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# Notes and Comments

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## Morality and the Need for a Liberal Construction of Egregious Conduct

Have the courts been so hardened to offensive behavior that they fail to recognize egregious conduct when they see it? Do the emperor's new clothes really hide his nakedness? Has the court's sense of morality been diminished to such an extent that any type of sexual misconduct or aberrant behavior will be countenanced in the 21st Century? These and other questions will shortly be answered by the Court of Appeals when it hears oral arguments in the notorious *Howard S. v. Lillian S.*[1] appeal in the next several weeks.

Sometimes what appears to be exceedingly transparent becomes a most perplexing issue. Put another way, what Shakespeare reported as "much ado about nothing" has, to some, raised its head in Howard's and Lillian's matter. But to many others, the conflict of what acts of a litigant constitute actionable egregious conduct is hardly so trivial a matter.

Whenever the issue of judicial construction rears its ugly head, I always choose to reflect first on the definition of the term in common usage, preferring *The American Heritage Dictionary* to *Black's*. Egregious is defined as "outstandingly bad, flagrant," a seemingly terse and to-the-point definition of a chiseled adjective. It has no alternate meaning. Conduct, a noun, is defined as "the way a person acts; behavior." Once these definitions are obtained, it is not much of a stretch to conclude that if a spouse in a matrimonial litigation commits an act, or a series of acts, that is outstandingly bad and flagrant, such wrongful behavior can be considered in equitably dividing the couple's marital property.

Despite such simplistic analysis, the justices in the Appellate Division First Department (at least those who joined in the majority decision) chose to go further in deciding this issue, and ultimately held that a wife who conceived a child during her marriage with a man other than her husband, and who deliberately concealed the truth of the child's parentage from her husband, and continued to have a series of affairs during the marriage at times when she and her husband vacationed with the children (finding a way to do so apparently by trick and device), was not so "outstandingly bad" as to constitute actionable egregious conduct.

To really appreciate the thrust of the majority's opinion, a review of the facts is essential. The complaint alleged the parties were married for 11 years and have four children. In 2004, after seven years of marriage, the wife had an extramarital affair, became pregnant, and gave birth to a male child. The husband further alleged that his wife knew or should have known that he was not the child's biological father, but concealed that information from him, and that thereafter, he raised the child as his own. The complaint also alleged that the wife began another affair in 2007 which continues "to this day," and which affair the wife concealed from the husband,

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while at the same time asking her husband for a divorce. Shortly thereafter, the husband became suspicious about his son's parentage and obtained a DNA test, which concluded he was not the father of the child.

The complaint asserts causes of actions for divorce, and a separate cause for fraud, requesting damages from his wife for the money he spent to support the child, the fees he spent for their collaborative divorce proceedings, and his wife's share of profits made from the couple's investments. In 2008, the wife moved to dismiss the fraud claim, and the husband cross-moved for expanded discovery to explore defendant's egregious conduct, and her lack of contribution to and her dissipation of marital assets. The lower court denied the motion to dismiss the fraud claim, but limited the husband's right to damages for the cost of the collaborative divorce. It went on to hold that the conduct of the wife was not egregious, and therefore could not be considered in the award of spousal maintenance or a division of marital property. The husband appealed, arguing that the court erred, as a matter of law, in holding that the wife's alleged conduct was not egregious, and limiting his damages. In a 4-to-1 decision, Justice Helen Freedman, writing for the majority, concluded that the lower court's determination was correct, and the order appealed from was affirmed. Justice Nardelli, in an expansive dissent, thought otherwise . . . and, I believe, so will the Court of Appeals.

The majority correctly decided that in determining whether egregious conduct is actionable it must be found that the litigant's acts "are so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship, misconduct that shocks the conscience of the court, thereby compelling it to invoke its equitable power to do justice between the parties," quoting *Blickstein*[2] and citing *O'Brien*.[3] In so doing, the court's conclusion to affirm the lower court's order was a *non sequitur* of epic proportions. One must ask whether any wrongful conduct would ever comply with the court's own definition if the acts of Lillian S. did not qualify. They certainly were "outstandingly bad," and were so uncivilized as to clearly evidence a blatant disregard of the marital relationship. If the court's conscience is not shocked by a wife who engages in an affair during marriage, conceives a child, and then deliberately conceals these facts from her husband, and thereafter continues her reprehensible moral behavior, then what more need be shown to satisfy the court's sense of morality? Should there be any reason to promote the sanctity of marriage in the 21st Century? Should former Governor Spitzer's and Governor Sanford's acts of promiscuity be blinked at without punishment or admonishment? These and other similar questions apparently have been answered in the negative, at least by the First Department, when the majority concluded that the holding in *McCann*[4] that marital fault is only actionable when it "callously imperils the value our society places on human life and the integrity of the human body." Put another way, the majority has countenanced morally reprehensible conduct which evidences "a blatant disregard of the marital relationship," provided it does not result in a brutal physical assault of extreme violence. Morality in marriage in such context, at least for the moment, is no longer the aspirational standard, but rather a pariah to be avoided in modern society. The court went on to carve out a limited definition of actionable egregious conduct, explaining that it must be both ". . . clearly violative of the marital relationship" and ". . . endanger the lives or well being of family members" and also be ". . . designed to inflict extreme emotional or physical abuse." Apparently this prescription, written in the conjunctive, makes it necessary for a spouse to have as a motive the desire to endanger his or her opposite member. Such requirement would rule out all unintentional behavior, leaving off the hook any repentant spouse who disavowed any intent to endanger the mental or physical well-being of his innocent spouse . . . such as Lillian S., who kept from her husband the fact that he was not the father of her newly born son. The majority went on to explain that the dissent was mistaken when it found otherwise because the wife's alleged deception had not harmed either the husband's or child's health and well-being. In a further *non sequitur* it explained that while the husband's emotional state "may be affected by learning that a child he nurtured and bonded" is not his own, his relationship with the child is not affected. But the majority did not stop there, it went further. It held that punitive damages could not be considered unless there was conduct ". . . evincing a high degree of moral turpitude," which the majority found was not present in Lillian S.'s behavior.

We turn next to the better reasoned dissent of Justice Nardelli, who tersely identified the error of the majority in holding that the wife's behavior could not be determined as a matter of law not to be egregious, and should await a trial before a trier of facts. The dissent went on to trace the *Blickstein* foundation to establish when fault could be considered in matrimonial litigation, and then went on to get to the heart of the matter by explaining:

> In analyzing whether defendant's conduct satisfies the egregious misconduct standard set forth in *Blickstein*, there can be, in my view, no dispute that defendant's actions "bespeak of a blatant disregard of the marital relationship," the foundation of which relationship must rest on mutual love, trust and respect. The question then becomes whether defendant's behavior was so egregious as to shock the conscience of the court or, stated another way, "whether the social values contravened by the offending spouse's behavior is [*sic*] so important that some punitive response in the context of equitable distribution is appropriate."[5]

Justice Nardelli then addressed the majority's rationale:

> Nevertheless, "[w]hile serious and egregious marital misconduct . . . [is more often found to include] spousal abuse, domestic violence, and attempted murder, it is not limited solely to physical and mental cruelty; adultery that substantially contributes to the dissolution of a marriage is also recognized as a relevant fault-based factor in a substantial majority of jurisdictions" (Swister, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 Regent Univ. L. Rev. 243, 257 (2004-2005)). We must, however, also take into account plaintiff's assertion that defendant conceived a child during the course of one of her affairs and intentionally concealed the parentage of that child from the plaintiff for a number of years, allowing him to raise the child as his own and develop a strong father-son bond, which evinces nothing less than a blatant disregard for the health and emotional well-being of plaintiff and the other children. (*Winner v. Winner*, 171 Wis. 413, 177 NW 680, 682 (1920) ("the concealment by the woman of the paternity of her child is a fault so grievous that there is no excuse or palliation for it" . . . ).[6]

and then went on to reflect:

> Finally, and most importantly, defendant risked, and continues to place in jeopardy, the health of the child by misrepresenting medically necessary parental information to doctors and hospitals, conveying to them that plaintiff was the child's father and, after the truth was revealed, and despite plaintiff's protestations, continuing to refuse to provide the biological father's medical history, thereby allowing the child's medical history to contain significant, potentially life-threatening gaps. While the majority finds that this conduct "does not rise to the level of egregious fault," I take a dimmer view.[7]

Isn't the better test to determine whether the alleged wrongful act destroys a "highly valuable social principle" rather than whether it is actionable because it imperils human life and the integrity of the human body? Justice Nardelli thought so when he opined:

> In this matter, taking the allegations as set forth by plaintiff as true, I find defendant's willingness to play fast and loose with the health of her child by knowingly misleading his health care providers as to his true genetic background, thereby providing, in essence, a false medical history, and then refusing to rectify the situation when asked to do so, implicates and contravenes the paramount social values discussed in *Havel v. Islam* and *McCann v. McCann*. Moreover, when considering the foregoing conduct, coupled with defendant's multiple acts of adultery, her numerous, sometimes lengthy trips with her lover during which she maintained no contact with her husband and children, her willingness to allow her lover to secretly accompany her on a family vacation, and her dissipation of assets, I find it sufficient, at this juncture, to state a claim that defendant engaged in egregious conduct as set forth in *Blickstein*, and further to foreclose dismissal of any of plaintiff's claims and to warrant granting the liberal discovery sought in his cross-motion.[8]

The Court of Appeals will have a number of difficult issues to resolve when it decides this appeal. It is hoped that either a broad and liberal interpretation of what facts constitute egregious fault will be made, or if it be determined that such facts do not exist as a matter of law, then *Blickstein* should be overruled and egregious fault removed as a factor to be considered in either awarding maintenance or equitable distribution.

