NYSBA SPRING 2004 | VOLUME 36 | NO. 1

Family Law Review

A publication of the Family Law Section of the New York State Bar Association

Notes and Comments

Elliot D. Samuelson, Editor

In the Absence of a License or Advanced Degree, Should the Special Skills and Knowledge of a Spouse Acquired on the Job, Which Creates Enhanced Earnings, Be Valued as a Marital Asset?

A most interesting and comprehensive decision by Justice Drager in New York County, *J.C. v. S.C.*, that appeared in the New York Law Journal on October 31, 2003 (page 20, col. 1), has caused us to revisit the ongoing vexatious problem of whether we should treat all marital litigants equally, or are we to insulate spouses who hold no license or advanced degrees from awards for enhanced earnings. Necessarily, such review must include reflections of the holdings in *O'Brien, DeJesus, Golub, Hougie, Grunfeld, Elkus* and the like.

Briefly stated, the facts of this case are relatively simple. The parties were married for 23 years, and were both 48 years old at the commencement of the action. The husband acquired before marriage, but did not utilize, a CPA license in his employment as the CFO of an investment banking firm. During the marriage he acquired a Series 27 license that required one day of study to obtain, and was needed to certify certain reports in his business. (This license was not valued separately but was considered in the enhanced earnings calculation). The children were 20 and 18, and the wife was a stay-at-home Mom for most of the marriage, and had recently returned to work, earning approximately $25,000 annually, while the husband earned $600,000.

The progeny of all litigation in this field stems from the Court of Appeals decision in *O'Brien v. O'Brien*,[1] which, few legal scholars would deny, created a clever new remedy for marital litigants by either judicial legislation or utilization of a legal fiction, possibly to right a wrong the Court perceived prejudiced the wife. It is to be remembered that Loretta O'Brien was the long-suffering wife who had worked two jobs in order to permit her husband to attend medical school in a foreign country, and then was cast aside as an old shoe for another woman when her husband finally became a medical doctor. In order to give her a share in the husband's future earning prospects as a physician, the Court reasoned that there had to be something of value to be evaluated. It then explained that such thing of value could be either tangible or intangible property, and went on to carve out a remedy for Mrs. O'Brien to receive the value of her husband's medical license based upon the skill he obtained at medical school that would afford enhanced earning potential for the rest of his professional career, albeit that the license could not be sold and had no extrinsic value.

Our high Court had the opportunity to revisit this determination that a medical license was such a thing of value to create enhanced earning capacity in both *DeJesus* (holding that marital property should include a wide range of intangible assets), and the *Grunfeld* case (permitting both a license and a law practice to be evaluated, reaffirming its position in *O'Brien*), but held fast

Inside

to its initial determination. Since *O'Brien* the evaluation of a professional license which produces enhanced earnings has been expanded to include advanced degrees, goodwill, celebrity status, and recently Series 7 licenses, all categories sharing the common thread that the recipient acquired special skills and knowledge while attending school that provided the basis for obtaining enhanced earnings, i.e., the ability to generate greater income than a similar employee without such special skills and training.

"It is time that the courts should recognize that to deny evaluation of the skills and knowledge that produce enhanced earnings by the spouse who did not sit in a classroom . . . but nevertheless acquired the same education, skills and knowledge from on-the-job training and exposure in the workplace, denies justice to such litigants."

Justice Drager recognized these concepts when she mused, "Moreover, even if the court were to find that he acquired something of value that can be translated into property, the wife failed to prove the value of such property." However, later in the decision, specifically finding that the husband was an exceptional wage earner, the Court determined that such holding does not automatically result in the finding of the existence of an asset which must be valued and distributed. Put another way, the Court seemed to be hedging its bets, suggesting that the Court might be willing to find the husband enjoyed substantial enhanced earnings, but it could not do so because the expert witness failed to give sufficient testimony to justify such conclusion. In this regard, telling is her conclusion that ". . . the court finds that the husband is an exceptional wage earner, but further finds that there is no component of his career, derived during the marriage, that constitutes a thing of value affording him an enhanced earning capacity." And therein lies the rub.

