been assigned a negative connotation.[32] According to the labeling theory of criminal causation, a child who has not committed a criminal act but is labeled and treated as a delinquent is more likely to become a delinquent to fit their label.[33] In an attempt to avoid the stigma[34] attached to the term "juvenile delinquent," the legislature assigned the term "persons in need of supervision" to non-criminal status offenders, but retained and redefined the delinquent category of juveniles.[35]

In addition to the creation of a new category called "persons in need of supervision," the legislature attempted to provide more definition to the powers of the courts and the police in relation to juvenile delinquents.[36] For example, the separation of the two categories allowed the court to place a juvenile delinquent in detention while awaiting the filing of a petition or even after the petition was filed; however, the court could not place PINS in detention during these times.[37] Yet, delinquents and PINS were still referred to in one code article, Article 7, with many of the procedures remaining identical for both proceedings.[38] The legislature expected the separate titles, delinquent and PINS, would encourage the use of separate dispositional and treatment arrangements, with the "expectation that community-based programs would play a greater role in the rehabilitation of the status offender."[39]

Then, in 1982 Article 3 of the Family Court Act was enacted which separated entirely the laws governing delinquents from those laws governing PINS.[40] This separation was made to provide practitioners with clear rules regarding the procedures to use in a delinquency action to ensure that juvenile delinquents receive "swift and certain justice."[41] This change in juvenile delinquency proceedings followed from the transformation of the proceedings from non-adversarial into "quasi-criminal" in nature.[42] The result of this transformation included granting delinquents many procedural due process rights such as the right to formal notice of their charges, the right to counsel, and the right to confront and cross-examine witnesses.[43] Due process rights were extended to juvenile delinquents but since delinquents were separated from Article 7 PINS proceedings, PINS were not granted these same due process rights.[44]

Today's juvenile justice system is radically different from that founded on *parens patriae*.[45] There are fewer cases that actually reach the judge as the family court process tries to avoid "formal court action" as much as possible due to its quasi-criminal nature.[46] Now the family court is generally used only as a "last resort."[47] To implement this policy of "last resort," one diversion from family court created was probation intake.[48] Now there are ways to avoid the family court's dispositions, including the possibility that the judge himself will divert the case upon the first court appearance.[49] Those children that are processed through the family court are no longer treated by the court as the judges' mischievous children, but are subject to the full effect of judicial dispositions.

IV. Juvenile Delinquents versus Persons in Need of Supervision

There are conflicting views as to whether there are any clear differences between PINS and delinquents, which would require different treatment, and thereby require different court procedures, and separate dispositional options.[50] One primary difference is that a "delinquent" is defined under Article 3, as "a person over seven and less than sixteen years of age, who, . . . committed an act that would constitute a crime if committed by an adult."[51] Whereas, under Article 7 of the Family Court Act, a 'person in need of supervision' is "[a] male less than sixteen years of age and a female less than eighteen years of age[52] who does not attend school . . . or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority."[53] Therefore, juvenile delinquents do something that they could be punished for if they were adults, while PINS do something that an adult cannot be punished for.

PINS behaviors may include things like running away,[54] truancy,[55] abusive language, being sexually active, and associating with undesirable companions.[56] These behaviors are all characteristics of adolescence.[57] It is generally asserted that these behaviors are exhibited as a reaction to situations in their environment that they are not able to correct themselves, as many PINS are youth who were in need of help anyway, due to intolerable home life situations.[58]

Another suggested difference between the two categories of juveniles is the process by which they are brought to the attention of the court. Generally, delinquency petitions are commenced by someone external to the family,[59] while PINS petitions are commenced more often by someone within the family.[60] Delinquency petitions are initiated by the police more often,[61] while PINS petitions are commenced primarily by parents.[62]

V. The Juvenile Justice and Delinquency Prevention Act of 1974

In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA) which focused on the deinstitutionalization of status offenders (PINS), the separation of juveniles from adult criminals in institutions, and ensuring due process protections for juveniles in the juvenile justice system.[63] One of the primary purposes of the JJDPA was to create new community-based treatment alternatives for juveniles instead of locking them up.[64] States were prohibited from placing *any* status offender in secure detention for the first six years following the enactment of the JJDPA, in order to receive federal formula grants.[65]

Many different reasons were argued for the deinstitutionalization of status offenders. Some suggested that since status offenders are not given the same rights as juvenile delinquents during the court process[66] they should not be subjected to the dispositions, specifically secure confinement, which juvenile delinquents are subject to.[67] Others argued that secure facilities are "not conducive to healthy development in children,"[68] and some suggested that releasing PINS from secure detention facilities would produce savings in the public budget.[69] No matter what the final justification was for the deinstitutionalization mandate, many states implemented the JJDPA's requirements to receive the formula grants.[70]

Then in 1980, judges were successful in lobbying Congress and the JJDPA was amended to provide an exception to the prohibition of secure detention of all status offenders (PINS).[71] The exception is known as the "valid court order" amendment, which allows the secure detention of adjudicated status offenders who are in violation of a valid order of the juvenile court.[72] However, the court must implement certain due process protections in order to take advantage of this exception. In order to fit within the "valid court order" exception, the juvenile court judge[73] must give a court order to a juvenile who:

> Was brought before the court and made subject to such order; who received, before the issuance of such order, the full due process rights guaranteed to such juvenile . . .; with respect to whom an appropriate public agency . . . reviewed the behavior of such juvenile . . ., determined the reason for the behavior . . ., determined that all dispositions . . . have been exhausted or are clearly inappropriate; and submitted to the court a written report stating the results of the review conducted."[74]

Only when all of these requirements are met can a status offender be placed in a secure detention facility under the JJDPA.[75] The JJDPA does not in and of itself give states authority to incarcerate status offenders.[76] The JJDPA simply allows state legislatures to permit the commitment of status offenders who violate valid court orders and continue to receive grant money.[77] Therefore, many states, but not all states, adopted new legislation allowing secure detention of adjudicated status offenders.[78] Those states that have not adopted the "valid court order" exception cannot take advantage of this exception.

VI. Does the New York Family Court Act Authorize "Bootstrapping"?

New York was one of the states that implemented the original requirements of the JJDPA (before the 1980 amendment of the "valid court order" exception) and began to deinstitutionalize PINS. In order to implement the JJDPA, in 1978 the legislature amended section 720 of the Family Court Act, adding subdivision three which required that "a child alleged or adjudicated a PINS may not be placed . . . in a secure detention facility" where non-secure placements are available.[79] Senator Pisani, who proposed the amendment, wrote "[i]t is essential that the State comply with [the JJDPA] requirement in order to remain eligible for Federal funding under this Act. This bill would ensure that compliance occurs."[80]

However, there has never been an amendment by New York to adopt the JJDPA's "valid court order" exception to the secure confinement of PINS. Therefore, New York family courts cannot use the "valid court order" exception to justify the secure confinement of PINS. Yet, even though New York did not adopt the "valid court order" exception, it is possible that the family courts might have some other statutory authority to use secure confinement of PINS in other situations that are not permitted under the JJDPA. In order to determine whether this is true, an analysis of the Family Court Act is necessary.

Contempt Powers

Utilizing the power of contempt is one way the various New York family courts have permitted the secure detention of PINS. However, does family court have the *statutory authority* to support the use of contempt to place PINS in secure detention? In order to determine the extent of the family court's contempt powers, the plain language of the Family Court Act must first be analyzed. Under Judiciary Law § 750, "a court of record" is granted the power to punish for criminal contempt any "person who is guilty of . . . [the] willful disobedience to its lawful mandate."[81] The family court is a court of record,[82] however, Family Court Act section 156[83] limits the court's contempt power. Section 156 states:

> The provisions of the judiciary law [of] . . . criminal contempts shall apply to the family court in any proceeding in which it has jurisdiction, . . . and a violation of an order of the family court in any such proceeding which directs a party . . . to do an act or refrain from doing an act shall be punishable under such provision of the judiciary law, *unless a specific punishment or other remedy for such violation is provided in this act.*[84]

Therefore, before utilizing a contempt order under section 156, the court must first determine whether a specific punishment or other remedy for a violation of an order of the family court is supplied by the Family Court Act.[85]

Under Article 7 of the Family Court Act, four dispositions are available to a judge in deciding PINS cases: (1) the child can be discharged with a warning,[86] (2) the judgment can be suspended,[87] (3) the child can be placed following Family Court Act § 756,[88] or (4) the child can be placed on probation.[89] In addition to these four dispositional options, part seven of Article 7, entitled "Compliance with orders,"[90] provides the court with alternative options given the different violations that can occur.[91] For example, section 778, titled "Failure to comply with the terms of placement in authorized agency," specifies a remedy in the particular instance in which a PINS "leaves the institution without permission."[92] If the PINS leaves an institution, in violation of the court's order, the court "may revoke the order of placement and proceed to make any order that might have been made at the time the order of placement was made."[93] Section 773 also allows the court to transfer a PINS to a different non-secure facility upon certain findings.[94] Therefore, Article 7 appears to provide the court with "specific remedies" for a violation of an order of the court, under Article 7, which in following the plain language of the statute, appears to make the contempt provision of section 156 inapplicable to PINS proceedings.[95]

In addition to analyzing the plain language, we must look at the legislative history of section 156 to determine what the legislature intended when they enacted the current section 156 in 1975.[96] The history of the contempt powers of the family court demonstrates that the contempt power does not extend to Article 7 PINS dispositions. The original section 156 (contempts) read:

> The provision of the judiciary law relating to civil and criminal contempt apply to the family court, except that the family court may not treat a violation of any order of disposition by a party to a proceeding in the family court, as a civil or criminal contempt, unless specifically empowered to do so under this act.[97]

In comparison, as previously stated, today section 156 reads:

> The provision of the judiciary law relating to civil and criminal contempts shall apply to the family court in any proceeding in which it has jurisdiction under this act . . . and a violation of an order of the family court in any such proceeding which directs a . . . person . . . to do an act or refrain from doing an act shall be punishable . . ., *unless a specific punishment or other remedy for such violation is provided in this act or any other law.*[98]

The obvious change is that today section 156 does not include the explicit exception to orders of dispositions.[99] The exception in the old section 156 explicitly denied the contempt power in PINS dispositions.[100] So before 1975, when the current section 156 was enacted, it was clear that PINS adjudication could not be bumped up to a juvenile delinquent by means of contempt charges, because the judiciary did not have the authority to hold PINS in contempt for running away from placement, as a violation of an order of disposition.[101]

So what happened to the phrase "except that the family court may not treat a violation of any order of disposition by a party to a proceeding in the family court, as a civil or criminal contempt," that excludes contempt powers from orders of dispositions explicitly?[102] The answer may be found in the documents submitted to the Administrative Board's Family Court Advisory and Rules Committee that drafted the amended bill that we now know as section 156 of the Family Court Act. The Office of Court Administration, which proposed the change, suggested the prior provision was "unsatisfactory and a source of confusion."[103]

One of the five reasons the Administration lists for the confusion in old section 156 is that there are "many Family Court orders which are inappropriate for enforcement by contempt."[104] An example listed as inappropriate for enforcement by contempt was "orders of placement."[105] The Administration states that these kind of orders, orders of placement, do not normally "direct anyone to do anything or refrain from doing anything,"[106] and therefore contempt is not the appropriate means of enforcement.[107] In addition, the Administration explained how the new bill, the current section 156, is meant to clear up the confusion of the old section 156.[108] They stated that the current section 156 "limits the contempt power to those situations where no other statutory remedies are authorized."[109] This statement brings us right back to the plain language of the current 156 and the inclusion of other statutory remedies within Article 7. Following from this analysis of the plain language and legislative history of section 156, the court surely does not have jurisdiction to hold a PINS in contempt, where the Family Court Act specifically provides for alternative remedies within Article 7.

Lastly, to support the conclusion that PINS cannot be held in contempt, it is helpful to remember the historical development of the juvenile court system and the reasons for which New York separated juvenile delinquents from PINS, as well as the differences outlined between the two classifications.[110] This background information supports the prohibition of the New York Family Court Act on the use of contempt powers to uphold PINS dispositions. With no intention of repeating the beginning of this article, we must recall first that the objective of the juvenile court was not to punish, but to function as a non-criminal court to rehabilitate the juvenile.[111] Ordering placement in a secure facility which is the purpose of using contempt with PINS, definitely sounds more like punishment than an attempt to rehabilitate.

Following, one of the reasons that New York assigned the term PINS to some children and delinquent to others was to ensure the court would have different powers over each class of children.[112] One of the most important divisions in power was that the court could place juvenile delinquents in detention both before and after the filing of a petition while the court could not place PINS in detention during these times.[113] If the court was allowed to "bootstrap" contempt to PINS adjudications, this "permit[s] the court to accomplish indirectly that which it could not accomplish directly."[114] This would undermine the intent of the legislature in making the division between delinquent and PINS.

A primary reason why a PINS should not be placed in a secure detention facility is the most pronounced and undisputed difference between the delinquent youth and the PINS youth. PINS have done something that would be dismissed if they were seventeen.[115] Does this kind of behavior warrant secure confinement?[116] As an appellate court judge stated, the "act of eloping from [a] treatment facility, although violative of the Family Court's orders, was nevertheless an act consistent with PINS behavior, not with juvenile delinquency."[117] The distinction between delinquents and PINS must have some effect on disposition, or the separation of the two categories would be unnecessary.