Current morality must necessarily find its roots beginning in biblical times, and should not be cast aside simply because 21st Century values do not comport with a prior sense of marital decency. "Thou shall not covet thy neighbor's wife" cannot be now simply blinked at. It is time the courts put an end to accepting marital infidelity of the highest magnitude to excuse a flagrant breach of acceptable conduct.

## Endnotes

1. *Howard S. v. Lillian S.*, 62 AD3d 187, 876 NYS2d 351 (1st Dep't 2009).
2. *Blickstein v. Blickstein*, 99 AD2d 287, 292, 472 NYS2d 1110 (1984).
3. *O'Brien v. O'Brien*, 66 NY2d 576, 589, 498 NYS2d 743 (1985).
4. *McCann v. McCann*, 156 Misc. 2d 540, 593 NYS2d 917 (1993).
5. *Howard S. v. Lillian S.*, 62 AD3d 187, 197, 876 NYS2d 351 (1st Dep't 2009).
6. *Id.* at 198.
7. *Id.* at 199.
8. *Id.* at 201.

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# Snooping: What's Legal, What's Illegal?

By Amy L. Reiss and Lisa Zeiderman

Gathering information about one's spouse through technology is playing an increasingly significant role in matrimonial and family law litigation. Spouses embroiled in divorce litigation are using cutting-edge technological equipment to achieve a strategic edge in their divorce. Commencing with the initial client consultation and continuing until the ultimate moment of resolution or trial, the attorney is frequently confronted with issues regarding the legalities of information gathered by spouses. While it seems that technological advances may occur faster than the completion of a litigated divorce, the attorney must be familiar with these changes, their impact on discovery and evidentiary rules, and the overall relevance in divorces, so that information can be obtained in a legal and admissible manner, without placing a client at risk for criminal prosecution and civil penalties.

## Computer Eavesdropping: Legally Accessing Stored Communications vs. Illegal Interception of Electronic Communications

Matrimonial attorneys should be familiar with several sections of New York's Penal Law (NYPL), specifically § 250.00, which concerns offenses against the right to privacy. NYPL § 250.05 provides that a spouse is guilty of eavesdropping, a class E felony, when he or she "unlawfully engages in wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication." An electronic communication is generally any non-aural communication, not expressly excluded from the definition, which is transmitted "in whole or in part" by a wire, radio, electromagnetic, photo-electronic or photo-optical system. Included within that definition are communications transmitted by facsimile machines, computers (e.g., electronic mail), display pagers, and the "digital information captured by a pen register."[1]

Additionally, CPLR 4506 (1) entitled *"Eavesdropping evidence; admissibility; motion to suppress in certain cases"* provides that:

> The contents of any overheard or recorded communication, conversation, or discussion, or evidence derived there from, which has been obtained by conduct constituting the crime of eavesdropping, as defined by § 250.05 of the penal law, may not be received in evidence in any trial, hearing or proceeding before any court . . . provided, however, that such communications, conversation, discussion or evidence, shall be admissible in any civil or criminal trial, hearing or proceeding against a person who has, or is alleged to have, committed such crime of eavesdropping.

Thus, if the Penal Law is violated, then pursuant to CPLR 4506 (1) the content may not be received in evidence in any trial, hearing or proceeding before any court.

To constitute wiretapping, the recording or overhearing of the telephonic or telegraphic communication must be conducted by a person other then the sender or receiver of the communication, without the consent of either the sender or receiver. Intercepted communications do not include reading or accessing communications that have actually occurred on prior occasions, such as the accessing of communications on the hard drive of a computer.[2]

In *Byrne v. Byrne*,[3] the couple litigated who should have access to information contained in a computer notebook, which belonged to Mr. Byrne's employer, Citibank. Mrs. Byrne removed the computer, which the children used for their homework, from the marital residence, and gave it directly to her attorney. While Mrs. Byrne claimed that there was important financial information stored in the computer's memory, Mr. Byrne argued that removing the computer from the marital residence was improper. Citibank inserted itself into the action, arguing that the computer belonged to the company and should be returned to Citibank. During motion practice, the court took possession of the laptop computer. Justice Rigler stated:

> The computer memory is akin to a file cabinet. Clearly, [Mrs. Byrne] could have access to the contents of a file cabinet left in the marital residence. In the same fashion, she should have access to the contents of the computer.

After determining that Mrs. Byrne had the right to obtain physical custody of the notebook computer, Justice Rigler ordered that: (a) the parties and their experts would meet to download all the files in the computer; (b) all original documents would be provided to the court, and a list containing the nature of the documents would be generated and provided to both parties' counsel, after which Mr. Byrne had a limited time to submit a motion with respect to any documents that he claimed were protected by the attorney-client privilege; (c) if a motion was not timely made, Mrs. Byrne's counsel would receive all of the documents, and (d) the computer would be returned to Citibank after downloading was completed.

Five years later came *White v. White*,[4] a commonly cited case regarding electronic storage. Unbeknownst to her husband, Mrs. White had retained a research firm to copy his e-mails. Learning about these copies for the first time at his deposition, Mr. White had thought—incorrectly—that his AOL e-mails and attachments could not be read without his password. In fact, Mr. White had unknowingly saved all of his e-mails on his hard drive. Subsequently, Mr. White moved to suppress his e-mails stored on the hard drive of the family computer.

Quoting from *Bohach v. City of Reno*, 932 F. Supp. 1232 (D. Nev. 1996), in the *White* case, the court stated:

> An "electronic communication" by definition, cannot be "intercepted" when it is in "electronic storage," because only "communications" can be "intercepted," and, . . . the "electronic storage" of an "electronic communication" is by definition not part of the communication.

A communication in electronic storage means an unopened e-mail stored on a public or private service provider. Opened e-mail, even if stored on the service provider's system, is no longer in electronic storage since electronic storage is by definition an intermediate storage incidental to transmission.[5]

Mr. White also claimed that Mrs. White did not have authorization to access the family computer. Disagreeing with Mr. White's claims, the court stated:

> It has been held that "without authorization" means using a computer from which one has been prohibited, or using another's password or code without permission. *Sherman & Co. v. Salton Maxim Housewares, Inc.* 94 F. Supp. 2d 817 (E.D. Mich. 2000). Although she did not often use the family computer, [Mrs. White] had authority to do so. Additionally, [Mrs. White] did not use [Mr. White's] password or code without authorization. Rather, she accessed the information in question by roaming in and out of different directories on the hard drive. As stated in *Sherman*, where a party "consents to another's access to its computer network, it cannot claim that such access was unauthorized."

In the recent 2008 decision *Moore v. Moore*,[6] just prior to the commencement of the parties' divorce action, Mrs. Moore obtained possession of the laptop computer from the trunk of a car, to which both parties had access. Mr. Moore's online chats had been stored on the hard drive of the laptop computer. Mrs. Moore gave the computer to her attorney, who requested the password from Mr. Moore's attorney. The attorneys agreed that the password would be provided and that Mr. Moore would pay for the cost of making two copies of the material downloaded by Mrs. Moore's counsel. Subsequently, the attorneys entered into a written stipulation, agreeing that Mrs. Moore would have a clone of the hard drive made without any deletions or alternation, with copies to be supplied to both attorneys. This was accomplished without the transfer of any passwords, as the files were not encrypted.

Mr. Moore then submitted an Order to Show Cause, seeking to suppress evidence of his online chats. He argued that Mrs. Moore illegally obtained his online chats in violation of the NYPL. In holding that the sections of the NYPL cited by Mr. Moore did not govern the circumstances, Justice Saralee Evans stated the following:

> In accessing the disputed files, [Mrs. Moore] did not intercept, overhear or access electronic communications. The communication at issue, [Mr. Moore's] on line chats with the co-defendant occurred on unstated prior occasions, presumably in perfect privacy. A recording of those communications was saved by [Mr. Moore]. [Mrs. Moore's] subsequent access to that material downloaded and saved to the hard drive of the computer was not the result of an intercepted communication and does not constitute a violation of the Penal Law, § 250.05.

As a result, Mr. Moore was denied his application to suppress evidence of his online chat communications.

## Interception Is a Crime

While a spouse may not be guilty of eavesdropping by accessing materials stored on a computer hard drive (as the communications previously occurred and are actually stored and not intercepted), the snooping spouse who records a spouse's communications (e-mail, instant messages or other online communications) without permission may be guilty of the class E felony of eavesdropping. Use of keystroke-capture software, automatic session logs, routing copies of e-mail sent or received to another email account or anything else that possibly records email or instant messages being prepared, sent or received, in order to record such online communications may constitute eavesdropping. Additionally, a spouse may be guilty of a class A misdemeanor if he or she possesses any eavesdropping instruments, devices or equipment that are designed for, adapted to or commonly used in wiretapping or mechanical overhearing of a conversation, with the intention to "use or to permit" the use of such devices in violation of NYPL § 250.05.