Justice Drager reviewed at length the decision in *Golub v. Golub*,[2] noting that Justice Silberman called for an even more expansive view of *O'Brien* when she wrote that, ". . . the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution." Drager tacitly acknowledged this was the right direction to be followed and she left little doubt of such feelings when she included in her decision the following observation:

> Finally, although this court found the husband's career did not create an enhanced earning capacity, the husband will benefit for years to come from the progression of his career that occurred during the marriage. The wife may receive some of the benefit of his career in the form of maintenance. However, this court finds that, in equity, it is appropriate to take this fact into account in the distribution of the assets of the marriage.[3]

It appears that the court was conflicted by the prejudice that would befall the wife since she failed to value his enhanced earnings, and the corresponding benefit to the husband whose enhanced earnings were not distributed in equitable distribution. The court earlier noted that the wife's forensic accountant failed to specify the skills that enhanced the husband's earning capacity. Yet, the accountant did testify that the *husband had gained knowledge during his 20-year work history and on-the-job training, and that it was such skills and training that should be valued*. The accountant then concluded, despite the court's opinion that such conclusion constituted circular reasoning, that it was the husband's ability to earn a greater income than others holding a similar position that really constituted the asset. In reaching this conclusion, the accountant considered the Series 27 license "implicitly" in the calculation of enhanced earnings, but this was not an integral part of his evaluation, or even necessary to reach the conclusion that the absence of a license or advanced degree was not a deterrent to reach his findings.

Interestingly, before finishing its decision, the Court acknowledged the holding in *Hougie v. Hougie*[4] that seemed to rule that a license or advanced degree was unnecessary to value an investment banker's skills and experience that created enhanced earning capacity. Justice Drager seemed to imply that it was not the investment banker's skills that created the asset, but rather the enhanced earning capacity, and concluded that:

> The determination that a spouse is an exceptional wage earner should raise a warning flag that there may be something of the person's career subject to evaluation, irrespective of whether that person holds a license or not. However, the determination that a spouse is an exceptional wage earner does not automatically result in the finding of the existence of an asset subject to distribution.

It is time that the courts should recognize that to deny evaluation of the skills and knowledge that produce enhanced earnings by the spouse who did not sit in a classroom for a year or more in acquiring an MBA degree, for example, but nevertheless acquired the same education, skills and knowledge from on-the-job training and exposure in the workplace, denies justice to such litigants. The spouse of such persons must not be treated differently from the spouse of a license or degree holder, otherwise, a person married to such a spouse will be severely prejudiced financially as long as the *O'Brien* doctrine remains the law in New York State. And, this is true apart from the constitutional equal protection argument that can be made. Why should knowledge acquired by the reading of books and the listening to lectures by professors be favored over knowledge obtained by the reading of books outside the classroom, the discussions with superiors and participation in actual business activities and commercial transactions in the workforce? It would seem to this writer that the latter experience is far superior to the academic one, and if the degree and license must be valued, then too must the skills, experience, and on-the-job training acquired during the marriage which produces enhanced earnings, which must similarly be valued. That is the thing of value that *O'Brien* required.

We look forward to the Court of Appeals' next opportunity to either rectify the injustice to the husband or wife of an unlicensed or non-degree exceptional wage earner, or the reversal of *O'Brien* and elimination of the enhanced earning doctrine.

Endnotes

1. 66 N.Y.2d 576 (1985).
2. 139 Misc. 2d 440.
3. DRL 236(B)(5)(d)(13).
4. 261 A.D.2d 161 (1st Dep't 1999).

Mr. Samuelson is a partner in Samuelson, Hause & Samuelson, LLP in Garden City, New York and a past president of the American Academy of Matrimonial Lawyers—New York Chapter, and is listed in *The Best Lawyers in America.*

The License, the Practice and the Wizard of Oz (Part II)

By Stuart A. Gellman

When we last visited,[1] we compared the differences utilized in evaluating both businesses and enhanced earnings. We spoke of the inherent disparity when each of these assets has been valued in the past by the courts for purposes of equitable distribution.