PINS are also petitioned into family court more often by their parents.[118] Is it fair to place a youth in a secure facility when they have done nothing of a criminal nature? Should the court allow parents to obtain secure placement for their children so that they do not have to deal with them at home?

The plain language, legislative history, and a look at the reasons why laws governing delinquents are sepa-

rate from PINS all support a conclusion that the Family Court Act does not authorize New York family courts to utilize the "bootstrapping" method many have applied very readily. Children are classified as "persons in need of supervision" because they need some kind of assistance and not because they need to be separated from society. They pose no threat to the public and therefore should be allowed to behave the way all adolescents behave without the fear of secure placement.

VII. Recommended Changes

There are two different types of basic changes that could be made to clarify whether the family courts have the authority to hold PINS in contempt and if so when they can do so. The change chosen is dependent on whether New York wants to divest the court of its power over PINS entirely or to maintain family court jurisdiction over PINS.[119]

A. Eliminate PINS Jurisdiction

The first option would be to remove the PINS classification from court jurisdiction entirely. This is a course of action supported by many people.[120] This would clarify the situation as there would be no PINS classification to manipulate. In addition to eliminating the "bootstrapping" dilemma facing judges, there are other reasons to support such a drastic change. First, some suggest that many of the cases that are processed as PINS should really be processed as neglected or abused youth.[121] As PINS, these youth may be placed in a non-secure facility instead of receiving needed services.[122] Instead, those youth that are abused or neglected should not be placed in a non-secure facility with an emphasis on reforming the child's bad behavior, but the court system should identify where the bad behavior stems from and treat or remove that problem. Additionally, judges have admitted to treating neglect cases as PINS for the sole reason of avoiding the delays and formalities that are created by involving a parent in a neglect or abuse proceeding.[123] This is a poor reason for "punishing" an innocent child instead of punishing his or her parents.

Another problem with the PINS system is its use as a forum by parents to punish their children.[124] Petitions initiated by parents often mention behaviors like refusal to obey, sexual activity, and truancy.[125] The court then generally responds according to the parent's wishes, which often includes the parent refusing to take the PINS home.[126] This results in placement of the PINS based on the allegations by their own parents of normal adolescent behavior.[127]

Other reasons that have been given for the removal of jurisdiction over PINS include:[128] the behavior of PINS are part of adolescence and the maturation process and they should not be "criminal"; PINS do not pose a threat to the public welfare; the discretionary nature of the juvenile court leads to decisions by judges that are based on sex, race, or class; and the juvenile courts' calendars are overloaded with petitions of non-criminal youth.[129] Some alternatives to the PINS system might include a child advocacy center[130] or an emancipation statute.[131] In addition, the overall eradication of the PINS system would not be a significant change because it would only dismiss the non-criminal, non-neglected youth who were brought before the court by their parents seeking help from the court in rectifying some disagreement.[132] Jurisdiction over those youth who are delinquent, neglected or abused would remain.[133]

B. Maintain PINS Jurisdiction

A second option is to maintain court jurisdiction over PINS and clarify whether "bootstrapping" is an acceptable practice and when. This could be accomplished by asking the New York State legislature to amend the Family Court Act. Such an amendment could take a number of forms. The amendment might state that the use of contempt is entirely prohibited where PINS dispositions are concerned, with no exceptions. Alternatively, the legislature might use a different technique by changing the definition of "juvenile delinquency" to include the violation of a valid court order.

1. Prohibit Contempt Charges in PINS Violations

One way the legislature could implement the first option of clarifying the prohibition without exception would be to amend section 720(2) of the Family Court Act to state the following: "the detention of a child in a secure detention facility shall not be directed under any of the provisions of this article"[134] nor shall contempt charges be applicable in the event that a child violates a disposition of the provisions of this article. This would provide clarity and there would be no question as to the prohibition on the courts to hold PINS in contempt for continuing the behavior that brought them before the court initially.

2. Modify the Definition of "Juvenile Delinquent"

In the alternative, the legislature might clarify the court's options by allowing the court to turn a PINS proceeding into a delinquency proceeding where the actions of PINS meet the requirements of the JJDPA's "valid court order" exception to secure confinement.[135] This change could be done by following the example of Ohio and including within the definition of a "juvenile delinquent" any child "[w]ho violates any lawful order of the court"[136] made under the Family Court Act. An amendment defining what a "valid court order" requires would also be necessary.[137] This would allow the court to reach the result of "bootstrapping" by allowing PINS status to be changed to delinquent status

where the behavior meets the qualifications of the "valid court order" violation. This would then enable the court to place the violating delinquent in a secure facility under Family Court Act Article 3.[138]

3. What Is the Best Option?

Overall, I believe it is "incongruous to classify a juvenile as a delinquent for the same kind of conduct which under . . . [Article 7] makes the child a [PINS] only."[139] A runaway is a PINS because she ran away from home. Should her status be increased to that of a "juvenile delinquent" because she decides to continue running away? That is absurd. Although it would be much easier to completely eliminate PINS jurisdiction, this probably is not the best course of action to take simply to deal with the question of the "bootstrapping" technique. Elimination of jurisdiction over PINS seems drastic in the face of such an easily rectified ambiguity between the courts as to whether "bootstrapping" can be utilized or not. Instead, I believe the best course of action would be to amend the law. I would recommend an amendment that will allow New York State to continue receiving federal grant money under the JJDPA, but also provides the family courts with more power to enforce their dispositional orders.

The amendment could take the form previously mentioned.[140] The amendment would specifically prohibit the courts use of contempt to enforce PINS dispositions, and add to the definition of "juvenile delinquent" the violation of a valid court order. These changes would clarify the prohibition of contempt charges in which PINS violate a dispositional order. However, by defining delinquency as including a violation of a valid court order, the court is given the statutory authority to upgrade the PINS to a juvenile delinquent. Thereby, the court can place the child in secure confinement. In this way the courts would be given the power they lack to enforce dispositional orders of PINS. It would be expected that judges would only utilize this power in extreme circumstances versus in every case that a PINS violates their dispositional order. Judges must remember the purpose of PINS jurisdiction is rehabilitation not punishment.

VIII. Conclusion

As the law stands today in New York State, the Family Court Act prohibits judges from holding PINS in contempt for violating their dispositions. This is found within the plain language of section 156 stating that civil or criminal contempt may only be utilized where there is no "specific punishment or other remedy for such violation . . . provided in [the] act."[141] These "specific punishments" are provided in part seven of Article 7 for instances in which PINS fail to comply with a dispositional order of the court.[142] The prohibition of holding PINS in contempt is also supported by the legislative history of section 156, as well as the historical development of the family court and the characteristic differences between PINS and delinquent youth. Therefore, until the legislature takes action to amend the law to allow the court to hold PINS in contempt, the family court lacks the statutory authority to "bootstrap" PINS adjudications into delinquents for violating a PINS disposition.

What this means is, in the case of Naquan's criminal contempt proceedings, the court must dismiss the petition filed alleging he is a juvenile delinquent,[143] but the only option available to the court is then found in section 778 of the Family Court Act. Under section 778 if the court is satisfied with the proof offered that Naquan left the placement without just cause, then "the court may revoke the order of placement and proceed to make any order that might have been made at the time the order of placement was made,"[144] which does not include placement in a secure facility. This might very well allow Naquan to continue the behavior that brought him before the court in the first place, but at this time the judge does not have statutory authority to hold Naquan in criminal contempt for running away from the dispositional placement.

Endnotes

1. *In re Naquan J.*, 727 N.Y.S.2d 124, 125 (N.Y. App. Div. 2001).
2. *Id.*
3. *Id.*
4. *Asia H.*, 705 N.Y.S.2d at 872.
5. Other methods used to detain status offenders include "relabeling" delinquent offenders or involuntary commitment of status offenders to in-patient treatment facilities. *See generally* W. Krause & M.A. McShane, *Deinstitutionalization Retrospective: Relabeling the status offender,* 17(1) J. Crime & Just. 45 (1994); I. Schwartz, *The Hidden System of Juvenile Control,* 30(3) J. Crime & Delinq. 371 (1984); Jan Costello & Nancy Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice & Delinquency Prevention Act*, 16 Harv. C.R.-C.L. L. Rev. 41 (1981).
6. N.Y. Fam. Ct. Act § 353.3 (McKinney 1999 & Supp. 2001-2002). This is because "bootstrapping" allows charges of contempt to be brought against PINS, which increases the PINS status to a delinquent. The judge can then place the youth in a secure facility if he so desires. "Secure detention facility" is defined under Art. 7 as "a facility characterized by physically restricting construction, hardware and procedures." N.Y. Fam. Ct. Act § 301.2(4) (McKinney 1999 & Supp. 2001-2002).
7. N.Y. Fam. Ct. Act § 720(2) (McKinney 1999 & Supp. 2001-2002). "Non-secure detention facility" is defined as "a facility characterized by the absence of physically restricting construction, hardware and procedures." N.Y. Fam. Ct. Act § 712(d) (McKinney 1999 & Supp. 2001-2002).
8. N.Y. Fam. Ct. Act § 778 (McKinney 1999).
9. *Naquan J.*, 727 N.Y.S.2d at 127.
10. *Id.* at 128.
11. In New York, PINS and juvenile delinquent petitions are heard in the Family Court. N.Y. Fam. Ct. Act § 115 (McKinney 1999 & Supp. 2001-2002).

12. *Naquan J.*, 727 N.Y.S.2d at 124-25 (holding the Family Court Act precludes the family court from compelling PINS to comply with its order by holding PINS in contempt); *see also In re Jasmine A.*, 727 N.Y.S.2d 122, 124 (N.Y. App. Div. 2001) (holding the act of eloping from a treatment facility was an act consistent with the behavior of a PINS and therefore no contempt charge could be filed against the PINS).

13. *In re Kimberly A.P.*, 678 N.Y.S.2d 867, 869 (N.Y. Fam. Ct. 1998) (holding there was nothing to indicate that a contempt charge could not be used and holding a PINS in contempt for running away from placement); *see also Asia H.*, 705 N.Y.S.2d at 875 (applying the valid court order exception of the JJDPA to an act by a PINS violating an order of protection).

14. The decisions of the family courts of New York are appealed to one of the four departments of the Appellate Division of the Supreme Court. Therefore, the decisions of one department are not binding on all four departments. Here, the decision of the Second Department, Appellate Division of the Supreme Court is not binding authority on the Jefferson County Family Court because it falls within the Fourth Department.

15. Deanna S. Gomby, *et al.*, *The Juvenile Court: Analysis & Recommendations*, 6(3) Future of Child. 4, 4 (1996), *available at* http://www.futureofchildren.org/information2827/information_show.htm?doc_id=77763.

16. *Id.* at 5.

17. *Id.* at 5-6.

18. Rayna H. Bomar, *The Incarceration of the Status Offender*, Note 18 Memphis St. U. L. Rev. 713, 715 (1988) (quoting M. Paulsen, The Problems of Juvenile Courts and the Rights of Children 11-12 (1975)).

19. Gomby, *supra* note 15, at 5-6.

20. Gomby, *supra* note 15, at 5-6.

21. Douglas E. Abrams & Sarah H. Ramsey, Children and the Law 1042 (West Group 2000).

22. *Schall v. Martin*, 467 U.S. 253, 265 (1984); *see Prince v. Massachusetts*, 321 U.S. 158, (1944) (stating "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults").

23. 467 U.S. at 265.

24. Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 107 (1909).

25. *Id.*

26. Merril Sobie, The Creation of Juvenile Justice 158 (New York Bar Foundation 1987).

27. Sobie, *supra* note 26, at 158-59. The organization of the children's court parts and the 1922 Children's Court Act were previous attempts to give the court control over every family dysfunction, including children. *Id.* at 159 n.513.

28. 'Status offense' is the generic term given to describe "conduct sanctionable only where the person committing it is a juvenile." Douglas E. Abrams & Sarah H. Ramsey, Children and the Law 1006 (West Group 2000). Children who commit a status offense have been called 'persons in need of supervision' in New York since 1962. Sobie, *supra* note 26, at 161.

29. Previously "delinquent" included PINS offenses as well. N.Y. Fam. Ct. Act Art. 7 Introductory Practice Commentary at 4 (McKinney 1999).

30. Sobie, *supra* note 26, at 161. Under the preceding Children's Court Act, "the court's entire jurisdiction over juvenile misbehavior . . . was subsumed under the term 'juvenile delinquent.'" N.Y. Fam. Ct. Act Art. 7 Introductory Practice commentary at 4 (McKinney 1999). Following the 1962 enactment, the term "delinquency" then changed back to its original meaning of "criminal conduct by a juvenile." Sobie, *supra* note 26, at 161.

31. Joint Legislative Committee on Court Reorganization, S.4501, 185th Sess., at 3434 (1962).

32. *Id.*

33. *See* Sharla Rausch, *Court Processing Versus Diversion of Status Offenders: A Test of Deterrence & Labeling Theories*, 20 J. Res. in Crime & Delinq. 39, 40 (1983).