Moreover, as set forth in NYPL § 156.20, a spouse is guilty of computer tampering in the fourth degree, a class A misdemeanor if he or she "uses or causes to be used a computer or computer service and having no right to do so he intentionally alters in any manner or destroys computer data or a computer program of another person."

Further, pursuant to NYPL § 156.25, a spouse is guilty of computer tampering in the third degree, a Class E felony, when he or she

> commits the crime of computer tampering in the fourth degree and (1) he/she does so with an intent to commit or attempt to commit or further the commission of any felony; or (2) he/she has been previously convicted of any crime under this article or subdivision eleven of § 165.15 of this same chapter; or (3) he/she intentionally alters in any manner or

> destroys computer material; or (4) he / she intentionally alters in any manner or destroys computer data or a computer program so as to cause damages in an aggregate amount exceeding one thousand dollars.

Based upon the foregoing, a client who alters the manner in which software operates or installs unauthorized software, such as a spy program, may be guilty of a crime. Inserting keystroke-copying software in a spouse's computer, without consent by the spouse, may also constitute computer tampering. Programming a spouse's computer to send copies of his or her e-mail without permission may constitute alteration of computer data, and therefore computer tampering.

## Whether Use of Computer Constitutes a Crime Depends on the Facts

A snooping spouse may also be guilty of unauthorized use of a computer pursuant to NYPL § 150.05 and / or criminal possession of computer-related material pursuant to NYPL § 156.05. As such, the attorney should consider whether the client attempting to retrieve materials from a computer is actually authorized to use the computer.

In the December 2008 case of *Boudakian v. Boudakian*,[7] the court held that Mrs. Boudakian was not guilty of computer trespass or criminal possession of computer related material, as she was authorized to use the computer. Mr. Boudakian had sought suppression of all information obtained by his wife from the parties' Dell laptop computer. It was uncontested that prior to the commencement of the action for divorce, Mrs. Boudakian had the password and access to the laptop used by her husband. Mr. Boudakian claimed, however, that he had a separate password for the e-mail account that he accessed through the computer, for which he claimed an expectation of privacy. Although Mr. Boudakian conceded that the parties' children used the computer to view movies, he also claimed that since they never viewed the computer unattended, the computer should not be considered a family computer.

In *Boudakian*,[8] the court specifically dealt with the issue of access, stating that since the laptop was a family computer, the wife had access to its contents. As such, she was well within her right to have her computer expert assist her in copying the hard drive, as she had the right to access such hard drive on her own. Having had the right of access, she was not guilty of unauthorized use of the computer. Moreover, since she didn't access anything other then the hard drive, which she was authorized to use, Mrs. Boudakian wasn't found guilty of tampering with private communications. Nor was Mrs. Boudakian guilty of eavesdropping, as the communications had occurred on prior occasions and the subsequent access to material on the hard drive did not constitute eavesdropping. Similarly, in *Byrne*,[9] as noted above, the court held that the relevant issue wasn't possession of the computer, but instead who had access to the computer's memory akin to a filing cabinet in the house.

## Illegal and Inadmissible

If your client has illegally obtained the information from a spouse's computer, you may arrive at trial only to discover that such evidence is inadmissible.[10] Pursuant to CPLR 4506 and as set forth in *Sharon v. Sharon*,[11] materials obtained by "eavesdropping" as is defined by NYPL § 250.05, may not be admissible at trial. In *Sharon*, the court suppressed evidence obtained in violation of the NYPL § 250.05. In *I.K. v. M.K*,[12] the trial court held that tapes and transcripts obtained through illegal eavesdropping were not admissible at trial. Moreover, the tapes and transcripts could not be reviewed by the experts who would be called as witnesses because any comment by them at trial, based upon the review of illegally obtained evidence, would also be inadmissible.

By contrast, in *Moore*,[13] when Mr. Moore moved to suppress his online chats with the co-defendant, the court found that such evidence was admissible, as Mrs. Moore hadn't violated any laws in obtaining such information. See also *Boudakian*, in which case Mr. Boudakian was denied his motion to suppress the information on his hard drive under CPLR 4506(1) and CPLR 3103, with the court citing *Robinson v. Robinson*,[14] for the proposition that even if information was obtained by improper means, suppression under CPLR 3013, is not warranted when the party would be entitled to discovery of the information obtained.

Similarly, in *Gurevich v. Gurevich*,[15] the wife obtained copies of the husband's e-mails in his account after the parties separated. In *Gurevich*, the husband claimed that the wife, a computer programmer, stole his emails, as he did not give her permission to utilize his account. He further claimed that the act of starting a divorce action should constitute an implied revocation of such authority. In supporting the wife's argument, the court stated:

> It is this court's understanding from the reading of the statute, legislative history and case law that the purpose of Penal Law § 250.00 is to prohibit individuals from intercepting communication going from one person to another, and in this case an email from one person to another. In the case at bar the email was not "in transit," but stored in the email account. Even assuming the husband's facts, as stated, to be true, the wife may have unlawfully retrieved information from a computer, in violation of Penal Law § 156.10 but there was no interception and accordingly fails to fall within the scope of CPLR § 4506 as presently written.

The court added that there is no statute that would recognize an implied revocation upon service of a divorce action and bar the use of stored e-mail.

## The Rewards of Using the Appropriate Channels of the Legal System

In *Etzion v. Etzion*,[16] Mrs. Etzion moved by Order to Show Cause for access to examine data on her husband's personal and business computers. Instead of resorting to self-help, Mrs. Etzion sought assistance from the court, in order to obtain broad disclosure from several different computers containing information about Mr. Etzion's businesses and finances.

To assist in balancing the relevant and material disclosure permitted by CPLR 3101(a) with the claims of privilege pursuant to CPLR 3103(a), Justice Stack appointed an attorney referee to supervise discovery. Justice Stack directed Mrs. Etzion's expert to clone or copy the hard drives of each computer and provide the new hard drive to the referee. Hard copies of the business records were to be made and distributed to the attorneys for both parties; however, copies of personal records, e-mails or other correspondence between Mr. Etzion and third parties and / or Mr. Etzion and his attorneys were not permitted. Only the referee was given access to the cloned hard drives, which were to be returned to Mr. Etzion at the conclusion of the case.

Two years later the technological revolution moved forward and the Etzions returned to court, once again battling over computer information.[17] Though the parties had entered into a Stipulation of Settlement in 2005 and were divorced, Mrs. Etzion claimed fraud and requested electronic discovery with respect to property previously valued by a neutral appraiser for $6.6 million. The property had been rezoned during the parties' settlement negotiations, unbeknownst to Mrs. Etzion, to permit redevelopment. Approximately two months after the judgment of divorce was entered, Mr. Etzion entered into a contract for its sale for the sum of $84 million. Mrs. Etzion sought electronic discovery regarding this issue, including communications, and was denied such relief.[18] The Appellate Division modified the trial court's order and determined that given Mrs. Etzion's cause of action sounding in fraud, discovery should be allowed with respect to any computer-stored data (either held in escrow or in Mr. Etzion's business or personal computers) bearing on the issue of whether Mr. Etzion made misrepresentations to Mrs. Etzion in the parties' Stipulation of Settlement. Discovery was limited to non-privileged materials that could provide evidence of Mr. Etzion's alleged misrepresentation.[19]

## Conclusion

As set forth above, there are many important legal considerations to address when addressing computer issues. First, and foremost, advise every client to change their passwords immediately. Additionally, before snooping through a spouse's hard drive, there are many factors to consider. Is the password protected? Is the electronic instrument used by the family? Who owns the device or computer? Who is an authorized user? Can one seek self-help? Are you adequately protecting your client from engaging in illegal activity? Is a court order required? Is there privileged information? How can a spouse obtain the information properly and legally so that it can be admissible as evidence in a trial? The foregoing and many other questions regarding the use of technology may confront the attorney as early as the very first meeting with his or her potential client. The ability to answer these questions correctly is essential, as the gathering of this information shapes a client's case from its commencement to the day of resolution or trial.

## Endnotes

1. *Gurevich v. Gurevich*, 2009 NY Slip Op. 29191 (Sup. Ct., Kings Co. 2009), citing *People v. Kramer*, 92 NY2d 529, 683 N.Y.S.2d 743, 706 N.E.2d 731 (1998).
2. *Moore v. Moore*, 2008 N.Y. Misc., Lexis 5221, 240 N.Y.L.J. 32 (Sup. Ct., N.Y. Co. 2008); *White v. White*, 781 A.2d 85 (N.J. Super. Ct. Ch. Div. 2001).
3. *Byrne v. Byrne*, 168 Misc. 2d 321, 650 NYS 2d 499 (Sup. Ct., Kings Co. 1996).
4. *White, supra* note 2.
5. *White, id.*
6. *Moore, supra* note 2.
7. *Boudakian v. Boudakian*, N.Y.L.J., Dec. 26, 2008, at 21, col. 3 (Sup. Ct., Queens Co. 2008).
8. *Boudakian, id.*
9. *Byrne, supra* note 3.
10. *Boatswain v. Boatswain*, 3 Misc. 3d 803, 778 N.Y.S. 2d 850 (Sup. Ct., Kings Co. 2004).
11. *Sharon v. Sharon*, 147 Misc. 2d 665, 558 N.Y.S. 2d 468 (Sup. Ct., Nassau Co. 1990).
12. *I.K. v. M.K*, 194 Misc. 2d 608, 753 N.Y.S.2d 828 (Sup. Ct., N.Y. Co. 2003).
13. *Moore, supra* note 2.
14. *Robinson v. Robinson*, 308 A.D.2d 332, 764 N.Y.S. 2d 93 (1st Dep't 2003).
15. *Gurevich v. Gurevich, supra* note 1.
16. *Etzion v. Etzion*, 796 NYS2d 844 (Sup. Ct., Nassau Co. 2005).
17. *Etzion v. Ethicon, Metro Shipping and Warehousing, Inc. and Variety Accessories, Inc.*, 19 Misc. 3d 1102A, 859 N.Y.S.2d 902 (Sup. Ct., Nassau Co. 2008).
18. *Etzion, id.*
19. *Etzion v. Etzion*, 2009 NY Slip Op. 3690 (2nd Dep't 2009).