The premise was that, for the most part, academicians and the courts are not so much in disagreement with the methodology utilized in valuing ongoing businesses or even professional practices. Ultimately a multiple will be applied to the entity's excess earnings, which might be anywhere between 1 and 6, depending on the nature of the business or whether the marital asset may be a professional practice. But in valuing an enhanced earnings attainment, experts and courts carry out these excess earnings for an entire working career, ending usually at an age of 65 or somewhere close thereto. These extensions of years can oftentimes reach 20 and possibly even 30.

It is this author's opinion that the events that lead to a business being valued for purposes of equitable distribution should be, in substance, no different than the events leading to the attainment of a professional degree, license or certificate. And yet the precedent of *O'Brien v. O'Brien*[2] has strangled courts and its advocates with a methodology that remains substantively the same to this day. I had suggested that the variance was not likely to be resolved by the courts insofar as altering the position that enhanced earnings attainments were marital property. Nor was it likely to be resolved by the legislature, at least not in the immediate future. I left you with the thought that there was a realistic solution to the problem that addressed not only the concern of my previous article, but also, ancillarily, the frailties associated with distributive awards of enhanced earnings generally.

The solution to which I refer is the case of *R.R. v. P.R.*[3] Here, the husband's specialty in anesthesiology was valued by the wife's expert utilizing a typical *O'Brien* approach that deviated little, if at all, from valuations presented to courts over these past several years.[4] This Court, however, rejected this approach in toto, with the most captious language against *O'Brien* that this writer can recall since it was decided. Justice Marylin Diamond, in her decision, stated: "While defendant's expert's methodology may be routine, this Court has no confidence in its accuracy or predictive quality in this case. The tort analogy adopted in O'Brien is fundamentally flawed in equitable distribution cases involving valuation of a career in its infancy."[5]

Given the Court's further inferences in its decision, it is the belief, and certainly the hope, of this author that Justice Diamond would apply her same methodology to other enhanced earning cases where the attaining event was not nearly in its infancy. It would seem to me that the lack of competence that she had espoused against prognostications rather than reality would be equally applicable.

In essence, the Court ordered that a certain percentage of Dr. R. 's income, after reductions for spousal and child support as well as the consideration of tax consequences, would be payable *as a distributive award* to Mrs. R. over a 15-year period of time.

Before proceeding with the analysis that makes this case somewhat monumental in stature, the obvious question is how a trial court can seemingly dilute if not obliterate the finding of the Court of Appeals in *O'Brien.* It is suggested that it has not.

Let us not forget the meaning of *O'Brien.* It stands for the proposition that a professional degree or license is marital property. It does not stand for an absolute affirmation of the methodology of valuation that was presented to it. Remember that in *O'Brien,* Dr. O'Brien presented no evidence of the worth of his medical license. His argument was restricted to the concept that the license itself should just not be marital property. The only valuation before the Court came from the wife's expert, which valuation was found to be acceptable by the Court. The key word here is "acceptable." Had a totally different methodology been presented to the Court that too formed a somewhat logical, quantitative conclusion to the issue, it is very probable that that also would have been accepted and perhaps, as strange as this may be to ponder, even followed to this day rather than the methodology that is currently used. The Court of Appeals in *O'Brien* tells us that the methodology presented was an acceptable, but not *the* means of valuing an enhanced earnings event. Justice Diamond, in her admonition of *O'Brien,* was not critical in its holding. She too held that Dr. R.'s attainment was marital property and in fact structured a distributive award that set forth her perception of the value and distribution of that attainment. Her criticism was directed toward the methodology adopted by previous courts and its continued application today.

As an aside, it should be noted that the methodology that was adopted in *O'Brien* remarkably remains sub-

stantially unchanged to this day. Yes, it has been tweaked now and then. Experts have added a mortality computation and have from time to time altered the original 3% discount rate. But for the most part, the methodology over these years has remained substantially unchanged. Why? Because it's easy; because it's exacting; and because courts and experts are reluctant to embody a change that holds little likelihood of success. After all these years, Justice Diamond has finally presented us with a more creative way to distribute an enhanced earnings event. For informational purposes, for those who may doubt the ability of this case to withstand judicial scrutiny, it has in fact been affirmed by the Appellate Division, First Department.[6]

Let us now analyze what Justice Diamond has accomplished, not only as it relates to the initial premise of this article, but perhaps, even more importantly, to certain ancillary issues that may result in even greater impact.