34. For a discussion of the actual effect of labeling theory see generally Stanton P. Fjeld et al., *Delinquents & Status Offenders: The Similarity of Differences*, 31 Juv. & Fam. Ct. J. 3 (1981); Dennis B. Anderson & Donald F. Schoen, *Diversion Programs: Effect of Stigmatization on Juvenile/Status Offenders*, 36(2) Juv. & Fam. Ct. J. 13 (1985).

35. N.Y. Fam. Ct. Act Art. 7 Introductory Practice Commentary at 5 (McKinney 1999); 1962 N.Y. Laws 686; pp. 3428, 3435; Whether the juveniles were actually stigmatized is a discussion outside the realm of this article.

36. Joint Legislative Committee on Court Reorganization, S.4501, 185th Sess., at 3434 (1962).

37. *Id.*

38. Sobie, *supra* note 26, at 161-62.

39. Julie Zatz, *Problems and Issues in Deinstitutionalization: Historical Overview and Current Attitudes, in* Neither Angels Nor Thieves: Studies in Deinstitutionalization of Status Offenders 27 (Joel F. Handler & Julie Zatz eds., 1982).

40. 1982 N.Y. Laws 920.

41. Memorandum of Sen. Halperin, *reprinted in* [1982] N.Y.S. Executive Chamber Legislative Bill Jacket 920.

42. *Id*.

43. *Id.*; *see also In re Gault*, 387 U.S. 1, 31-42 (1967), *In re Winship*, 397 U.S. 358, 368 (1970) (providing juveniles with a standard of proof of beyond a reasonable doubt in the adjudicative stage of a delinquency proceeding).

44. *See* Memorandum of Sen. Halperin, *reprinted in* [1982] N.Y.S. Executive Chamber Legislative Bill Jacket 920; *see generally* Erin M. Smith, *In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 L. & Inequality 253 (1992).

45. N.Y. Fam. Ct. Act Art. 7 Introductory Practice commentary at 7 (McKinney 1999).

46. *Id.*

47. *Id.*

48. Besharov, Juvenile Justice Advocacy 14 (1974), *in* N.Y. Fam. Ct. Act Art. 7 Introductory Practice Commentary at 7 (McKinney 1999).

49. *Id.*

50. *See generally* Stanton P. Fjeld et al., *Delinquents & Status Offenders: The Similarity of Differences*, 32 Juv. & Fam. Ct. J. 3 (1981) (stating that overall, delinquents and status offenders cannot be clearly separated).

51. N.Y. Fam. Ct. Act § 301.2(1) (McKinney 1999 & Supp. 2001-2002). The definition also requires that the juvenile "(a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from criminal court to the family court." *Id.*

52. The court struck down the difference in age cutoffs for boys and girls as unconstitutional. So New York PINS jurisdiction cutoff was actually age 16 for both boys and girls before the amendment became effective on July 2, 2002. *See In re Patricia A.*, 31 N.Y.2d 83, 89 (1972).

53. N.Y. Fam. Ct. Act § 712(a) (McKinney 1999 & Supp. 2001-2002). On July 2, 2002, section 712(a) stating "[a] male less than sixteen years of age and a female less than eighteen years of age," was replaced with "[a] person less than eighteen years of age." N.Y. Fam. Ct. Act § 712(a) (McKinney Supp. 2001-2002).

54. In 1996, juvenile courts in the U.S. formally processed approximately 25,800 runaway cases. Howard N. Snyder & Melissa Sickmund, Juvenile Offenders & Victims: 1999 National Report 166 (OJJDP 1999).

55. In 1996, approximately 39,300 truancy cases were formally processed in U.S. juvenile courts. *Id.*

56. Jesse Souweine, *Changing the PINS System in New York*, *at* (July 2, 2001). In 1996, approximately 44,800 ungovernability cases were formally processed in U.S. juvenile courts. Snyder, *supra* note 54, at 166.

57. Julia A. Soyars-Berman, *A Proposed Alternative to the New York State PINS System: Who is Looking after the Best Interests of the Teenage Child?*, 39 Syracuse L. Rev. 1401, 1415 (1988).

58. *Id.* at 1402; "Their actions may well camouflage the fact that all is not well at home." Julie Zatz, *Problems & Issues in Deinstitutionalization: Laws, Concepts & Goals, in* Neither Angels Nor Thieves: Studies in Deinstitutionalization of Status Offenders 41, 46 (Joel Handler & Julie Zatz eds., 1982); Juvenile court judges also have the option of substituting a neglect or abuse petition for a PINS petition in order to proceed against the parents. *See generally In re Leif Z.*, 431 N.Y.S.2d 290 (1980).

59. N.Y. Fam. Ct. Act § 310.1 (McKinney 1999). Section 310.1 states that "[o]nly a presentment agency may originate a juvenile delinquency proceeding." *Id.*; The term "presentment agency" is defined as "the agency or authority which . . . is responsible for presenting a juvenile delinquency petition." N.Y. Fam. Ct. Act § 301.2(12) (McKinney 1999 & Supp. 2001-2002).

60. See Anne R. Mahoney, *PINS and Parents,* in Beyond Control: Status Offenders in the Juvenile Court 161, 172 (Lee E. Teitelbaum & Aidan R. Gough eds., 1977) (stating that delinquency petitions are generally commenced by someone external to the family, while PINS petitions are commenced more often by the child's parent).

61. Snyder, *supra* note 54, at 166; N.Y. Fam. Ct. Act § 310.1 (McKinney 1999). In 1996, "law enforcement agencies referred forty-eight percent of the petitioned status offense cases processed in [U.S.] juvenile courts . . . compared with 86% of delinquency cases." Snyder, *supra* note 54, at 166.

62. N.Y. Fam. Ct. Act § 733 (McKinney 1999 & Supp. 2001-2002) Section 733 states:

> The following persons may originate a proceeding under this article:
> (a) a peace officer . . . or a police officer;
> (b) the parent or other person legally responsible for his care;
> (c) any person who has suffered injury result of the alleged activity of a person in need of supervision;
> (d) the recognized agent . . .;
> (e) the presentment agency.

Id.

63. Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 Harv. C.R.-C.L. L. Rev. 41, 50 (1981).

64. *The Juvenile Justice & Delinquency Prevention Act: Hearing on S. 3148 Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary*, 92nd Cong. 204 (1973) (statement of Senator Birch Bayh, Member, Committee on the Judiciary).

65. *See* 42 U.S.C. § 5633(12) (1994); Every state must "provide within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult . . . shall not be placed in secure detention facilities or secure correctional facilities." *Id.* section 5633(12)(A); States must also "submit annual reports . . . containing a review of the progress made by the State to achieve the deinstitutionalization of [status offenders]." *Id.* section 5633(12)(B).

66. *See generally* Erin M. Smith, *In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 Law & Equality 253 (1992).

67. Souweine, *supra* note 56, at 6.

68. *Id.*; This was also a concern of the Legislative Committee on Court Reorganization in 1962 when the legislature separated PINS and delinquents. "It [becomes] even more difficult to justify a commitment in the absence of delinquency." Joint Legislative Committee on Court Reorganization, S.4501, 185th Sess., at 3436 (1962).

69. Souweine, *supra* note 56, at 6.

70. David J. Steinhart, *Status Offenses*, 6(3) Future of Child. 86, 91 (1996), *available at* <http://www.futureofchildren.org/information2826/information_show.htm?doc_id=77817>.

71. Jan C. Costello & Nancy L. Worthington, *Incarcerating Status Offenders: Attempts to Circumvent the Juvenile Justice and Delinquency Prevention Act*, 16 Harv. C.R.-C.L. L. Rev. 41, 55 (1981).

72. Juvenile Justice and Delinquency Prevention Act (JJDPA) of 1974, 42 U.S.C. § 5633(a)(12) (1994) requiring the state to provide information that "juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses (*other than an offense that constitutes a violation of a valid court order* . . .) shall not be placed in securedetention facilities or secure correctional facilities," in order to receive a grant. *Id.* (emphasis added).

73. In New York State the juvenile court is called the family court. N.Y. Fam. Ct. Act § 113 (McKinney 1999).

74. 42 U.S.C. § 5603(16) (1994).

75. *Id.*

76. Rayna H. Bomar, *The Incarceration of the Status Offender*, 18 Memphis U. L. Rev. 713, 733 (1988).

77. *Id.*

78. David J. Steinhart, *Status Offenses*, 6(3) Future of Child. 86, 91 (1996), *available at* <http://www.futureofchildren.org/information2826/information_show.htm?doc_id=77817>.

79. 1978 N.Y. Laws 549; A memorandum from the Division of Criminal Justice Services stated that the 1978 amendment "was an effort to comply with federal requirements in order to receive federal funding." Memorandum of Sen. Pisani, *reprinted in* [1978] N.Y.S. Executive Chambers Legislative Bill Jacket 920.

80. Memorandum of Sen. Pisani, *reprinted in* [1978] N.Y.S. Executive Chambers Legislative Bill Jacket 548.

81. N.Y. Jud. Ct. Acts § 750(A)(3) (McKinney 1992 & Supp. 2001-2002).

82. N.Y. Jud. Ct. Acts § 2(8) (McKinney 2002).

83. N.Y. Fam. Ct. Act § 156 (McKinney 1999 & Supp. 2001-2002).

84. *Id.* (emphasis added).

85. *Id.*

86. N.Y. Fam. Ct. Act § 754(1)(a) (McKinney 1999 & Supp. 2001-2002).

87. N.Y. Fam. Ct. Act § 754(1)(b) (McKinney 1999 & Supp. 2001-2002).

88. N.Y. Fam. Ct. Act § 754(1)(c) (McKinney 1999 & Supp. 2001-2002). Section 756 states the following;

> (a) (i) . . . the court may place the child in its own home or in the custody of a suitable relative or

other suitable private person or a commissioner of social services, subject to the orders of the court. (ii) Where the child is placed with the commissioner of social services, the court may direct the commissioner to place the child with an authorized agency or class of authorized agencies. (c) A placement pursuant to this section with the commissioner of social services shall not be directed in any detention facility.

N.Y. Fam. Ct. Act § 756 (McKinney 1999 & Supp. 2001-2002).

89. N.Y. Fam. Ct. Act § 754(1)(d) (McKinney 1999 & Supp. 2001-2002).
90. N.Y. Fam. Ct. Act §§ 768-780 (McKinney 1999).
91. N.Y. Fam. Ct. Act §§ 771-779 (McKinney 1999).
92. N.Y. Fam. Ct. Act § 778 (McKinney 1999).
93. *Id.*
94. N.Y. Fam. Ct. Act § 773 (McKinney 1999).
95. *See Naquan J.*, 727 N.Y.S.2d at 126; "Therefore, even when faced with a situation where the PINS respondent persistently absconds from every nonsecure placement facility in which he or she has been placed, the Family Court may not rely on such circumstances to compel compliance in a secure facility." *Id.; see Jasmine A.*, 727 N.Y.S.2d at 124 (holding that the PINS behavior was "an act consistent with PINS behavior, not with juvenile delinquency"). This line of reasoning has also been applied in other areas of the Family Court Act where specific remedies are outlined. *See generally Michael N.G. v. Elsa R.*, 650 N.Y.S.2d 140 (1996).
96. 1975 N.Y. Laws 496.
97. *Id.* (emphasis added).
98. N.Y. Fam. Ct. Act § 156 (McKinney 1999 & Supp. 2001-2002) (emphasis added).
99. *Id.*
100. 1975 N.Y. Laws 496.
101. *Id.*
102. *Id.*
103. Governor's Memorandum of Approval of ch. 486, *reprinted in* 1975 Legis. Ann. 17.
104. *Id.*
105. *Id*.
106. *Id*.
107. *Id*.
108. *Id*.
109. *Id.*
110. *See generally supra* notes 56-68 and accompanying text.
111. Gomby, *supra* note 15, at 5.
112. *See* Sharla Rausch, *Court Processing versus Diversion of Status Offenders: A Test of Deterrence & Labeling Theories*, 20 J. Res. in Crime & Delinq. 39, 40 (1983).
113. Joint Legislative Committee on Court Reorganization, S. 4501, 185th Sess., at 3434 (1962).
114. *In re Tasseing H.*, 422 A.2d 530, 537 (Pa. Super. Ct. 1980).
115. N.Y. Fam. Ct. Act § 712(a) (McKinney 1999 & Supp. 2001-2002).
116. It should be noted that girls are more likely than boys to be incarcerated as a result of contempt. A "male offender had a 3.9% chance of incarceration, which increased to 4.4% if he was found in contempt, [while] the female offender had a 1.8% chance of incarceration which increased to 63.2% if she was held in contempt." Francine T. Sherman, *Effective Advocacy Strategies for Girls: Promoting Justice in an Unjust System*, *in* Children's Law Institute: Legal & Social Welfare Issues of Girls & Adolescents 151, 166 (Practicing Law Institute 2001). This might result from the higher percentage of girls than boys that are runaways. *Id.*
117. *Jasmine A.*, 727 N.Y.S.2d at 124.
118. Douglas E. Abrams & Sarah H. Ramsey, Children and the Law 1007 (West Group 2000); *see also* Souweine, *supra* note 56, at 9.
119. *See generally* Anthony A. Guarna, *Status Offenders Belong in Juvenile Court*, 28 Juv. Just. 35 (1977) (arguing in favor of juvenile court jurisdiction over status offenders).
120. *See generally* Charles H. Logan & Sharla P. Rausch, *Why Deinstitutionalizing Status Offenders is Pointless*, 31(4) Crime & Delinq. 501 (1985); Orman W. Ketcham, *Why Jurisdiction over Status Offenders Should be Eliminated from Juvenile Courts*, 57 B.U. L. Rev. 645 (1977).
121. Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 Yale L.J. 1383, 1391 (1974).
122. *Id.* at 1393.
123. *Id.*
124. *Id.* at 1394.
125. *Id.*
126. *Id.* at 1396.
127. *Id.*
128. The reasons listed and discussed are not inclusive, as many arguments have been offered both in support and in opposition to abolishing PINS jurisdiction.
129. Rayna Hardee Bomar, *The Incarceration of the Status Offender*, 18 Memphis St. U.L. Rev. 713, 726-27 (1988); *see generally* Irene M. Rosenberg, *Juvenile Status Offender Statutes: New Perspectives on an Old Problem*, 16 U.C. Davis L. Rev. 283 (1983) (suggesting that status offender jurisdiction should be abolished).
130. *See* Julia A. Soyars-Berman, *A Proposed Alternative to the New York State PINS System: Who is Looking after the Best Interest of the Teenage Child?*, 39 Syracuse L. Rev. 1401, 1422-27 (1988).
131. *Id.* at 1427-43 (suggesting that many minors are competent and should be allowed to take an active role in their own rehabilitation).
132. Note, *Ungovernability: The Unjustifiable Jurisdiction*, 83 Yale L.J. 1383, 1406 (1974).
133. *See Id.*
134. N.Y. Fam. Ct. Act § 720(2) (McKinney 1999 & Supp. 2001-2002).
135. 42 U.S.C. § 5633(a)(12) (1994).
136. Ohio Rev. Code Ann. § 2151.02(B) (West 1994 & Supp. 2001).
137. *Id*.
138. N.Y. Fam. Ct. Act § 353.3 (McKinney 1999 & Supp. 2001-2002).
139. J. Rothgerber, Jr., *The Bootstrapping of Status Offenders: A Vicious Practice*, 1 Ky. Child. Rts. J. 1,4 (1991).
140. *See infra* Part VII.B.2.
141. N.Y. Fam. Ct. Act § 156 (McKinney 1999 & Supp. 2001-2002).
142. N.Y. Fam. Ct. Act §§ 771-780 (McKinney 1999).
143. *See supra* notes 7-9 and accompanying text.
144. N.Y. Fam. Ct. Act § 778 (McKinney 1999).