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# Joint Legal Custody, a Viable Option for the Court—A Parenting Coordinator, a Viable Solution for the Parents

By Harvey G. Landau

There is often no more consequential and difficult decision for a court to decide than the issue of custody.

The rights of the non-primary custodial parent with his or her child have been evolving in recognition that such relationships are extremely important to the well-being of the child. "It is well established policy of this State, for example, that whenever possible, the best interests of a child lie in his [or her] being nurtured and guided by both of his natural parents." In 2006, a report by the Matrimonial Commission, appointed by then Chief Judge Kay, recommended that the term "visitation," meaning that the time the non-custodial parent spends with the child, should be replaced in favor of the term "parenting time." The Commission report concluded that the term "visitation" had a detrimental impact pointing to prison terminology as the only other significant environment the term "visitation" is utilized. The American Law Institute's *Principles of Family Dissolution* uses the phrases "decision-making responsibility"and "parenting time," instead of "legal" or "physical custody." The change in terminology is not just a style preference, but reflects the underlying assumption that there are many ways in which parents are involved in their children's lives, in ways not captured by traditional terms.[1]

Regardless of the term used, parental access is viewed as a joint right of the parent and the child. Thirty-five states, and the District of Columbia, by statutes or case law, explicitly authorize joint custody awards as a presumption or strong preference. For example, in Michigan the statute provides, "In custody disputes between parents, the parent shall be advised of joint custody. At the request of either parent, the Court shall consider an award of joint custody, and the Court shall state, on the record, the reasons for granting or denying a request." The statute further goes on to give the Court a statutory framework in which to decide whether a joint custodial arrangement is appropriate in the case. There is also a distinction between joint legal custody, which pertains to decision-making, and joint residential custody, which refers to a more equal parental access schedule for the parents. In the State of Florida, the law provides: "The Courts shall order that parental responsibility for a minor child be shared by both parents, unless the Court finds that shared parental responsibility would be detrimental to the child."[2]

## Joint Custody—An Updated View

The courts have further opined that the non-primary [residential] parent has a right to "reasonable and meaningful access to the child[ren]." The term "meaningful access" is intended to be frequent and regular access.[3]

Decisions regarding custody are often made by the Court without reference to the research on child development, unless an expert witness testifies or renders a forensic report on the issue of custody. There are no generally recognized standards for parental access and decision-making in New York, leaving it instead to the "sound discretion of the trial judges."[4]

The empirical literature underscores that children need regular contact with both parents to foster and maintain their attachments. Extended separations from either the mother or father are undesirable because such separation is likely to unduly stress the child's developing relationships. Even with older children, regular contact with the non-primary residential parent is an important criterion for the children having a favorable emotional outcome in dealing with the trauma of their parents' divorce.[5]

Recent studies indicated that joint legal custody arrangements, compared with sole custody, suggest a protective effect for some children. In addition, other studies found that children in joint legal custody arrangements were better adjusted on multiple objective measures, including emotional and behavioral adjustment, and academic achievement.[6]

While low parental conflict is another positive factor for children following divorce, the threshold in which the parental conflict becomes a risk factor is not clearly defined, and some conflict appears to be normal and acceptable in most post-divorce situations. In referring to high-conflict divorces, a distinction should be made in cases in which there has been a history of domestic violence, or where a parent has psychological problems, that would make joint legal custody or decision-making not viable options, and should be avoided. However, studies have shown that most parents diminish their conflict in the first two or three years after the divorce, and only a smaller percentage, 8% to 12%, continue high conflict after that period of time. Usually, this relatively small percentage of contentious and litigating parents are more likely to be emotionally disturbed, have character disorders, or spouses who are intent on vengeance, or controlling their former spouse.[7]

What is becoming abundantly clear is that

> whatever its specific nature or focus, interventions are more likely to benefit children from divorced families if they seek to contain parental conflict, promote

> authoritative and close relationships between children and *both* of their parents, enhance economic stability in the post-divorce family, and, when appropriate, involve children in effective interventions that help them have a voice in shaping more individualized and helpful access arrangement.[8]

As a result, in most cases, joint legal custody should be the "default option" for the court, absent there being good cause not to do so, such as in cases with a history of domestic violence or psychological difficulties of a parent.

A well-reasoned analysis of an award of joint custody and the role of a parent coordinator is found in the case of *D.Z. v. C.P.*, in which the court awarded joint custody, "even where the parties' ability to communicate is somewhat hindered by the animus that has been generated during the course of a now irretrievable, broken relationship."[9] The court distinguished the facts from the abusive relationship of the parties in the 1978 seminal Court of Appeals decision in *Braiman v. Braiman*,[10] and also discussed the many changes and benefits of the concept of joint legal custody set forth in more recent court decisions and scholarly articles in the past 30 years.

The court observed that "[a] parenting coordinator is a combination educator, mediator, and sometimes therapist, who helps parents develop conflict-management skills and decide disputes if they cannot."

The Appellate Division, Second Judicial Department, in *Ring v. Ring*, affirmed the order of a Family Court Judge who awarded joint custody to parents who each sought sole custody, and had a "caustic relationship, including filing related family offense petitions."[11]

Even in cases where joint decision-making was not a realistic possibility because of the parties' acrimony, courts have still awarded joint custody, but "zones," or "spheres," of decision-making authority. For example, these cases have included a mother having final decision with respect to religion, finances, counseling / therapy, and summer activities, and the father, final decision with respect to education, medical / dental care, and extracurricular activities.[12] In another case, the court awarded the non-residential custodial father final decision on education and religion.[13] A court awarded a father final decision-making on all important issues where the primary custodial-mother failed to consult with him as required.[14]

## The Role of a Parenting Coordinator

As a necessary component of awarding joint custody, the court should set forth a defined parental access schedule for each parent, and direct either joint or separate spheres of decision-making that should control the decision-making process.[15]

To facilitate the joint custodial decision-making, and encourage mutual parental cooperation with their children, the courts now have the viable option of appointing a parent coordinator, even absent the parties' consent to the selection of a parenting coordinator.[16]

The parenting coordinator may be empowered by the parents, or by court order, to make recommendations binding on the parents in the event they are unable to agree. If either parent feels there is sufficient reason to challenge the recommendations of the parenting coordinator, he or she still has recourse to the courts, but may be subject to costs, i.e., legal fees, if the court supports the recommendation of the parenting coordinator. The parenting coordinator cannot change the order of the court, particularly as to parental access of the non-primary residential parent, or child support arrangements, but is to assist the parents in implementing strategies consistent with court orders.

In New York State, the 8th Judicial District has adopted "Guidelines for Parenting Coordination." In creating these guidelines or protocols, many of the recommendations developed by the Association of the Family and Conciliation Courts (AFCC) Task Force on Parenting Coordination, were utilized.[17]

The State of New Jersey has also adopted a Parenting Coordinator Pilot Program in Bergen, Middlesex, Morris / Sussex, and Union counties,[18] with similar AFCC–recommended provisions.

By way of illustration, an order appointing a parenting coordinator may include, but is not limited to, making recommendations to the parties or to the court such as:

1. Minor changes or clarification of parenting time / access schedules or conditions, including vacation, holidays, and temporary variation from the existing parenting plan;
2. Transitions / exchanges of the children, including date, time, place, means of transportation and transporter;
3. Health care management including mental, dental, orthodontic, and vision care;
4. Education or daycare, including school choice, tutoring, summer school, participation in special education testing and programs or other major educational decisions;
5. Enrichment and extracurricular activities, including camps and jobs;
6. Religious observances and education;
7. Children's travel and passport arrangements;
8. Clothing, equipment, and personal possessions of the children;

9. Communication between the parents about the children, including telephone, fax, e-mail, notes in backpacks, etc.;

10. Role of and contact with significant others and extended families;

11. Parenting classes for either or both parents.

The parent guidelines and applicable case law provide that the courts retain discretion as to the scope of authority of the parenting coordinator, other than the court cannot delegate to a parenting coordinator the ultimate decisions as to the parental access schedules and the financial support of children.[19] However, a statewide adoption of these guidelines could result in both the matrimonial Bar and the bench encouraging parents at the early stages of litigation to consider such an arrangement for the benefit of themselves, and, most importantly, for their children.