1. Reduction in the Years Within Which the Attainment (Distributive Award) Is Paid

Dr. R. was 34 years old at the time of the trial. The premise of this article is that a distributive award based upon an enhanced earning event should be treated no differently, as to the number of years that it is valued, than a distributive award based upon the valuation of a business. Were that to be true, the enhanced earnings would be carried out perhaps 4–6 years, with the non-titleholder sharing an appropriate percentage of those earnings, and any future earnings beyond those years would belong to the titleholder. In the instant case, had the typical *O'Brien* analysis been accepted by the Court, the enhanced earnings could have been projected out some 31 years (age 65 less Dr. R.'s age at trial). Justice Diamond only ordered a payout on income earned over a 15-year period of time. Quite an improvement. But perhaps this 15 years is even less.

Had the usual *O'Brien* analysis been utilized, a large percentage might well have been ordered. Remember in *O'Brien* itself, 40% of the value of the attainment was ordered to be paid in the form of a distributive award to Mrs. O'Brien. Here the percentages of income constituting each yearly payment were graduated, depending on the amount of earnings. It varied from a low of 15% to a high of 32.5%, and this was after credits for spousal and child support and the impacting of income taxes. In essence then, when you consider the fact that a lower percentage was being paid by the titleholder, that would equate itself to an even smaller number of years when compared to the payout pursuant to a typical *O'Brien* analysis. It is the belief of this author that 15 years is still too long, but when compared to working lives of a profession in its infancy, it is a hearty step in the right direction.

2. The Consideration of Mortality and Disability

Let us consider mortality first. Most experts utilize tables which discount future earnings based upon mortality. For example, when evaluating the earnings for the year the titleholder becomes 50 years of age, in Dr. R.'s case we would ask what the likelihood would be that a 34 year old male would live until age 50. The answer, utilizing insurance tables, is 96.5%. Therefore, the total projected earnings for age 50 would be discounted by 3.5% for purposes of mortality. This discount would be calculated for each year, with the discount being greater as the titleholder became older. Wonderful! Tell that to the titleholder's heirs if he or she unfortunately died before attaining the age of 65 and the estate was saddled with the remaining payments of the distributive award. The mortality projection as utilized in the typical *O'Brien* analysis, from a pragmatic standpoint, is slightly short of incredulity. Justice Diamond's methodology, however, deals with a yearly payment premised upon Dr. R.'s actual earned income. If Dr. R. were not living, there would be no earned income, and therefore no payment at all. In her methodology, mortality is finally treated in a totally realistic fashion as against being premised upon some small discounted projection.

As to disability, Justice Diamond's decision is even more poignant. The typical *O'Brien* analysis does not consider disability for there are no reliable statistics that would be of aid. Experts can increase the discount rate somewhat, but this is just as ineffective as the mortality discount. Judge Meyer, in his concurring opinion of *O'Brien,* evidencing his concern with this issue because he knew that distributive awards would not be modifiable, wrote as follows:

> The equitable distribution provisions of the Domestic Relations Law were intended to provide flexibility so that equity could be done. But if the assumption as to career choice on which a distributive award payable over a number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hands), it should be possible for the court to revise the distributive award to conform to the fact . . . .

What if the surgeon lost the use of his or her hands or eyes? What recourse was available to them if a distributive award had already been ordered by the court? None. But in Justice Diamond's decision, again, each year's payment is premised upon Dr. R.'s income. If Dr. R. could not earn the money because of disability, the annual payment would reflect that event. Disability, or its potential impact on earnings, is thus also and finally treated in realistic fashion.

3. Distributive Awards—Are They Now Modifiable?

And to save the best for last. Although there have been intellectual comments that pose cogent arguments that distributive awards might be modifiable,[8] we know at the present time that they are not.[9] And although we discuss here the possible hardship that may result from adhering to that strict rule, its existence lies in the premise that to do so would effectively undermine the finality of judgments in matrimonial actions. Justice Sullivan articulated this in *Greenwald* v. *Greenwald:*[10] "The reason for the rule is clear. Recognition of such changes to effect a modification of the distribution 'would effectively undermine the finality of judgments in matrimonial actions.'"