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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 2002) 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.

Fabio A. v. Irena Z.-A., United States District Court, Southern District of New York (Pauley, William H. III, May 3, 2001)

For the Petitioner: Robert S. Zeif, Esq.
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Decision and Order

Petitioner Fabio A. filed this petition pursuant to the Hague Convention on the Civil Aspects of Child Abduction (the "Convention"), as implemented by the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 *et seq.*, seeking an order requiring his wife Irena Z.-A. to return their child Alessandra to Italy. On February 14, 2001, this Court commenced a plenary hearing to determine whether Ms. Z.-A. wrongfully removed Alessandra from Italy.[1]

For the following reasons, this Court grants the petition.

Findings of Fact

Mr. A. is a world-renowned opera tenor and an Italian citizen. He was born in Genoa, Italy and most of his family still resides there. Since 1996 Mr. A. has maintained a residence for tax purposes in Monaco. (Tr. 241.) In 1992, he met Irena Z.-A., who is also an opera singer, while they were performing "Carmen" in Spain. (Hearing Transcript ["Tr."] 444.) They were married a year and one-half later in Genoa, Italy. (Tr. 101.)

Ms. Z.-A. is a citizen of the former Yugoslavia/Serbia and her family resides in Belgrade, Serbia. She maintains an apartment in Belgrade. In 1995, Ms. Z.-A. also obtained Italian citizenship. (Tr. 103.) Her Italian passport issued in 1995 identifies Genoa, Italy as her residence and domicile. (Tr. 513.) In 1999, Ms. Z.-A. obtained a Serbian passport listing her Belgrade apartment as her residence and domicile. (Tr. 511, 516.) Ms. Z.-A. does not have any official document identifying New York as her place of domicile, nor does she have a United States social security number. (Tr. 521-23.)

Alessandra, the couple's only daughter, was born in Genoa, Italy on March 25, 1994. She is a citizen of Italy and her primary language is Italian. (Tr. 103, 105.) Like her mother, Alessandra has both Italian and Serbian passports. Her Italian passport identifies her domicile as Genoa, Italy and her Serbian passport, which was obtained on February 17, 2000, identifies her domicile as Belgrade, Serbia. (Tr. 517.)

None of the parties or any member of their families is an American citizen or domiciled in the United States.

Mr. A. was the primary financial provider for the family while Ms. Z.-A. was the primary child-care provider. Although Mr. A.'s professional commitments were demanding, he cared for his daughter Alessandra when his schedule permitted by, among other things, taking her to doctors' appointments, restaurants, parks and musical performances. (Tr. 203-04.)

Mr. A.'s operatic obligations require him to travel frequently all over the world. Since Alessandra's birth, Mr. A. has rarely stayed for more than one month in any location. Until Alessandra turned six and was required by Italian law to attend school, she and Ms. Z.-A. often traveled with Mr. A. when he had engagements of more than a week. Their travels reached a crescendo in 1999.

From March 4th through April 6th of that year, Mr. A. shuttled between Hamburg, Germany and Genoa, Italy while Ms. Z.-A. and Alessandra stayed in Genoa. On April 7th, the family traveled to Baltimore, Maryland where Mr. A. had an extended engagement. On May 4th, the family went to New York City where they stayed for five days. On May 10th, Mr. A. traveled to Montreal, Canada. Ms. Z.-A. and Alessandra joined him in Montreal on May 26th where they remained until June 13th. Then, they flew to Genoa, Italy where Mr. A. rested for five days before he traveled to Vienna, Austria for a week. Ms. Z.-A. and Alessandra remained in Genoa where Mr. A. rejoined them on June 28th. Three days later, the family went to Verona, Italy where Mr. A. performed "Aida" for three weeks. They returned to

Genoa for three days at the end of July before traveling together to Buenos Aires, Argentina where they remained until August 14th. On August 15th, the family returned to Genoa for three days. Then, Mr. A. and Alessandra went to Verona, Italy for several days while Ms. Z.-A. traveled to Belgrade, Serbia. The family was reunited in Genoa on August 27th. (Pet.'s Ex. 9.) Alessandra's repeated return to Genoa, Italy is the recurring theme throughout her peripatetic adventures. (Pet.'s Exs. 9 & 10.) Even in her earlier years when Alessandra traveled less frequently, she spent more time in Genoa than any where else. (Pet.'s Exs. 9 & 10.)

When the family traveled, both parents tried to maintain continuity in Alessandra's life. For example, they arranged for her to receive medical care in each country, and paid for her to attend classes at an Italian-American school when she was in New York, which her parents paid for by the week. In Genoa, Italy, Alessandra lived with her parents in their rental apartment[2] (Tr. 257-61) near Mr. A.'s brothers and sisters. There, until she turned six, she attended pre-school and spent time with her paternal grandparents, aunts, uncles and cousins. (*See, e.g.*, Pet.'s Ex. 5: Alessandra's passport; Pet.'s Exs. 9 & 10: A. family itinerary.)

In 1994 and 1995, Mr. A. performed several times in New York, Philadelphia, Palm Beach and San Francisco. (Pet. Ex. 10: A. itinerary; Tr. 214.) Those performances left him with a financial windfall which he invested in an apartment in New York City. (Tr. 214.) Ms. Z.-A. loaned her husband some of the down payment, but the apartment is only in Mr. A.'s name. (Tr. 216.)

The family stayed in Mr. A.'s New York apartment whenever he performed in New York City. (Tr. 217.) He also periodically rented the apartment to friends. Although he stated on his mortgage loan that he would use the property as his principal residence for at least one year, he did not. (Tr. 273.) Rather, he declared himself a non-resident on his United States tax returns and the apartment in Genoa as his permanent residence. (Tr. 230, 233.)

In 1997, the A.s experienced marital difficulties. However, after seeing a marriage counselor they eventually reconciled. (Tr. 110-13.)

Also that year, Mr. A.'s career blossomed in the United States. He was engaged frequently by the Metropolitan Opera in New York City and the San Francisco Opera. The opportunity to work more regularly with the Metropolitan Opera developed at that time. (Tr. 239.) Before he could perform in the United States Mr. A. had to obtain a work visa for each engagement, a cumbersome task that was often not completed until the day of the performance. (Tr. 237.) On the advice of his manager, Mr. A. decided to apply for a green card for persons with "special talents." The green card would permit him to live abroad but perform in the United States without having to apply repeatedly for work visas. Mr. A. also believed it would decrease his tax liability. However, Mr. A. never intended to make the United States his permanent residence. (Tr. 246.) Ms. Z.-A. did not apply for a green card independently.[3] She understood that if Mr. A. obtained the green card he could request that similar privileges be extended to his family.

In late 1999, irreconcilable differences again fractured the A.s' marital relationship.

The following year, Mr. A. indefinitely postponed the requisite interview with the American government concerning his application for a green card. The effect was to suspend the processing of his application. (Tr. 245-46.) By that time, the negotiations with the Metropolitan Opera had collapsed and Mr. A.'s professional focus shifted to Europe. (Tr. 245.)

In the spring of 2000, Ms. Z.-A. left Genoa with Alessandra for New York where they spent most of April and all of May. (*E.g.*, Pet. Ex. 9: A. itinerary.) Alessandra attended the Italian-American school during May and visited with friends in New York. Alessandra and her mother returned to Genoa on June 2, 2000, where they resided until mid-December.

In late August 2000, petitioner and respondent separated. (Tr. 360.) Mr. A. ultimately moved into his parent's apartment while Ms. Z.-A. resided in the parties' Genoa apartment with Alessandra.

In September 2000, Mr. A. vacationed with Alessandra for one week. (Tr. 228-29.) When they returned to Genoa, Alessandra, then six, started kindergarten at a private Italian-American school where she was enrolled for the 2000-01 school year. She continued to attend that school in Genoa until December 12, 2000. Alessandra was also enrolled in an Italian-American school in New York so that when the family traveled to New York, where Mr. A. was scheduled to perform that fall, she could continue her studies.

In October 2000, Mr. A. filed an action in Genoa for a judicial separation under Italian law. He requested joint custody of Alessandra and an order directing Ms. Z.-A., who had transferred approximately $20,000 from Mr. A.'s account, not to remove their daughter from the country. (Pet.'s Ex. 1: Complaint for judicial separation; Tr. 528.) The Italian court scheduled a hearing for January 17, 2001.

On December 8, 2000, pursuant to an agreement between the parties, Mr. A. gave Ms. Z.-A. $1,000 and spent the weekend with Alessandra at his parent's house in Genoa. On December 10, 2000, he returned Alessandra to Ms. Z.-A. in Genoa. The next day, Ms. Z.-A. took Alessandra to school and requested copies of

future home work assignments. (Tr. 544.) Ms. Z.-A. advised the school that she was taking Alessandra to New York, but asked the school authorities not to disclose that to Alessandra because the trip was a surprise. (Tr. 544.)

On December 12, 2001, Ms. Z.-A. took Alessandra to New York without informing Mr. A. They entered the United States under a visa waiver program which permitted them to remain only until March 11, 2001. On December 13, 2001, Mr. A.'s attorney in Genoa received a letter from Ms. Z.-A.'s attorney advising that Ms. Z.-A. had gone to New York with Alessandra. Not surprisingly, Ms. Z.-A.'s attorney also canceled a settlement conference scheduled for December 14, 2000 in Genoa concerning the Italian matrimonial proceeding. (Tr. 368.) Ms. Z.-A.'s attorney promised that Ms. Z.-A. and Alessandra would return to Genoa by Christmas Day.

On December 19, 2000, Ms. Z.-A. filed for divorce and custody in New York State Supreme Court because she believed that New York divorce law would be more favorable to her. (Tr. 539.) She and Alessandra have remained in New York since that time.[4] Ms. Z.-A. cannot work in the United States under the visa waiver program. (Tr. 508-11.)

On December 28, 2000, Mr. A. instituted criminal proceedings in Italy against Ms. Z.-A. for the abduction of their child and her unilateral withdrawal of funds from his account. An arrest warrant was issued in Italy. (Pet.'s Exs. 20 & 21.) However, to facilitate Ms. Z.-A.'s appearance at the January 17, 2001 judicial separation hearing in Italy, Mr. A. procured a letter from the Genoa prosecutor agreeing not to arrest her if she returned to Italy for that hearing. In the interim, Mr. A. filed the petition in this Court.

Ms. Z.-A. did not appear in person at the Italian hearing. However, her attorney was present. The Italian court granted Mr. A. temporary custody of Alessandra and adjourned the matter to April 12, 2001. (Pet.'s Ex. 2: Court of Genoa Minutes of Personal Separation.)