## Conclusion

The courts awarding joint custody, combined with the appointment of a parenting coordinator, would also resolve a dichotomy that exists in family law. In awarding child support, courts are required to consider "the standard of living the child would have enjoyed had the marriage or household not been dissolved."[20] Yet, often the same consideration is not given to the standard of involvement the non-custodial parent would have enjoyed with his or her child had the [marital] relationship not been dissolved. This is especially true when young children are involved, and many important parental decisions are still to be made. Except for the divorce, such decisions would have been jointly made, or, at the very least, extensively discussed between the parents. The child would have also enjoyed daily interaction with both parents. While this daily interaction is not usually feasible after a divorce, an effort should be made to minimize the disruption of the parent-child access. A joint custodial arrangement, with an alternate dispute resolution component, such as the appointment of a parent coordinator for a fixed period of time, would be a viable solution for parents to accomplish this goal.

## Endnotes

1. *Daghir v. Daghir*, 82 AD2d 191 (2d Dep't 1981); Report to the Chief Judge of the State of New York, Matrimonial Commission, February 2006, page 11, www.nycourts.gov/reports/matrimonialcommissionreport.pdf; "Principles of the Law and Family Dissolution" (2002), *The American Law Institute*; *see also, The American Academy of Matrimonial Lawyers (AAML) Model for a Parenting Plan*, http://www.familylawfla.org/pdfs/AAML_Parenting_Plan.pdf.
2. *Weiss v. Weiss*, 52 NY2d 170 (1981); *Gerald D. v. Lucille S.*, 188 AD2d 650 (2d Dep't 1992); MCL, 722.26a(1); Fla. Stat. Title VI, 61.13 (c)(1),(2)
3. *Stahl v. Stahl*, 66 AD2d 186 (2d Dep't 1979), *affirmed* 49 NY2d 1036 (1980); *Cardia v. Cardia*, 203 AD2d 650 (3d Dep't 1994).
4. *Thompson v. Yu-Thompson*, 41 AD3d 487 (2d Dep't 2007), *see also* Friedman, Michael P. (2008) "The Case for Parental Access Guidelines in New York," NYSBA *Family Law Review*, Volume 40, No 2.
5. Kelly, Joan B. & Lamb, Michael E. (2000) "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children," *Family and Conciliation Courts Review*, Volume 38, Issue 3, 297-311.
6. Bauserman, R. (2002), "Child Adjustment in Joint Custody v. Sole Custody Arrangements: A Meta-Analytic Review," *Journal of Family Psychology*, 91, 91-102. [*See also* endnote 7, *infra*].
7. Kelly, Joan B. & Emery, Robert E. (2003), "Children's Adjustment Following Divorce: Risk and Resilience Perspectives," *Family Relations*, 52, 352-362.
8. *See also* Kelly, Joan B. (2002), "Psychological and Legal Intervention for Parents and Children in Custody Access Disputes: Current Research and Practice," *Virginia Journal of Social Policy and Law*, 10, 129-163.
9. 18 Misc. 3d 1123 (A) (Sup. Ct., Queens Co. 2007).
10. 44 NY2d 684 (1978).
11. 15 AD3d 406 (2d Dep't, 2005); *see also Martin v. Martin*, 113 AD2d 943 (2d Dep't 1985); *Matter of Venable*, 122 AD2d 374 (3d Dep't 1986).
12. *Wideman v. Wideman*, 38 AD3d, 1318 (4th Dep't 2007); *C.C.W. v. J.S.W*, 15 Misc. 3d 1140(A) (Sup. Ct., Monroe Co. 2006).
13. *Davis v. Davis*, 240 AD2d 928 (3d Dep't 1997).
14. *Follansbee v. Richards*, 237 AD2d 437 (2d Dept, 1997).
15. *E.S. v. R.S.*, 20 Misc. 3d 1144 (A) (Fam. Ct., Nassau Co. 2008); *In re J.J.M. v. M.E.S.*, 20 Misc. 3d 1123 (A) (Fam. Ct., Nassau Co. 2008).
16. *Zafran v. Zafran*, 306 AD2d 468 (2d Dep't 2003); *L.S. v. L.F.*, 10 Misc.3d 714 (Sup. Ct., Kings Co. 2005); *P.N. v. S.M.*, 17 Misc.3d 1122 (A) (Sup. Ct., Nassau Co. 2007); *D.Z. v. C.P., supra.* Parents may also be mandated to attend Parent Education programs (P.E.A.C.E.) 22 N.Y.C.R.R. Part 144.
17. "Guidelines for Parenting Coordination—Developed by the AFCC Task Force on Parenting Coordination" (2005) http://www.afccnet.org/pdfs/AFCCGuidelinesForParentingCoordinationnew.pdf; "8th Judicial District Guidelines for Parenting Coordination" http://www.nycourts.gov/courts/8jd/pdfs/ADR/Parent_Coord_Guide.pdf.
18. Parenting Coordination Pilot Program Implementing Guidelines, approved by Supreme Court, State of New Jersey, March 5, 2007, http://www.judiciary.state.nj.us.
19. *Ring v. Ring, supra; Martin v. Martin, supra; In re Venable, supra.*
20. Domestic Relations Law § 240(7)(f)(3)

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# Beyond Basic Equitable Distribution: Portfolio Asset Allocation in Divorce

By Scott M. Klein and Vincent Serro

The emotionally charged environment created by divorce can create hostility when making financial decisions that will affect the participants. A method to objectively make these financial decisions is to use the principles of "asset allocation" for your clients.

The matrimonial attorney can assist his or her clients, who in some cases may have never made a financial decision in their household, by encouraging them to use the principles of asset allocation. Clients who had or will be receiving growth investments by way of equitable distribution may now need income-producing securities while, conversely, others may need to generate growth from income-producing securities. These decisions can be overwhelming in a divorce case, especially for a non-titled spouse. A system of objectively making financial decisions to deliver a desired result can aid your clients in their financial lives.

Your clients probably want high return with little or no risk. Of course, this investment does not exist. One of the most popular methods of maximizing potential return while minimizing risk is asset allocation.

## Modern Portfolio Theory and the "Efficient Frontier"

Asset allocation is the process of determining what proportions of a portfolio's holdings are to be invested in various asset classes. The "Efficient Frontier" illustrates a portfolio's potential amount of expected return for a given level of risk. The more risk an investor is willing to take, the greater the expected return is to be. Modern Portfolio Theory states that it is not enough to consider the expected risk and return of one particular asset class.

By investing in more than one asset class, an investor has the opportunity to see the potential benefit of diversification—chief among them is a reduction of the risk in the portfolio. Keep in mind that diversification does not assure a profit or protect against a loss in declining market. A diversified approach to investing can help manage risk and help provide more consistent returns through all kinds of market environments.

Portfolio optimization is a mathematical technique for finding portfolios that lie along the "Efficient Frontier." When optimizing a portfolio, multiple factors are considered:

- Market expectations for return, risk, and correlation of assets
- Constraints limiting investment in particular asset classes
- Income tax rates

*"One of the most popular methods of maximizing potential return while minimizing risk is asset allocation."*

The purpose of an effective asset allocation strategy is to diversify—not just within the number of securities in a portfolio, but across different asset classes. Each portfolio can be customized based upon the financial needs of the client. When developing a customized portfolio, several questions need to be answered, including:

(1) What is the individual's risk tolerance?

(2) Will the client need the investments for current living expenses or for retirement?

(3) What income tax issues does the investor have?

4) What income tax bracket are they in and is the investor subject to Alternative Minimum Tax (AMT)?

A risk questionnaire can be use to understand the client's general attitude toward accepting investment risk, including, but not limited to, investment style, expected investment return, liquidity, and investment experience.

Knowing the client's time horizon is extremely important when it comes to choosing the type of investments and asset allocation. All things being equal, the client can afford to be more aggressive with a longer time horizon. Given a shorter time frame, it would be prudent to invest more conservatively because there is little time to make up any losses. Moreover, to properly allocate a client's portfolio, it is important to know that client's marginal tax bracket and if he or she is subject to AMT.

If, for example, your client is a non-working spouse and has a low risk tolerance and a need for additional cash flow, he or she may be better off negotiating for a greater portion of the fixed income investments, e.g., certificates of deposit, municipal bonds, corporate bonds, while accepting less of the growth stocks. According to our asset allocation models, a conservative investor may be better off with up to 72% of his or her portfolio in fixed income investments while only maintaining 10% in equities. Conversely, if your client is in need of more long-term growth, and is an aggressive investor, a greater piece of the growth stock portfolio might better serve his or her

long-term goals. Our models suggest that an aggressive individual may only allocate 5% of his or her portfolio to fixed income, while the 95% might be better served in equities. This example is for illustration purposes only and is not necessarily the correct allocation for every investor. Asset allocations will vary depending on a client's individual goals and risk tolerances.

*"Asset allocation is a time-tested approach to investing that earned Harry Markowitz a Nobel Prize."*

To view the potential success of a portfolio's asset allocation, the financial professional can "back-test" it based on a previous time frame. This tool can illustrate past performance of a proposed portfolio based upon historical data. Past performance is not a guarantee of what will happen in the future. While asset allocation does not assure a profit or protect against loss, by blending asset classes you can help reduce volatility and increase the likelihood of consistent returns over time.

Asset allocation is a time-tested approach to investing that earned Harry Markowitz a Nobel Prize. This theory can be put to work for divorcing parties when they need to make investment decisions during and after divorce so that their financial positions are maximized going forward.

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# Beyond *Graev*

By Robert Z. Dobrish and Erin McMurray-Killelea

"It Depends on What the Meaning of the Word 'Is' Is."