In going back to the concerns of Judge Meyer in *O'Brien,* and his knowing that the Court's hands would be tied when being asked to restructure a distributive award when events dictated such a result, let us ask first just when distributive awards arise in the first place. They do so primarily when there is a business or an enhanced earning attainment that cannot be shared with the non-titled spouse for practical, legal or liquidity reasons. Therefore, the non-titled spouse obtains a distributive award for their share of that asset. Should the underlying facts that resulted in the valuation and ultimate distribution of that asset prove untrue at some date in the future, that could not be altered. But has not Justice Diamond just reversed all of this? It is suggested by this writer that she has. If Dr. R. died or was injured, or was subject to any other income-reducing event, his earnings in turn would be reduced, which in turn would reduce his obligation as it relates to his yearly distributive award payment. And the beauty of this result is not only the result itself, but the fact that its implementation would occur without the necessity of judicial intervention, the underlying reason for the rule itself in the first place (see the language of Judge Meyer, above).

Conclusion

So where does this leave us? In far better shape than we had been before. With Justice Diamond's decision, we are no longer subject to the burdensome and unrealistic extensions of time that deal with work life tables and ages of retirement. They have been replaced by a more realistic number of years that are not subject to the aforementioned intransigent rules. We further have mortality and disability treated as a real rather than a speculated event. And lastly, we may finally have found the means, at least until the legislature speaks otherwise, to disassemble the ironclad rules relating to the modifiability of distributive awards and to structure them not on the projections or guesses of experts, but on the basis of real life events.

In the instant case, there was a concern whether or not Dr. R. would be able to pass his exams to become a Board Certified anesthesiologist. Instead of being bound by income projections that may or may not come true, if he did not reach that attainment, the distributive award structured by Justice Diamond would not saddle him with unrealistic payment obligations. If he did pass those exams, and his career flourished, his wife would share in the success to which she had clearly contributed.

Equitable distribution was not meant to be a crap game in which there would be winners and losers. We seek fairness in the distribution of marital assets. Remember the words of Justice Sullivan in *Harmon v. Harmon,*[12] where the distribution of a professional law partnership was at issue, when he stated: "The valuation of a marital asset, particularly an intangible asset such as an interest in a professional partnership, must be founded in economic reality."[13]

Those words are no less appropriate when valuing and distributing enhanced earnings attainments earned during the course of the marriage. Justice Diamond has given us the foundation from which we may, at long last, build upon and extend this concept of economic reality.

Endnotes

1. NYSBA Family Law Review, Volume 35, No. 2, Fall/Winter 2003, at 19.
2. 66 A.D.2d 576, 498 N.Y.S.2d 743 (1985).
3. N.Y.L.J., May 25, 2000, New York County, Supreme Court, page 28, column 5.
4. This approach was set forth in detail in The License, the Practice and the Wizard of Oz, Part I, NYSBA Family Law Review, Volume 35, No. 2, Fall/Winter 2003, at 21, column 1.
5. *R.R. v. P.R., supra,* at 29, column 4.
6. *R.R. v. P.R.*, 298 A.D.2d 169, 748 N.Y.S.2d 474 (1st Dep't 2002).
7. *O'Brien, supra,* at 751.
8. Leonard Florescue, *Distributive Awards and Enhanced Earnings or Licenses*, N.Y.L.J., April 18, 2003, page 3, column 1.
9. Elliot D. Samuelson, Letter to the Editor, Response to Leonard Florescue's article in note 8 *supra*, N.Y.L.J., May 2, 2003, page 2, column 6.
10. 164 A.D.2d 706, 565 N.Y.S.2d 494 (1st Dep't 1991).
11. *Greenwald, supra,* at 504.
12. 173 A.D.2d 98, 578 N.Y.S.2d 897 (1st Dep't 1992).
13. *Harmon, supra,* at 902.

Stuart A. Gellman is an accountant and attorney in Buffalo, New York, and an adjunct professor of law at the State University of New York at Buffalo, School of Law, where he teaches a course entitled "The Financial Aspects of Matrimonial Law." He lectures frequently and is an author on issues involving the valuation of closely held corporations, professional practices and licenses, and testifies to same in equitable distribution cases.