Thereafter, Mr. A. obtained an advisory opinion from the Juvenile Court of Genoa pursuant to Article 15 of the Convention declaring that Alessandra's "customary residence" was Genoa, Italy. It also determined that Ms. Z.-A.'s removal of Alessandra to New York without Mr. A.'s consent was illegitimate under Article 316 of the Italian Civil Code, "which provides that parental authority on children shall be exercised by both parents by joint agreement." (Ex. 3: Declaration of the Juvenile Court of Genoa.)

On March 21, 2001, the New York State Supreme Court, New York County issued a Decision and Order denying petitioner's motion to dismiss the New York divorce action without prejudice. (Decision and Order, Index No. 3505858/00.)

Conclusions of Law

I. The Convention

The objectives of the Convention are: "(a) to secure the prompt return of children wrongfully removed to or retained in any contracting State; and (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." The Convention, art. I (1980). The Convention is intended to prevent "the use of force to establish artificial jurisdictional links on an international level, with a view to obtaining custody of a child." Elisa Perez-Vera, Hague Conference on Private International Law, in 3 Acts and Documents of the Fourteenth Session ¶ 11 (1980), available at http://www.hcch.net/e/conventions/expl28e.html.

To effect the goals of the Convention, signatory states have agreed that when a child who is habitually residing in one signatory state is wrongfully removed to, or retained in, another, the latter state "shall order the return of the child forthwith." The Convention, art. 12. The Convention also provides that "until it has been determined that the child is not to be returned," the judicial or administrative authorities of a signatory state "shall not decide on the merits of rights of custody." The Convention, art. 16. Both the United States and Italy are signatories to the Convention.

The obligations of a signatory state are only triggered if a child has been "wrongfully removed or retained." A removal or retention is wrongful if:

> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The Convention, art. 3. It is the petitioner's burden to prove that the child was wrongfully removed by a preponderance of the evidence. 42 U.S.C. § 11603(e)(1)(A); *Croll v. Croll*, 229 F.3d 133, 138 (2d Cir. 2000).

"If a petitioner shows [the child] was wrongfully removed, the court must order the child's return to the country of habitual residence unless the respondent demonstrates that one of the four narrow exceptions apply." *Croll*, 229 F.3d at 138 (citing 42 U.S.C. § 11601(a)(4)); *Blondin v. Dubois*, 189 F.3d 240, 245 (2d Cir. 1999). Two of those exceptions may be established only

by "clear and convincing evidence" either that "there is a grave risk that [the child's] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation," pursuant to Article 13(b) of the Convention, or that return of the child "would not be permitted by the fundamental principles . . . relating to the protection of human rights and fundamental freedoms," pursuant to Article 20. *Blondin*, 189 F.3d at 245; 42 U.S.C. § 11603(e)(2)(A) (setting forth standard of proof for defenses pursuant to Articles 13(b) and 20). The other two exceptions to the presumption of repatriation need only be established by a preponderance of the evidence either that judicial proceedings were not commenced within one year of the child's abduction and the child is well-settled in the new environment, pursuant to Article 12 of the Convention, or that the petitioner was not actually exercising custody rights at the time of the removal, pursuant to Article 13(a) of the Convention. *Blondin*, 189 F.3d at 246; 42 U.S.C. § 11603(e)(2)(B) (setting forth standard of proof for defenses pursuant to Articles 12 and 13(a)).[5]

In order to determine whether Alessandra was wrongfully removed, this Court must resolve four issues: (1) When did the removal or retention at issue take place; (2) Immediately prior to the removal or retention, in which state was Alessandra habitually resident; (3) Did the removal or retention breach the rights of custody attributed to the petitioner under the law of the habitual resident; and (4) Was the petitioner exercising those rights at the time of the removal or retention, or would he have been exercising those rights but for the removal or retention? *See, e.g., Diorinou v. Mezitis*, 237 F.3d 133, 141 (2d Cir. 2001); *Mozes v. Mozes*, 239 F.3d 1067, 1070 (9th Cir. 2001). Each question will be addressed seriatim.

The answer to the first question is uncontroverted: Ms. Z.-A. removed Alessandra from Italy and brought her to New York without the petitioner's knowledge or permission on December 12, 2001. The answer to the second question is the lynchpin of this case. The answers to questions three and four in turn depend on where Alessandra habitually resided prior to the removal.

II. Habitual Residence

Petitioner claims that prior to removal, Alessandra's habitual residence was Italy. Respondent argues that it was New York.

The Convention does not define "habitual residence." "[W]ish[ing] to avoid linking the determination of which country should exercise jurisdiction over a custody dispute to the idiosyncratic legal definition of domicile and nationality of the forum where the child happens to have been removed," *Mozes*, 239 F.3d at 1071, the Convention instructs courts to interpret the expression according to "the ordinary and natural meaning of the two words it contains," *In Re J. (A Minor)* [1990] 2 A.C. 562, 578 (U.K. House of Lords) (Lord Brandon). "[T]he question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case." *Id*.

The Second Circuit has not had occasion to define "habitual residence." However, as Judge Kozinski has observed, "the most straightforward way to determine someone's habitual residence would be to observe his behavior." *Mozes*, 239 F.3d 1073. Such a determination would be based strictly on objective criteria such as how long the child resided in a state and whether her life was centered around a particular location. However, merely evaluating objective criteria could skew the results depending on what period of time one studied. *Id*. For instance, the outcome could be different if one scrutinized the residence of a child for one summer, one year, or her entire life.

To avoid such pitfalls, the English courts require a "degree of settled purpose" in order to establish habitual residence:

> The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This not to say that the "propositus" intends to stay where his is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

Shah v. Barnet London Borough Council and other appeals, [1983] 2 A.C. 309, 344 (U.K. House of Lords).[6] At least one court of appeals has adopted the "settled purpose" test. *See Feder v. Evans-Feder*, 63 F.3d 217, 223 (3d Cir. 1995).

The "settled purpose" principal is difficult to apply to young children who generally are unable to articulate reasons such as business opportunities to habitually reside in a particular place. Moreover, as Judge Kozinski noted, a child may have a "settled purpose" to reside at summer camp for a limited period, yet summer camp, with a predetermined beginning, middle and end, is not the child's habitual residence. *See Mozes*, 239 F.3d at 1074.

Although the "settled purpose" of a small child like Alessandra is elusive, the principle is informed by the subjective intent of those entitled to fix the child's residence. *See Mozes*, 239 F.3d at 1076; *Feder*, 63 F.3d at 224 ("a determination of [habitual residence] must . . . consist[ ] of an analysis of the child's circumstances in that place and the parents' present, shared intentions regarding their child's presence there"). Determining intent when the parents disagree about their child's habitual residence is an Augean chore. In such circumstances, it is necessary to look beyond the subjective intent of the parents to the objective manifestations of that intent.

One of the objective manifestations of intent is the relative period of time the parties resided in the alleged habitual residence. As Lord Brandon observed,

> [T]here is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so.

In Re J., 2 A.C. at 578-79; *see also*, *Mozes*, 239 F.3d at 1078 ("[H]ome isn't built in a day. It requires the passage of '[a]n appreciable period of time.'") (quotations omitted); *Feder*, 63 F.3d at 224 ("a child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimatization"); *Friedrich v. Friedrich*, 983 F.2d 1396, 1401-02 (6th Cir. 1993) ("[a child's] habitual residence can be 'altered' only by a change in geography and the passage of time").

Whether the parties resided in the residence on a temporary or conditional basis is also significant. Take Judge Kozinski's summer camp example; one of the reasons that summer camp cannot be a habitual residence is that it is temporary and finite. So too, if the parties stayed at a particular location for the purpose of vacationing or for a limited employment stint, the notion of habitual residence is undermined. *See*, *e.g.*, *Pesin v. Osorio Rodriguez*, 77 F. Supp. 2d 1277, 1285 (S.D. Fla. 1999) (Florida is not the child's habitual residence because, *inter alia*, "the parents' settled purpose of their family trip to Florida was, as planned, a family vacation finite in its duration . . . [and] the parties had packed for only a temporary visit, rather than a permanent move"), *appeal dismissed*, No. 00-10295, 2001 WL 273851 (11th Cir. Mar. 20, 2001); *In re Morris*, 55 F. Supp. 2d 1156, 1161 (D. Colo. 1999) (father's finite sabbatical to Switzerland where he held a teaching assignment for only one semester indicated that Switzerland was not the family's habitual residence).

The steps the parents have taken to acclimate their child to her surroundings is another objective manifestation of intent to habitually reside in a locale. *See*, *e.g.*, *Mozes*, 239 F.3d at 1078. Those steps may include an attempt to establish a regimen, school attendance, and the presence of family, friends and doctors.

Alessandra was born in Italy and her primary language is Italian. Her father's entire family lives in Italy, and she and her parents are all Italian citizens. While Alessandra has traveled around the world and remained abroad for up to two months at a time, she continually returned to Genoa, Italy. Moreover, the purpose of Alessandra's travel generally was to accompany her father when he performed. Mr. A.'s operatic engagements were temporary and finite.

Immediately prior to Ms. Z.-A.'s removal of Alessandra from Genoa, Alessandra spent seven months in Genoa, except for a brief vacation with her father. She regularly attended school in Genoa for the first half of the school year and visited with her grandparents in Genoa most weekends. That her parents registered her in an Italian-American school in New York City to save a place for her when the family was in New York is not persuasive. Mr. A. was likely to perform in New York and her parents did not want Alessandra to miss school.

The circumstances surrounding Ms. Z.-A.'s removal of Alessandra are also significant. There is no evidence that Ms. Z.-A. ever discussed with her husband or daughter a plan to move to New York. Rather, she removed Alessandra from Genoa without notice. Even Ms. Z.-A.'s attorney's letter notifying Mr. A. that Alessandra was in New York asserts that the visit was temporary.

Moreover, Ms. Z.-A. and Alessandra cannot remain in the United States indefinitely. They arrived in New York on the visa waiver program, which only permitted them to remain here until March 11, 2001. Ms. Z.-A. cannot work in the United States because she has neither a work permit nor any job prospects here. *See Mozes*, 239 F.3d at 1082 (mother and children traveling to United States on temporary visa and that family's economic base remaining in Israel indicates that parents had not agreed to stay indefinitely in United States). The only significant ties the family has to New York are that Mr. A. owns an apartment in Manhattan and that Alessandra has made some friends and occasionally

attended a pre-school here. Those facts do not outweigh the indicia pointing to Genoa as her habitual residence.

Respondent points to petitioner's application for a green card as evidence that the parties intended to settle permanently in New York. However, the stated purpose of the green card was to facilitate Mr. A.'s ability to perform in the United States and to confer upon him a tax benefit. Further, Mr. A. stopped pursuing the green card application in 1999, and by 2000 it was clear that if he had ever considered relocating to New York, he had abandoned that idea as the marital relationship deteriorated. Ms. Z.-A.'s personal desire to establish a permanent home in New York as her marriage unraveled is not sufficient to establish Alessandra's habitual residence here.

For all of the above reasons, it is apparent that immediately prior to Ms. Z.-A.'s removal of Alessandra to New York, Genoa was Alessandra's habitual residence.

III. Custody Rights

The analysis does not end with the determination of Alessandra's habitual residence. This Court must also determine questions three and four—whether Ms. Z.-A.'s removal of Alessandra breached rights of custody enjoyed by Mr. A. under Italian law and whether Mr. A. was exercising those rights at the time of the removal.

Article 14 of the Convention provides that this Court may take judicial notice of the law of the habitual residence in order to determine whether the removal breached Mr. A.'s rights of custody.[7] The Convention, art. 14; *see also Mozes*, 239 F.3d at 1084.

The Convention states that "rights of custody" includes "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." The Convention, art. 5(a). Rights of custody may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." The Convention, art. 3. There were no court orders or agreements between the parties with respect to the custody of Alessandra when she was removed from Italy. Accordingly, Italian law determines Mr. A.'s rights of custody.

The applicable Italian law states that, "[a] child is subject to the authority of its parents until majority . . . or emancipation. The authority is exercised by both parents by mutual agreement." Code Civil art. 316 (It.) It further states that "[t]he spouses agree between them the pattern of family life and fix the residence of the family according to the requirements of both and to those prevailing for the family. Each of the spouses has the authority to implement the agreed pattern." Code Civil art. 144 (It.) Thus, Mr. A., who was married when Ms. Z.-A. removed Alessandra from Italy, enjoyed rights of custody as that term is defined by the Convention. By unilaterally removing Alessandra from Italy and determining the child's residence without Mr. A.'s consent, Ms. Z.-A. breached her husband's rights of custody.

Ms. Z.-A. claims that Mr. A. was not exercising his custody rights at the time of the removal because she was Alessandra's primary care-taker. Although Alessandra resided primarily with her mother, the evidence presented at the hearing demonstrates that prior to the separation Mr. A. provided the sole means of financial support for Alessandra. After the separation, he was in constant contact with Alessandra and visited her regularly. He assisted in determining where she should attend school, ministered to her medical needs and took her on vacation. Additionally, immediately prior to the removal, Mr. A. spent the weekend caring for Alessandra at his parents home. Accordingly, Mr. A. was exercising his rights of custody at the time of the removal. *See*, *e.g.*, *Whallon v. Lynn*, 230 F.3d 450, 453, 459 (1st Cir. 2000) (rights of custody exercised where respondent spent two weekends a month with child, lived near her, provided some financial support, drove her to school, bought her clothes, took her to the doctor, helped her with homework); *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 640 (E.D.N.Y. 2000) (rights of custody exercised where parties participated in decision making regarding education and social welfare of children, looked after their medical needs and participated in their personal care); *cf. Croll*, 229 F.3d at 138-39 ("custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc.").[8]

Accordingly, Ms. Z.-A.'s removal of Alessandra from Genoa breached Mr. A.'s rights of custody which he was exercising at the time of the removal. Since Ms. Z.-A. has not presented any evidence that any of the four narrow exceptions set forth in the Convention apply in this case, it is incumbent upon this Court to order that Alessandra be returned to Italy.