**William Jefferson Clinton (*Starr Report*, Footnote 1,128)**

Lawyers, generally, rely upon the common sense interpretation of terms used by them in agreements without the necessity of explaining what every one of those terms mean. We rely, additionally, on New York courts' affection for and tendency to unquestioningly honor agreements and interpret them under their plain meaning. Enter *Graev*.[1] The Court of Appeals's *Graev v. Graev* decision is a reminder to matrimonial lawyers of the myriad agreement-drafting pitfalls faced even in the agreements we know so well. The separation agreement in *Graev* provided for cessation of the wife's maintenance upon certain "termination events," among them "cohabitation of the wife with an unrelated male for a period of sixty substantially consecutive days." The agreement did not define "cohabitation." This is a word exceedingly familiar to matrimonial lawyers, the meaning of which was seldom brought into question.

Suspicious after hearing a rumor that his ex-wife was sharing her vacation home with a boyfriend in the summer of 2004, Mr. Graev hired a private detective to chronicle the couple's comings-and-goings. After confirming his suspicions, Mr. Graev ceased his support payments to his ex-wife in September 2004. Ms. Graev sought enforcement of the agreement. After a hearing, the Supreme Court ruled that the word "cohabitation" as used in the agreement included shared household expenses as an essential element of "cohabitation" and distinguished the "warm" relationship Ms. Graev had with her boyfriend from "cohabitation." Specifically, the court found that Ms. Graev and her boyfriend did not operate as an "economic unit" and were, thus, not cohabiting. On appeal, Mr. Graev maintained that "cohabitation" was an ambiguous term requiring consideration of parol evidence to determine the intent of the parties. In a 3-2 decision affirming the lower court, the First Department found that Ms. Graev's relationship was not a "termination event" contemplated by the separation and found that "cohabitation" had an unambiguous, plain meaning that contemplated an economic partnership. In rendering its decision, the First Department relied primarily upon *Scharnweber*,[2] which had held that "cohabitation" must involve financial interdependence by a couple living together. The First Department stated that in drafting the agreement the attorneys were presumed to have been aware of the case.[3] In the absence of evidence that Ms. Graev and her boyfriend were sharing expenses, the First Department found that they were not "cohabiting."

In a 4-3 decision, the Court of Appeals reversed, finding that "cohabitation" was an ambiguous term requiring extrinsic evidence to determine the parties' intent. According to the majority, "cohabitation" could mean "any number of things" and that neither the dictionary nor case law provided an "authoritative or plain meaning" for "cohabitation." Drawing upon several New York cases which addressed "cohabitation" and *Black's Law Dictionary*, the Court stated that "cohabitation" could comprise myriad non-dispositive factors outside of an economic partnership, among them a sexual relationship.

After decades of inclusion in countless separation and divorce agreements, the term "cohabitation" has been deemed ambiguous by the Court of Appeals. Could other similarly unquestioned terms be next? A sampling of New York cases reveals that "cohabitation" is not the only seemingly plain term in separation agreements that has been deemed ambiguous and litigated. Several litigants have found themselves dragged back into court to ascertain the meaning of apparently innocuous terms in their agreements, and *Graev* poses the risk of opening the floodgates for similar battles.

## Medical and Dental Expenses

Provisions setting forth responsibility for medical and dental expenses have inspired a significant amount of litigation across the state. Parties may run into trouble regardless of whether they draft such provisions broadly by providing for allocation simply of "medical expenses" or whether they narrowly categorize such expenses. In *C.F v. R.F.*,[4] the Rockland County Family Court included ophthalmological and dental expenses within the "medical expenses" a husband was responsible for in a separation agreement. *C.F. v. R.F.* distinguished a similar provision debated in *Palyswiat v. Palyswiat*,[5] which found that a father was not responsible for pediatric expenses where the provision provided only for coverage of "orthodontic, dental, and ophthalmological care." The court drew upon New York's Education Law and concluded that dentistry and ophthalmology fall within the "practice of medicine" because both diagnose and treat pain, deformities, and physical conditions and, thus, were "medical expenses." *Robinson v. Robinson*[6] used the same Education Law to exclude "family therapy" and the son's tuition in a learning disability-focused boarding school from "medical expenses" for which the father was responsible under a separation agreement.

In *Arnold v. Fernandez*,[7] the Third Department deemed orthodontic expenses "dental expenses" for which the husband bore responsibility under the parties' separation agreement. ("Orthodontics is that branch of dentistry which deals with the development, prevention, and correction of irregularities of the teeth . . . [and] are clearly dental expenses and within the plain language of the agreement.") Similarly, a husband contested his responsibility for his ex-wife's "pharmaceutical expenses" under a separation agreement in *Stewart v. Stewart*.[8] The wife suffered from spinal stenosis and, as a result, filled prescriptions for several medications, among them Milk of Magnesia, Vitamin C, cod liver oil, and Tylenol. Her doctor prescribed these over-the-counter medicines because it was far less expensive for the wife to purchase the items via prescription. The husband maintained that he was not responsible for reimbursing his wife for such expenses. Finding little help from *Black's Law Dictionary*, case law, or *Stedman's Medical Dictionary*, the court deemed "pharmaceutical expenses" ambiguous and concluded that the only "logical" definition of such expenses was for drugs and medicines available solely by prescription. The court included in its definition "peripheral items necessary to administer such medicines," such as syringes, but excluded certain medical equipment available only via prescription such as eyeglasses, crutches, and hearing aids. One might also wonder whether therapy by a social worker or psychologist would be considered a "medical expense" and under which circumstances therapy itself might be considered "non-elective."

## "Working" and "Wages"

Provisions pertaining to prosaic concerns such as employment and earnings are equally open to interpretation. *Dube v. Horowitz*,[9] permitted the use of parol evidence to interpret a provision which calculated spousal support payments based on the husband's "wages." Prior to signing the agreement, the husband requested that references to his "gross income" be substituted by "wages" and the wife agreed. When the husband retired early from his job, he stopped paying support to the wife and maintained that his pension income did not constitute "wages." The court found that "wages" included retirement income by relying on case law and the husband's expertise as a retired labor specialist and by construing the "wages" provision against the husband who insisted on the provision. *Didley v. Didley*[10] similarly deemed ambiguous a provision which obliged the husband to pay the wife maintenance for as long as he was "working." The *Didley* separation agreement provided that the wife would receive weekly income and earnings pursuant to a shareholder agreement for the company of which the husband was a majority shareholder. The wife waived maintenance so long as the settlement agreement remained in effect. Later, the company was sold and the husband became its employee. The parties entered into a modification agreement under which the husband agreed to pay the wife weekly maintenance while he was "working." The husband's employment was later terminated and he ceased paying maintenance and argued that the modification obliged him to pay maintenance only if he was "working" at the company where he was employed at the time he signed the modification. The court deemed "working" an ambiguous term and left the determination of its meaning to the lower court.

## "Full-Time Residence"

*Canter v. Canter*[11] addressed a provision in a modification agreement which required the husband to pay child support until the youngest child completed four years of college "provided she continues to maintain her full time residence with the Wife during said period." The wife sought a declaratory judgment regarding this provision, arguing that because she would maintain a full-time residence for their daughter while she was in college the husband was still responsible for child support. The husband moved for summary judgment, maintaining that he had no child support obligation if their daughter attended an out-of-town college. The court deemed "full-time residence" ambiguous and looked to correspondence between the parties preceding their entry into the modification agreement, which revealed that the husband repeatedly proposed that he pay support only if their daughter was living at home. The court ultimately granted the husband summary judgment because the wife proffered no extrinsic evidence supporting her interpretation of "full-time residence."

## "With regard to," "incidental thereto," and Other Seemingly Harmless Phrases

Separation agreements nearly always attempt to define obligations by including connective phrases such as "with respect to," "in connection with," "with regard to" and "incidental thereto." Again, such attempts can backfire. *Nirenberg v. Nirenberg*[12] deemed ambiguous a provision which stated that the parties shall bear pro rata responsibility for "any and all income taxes due with respect to such returns." The court found that one could not conclude with certainty whether the provision referred to the total annual tax obligation of the parties or the unpaid balance of taxes owed as reflected on a tax return and remitted the matter to the trial court for a hearing. Similarly, the *Robinson*[13] court, discussed *supra*, addressed the parties' dispute over whether the husband's responsibility to provide the child "with a college level education and to pay the costs incidental thereto" included covering tuition at a highly specialized boarding school. The court found for the husband and declined to infer his intention to pay tuition for specialized schooling designed to enable the child to enter college. Though *Robinson* did not deem the provision ambiguous, the parties undoubtedly spent much time and money litigating a provision

that did not provide for all contingencies. Also poised for challenge are counsel fee clauses which entitle one party to fees from the other for services "incidental" to or "rendered" and incurred "in connection with" a case. *See, e.g., Clemens v. Clemens*[14] (interpreting phrase "for all services incidental thereto" in counsel fee case).