Maximizing Child Support Awards

By Donald M. Sukloff

While the computations of child support under the Child Support Standards Act (CSSA) are presumptively correct,[1] they represent a minimum standard.[2] Since they are minimum standards, it should be less difficult to increase than to decrease. Few can disagree with the enhanced needs of children in this affluent if not pampered society, nor with the diminished standard of living suffered in a marital break-up. Therefore advocates should not be content to obtain a minimum result when there are many opportunities for exceeding the guidelines.

There are three ways provided to increase the child support award: first, by ascertaining an increase to the income shown; second, by allocating a portion of non-recurring payments from extraordinary sources in a manner determined by the court; and third, by utilizing the "f" factors[3] to justify an increase over the statutory calculated amount. The latter two must be preceded by a finding that the calculated child support is unjust or inappropriate, and the court must set forth the factors it considered and make the award.[4]

Putting aside imputed income and perks (a subject by itself), let us consider these techniques.

I. Enlarging Claimed Income

Non-Income Producing Assets

Certainly it is unfair to ignore substantial assets owned by the non-custodial parent, and confine the child support computation to his or her modest income. The precursor for dealing with this situation was the pre-CSSA Court of Appeals case of *Kay v. Kay*,[5] holding that an award of maintenance and child support may exceed the payor's income where his capital resources (low-dividend-paying IBM stock) could be reasonably used to earn more.

By the same token, where the father received an $8,500 personal injury settlement, owned two vehicles valued at $16,000 and $14,000, owned a residence with an equity of $79,000, an $8,000 building lot, and a $5,000 IRA, the Court properly considered these non-income producing assets in awarding child support of over $90 per week on his disability income of $170 per week.[6]

Money, Goods and Services by Relatives and Friends

The court may consider sums of money from the parents as income in calculating the child support obligation.[7]

Self-Employment Deductions

With rare exceptions, the self-employed non-custodial parent presents numerous opportunities to add to or adjust reported income. The court has considerable discretion to attribute income to a parent regardless of the tax return.[8] Thus, where the non-custodial parent attempted to deduct losses from side businesses and rentals, the court declined to do so.[9] Also the courts have tended to ignore depreciation deductions as having little bearing on the real ability to pay support,[10] even though the statute seems to limit the exempt depreciation to that greater than on a straight-line basis.[11] Telephone and truck expenses utilized for personal as well as business expenses may be disallowed.[12]

"Few can disagree with the enhanced needs of children in this affluent if not pampered society, nor with the diminished standard of living suffered in a marital break-up."

In *Murphy-Artale v. Artale*,[13] the husband's tax return was suspect because he had control over reported income. The court therefore applied the formula to his average reported income for the previous five years. In *Barber v. Cahill*,[14] the court disallowed a plumber's depreciation, but did allow other business expenses where there was no showing that they were not actually incurred in the business.

Tax-Free Income

Tax-free income is reported on federal and state tax returns. Because child calculations are based on before-tax income, these amounts should be enlarged to the amount of taxable income that would produce the same amount.[15]

Most Recent Federal Tax Return or Current Income

Although the statute refers to the most recent federal tax return for ascertaining gross income, the courts are not prohibited from relying on current information. Thus where the non-custodial parent's income was substantially higher at the time of trial, the court should utilize that income rather than the most recent tax return.[16] On the other hand, a claim of reduced income from the most recent tax return can be ignored where

the parent has obvious control over his income and manipulated it at the time of trial.[17] Likewise, where there was no evidence that the medical condition that diminished the present income would cause a permanent reduction of income, the court used the most recent tax return.[18]

Maintenance Deduction

Beware of blindly deducting party spouse maintenance from gross income on the child support computation without proof that there is compliance with DRL § 240(1-b)(b)(5)(vii)(C). It is essential that there be a provision for a specific adjustment in the amount of child support on termination of maintenance before such a deduction may be made.[19]

Sporadic Income

Frequently the claim is made that the past bonuses, options, special perks, etc. are at best uncertain, unpredictable, and probably discontinued. In *Worsnop v. Worsnop*,[20] the defendant received sporadic and unpredictable income from certain stock dividends in the family business. The court treated this as income subject to child support computations, "if and when such income is received."[21]