Conclusion

For the foregoing reasons, it is hereby ordered that Alessandra A. be returned to Italy forthwith in the custody of petitioner Fabio A. Alessandra A.'s Italian and Serbian passports will be released to petitioner or his attorney Robert Zeif, Esq. The Clerk of the Court is directed to enter judgment in favor of the petitioner Fabio A. and close this proceeding.

SO ORDERED

Endnotes

1. Because the petitioner has a demanding professional schedule and was unable to proceed on an expedited basis, the parties expressly waived their rights to request a decision on the petition within six weeks. *See* the Convention, art. 11.
2. The lease states that the apartment is a second home for temporary stays and tourism. (Resp.'s Ex. SA: Lease Agmt.) However, Mr. A. credibly testified that the owner declared the apartment a secondary residence because if the apartment was declared a primary residence the owner would be subject to rent control as well as more stringent taxes. (Tr. 257-61.)
3. At a conference held on March 7, 2001, Ms. Z.-A.'s attorney informed the Court that Ms. Z.-A. is applying for a green card.
4. Ms. Z.-A. and her attorney agreed to surrender Alessandra's Italian and Serbian passports to the Court during the pendency of this proceeding. On February 12, 2001, Alessandra's passports were filed under seal.
5. In addition to the four exceptions, the Convention allows a court to take into account the preference of an older child. The court may "refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." The Convention, art. 13; *Blondin*, 189 F.3d at 246 n.3. Since Alessandra was six-years-old when this proceeding was filed, this Court did not inquire concerning her preference.
6. While other courts have cited *In Re Bates*, No. CA 122-89, High Court of Justice, Family Div'l Ct. Royal Courts of Justice, "slip op." (U.K. 1989) in further support of this proposition, this Court has been unable, despite diligent efforts, to locate such an opinion. These efforts have included inquiries to the courts that cited the case, the United Kingdom's Supreme Court of Judicature and Oxford University.
7. Article 14 of the Convention states:

   > In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

8. Neither party has argued that this Court must give deference to the Italian juvenile court's findings. Moreover, this Court need not determine what weight to accord the Italian juvenile court's determination that Alessandra was a habitual resident of Italy and that Ms. Z.-A.'s removal of Alessandra violated Mr. A.'s rights in custody because it is clear from the evidence presented to this Court that the removal was wrongful.

* * *

Clinton L. C. v. Lisa B. and Joseph S.[1] Family Court, Ulster County (Mizel, Marianne O., April 3, 2002)

For the Petitioner: Clinton, L. C., Pro Se

For the Respondent: Lisa B., Pro Se

For the Respondent: Joseph S., Pro Se

Law Guardian: Christopher Burns, Esq. for Jeremy S.

Decision and Order on Application for Assigned Counsel[2]

Clinton L. C. filed a petition on October 23, 2001, alleging that he is the father of a child, Jeremy S., born out of wedlock to Lisa B. on December 23, 1992. Joseph S. has been presumed to be Jeremy's father and had filed a paternity petition on February 14, 1994, alleging himself to be Jeremy's father. That petition had been dismissed for failure to appear and prosecute because Mr. S. had not appeared in court on June 1, 1994. Mr. S. had informed the court by telephone call on May 23, 1994, as noted in the file, that he was in a rehabilitation facility and would not be able to appear in court before June 6, 1994. Mr. S. did not refile his petition. As Jeremy's presumed father, Joseph S. had received notice of and appeared for several neglect and custody proceedings involving Ms. B. and Jeremy.

The initial appearance for Mr. C.'s paternity petition was conducted December 5, 2001 in front of Hearing Examiner John K. Beisel. The question of whether Mr. S. had been formally determined to be Jeremy's father was raised and the matter was adjourned for Mr. S. to be given notice and an opportunity to appear. Hearing Examiner Beisel appointed Christopher Burns, Esq., as law guardian for Jeremy and Mr. Burns raised equitable estoppel issues. The matter was then referred to this judge as a contested paternity proceeding (Family Court Act §439(a)).

Mr. C. has requested assigned counsel to represent him in these proceedings. He has submitted the required Financial Affidavit to apply for assigned counsel and meets the economic guidelines for assignment of counsel. However, Family Court Act §262(a)(viii) provides for assigned counsel only to *respondents* in paternity proceedings, and Mr. C. is the petitioner in this case. This would make him ineligible to receive assigned counsel except that Family Court Act §262(b) provides that

> . . . a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of the state of New York or of the United States, and includes such determination in the order assigning counsel.

For the reasons which follow, this court determines that Mr. C. is constitutionally entitled to counsel.

The court is informed that no father is identified on Jeremy's birth certificate. There has been no judicial determination from this court as to the identity of Jeremy's father, although Mr. S. has frequently appeared in this court in that role. Jeremy is nine years old and this

court assumes that Mr. S. has been identified to him as his father. From the information presented in court peripheral to the other proceedings, the court is unsure as to what extent Mr. S. has participated in Jeremy's life and resolution of the equitable estoppel issues is very much an unknown. The court will have to make a careful inquiry into Jeremy's relations with the various figures in his life. In his short life, Jeremy has been removed by the Department of Social Services from his mother's care. Two successive legal guardians have died. He is presently in the legal custody of cousins, but that has been a difficult living situation for him, resulting in his residence at Four Winds. He is now in the temporary custody of an uncle, who has a pending petition for Jeremy's custody. Not only are there equitable estoppel questions connected to paternity, but there are also looming questions as to stability and familiarity regarding custody and what rights or obligations any adjudicated father would have in Jeremy's life. These issues will require careful consideration for the court to navigate, let alone be argued by unrepresented litigants.

When the statute determining eligibility for assigned counsel was enacted by the laws of 1975, chapter 682, it did not contain a provision for assigning counsel to either the petitioner or the respondent in paternity proceedings. The right of a father to bring a paternity proceeding was not established until added by the Laws of 1976, ch. 665, §6. The Governor's Memorandum regarding this bill states that it was passed in response to the contradictory opinions expressed in *Stanley v. Illinois,* 92 Sup. Ct. 1208, 405 US 645 (1972) and *Matter of Malpica-Orsini*, 36 NY2d 568 (1975) regarding the rights to be afforded to fathers of out-of-wedlock children. The paternity respondent's right to assigned counsel was added by the Laws of 1978, chapter 456. There were no Executive, Legislative, or Judicial memoranda exploring the rationale for restricting representation only to respondents. Douglas J. Besharov in his Commentary to Family Court Act §262 (*McKinney's Consolidated Laws*, Book 29-A, 1999, Judiciary, Family Court Articles 1 to 2, p. 312), states

> . . . The only significant exceptions to the provision of counsel to indigent persons are: (1) petitioners in Article 5 paternity proceedings, presumably because they may obtain counsel fees from the respondent under Fam. Ct. Act §536 (1998)[sic] and because they often are represented by counsel for public assistance agencies; . . .

When the Family Court Act was created in 1962 (Laws of 1962, ch. 686), §536 provided "Once an order of filiation is made, the court in its discretion may allow counsel fees to the attorney for the mother, if she is unable to pay such counsel fees." Underlying this provision is the implied supposition that the petitioner was always going to be the child's mother or the public assistance agencies seeking reimbursement for assistance paid on behalf of the child concerned. It was not until the Laws of 1981, ch. 300, §4, effective September 1, 1981, that the statute was amended to allow counsel fees to be paid to "the prevailing party," whether the mother or the father. That chapter specifically states that its purpose was to eliminate "unconstitutional sex-based distinctions." However, by conditioning the award of counsel fees upon the issuance of an order of filiation, the counsel fee statute presumes that the "prevailing party" is the petitioner[3] and not a respondent who is found not to be the child's father.[4] Accordingly, the only persons who can receive counsel fees under this statute are petitioners who successfully establish a paternity relationship.

However, utilizing §536 to deny petitioners access to assigned counsel overlooks the situation, as here, where the respondent has no funds from which to reimburse the petitioner and the issues presented are complex. Ms. B. has been involved in several proceedings in this court over the last 10 years and each time has either requested and received assigned counsel or has chosen to represent herself. She has never not qualified for assigned counsel. Mr. C., in seeking to establish his paternity, is seeking to establish parental rights which, once established, are to be protected by assigned counsel under Family Court Act §262. Establishing the entitlement to parental rights should be no less constitutionally protected than defending against diminution of those rights, especially when, as here, there are legal challenges to be addressed before blood tests can even be ordered.

Accordingly, this court declares that Mr. C. is constitutionally entitled to assigned counsel as a petitioner in a paternity proceeding where he is seeking to establish his paternity of the subject child and the assistance of counsel is necessary to enable him to prosecute the action. The court hereby appoints Stuart L. Borrero, Esq., to represent Mr. C. This shall constitute the decision and order of this court.

Endnotes

1. These names are fictitious for purposes of publication.
2. Decision edited for purposes of publication.
3. Article 5 is a proceeding to *establish* paternity (Family Court Act §511) and is not a proceeding to declare a petitioner not to be the father of the child.
4. Case law has declared that Article 5 cannot be used to establish maternity of a child. *See, e.g., Andres A. v. Judith N.*, 156 Misc.2d 65 (Fam Ct., Queens Co., 1992).

* * *

Naureen T. v. Sheikh T., Supreme Court, Westchester County (Shapiro, Fred L., May 30, 2002)

For the Plaintiff: McCarthy, Fingar, Donovan, Drazen & Smith, LLP
11 Martine Ave.
White Plains, NY 10606

For the Defendant: Gary R. Rick, Esq.
75 South Riverside Ave.
Croton-on-Hudson, NY 10520

Short Form Order

The following papers numbered 1 to 31 were read on this Order to Show Cause by plaintiff wife for an Order pursuant to CPLR §3212 granting summary judgment.

Order to Show Cause—Affidavits	1-2
Answering Affidavits	27-28
Replying Affidavits	30, 31
Memorandum of Law	26
Exhibits	3-25, 29

Upon the foregoing papers, it is ordered that this motion is decided as follows:

In February, 2002, plaintiff commenced this action for divorce on the ground of cruel and inhuman treatment.[1] Plaintiff now moves for summary judgment based upon specific findings by the Family Court that the defendant had "regularly engaged in verbal abuse" against the plaintiff and that the defendant's notes to the parties' sons constituted "thinly disguised threats" with references to death. Defendant opposes the application upon the grounds that the collateral estoppel is not applicable and the prior Family Court proceedings are insufficient to support a finding of cruel and inhuman treatment.

Generally, the doctrine of issue preclusion prevents a party from relitigating issues in a subsequent proceeding which were raised and decided against that party in a prior proceeding *(Ryan v New York Telephone Company.* 62 NY2d 494, 500). One of the controlling factors is the identity of the issues in the two actions. In addition, the party against whom issue preclusion is asserted must have been provided a full and fair opportunity to be heard in the prior proceeding Additional factors which the court must take into consideration are the nature of the forum in the prior litigation, the nature of the litigation, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation *(Gilberiz v Barbieri,* 52 NY2d 285, 292). Collateral estoppel will only be applied to matters "actually litigated and determined" in a prior action (Restatement [Second] Judgments § 27; *see also, D'Arata v New York Cent. Fire Ins. Co.*, *supra* at 666). For a question to have been actually litigated, "it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding" *(Halyalkar 109 v. Board of Regents,* 72 NY 2d 261).

In the present case, issue preclusion is sought to be applied to specific findings by the Family Court. In a Decision by the Hon. Ingrid S. Braslow (September 1, 1999) the Court found that defendant had "regularly engaged in verbal abuse" against the plaintiff, sufficient to establish the need for an order of protection. A year and a half later, following a hearing, Family Court Judge David Klein issued a permanent order of protection. Judge Klein's findings were primarily based upon the content of two postcards containing references to death, which defendant admitted sending to the children. One postcard read, "Life is funny. Bad Guys win. But Good Guys will come back to bury them later." A second postcard read, ". . . those who prevent you from normal life will burn in hellfire."