## Conclusion

In her dissent, Judge Victoria A. Graffeo deems *Greav* as a harbinger for couples seeking to settle their differences. Judge Graffeo notes that "[t]he majority's rule creates uncertainty, making it difficult for parties to understand their obligations and responsibilities." Judge Susan Phillips Read, writing for the majority, countered that the "wisest rule, of course, is for parties in the future to make their intention clear by more careful drafting." Indeed. The decision leaves the matrimonial bar asking which other old standbys in agreements could be open to debate. Surely, simple, oft-invoked terms matrimonial lawyers include without a second thought in agreements cannot be open to interpretation. Think again. In this sense, *Graev* is merely a reminder of extant risks matrimonial lawyers face in drafting agreements with unexamined, boilerplate language. What do *Graev* and its antecedents teach us as matrimonial lawyers? That much can be left open to interpretation and that unexamined language in agreements can come back to haunt us all.[15] This poses quite a conundrum to those of us in the field who wish to draft agreements in a cost-effective manner and for our clients, who, understandably, seek finality and resolution through agreements. *Graev* opens a Pandora's box for matrimonial lawyers in that a host of oft-invoked terms in agreements could likely be found ambiguous: for example, "day-to-day," "routine" and "major" decision-making, "reasonable" visitation and attorneys' fees, "necessary" medical and mental health expenses, and "gainful" employment, to name but a few. On the other hand, perhaps *Graev*'s impact will not be as onerous as some fear. In early March 2009, the Second Department in *Kosnac v. Kosnac*[16] found clear and unambiguous a provision stating that as each child becomes emancipated "support for such child shall cease and the child support paid shall be reduced proportionally." Time will tell the extent to which Judge Graffeo's warnings are warranted.

## Endnotes

1. *Graev v. Graev*, 11 N.Y.3d 262, 2008 WL 4620698 (2008).
2. *Scharnweber v. Scharnweber*, 105 A.D. 2d 1080 (4th Dep't 1984).
3. The First Department's reliance on *Scharnweber* is questionable given that it is a 24-year-old Fourth Department case that had been cited in just four other decisions, none of which were issued by the First Department and just one of which came down in the past 15 years. *Clark v. Clark*, 827 N.Y.S.2d 159 (2d Dep't 2006), *Tricoles v. Tricoles*, 609 N.Y.S.2d 261 (2d Dep't 1994), *Salas v. Salas*, 513 N.Y.S.2d 770 (2d Dep't 1987), *Brown v. Brown*, 505 N.Y.S.2d 648 (2d Dep't 1986).
4. *C.F v. R.F.*, 671 N.Y.S.2d 925 (Fam. Ct., Rockland Co. Mar. 6, 1998).
5. *Palyswiat v. Palyswiat*, 84 A.D.2d 638 (3d Dep't 1982).
6. *Robinson v. Robinson*, 512 N.Y.S.2d 315 (Sup. Ct., Erie Co. Feb. 17, 1987).
7. *Arnold v. Fernandez*, 184 A.D.2d 805 (3d Dep't 1992).
8. *Stewart v. Stewart*, 738 N.Y.S.2d 536 (White Plains Cty. Ct. Jan. 30, 2002).
9. *Dube v. Horowitz*, 258 A.D.2d 724 (3d Dep't 1999).
10. *Didley v. Didley*, 194 A.D.2d 7 (4th Dep't 1993).
11. *Canter v. Canter*, 91 A.D.2d 1180 (4th Dep't 1983).
12. *Nirenberg v. Nirenberg*, 203 A.D.2d 980 (4th Dep't 1994).
13. *Robinson, supra,* note 5.
14. *Clemens v. Clemens*, 130 A.D.2d 455 (2d Dep't 1987).
15. There is also the danger of latent ambiguity, which courts have defined as emanating from a situation where the confusion arises not from the language, but from a future occurrence plainly not contemplated by the parties when they entered into the agreement. For example, *Lerner v. Lerner*, 120 A.D.2d 243 (2d Dep't 1986) explores the potential for latent ambiguity with respect to insurance provisions in separation agreements. The *Lerner* agreement provided for the husband's obligation to include his sons as irrevocable beneficiaries on "any and all future insurance that the Husband may take out during his lifetime . . ." When the husband died, his second wife received a check from the husband's pension plan and group-life insurance policy on which she was the sole named beneficiary. The second wife refused to distribute two-thirds of this amount to the husband's two children, arguing that the husband's pre-retirement death benefits of a pension plan were not "future insurance" contemplated by the separation agreement. The Second Department found the agreement's language facially plain, yet deemed the situation *latently* ambiguous.
16. *Kosnac v. Kosnac*, 875 N.Y.S.2d 504 (2d Dep't 2009).

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# Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

## Same-Sex Marriage Update

### Maine and New Hampshire are the fifth and sixth state, respectively, to permit same-sex marriage

Maine and New Hampshire join Massachusetts. Connecticut, Iowa, and Vermont to total six states that permit same-sex marriage.

On May 6, 2009, Maine's governor signed into law a freedom to marry bill which was approved by the House and Senate. Committed same-sex couples in Maine will be able to start getting married 90 days after adjournment of the legislative session, expected around the end of June.

On June 3, 2009, New Hampshire became the third state to move past civil unions to same-sex marriage. The Governor signed into law the bill that was approved by the state House and Senate. Gay couples can apply for marriage licenses starting January 1, 2010 when the law goes into effect in New Hampshire.

### Same-sex marriage progress in New York

On April 16, 2009, New York Governor David Paterson introduced a marriage equality bill to the New York Assembly and Senate. The Assembly passed the bill for the second time (it passed in 2007 also), and as of June 24, 2009, the bill was referred to the Senate Rules Committee. It now awaits Senate action, which was expected by the end of the legislative session in June. However, because of a stalemate on the issue, the Senate is still considering the bill.

### Massachusetts is the first state to challenge the federal Defense of Marriage Act (DOMA)

On July 8, 2009, Massachusetts Attorney General Martha Coakley filed suit against the U.S. government, the U.S. Department of Health and Human Services, and the U.S. Department of Veterans' Affairs seeking federal marriage benefits for 16,000 legally wed gay couples, claiming that Section 3 of the DOMA is unconstitutional and violates the 10th Amendment of the U.S. Constitution because it is overreaching, discriminatory and interferes with the state's authority to define and regulate marriage. (Section 3 of DOMA bars the federal government from recognizing same-sex marriages performed lawfully by states.) Currently, while the State of Massachusetts recognizes gay marriage, those couples cannot take advantage of approximately 1,100 federal rights related to marriage, including, but not limited to, equal treatment in the areas of Social Security, income tax credits, employment benefits, retirement benefits, health insurance benefits, and the right to bury a spouse in a veterans' cemetery.

**Author's note:** This is potentially a case for the U.S. Supreme Court if the Obama administration does not change the DOMA before then. The outcome of this landmark litigation could change the face of gay marriage laws forever.

## Recent Legislation

### New CPLR 5205(o), effective May 4, 2009: New exemption provisions not applicable to the collection of support

As discussed in my Winter 2009 column, effective January 1, 2009 there were many changes to Article 52 of CPLR regarding property that is exempt from the collection of money judgments. See CPLR 5205 (l) (exemption for first $2,500 in a bank account which contains funds that were directly or electronically deposited within the last 45 days) through (n), CPLR 5222 (i) (judgment debtor's banking institution account equal to or less than 240 times the federal or state minimum hourly wage, whichever amount is greater, cannot be restrained, except where the court determines that any part of said sum is not necessary for the judgment debtor and his/her dependents reasonable needs), CPLR 5230(a) and CPLR 5232(e).

CPLR 5205(o) creates an exception to this new rule for child support and maintenance collection as follows:

> The provisions of subdivisions (l), (m) and (n) of this section do not apply when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that the restraining notice or execution contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: "The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony."

See subdivision (l) for similar changes.

Likewise, the following additions mirrored CPLR 5205(o)

CPLR 2222 (k) added regarding subdivisions (h), (i) and (j).

CPLR 2222-a (i) added.

CPLR 5230 (a) amended to include such language.

CPLR 5232 (h) added (subdivision (e) amended to add similar language).

### DRL § 177 repealed and new DRL § 255 is added, effective October 9, 2009: COBRA language

DRL § 255 provides that prior to signing a judgment of divorce or separation, or a judgment annulling a marriage

or declaring the nullity of void marriage, the court shall ensure that:

1. Both parties have been notified, at such time and by such means as the court shall determine, that once the judgment is signed, a party thereto may or may not be eligible to be covered under the other party's health insurance plan, depending on the terms of the plan. Provided, however, service upon the defendant, simultaneous with the service of the summons of a notice indicating that once the judgment is signed, a party thereto may or may not be eligible to be covered under the other party's health insurance plan, depending on the terms of the plan, shall be deemed sufficient notice to defaulting defendant.
2. If the parties have entered into a stipulation of settlement / agreement on or after the effective date of this section resolving all of the issues between the parties, such settlement / agreement entered into between the parties shall contain a provision relating to the health care coverage of each party; and that such provision shall either: (a) provide for the future coverage of each party, or (b) state that each party is aware that he or she will no longer be covered by the other party's health insurance plan and that each party shall be responsible for his or her own health insurance coverage, and may be entitled to health insurance on his or her own through a COBRA option, if available. The requirements of this subdivision shall not be waived by either party or counsel and, in the event it is not complied with, the court shall require compliance and may grant a thirty day continuance to afford the parties an opportunity to procure their own health insurance coverage.

**Author's note:** Good riddance to a law that did not make sense. Practitioners should add this new COBRA language to the summons to ensure that notice is given.