II. Non-Recurring Payments from Extraordinary Sources

A non-recurring payment as a source of child support is treated differently. Instead of adding this payment to income, a proportion of it may be allocated to child support to be paid in a manner determined by the court.[21] However, the allocation must be preceded by a finding of "unjust and inappropriate."[22] Specifically excluded from being non-recurring payments, are payments that are otherwise considered as income.[23]

Inheritance

In *Bryant v. Bryant*,[24] the Third Department did not agree with the lower court's award of $100,000 based on an inheritance of $400,000 because the proof was not substantiated nor did the court consider tax consequences. (Apparently the trust would have to liquidate property). The issues were returned to the trial court with instructions that a lump sum payment is permissible, but that the court must first determine whether an award would be "unfair or unjust" considering the basic child support already imposed. Once the court determined that an additional award is merited and a lump sum appropriate, then the court must consider the impact on the payor and how to fashion it, "and whether here the award can be fashioned in a manner as to avoid invading the principle." In a footnote, the court indicated it would look with disfavor on an outright grant of funds to this petitioner.

In *Cody v. Evans-Cody*,[25] the court held that where a strict application of the guidelines will produce unjust or inappropriate results, the court may treat an inheritance as an available resource and award additional child support. In that case, the non-custodial parent moved to Arizona and used her inheritance to buy a mobile home and 25 acres. Because the money was spent, she claimed she could not pay additional child support. The Second Department concluded that the inheritance should be considered in determining the child support obligation notwithstanding her dissipation, and ordered an increased amount. "The respondent's voluntary choice of placing her inheritance in non-income producing assets does not result in exclusion of those assets from consideration of the child support equation."[26] The inheritance must be actual, not prospective.[27]

Lump Sum

A father received a $250,000 lump sum payment from his former employer which the father claimed was "seed" money for research and development. However, it ended up in his personal investment account. The court affirmed the inclusion of this lump sum as an asset available for child support. By doing so, the entire $250,000 was added to his income. The court applied the basic child support obligation to the first $80,000 and utilized 25 percent of the additional income over $80,000 as having been the previous unchallenged amount to be considered for child support.[28] Also in *Wiltsie v. Wiltsie*,[29] the court included a taxable lump sum pension payment in the child support calculation. On the other hand, a father satisfied the court that the income from the sale of his dental practice should not be used in the calculation of his pro-rata share of college expenses.[30] There the court affirmed the lower court's determination not to add non-recurring income from the sale of the father's dental practice to the adjusted gross income to calculate his pro-rata share of college expenses on the basis that there was credible evidence in the record to support this determination.

Torts

A tort recovery may be treated like an inheritance, namely as an additional resource to justify additional child support, especially where there is a structured settlement.[31] In *Erie Co. DSS v. LaBarge*,[32] the court in its discretion refused to consider a $1.3 million personal injury award for additional child support because income from the award was included in the income subject to calculation.

III. "f" Factors

Financial Resources of the Parents and Child

Resources have been deemed to include "everything available to support the child."[33]

Certainly it would be unjust and inappropriate to have child support computed on smaller earnings where the non-custodial parent had substantial assets. Thus in *Webb v. Rugg*,[34] the payor showed wages of only $6,900 for five months, but had savings of $15,000, a Corvette valued at $12,000, mutual funds yielding $2,000 annually, and a recent business investment of $50,000. Child support of $250 per month was deemed appropriate. In addition, where the non-custodial parent's income is substantially greater than the custodial parent, a statutory allowance of child support may be unjust and inappropriate.[35]

Other potential financial resources to be considered could be the paramour or present spouse's resources; or a lavish life style showing greater income than reported.[36]

Physical and Emotional Health of Child and Special Needs and Aptitudes

In *Daniels v. Daniels*,[37] a substantial deviation upwards was based on a seriously handicapped child. Moreover, the substantial maintenance and equitable distribution awards compensated for the limited duration of child support. In *Wacholden v. Wacholden*,[38] the court awarded two-thirds of a gifted child's figure skating expenses.