The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate (*see, Kaufman v Eli Lilly Co.*, 65 NY2d 449). Defendant asserts that Judge Klein's March 19, 2001 findings are insufficient to support plaintiff's relief primarily because defendant was not represented by counsel.[2] Although unrepresented at the hearing, defendant was permitted to cross examine the plaintiff with respect to defendant's conduct and allegedly threatening behavior. Moreover, contrary to defendant's contentions, both parties have extensively litigated this issue and it is clear that the doctrine of collateral estoppel would preclude defendant from relitigating the issue of his conduct which warranted the issuance o f the orders of protection. Since defendant has conceded that he wrote and sent the postcards upon which the permanent order of protection was based, it is this Court's opinion that defendant had a full and fair opportunity to develop all claims. Arguing that the adverse findings were erroneous, however, is insufficient as a matter of law to defeat preclusion on the basis of collateral estoppel. Rather, defendant must refute plaintiff's showing that an identity of issue exists which he had a full and fair opportunity to litigate. Defendant's opposition confirms that he is merely seeking a second forum to relitigate the identical issues already decided adversely against him. Needless to say, the underlying intent of the collateral estoppel doctrine is to conserve judicial time and resources by precluding a party from relitigating an issue which has been resolved against him or her in another action *(see, Schwartz v Public Adm'r of County of Bronx,* 24 NY2d 65). In the matter at bar, the ultimate factual issue as to whether defendant engaged in a course of conduct which so endangered plaintiff's physical or mental well being was resolved against him in at the two prior Family Court proceedings. Accordingly,

this Court finds that the record is sufficient to conclude that the doctrine of collateral estoppel is applicable to the present situation.

Domestic Relations Law 170(1), provides that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of "the cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant." When the marriage is one of long duration, a high degree of proof of cruel and inhuman treatment is required *(Biegeleisen v Biegeleisen,* 253 AD2d 474; *see*, *Palin v Palin,* 213 AD2d 707). In the case at bar, the plaintiff sufficiently demonstrated that a course of conduct by defendant which so endangered her physical or mental well being has rendered it unsafe or improper for her to cohabit with him (*see*, Domestic Relations Law § 170[1]). This Court concludes that the evidence has established a pattern of behavior that represents continuing cruelty. The Family Court's findings that specific acts of verbal abuse, particularly when coupled with thinly disguised written death threats, constitute cruel and inhuman treatment as contemplated by Domestic Relations Law § 170 (1). These findings, entitled to collateral estoppel effect, adequately demonstrate a course of conduct by defendant so endangering the physical or mental well being of plaintiff as to make her continued cohabitation with defendant unsafe or improper, and warrant judgment in plaintiff's favor notwithstanding the 20-year duration of the marriage (*see*, *Paccione v Paccione,* 202 AD2d 224). Accordingly, the Court grants the wife's motion for summary judgment in her favor on her cause of action for divorce pursuant to subdivision (1) of section 170 of the Domestic Relations Law.

Inasmuch as neither party addressed the counterclaims interposed by defendant, entry of a final judgment in this matter shall be held in abeyance pending a resolution of the parties' outstanding financial matters. The parties and their respective counsel are directed to appear for a preliminary conference in courtroom 702 at the Westchester County Courthouse at 2:30 P.M. on June 21, 2002.

Endnotes

1. Plaintiff's second cause of action seeks to declare the validity of the foreign divorce pursuant to CPLR §3001 which terminated the marriage between the parties on December 13, 2000.
2. In a letter dated February 1, 2001, on the eve of hearing, defense counsel, Gary Rick, Esq. requested permission to withdraw as attorney for Mr. Sheikh T. Although Mr. Rick did not appear for the hearing on March 19, 2001, he is currently defendant's attorney of record.

* * *

In Re Stacey B., Family Court, Orange County (Kiedaisch, Debra J., June 25, 2002)

In a Proceeding Pursuant to the Interstate Compact on Juveniles

For the Petitioner: Marc Wohl, Esq.
Assistant County Attorney
Katherine M. Bartlett, Esq.
Orange County Attorney
Box Z, Quarry Road
Goshen, New York 10924

Law Guardian: Cheryl E. Maxim, Esq.
Children's Rights Society
213 West Main Street
P.O. Box 1002
Goshen, New York 10924

Decision and Order

This order arises as part of the proceedings in which petitioner Orange County Department of Law under the Interstate Compact on Juveniles (hereafter, the Interstate Compact) (Unconsolidated Laws, 1801-1806) is seeking to enforce a requisition issued by the State of South Carolina for the return of the subject juvenile (Stacey) to authorities in South Carolina. Stacey is now almost 15 years of age having been born on July 16, 1987. As noted in the order of this Court, dated March 12, 2002, issued upon a motion by Stacey to dismiss the proceeding, Stacey and her siblings have been the subject of child protective removal proceedings in the State of South Carolina (S.C. Code Ann. sec. 20-7-610; S.C. Code Ann. 20-7-736). Under these statutes a child may be removed from a parent's household if the preponderance of the evidence establishes the child is an abused or neglected child and the child cannot be protected from unreasonable risk of harm affecting the child's life, physical health, safety, or mental well-being without removal. By order, dated September 23, 2001, the Honorable Rolly W. Jacobs, Presiding Judge of the Family Court of the Fifth Judicial District, South Carolina, removed Stacey and her siblings on an emergency basis from the home of Stacey's biological father, and his spouse, upon allegations of drug and alcohol usage in the home by family and non-family members. There were also allegations Stacey was provided with sexual paraphanalia. Based on such order the children were placed in the custody of the Department of Social Services of [Kershaw County] South Carolina (hereafter, Kershaw County DSS). It is noted Stacey did not receive foster care placement as did her siblings but was placed in a residential group facility. By order dated November 2, 2001, upon consent of the parties including the children's [South Carolina] Guardian ad Litem, and upon findings that illegal drug related conditions in the father's home had been ameliorated, custody of

Stacey's siblings was returned to Stacey's biological father and his spouse subject to certain conditions and oversight by the Kershaw County DSS. With respect to Stacey, the November 2, 2001 order continued Stacey in the custody of the Kershaw County DSS with further proceedings ordered upon "the return of Stacey B. to South Carolina or sooner upon petition of any party." Stacey had absconded from placement in a group home on or about September 21, 2001, eventually finding her way from South Carolina to New York State. Issuance from South Carolina of the requisition under the Interstate Compact followed on December 11, 2001.

The application for Stacey's return to South Carolina has been opposed by Stacey who is being represented in these proceedings in New York by the Children's Rights Society, Inc., Cheryl E. Maxim, of counsel. In the March 12, 2002 order this Court reviewed the Interstate Compact noting that all states have become signatories to the Interstate Compact clearly evincing a national policy favoring its enforcement and the return of runaways to their home states. This Court held that in requisition proceedings under the Interstate Compact where a reasonable showing has been made as to the legality of the proceeding underlying the order of requisition the standard is not a general "best interest" of the child standard but rather the party resisting such return to the requisitioning jurisdiction must demonstrate that compliance would place the juvenile in imminent risk to her life or mental and physical health.

The Court has now had the opportunity to conduct some evidentiary hearings in this matter as well as had the benefit of conferring with the Family Court in South Carolina. As the Family Court in South Carolina had rendered a prior custody determination placing Stacey in the custody of the Kershaw County DSS, the proceeding before this Court, in addition to involving the provisions of the Interstate Compact, is also governed by the now repealed Uniform Child Custody Jurisdiction Act (UCCJA) (DRL, former article 5-A). When interpreting the language of a statute, the Court's primary consideration is to ascertain and give effect to the intent of the Legislature. See, McKinney's Cons. Laws of N.Y., Book 1, Statutes, 92(a). It is also axiomatic that statutes are to be read together if this can be accomplished without misdirecting the one, or breaking the spirit of the other (*Matter of Foley v. Bratton*, 92 N.Y.2d 781, 787; *Morris Plan Indus. Bank v. Gunning*, 295 N.Y. 324, 330-33; *Matthews v. Matthews*, 240 N.Y. 28, 36).[1]

During these proceedings New York repealed the UCCJA and at Domestic Relations Law, article 5-A in its place enacted the Uniform Child Custody Jurisdiction Enforcement Act (hereafter, UCCJEA). Both of these statutes are intended to control and minimize interstate jurisdictional conflicts concerning child custody orders. As extolled in Memorandum AO4203, which accompanied passage of the UCCJEA in New York, the UCCJEA is intended to remediate shortcomings found in the UCCJA by providing clearer standards as to which Court's custody order is controlling, thereby, rendering the issuance and enforcement of child custody determinations more uniform and capable of enforcement. In this regard it is noted that this proceeding is to compel enforcement of a South Carolina custody determination as that term is defined under either the UCCJA at former DRL 75-c(2), or under the UCCJEA at DRL 75-a(3).

The effective date of the UCCJEA is April 28, 2002. Any proceeding concerning custody issues which is commenced prior to that date, as is the instant proceeding, is to be governed by the law then in effect, i.e. the UCCJA (see, L. 2001, c. 386, sec 2). However, under the facts and circumstances of this case application of the UCCJEA or UCCJA leads to the same result. Each of these statutes provides for emergency child protective jurisdiction. A court under either the UCCJA or the UCCJEA has authority to issue an order affecting custody if the child is present in the State in which such tribunal is located, as is Stacey, and "it is necessary in an emergency to protect the child." Such emergency jurisdiction may be exercised even though the resulting order conflicts with the exercise of continued exclusive jurisdiction over custody by the Court of another State (see DRL 76 through DRL 76-c; see former DRL 75-d[1][c][ii]). In *Matter of Sayeh R.*, 91 NY2d 306, the Court of Appeals approved the issuance of an order of protection on behalf of a child in a proceeding brought by an agency which order conflicted with the lawful custody order of the State of Florida. The order was necessary to protect the child from dire harm. However, in so finding, the Court of Appeals alerted the trial courts to be vigilant and guard against meritless child protective applications brought as legal artifice to circumvent the legitimate exclusive custody jurisdiction of another State. The Court of Appeals decision indicates the authority to modify a prior custody order on the basis of emergency child protective jurisdiction under the UCCJA must be carefully and circumspectly administered only in cases presenting genuine issues of the risk of harm to the child. This is necessary in order to preserve the statutory scheme which seeks to create a framework of consistency among the States in the issuance and enforcement of custody orders.

Pursuant to the UCCJEA an "emergency" order remains in effect until an order is obtained from the other State, which exercised prior custody jurisdiction, within the period specified in the emergency order or the period expires, provided, however, that where the child is in "imminent risk of harm", the order shall remain in effect "until a Court of a state having jurisdiction [over custody under the provisions of the UCCJEA statute] has taken steps to assure the protection of the child" (DRL 76-c[3]). In effect, this standard coincides

with the standard, imminent risk to life or [mental or physical] health, which this Court found must be met to resist a lawfully issued requisition under the Interstate Compact. In this regard neither the Interstate Compact nor the interstate custody statutes are at odds with each other.

Although, as noted, the UCCJEA became effective after the commencement of the proceeding in this Court, there is nothing in the UCCJA or case law construing the statute which indicates it would be error for this Court to apply the standards and procedures set forth under the UCCJEA with respect to how emergency child protective jurisdiction is to be exercised in this case under the UCCJA, since the UCCJA does not set forth what an emergency protective order is to contain.

The UCCJA and UCCJEA also provide that Courts are to communicate with each other when the same parties are involved before them in matters affecting child custody (see, former DRL 75-g[2][3]; DRL 76-c[4]).

In this proceeding this Court held two telephone conferences with Judge Jacobs which were attended, on notice, by the parties, and their attorneys, in New York and South Carolina, and DSS representatives of both States involved. In addition, this Court conducted two days of hearings at which sworn testimony of witnesses has been taken. Without recounting all of the testimony, there was sworn testimony by Stacey that she was sexually abused and raped by her stepfather. He was convicted and sentenced to prison. Thereafter, she went to live in her biological father's household where there were as many as 12 or so unrelated persons at times residing in the household. There was corroborating testimony that the house was under police surveillance for suspicion of drug dealing. Stacey also testified that her father and his spouse often drank alcohol to excess and/or abused illegal drugs. Stacey stated that to protect her siblings she "ratted out" the drug activity in the house. Stacey also testified that her biological father made comments of a sexual nature to her and inappropriately touched parts of her body on top of her clothing. The New York Sexual Abuse Task Force personnel to whom Stacey revealed her allegations, testified that they believed Stacey's statements and that her demeanor and behavior were consistent with that of a sexually abused victim. The evidence indicates that reference of the New York DSS investigation into these allegations was made to South Carolina DSS officials. It appears from the testimony elicited from the Orange County DSS caseworkers in the New York proceeding, as well as the Court's telephonic conferences with the South Carolina Court, that the Kershaw County DSS deemed the recently disclosed allegations of sex abuse to be unfounded. Questions were raised in this Court's mind as to the thoroughness of the investigation by Kershaw County DSS as the father made statements to New York witnesses indicating he did not recall being interviewed by South Carolina DSS investigators or caseworkers with respect to the allegations. The determination that the sex abuse allegations are unfounded appears to have been made without the benefit of interviewing either Stacey or her family in South Carolina.

When Stacey was removed by Court order from the father's household she was placed in a residential facility, and not a family foster home. Stacey was attacked by another resident of the facility. Stacey was moved from one residential home to another from which she eventually absconded. The evidence strongly suggests that Stacey should be placed in a foster family setting and not in a group secured residence. The evidence has shown that in New York with an attentive foster mother and proper oversight by DSS and professional counseling Stacey has become adjusted, is doing well in school, and does not exhibit any of the negative conduct which it has been alleged she exhibited in South Carolina. The foster mother has indicated an interest in adopting Stacey. Based on Stacey's extremely positive adjustment in New York, DSS officials inquired of the father whether he would consider surrendering Stacey. The father refused. It is noted that Stacey had spent most of her life living in her mother's household, and only lived with her father for approximately 10 months prior to placement in DSS custody. Prior to moving into the father's residence Stacey had minimal sporadic contact with her father. The father has not sought to visit Stacey in New York. Stacey's mother is not a residential resource for her.