### DRL § 236(B)(2) amended to add subdivision b, effective September 1, 2009: Automatic restraining orders upon the commencement of a matrimonial action

Simultaneously upon the service of the summons, the plaintiff shall serve upon the defendant a copy of the automatic restraining orders set forth in paragraph (b), which binds both parties during the pendency of the action unless modified by the parties in writing or by the court. (The plaintiff is bound by the automatic order upon the filing of the summons, and the defendant is bound upon the service of the summons.)

The automatic restraining order language is as follows:

> (1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keough accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court. (3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action. (4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical hospital and dental insurance coverage in full force and effect. (5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

## Court of Appeals Roundup

### Non-custodial parent has no control over decisions regarding child's education

### *Fuentes v. Bd. of Educ. of City of New York*, 12 NY3d 309, 879 NYS2d 818 (2009)

The non-custodial parent of a blind child who received special education services to accommodate his disability did not have the right to request a hearing under the federal Individuals with Disabilities Education Act (IDEA) to review the adequacy of those services, because the former wife had sole custody of the child and their divorce decree and custody order were silent on the issue of the right to make decisions regarding the child's educa-

tion. The court mentioned that although the non-custodial parent has the right to be informed about the child's education, unless the custody order expressly permits joint decision-making authority or designates particular authority with respect to the child's education, the non-custodial parent has no right to "control" educational decisions.

### No recoupment for maintenance payments to former wife

***Mahoney-Buntzman v. Buntzman*, 12 NY3d 415 (2009)**

The wife was not entitled to a 50% credit against equitable distribution for the husband's payment to maintenance to his former wife. *See also* ***Johnson v. Chapin***, 12 NY3d 461 (2009). The court noted in *dicta* that child support to a former spouse is also not one of those types of liabilities entitled to recoupment. "The parties' choice of how to spend funds during the course of the marriage should ordinarily be respected. Courts should not second-guess the economic decisions made during the course of a marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end."

The wife was not entitled to a credit against equitable distribution for payments made during the marriage for the husband's student loans which were taken and repaid during the marriage. Here, the husband's degree was found to confer no economic benefit, and therefore had no value. Interestingly, in a footnote, the court commented that if the student loan were still outstanding at the time of the divorce, it may have been prudent for the court to make the husband solely responsible for the repayment of said loan.

Stock in the husband's business acquired during the marriage is properly valued on the date of the divorce trial, for the purpose of calculating an equitable distribution award. Although the husband played a significant role in changing the direction of the business and in its expansion post-commencement, the appreciation in value of the stock was also due to significant contributions of others.

Where the husband received $1.8 million for the sale of stock in two corporations and reported it on the parties' joint income tax return as self-employment business income, the trial court properly exercised its discretion when it classified the money received by the husband as marital property. A party to a litigation may not take a position contrary to a position taken in an income tax return, which is a sworn affidavit.

**Author's note:** Aren't child support and maintenance obligations to a former spouse in essence a separate property debt, and if paid with marital funds, the non-obligor spouse should receive a credit? The court seems to define it as a living expense rather than a debt.

## Credits for overpayment of maintenance

***Johnson v. Chapin*, 12 NY3d 461 (2009)**

The husband was entitled to a credit in calculating the equitable distribution award for the amount that his *pendente lite* spousal support payments exceeded final spousal maintenance award. ($18,000 / mo. *pendente lite* award less $6,000 / mo. final award.) However, the husband was not entitled to a credit for child support overpayments since it is against public policy.

## Enforcement of judgments: Lien gaps

***Gletzer v. Harris*, 12 NY3d 468 (2009)**

With the amendment of CPLR 5014 in 1986, a judgment creditor can obtain a lien renewal before it expires by commencing a plenary action and obtaining a lien renewal judgment up to one year before the expiration of the ten-year lien period. If a lien renewal judgment is obtained in this manner, the lien is renewed for an additional ten-year period on the date the first ten-year period expires. In this case, because the plaintiff (judgment creditor) obtained his renewal judgment after the expiration of the first ten-year period, it took effect on the date it was issued, thus leaving a "lien gap" between the date the first lien expired and the date of the renewal judgment, even though he commenced his renewal action one day before the expiration of the first lien period.

**Author's note**: Whether you are enforcing a judgment for a client or for your own counsel fees, be aware of the expiration of the lien, and make the motion as soon as the ninth year of the judgment begins, in order to permit the court enough time to make its decision and not have the "lien gap" problem.

## Other cases of interest

### Equitable distribution of medical degree and license

***Mairs v. Mairs,* 61 AD3d 1204, 878 NYS2d 222 (3d Dep't 2009)**

The Third Department increased the wife's award of the husband's medical degree, license and practice, which were earned and developed during the parties' 20-year marriage, from 15% to 30%. While the husband pursued his studies and residency, the wife not only gave birth to the parties' seven children, but also continued to provide the principal source of the family's income. Thereafter, when the husband entered private practice in New York, the wife assisted with the management of the practice by handling billing, while at the same time continuing to commute to her job as a tenured professor at a college in Philadelphia.

The court below did not abuse its discretion by imposing a 4.2% interest rate on the amount the husband owes the wife for her share of the marital assets. In a footnote, the court noted that the court below failed to explain its deviation from the statutory 9% interest rate.

The wife's maintenance award was increased from $400 / week for seven years to $500 / week for the same period of time based on the husband's earning $300,000 per year and his high future earning potential, and the wife's earning not more than $50,000 / year, her chronic asthma and her inability to earn significantly more in the future.

**Author's note**: This case represents the largest contribution made by a spouse to the husband's medical career, and yet she was only awarded 30% of her spouse's degree or license. It appears from the recent cases that the trend is to award less than 50% of a license or degree, probably to make up for the inequity of valuing it in the first place.

### In the wake of *Prichep v. Prichep*, 52 AD3d 61, 858 NYS2d 667 (2d Dep't 2008)

As discussed in my previous columns, the Second Department in *Prichep* held that pursuant to DRL **§** 237, an application for interim counsel fees by the non-monied spouse in a divorce action should not be denied or deferred to trial without good cause, articulated by the court in a written decision "because of the importance of such awards in the fundamental fairness of the (divorce) proceedings." In my previous columns, I reported several cases that followed *Prichep*, including but not limited to ***Mueller v. Mueller,*** 61 AD3d 652, 878 NYS2d 74 (2d Dep't 2009), *$10,000 interim counsel fee award modified to $25,000*; and ***Penavic v. Penavic***, 60 AD3d 1026, 877 NYS2d 118 (2d Dep't 2009) *order deferring wife's request for $250,000 in interim counsel fees to the trial court modified by awarding wife interim counsel fees of $100,000 without prejudice to make a future application for further counsel fees.* Commencing in April 2009 and thereafter, another case, ***Meltzer v. Meltzer***, 879 NYS2d 722 (2d Dep't June 2, 2009) followed the *Prichep* principle. Judge Falanga's award of an additional $35,000 in interim counsel fees was affirmed, based on the disparity of income between the parties and the husband's obstructionist conduct.

### Modification of support

### *Awaad v. Awaad*, 62 AD3d 695, 880 NYS2d 292 (2d Dep't 2009)

Family Court's order granting the father downward modification of his child support obligations was reversed on appeal. The father's loss of employment is not enough to show a substantial and unanticipated change of circumstances. Rather, he must present evidence of his good-faith efforts to obtain new employment commensurate with his qualifications and experience.

### *Tomczyk v. Tomczyk*, 61 AD3d 1029, 876 NYS2d 726 (3d Dep't 2009)

Former wife did not have to allege a change in circumstances in order to be entitled to a hearing to modify spousal support where she alleged that she was unable to be self-supporting and is below the poverty guidelines.

### Summer camp considered as child care expenses

### *Micciche v. Micciche,* 62 AD3d 673, 879 NYS2d 502 (2d Dep't 2009)

The court below properly found that summer camp expenses for the children constituted child care expenses within the meaning of DRL § 240 (b)(c)(4), and properly directed the payor spouse to pay a *pro rata* share of those expenses . The Appellate Division cited this author's ***Cohen-Davidson v. Davidson***, 255 AD2d 414, 680 NYS2d 564 (2d Dep't 1998) which is the original case that stands for this proposition.

## Relocation

### *Impastato v. Impastato*, 62 AD3d 752, 879 NYS2d 509 (2d Dep't 2009)

The court properly denied the defendant's motion for permission to relocate to Texas with the parties' two children since she did not establish, by a preponderance of the evidence, that the proposed relocation would be in the children's best interest. Rather, the interstate move would have an adverse impact on the quality and quantity of the children's future contact with their father and would not guarantee the children any emotional, educational, or economic benefit

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A special thanks to Carolyn Kersch, Esq. for her assistance in the Recent Legislation portion of this column.

**Assistant Editor's Note:** Recent developments since this article was prepared: DRL § 236B(6) has been amended to add the loss of health insurance benefits upon the dissolution of marriage as a designated factor 11 in considering an award of maintenance. It is effective September 16, 2009 as to actions commenced after that date. Also, on the Governor's desk is S3879-A / A8888 which will, if signed, raise the combined parental income amount applied to the CSSA calculation from $80,000 to $130,000 effective January 31, 2010. So, we ask. . .has the legislature spoken on the issue of capping even though the CSSA still permits the court to address income beyond the statutory amount? Does this mean, going forward, we are using "needs" above $130,000?"

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