On June 18, 2002, this Court received from Judge Jacobs a copy of an order issued by him, dated June 11, 2002. The order plainly acknowledges Stacey has made additional allegations of abuse and neglect against her family in South Carolina. The order, upon consent of the Kershaw County DSS, Stacey's Guardian ad Litem, and Stacey's biological father and stepmother, makes the following decrees:

> "Upon [Stacey's] return to South Carolina, legal and physical custody of [Stacey] shall remain with the Department of Social Services until further order of the Court.
>
> All allegations raised by [Stacey] shall be fully investigated by the South Carolina Department of Social Services. The South Carolina Department of Social Services shall seek the cooperation of New York in that state providing all information they have in their possession regarding allegations made by [Stacey].

> At the conclusion of the investigation by the South Carolina Department of Social Services, a hearing shall be held before the Court to address the following issues: the new allegations of abuse and neglect by Stacey, any treatment services recommended for the family and custody of Stacey."

It is the view of this Court that the foregoing order clearly meets the requirements set forth in DRL 76-c[3] that the Court in South Carolina, being the Court having continuing jurisdiction over custody, has "taken steps to assure the protection of the child." The issuance of such order requires that this Court refrain from the further exercise of temporary emergency child protective jurisdiction in this case (DRL 76-c[3]).

Accordingly, it is hereby

ORDERED that the application for enforcement of the requisition of Stacey to South Carolina is granted; and it is further

ORDERED that Stacey shall forthwith be returned to her legal guardian in the State of South Carolina, the South Carolina [Kershaw County] Department of Social Services; and it is further

ORDERED that the Orange County Department of Social Services shall forthwith contact and arrange with the South Carolina Department of Social Services for the return of Stacey to her legal guardian in South Carolina in accordance with the procedures set forth in the Interstate Compact on Juveniles.

Given the past sexual victimization of Stacey, her tender age, and the threat to her mental well being were she subjected to further abuse, Stacey remains at risk of substantial harm in the absence of vigorous investigation and responsible agency intervention. This Court reiterates that during the period Stacey has been residing in the custody of DSS in New York, and, particularly, in the foster home in which she has been placed she has not exhibited any of the alleged anti-social conduct and self-destructive conduct which it has been alleged Stacey exhibited before she came to New York. Rather, as noted, Stacey has adjusted well to school, has friends, and genuinely seems to be happy. Considering what Stacey has suffered in her short life and that she appears to have found a semblance of stability and happiness, it is with reluctance that this Court has issued the order which will compel Stacey to leave New York. However, as this Court is required to uphold the law, it has issued such order. The primary comfort of which this Court does take hold of is that the Court in South Carolina, the Hon. Rolly W. Jacobs, F.C.J., has demonstrated that he is equally as concerned as is this Court with Stacey's well being and this Court trusts that what is right shall be done for Stacey. This case is an example where the inter-court communication provisions of the UCCJA and UCCJEA were shown to be of genuine assistance to both of the Courts involved.

Endnotes

1. As set forth in the March 12, 2002 order of this Court, the Interstate Compact provides it shall have the full force and effect of law within such State which executes it (see, Article XIII, Unconsolidated Laws, 1801-1806).

Recent Decisions and Trends

By Wendy B. Samuelson

Visitation and Same-Sex Partners

***Janis C. v. Christine T.*, ___AD2d ___, 742 N.Y.S.2d 381 (2d Dep't 2002)**

In 1993, two women had a formal commitment ceremony as partners for life. Two years later, they decided to raise children together. Christine was artificially inseminated and was the stay-at-home mom, while Janis financially supported the family. Christine executed a will appointing Janis as the "co-parent" and "adoptive parent" of the children in the event of her death. They raised two children for a period of approximately three years. Both parties considered themselves, and were considered by others, to be the "mothers" of the children and shared in all child rearing duties.

When the relationship deteriorated and Christine left with the children, refusing to permit Janis to visit them, Janis commenced a proceeding pursuant to FCA Article 6 seeking visitation. Christine moved to dismiss the petition on the grounds that Janis had no standing to seek visitation since she was neither their biological nor adoptive parent. Janis opposed, claiming that Christine was barred by the doctrine of equitable estoppel from contesting standing because she had been the "de facto parent" or "psychological parent" since they raised the children together for several years.

The Westchester Family Court denied the motion to dismiss and, after a hearing, invoked the doctrine of equitable estoppel to give Janis standing and determined that visitation would be in the children's best interests because she had become their "psychological parent."

The Second Department reversed, and found that although "equitable estoppel has been applied as a defense in various proceedings involving paternity, custody, and visitation, it does not apply to this case." Rather, the court determined that the outcome was governed by *Speed v. Robins*,[1] which followed the precedent set in the Court of Appeals case, *Alison D. v. Virginia M.*,[2] holding that a same-sex partner is not a "parent" within the meaning of DRL § 70 and, therefore, does not have standing to sue for visitation.

The court declared that "any extension of visitation rights to a same sex domestic partner who claims to be a 'parent by estoppel,' 'de facto parent,' or 'psychological parent' must come from the New York State legislature or the Court of Appeals."[3]

Speed v. Robins does not contain any facts in its decision and merely determined that a same-sex partner does not have standing to sue for visitation. *Alison D. v. Virginia M.* does not really address the equitable estoppel issue and merely brushes upon it. Rather, it focuses on the issue that the definition of a parent under DRL § 70 does not include a same-sex partner. Moreover, Justice Judith Kaye wrote a firm dissent in that decision, admonishing that the court should make a broader interpretation of the definition of a parent in the best interests of the children in order to accommodate our changing society.

Editor's Note: *It appears that the court is discriminating against same sex partners, because the Second Department failed to follow its own holding in* Jean Maby H. v. Joseph H.,[4] *where the facts were substantially similar to this case, and which held that equitable estoppel is an appropriate defense in a case involving a request by a nonbiological "psychological father" for visitation. The author was counsel for the nonbiological father.*

Visitation and Smoking

***MD v. DD*, __Misc. 2d__, 740 N.Y.S.2d 811 (Oneida County 2002)**

A 13-year-old child sent a letter to the judge complaining that his mother smoked in the house and car during his overnight visitations with her. The court considered this case as one of first impression because the courts have ordered a smoke-free environment for the children where they are allergic to smoke or have asthma, but not where there is a risk of exposure to environmental tobacco smoke (a.k.a. "second-hand smoke").

The Oneida County Supreme Court held that it would take judicial notice of certain scientific articles as the basis for holding that environmental tobacco smoke poses a significant health risk to children, and second-hand smoke significantly increases his risks of developing asthma, coronary artery disease, lung cancer and certain chronic respiratory disorders. In addition, if there were no written objections filed within 30 days, the court would order that, in the best interests of the child, the child shall not reside in or visit or occupy any residence or car of the parties in which smoking of any kind occurs at any time and that he should be in a smoke-free environment outside the home to the extent practicable.

Law Guardian Immunity

***Bluntt v. O'Connor*, 291 AD2d 106, 737 N.Y.S.2d 471 (4th Dep't 2002)**

In a case of first impression, the court properly dismissed the mother's legal malpractice complaint against the law guardian on the grounds that she lacks standing to sue either on behalf of the child or individually against the law guardian appointed to represent her child in a visitation proceeding. The court determined, in *dicta*, that law guardians are entitled to quasi-judicial immunity as a matter of public policy in order to prevent qualified attorneys from declining to accept appointments as law guardians for fear of being retaliated against by disgruntled parents.

Relocation

***Jelfo v. Arthur*, 2002 WL 1225260, slip op. 04634 (3d Dep't, June 6, 2002)**

Following the parties' divorce, the parties were awarded joint custody, and the father was awarded physical residential custody of the parties' two sons during the school year, while the mother was awarded physical custody during most of the summer. Eight years later, the father, without court permission, relocated to Pennsylvania, a three-hour drive away from the mother's residence. The mother moved for a modification of the child custody order, and the Family Court modified the order by granting the mother custody of the children during the school year and the father custody during the summer.

The Third Department affirmed. The relocating parent has the burden of demonstrating that the proposed move is in the children's best interest especially where it prevents the other parent from being able to enjoy frequent and regular contact with the children. The father conceded that the primary purpose of his relocation was financial. The court found that such a relocation would not "substantially enhance" the children's well-being "in terms of educational opportunities or overall quality of life." The court found that, although the children enjoy a loving relationship with both parents, permitting them to relocate would "significantly diminish the extensive and frequent contact that [the mother] and the children previously enjoyed" which appears to outweigh the fact that the children resided with their father during the school year for eight years and the importance of their relationship with their half-siblings who lived with the father.

Editor's Note: *You move, you lose.*

Valuation Date and Retroactivity of Maintenance

***McAteer v. McAteer*, No. 04529 slip op. (3d Dep't, May 23, 2002), 2002 WL 1033539**

The parties were married in 1974 and separated in November 1989. They had one adult child. Both parties were in their early 50s. The wife earned $21,000 per year as a receptionist and had limited education and training. The husband earned $55,000 per year as a union construction worker. The husband commenced an action for divorce in 1992 which was dismissed after trial for failure to state a cause of action for divorce. On November 15, 1999, the wife commenced a new action.

The trial court awarded the wife $400 per month in maintenance, to terminate when the husband began collecting Social Security benefits. The appellate court affirmed the amount of the award, but found that the lower court erred in fixing the termination of maintenance upon the husband's eligibility for Social Security benefits. Rather, the court held that "the parties' circumstances would be far better accommodated" by terminating the wife's support at the time the husband retired and she began receiving her distributive share of the husband's pension.

The trial court also erred in fixing the retroactivity of the award of maintenance to February 1, 2001, instead of the commencement date of the divorce action on November 15, 1999, when the wife made her application for maintenance (the date of the summons), pursuant to DRL § 236(B)(6)(a).

The trial court distributed the husband's pension in accordance with the *Majauskas* formula, fixing the date of commencement of defendant's unsuccessful divorce action in July 1992 to determine the marital portion of the pension. The appellate division held that this was error, and should have used the date of the more recent divorce action. Since the court's determination altered the value of the marital portion of the husband's pension, as well as the duration of the maintenance award, the matter was remitted to the trial court to give it an opportunity to consider the issue of the interdependence between the equitable distribution of the marital portion of the husband's pension and the award of maintenance to the wife.

Equitable Distribution and Separate Property

***Parkinson v. Parkinson*, No. 04916 slip op. (4th Dep't, Jun 14, 2002), 2002 WL 1301444**

The parties were married thirty years, and had three adult children. During the marriage, the wife's

mother gifted her residence allegedly to the wife but titled the property in both the husband's and wife's names. The mother lived in that residence until her death. Two years prior to her death, the mother requested the husband to transfer title to the property solely in the wife's name because she wanted the wife to have the property since she had no retirement funds of her own.

The Fourth Department affirmed the Supreme Court's finding that the wife met her burden of proof establishing that this residence was a separate property gift from her mother and intended only for her based on the following evidence: the husband admitted that the wife's mother asked him to make the transfer and he did so; and the husband signed a document acknowledging that the residence was the wife's separate property, although the document failed to meet the notarization requirements of DRL § 236(B)(3).

Editor's Note: *All of these determinations are fact sensitive and depend upon the quantum of proof.*

Modification of Child Support

***Zelnick v. Zelnick*, __AD2d __, 742 N.Y.S.2d 278 (1st Dep't 2002)**

The parties' child initially lived with the mother after the parties' divorce, and the husband was directed to pay child support. Thereafter, in 1997, the daughter lived with the father and he paid almost all of her expenses including tuition, medical, travel, clothes, food and utilities. Based on such facts, the appellate court concluded that a substantial change in circumstances occurred warranting a termination of the father's child support obligation from the date of his application. It should be noted that the termination is only retroactive to the date of the application (as the statute provides), and not the earlier date when the circumstances changed and the child moved in with her father.

Endnotes

1. 288 AD2d 479, 732 N.Y.S.2d 902, *lv. denied*, 97 N.Y.2d 613.
2. 155 AD2d 11, 552 N.Y.S.2d 321 (1991), *aff'd*, 77 N.Y.2d 651.
3. *Id.* at 382.
4. 246 AD2d 282, 676 N.Y.S.2d 677 (2d Dep't 1998).

Wendy B. Samuelson is a partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, 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 can be reached at (516) 294-6666 or WBSesq1@aol.com

Erratum

In our Spring 2002 edition, Vol. 34, No. 1 of the *Family Law Review*, we inadvertently omitted the attorneys' names in the *Anonymous v. Anonymous* decision, which are as follows:

Donald H. Greener, Esq., P.C.
Attorney for the Petitioner
450 Seventh Avenue, Suite 1700
New York, NY 10123

Respondent appeared *pro se*

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Affidavit of Plaintiff (Blank Form with Instructions) (UD-6)

Affidavit of Defendant (UD-7)

Affidavit of Defendant (Blank Form with Instructions) (UD-7)

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Child Support Worksheet (Blank Form with Instructions) (UD-8)

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