Standard of Living the Child Would Have Enjoyed

This should be contrasted with the maintenance guide of the standard of living established in the past during the marriage.[39] This factor was emphasized in *Anonymous v. Anonymous*,[40] and provides a basis for a continuing review. The Third Department has held that the court may consider the future earning capacity on whether to deviate.[41]

Non-Monetary Contributions

Such dedications of time to transportation, extracurricular activities, homework, health professionals, etc., can be not only expensive, but time-consuming. Where the custodial parent does it all, these contributions may be considered in fixing additional child support. This is especially true where the custodial parent sacrifices his or her earning potential to have time for the children. It would seem that this is an often-neglected factor.

Any Other Factors

This item challenges the imagination to convince the court that the particular factor is relevant. Consider such proof as prior inequality or unfairness in child support payments, a cessation of extra benefits previously relied on, a bankruptcy freeing up available monies, a sudden unanticipated child expense, etc.

Conclusion

There are many fact patterns where child support should not be based on claimed income or limited to the calculations under the Child Support Standards Act. Because of the mandatory requirement of showing the pro-rata share of the child support obligation is unjust or inappropriate, the practitioner would be well advised to prepare the client and specifically ask why the calculated child support amount would be unjust or inappropriate!

The statute affords the advocate many opportunities to maximize child support. It is urged that a studied application of these provisions can be of inestimable benefit to the child.

Endnotes

1. FCA § 413(1)(h) (author's note: rather than use both Family Court Act and Domestic Relations Law Act sections, only the Family Court Act sections are used).
2. L. 1989, ch. 567, sec. 1.
3. FCA § 413(1)(f).
4. *Copeland v. Evans*, 181 A.D.2d 1062 (4th Dep't 1992); *Gentner v. Gentner*, 289 A.D.2d 886 (3d Dep't 2001).
5. 37 N.Y.2d 632 (1975).
6. *Ogborn v. Hilts*, 262 A.D.2d 857 (3d Dep't 1999).
7. *Mellen v. Mellen*, 260 A.D.2d 609 (2d Dep't 1999); *Wildenstein v. Wildenstein,* 251 A.D.2d 189 (1st Dep't 1998); *Lapkin v. Lapkin*, 208 A.D.2d 474 (1st Dep't 1994); *Carlson-Subik v. Subik*, 257 A.D.2d 859 (3d Dep't 1999).
8. *Blaise v. Blaise,* 241 A.D.2d 680 (3d Dep't 1997); *Liebman v. Liebman*, 229 A.D.2d 778 (3d Dep't 1996).
9. *Gallagher v. Flattery*, 220 A.D.2d 867 (3d Dep't 1995).
10. *Mireille v. Ernst*, 220 A.D.2d 503 (2d Dep't 1995); *Barber v. Cahill*, 240 A.D.2d 887 (3d Dep't 1997); *Calabresa v. Johnstone*, 274 A.D.2d 971 (4th Dep't 2000).
11. FCA § 13(1)(b)(5)(vi)(A); *see Frankel v. Frankel*, 287 A.D.2d 686 (2d Dep't 2001).
12. *Haas v. Haas*, 265 A.D.2d 887 (3d Dep't 1999).
13. 219 A.D.2d 587 (2d Dep't 1995).
14. 240 A.D.2d 887 (3d Dep't 1997).
15. *Mitchell v. Mitchell*, N.Y.L.J., Sept. 16, 1996; *Simeon v. Simeon*, N.Y.L.J., Dec. 14, 1989.
16. *Pauk v. Pauk*, 232 A.D.2d 386 (2d Dep't 1996).
17. *Malatino v. Malatino*, 185 A.D.2d 605 (3d Dep't 1992).

18. *Winnert-Marzinek v. Winnert*, 291 A.D.2d 921, 922 (4th Dep't 2002).
19. *Jarrell v. Jarrell*, 276 A.D.2d 353 (1st Dep't 2000); *Kissinger v. Kissinger*, 202 A.D.2d 752 (3d Dep't 1994).
20. 204 A.D.2d 624 (2d Dep't 1994).
21. *Id*. at 625.
22. FCA § 413(1)(e)(5).
23. *See Skinner v. Skinner*, 271 A.D.2d 679, 680 (2d Dep't 2000).
24. 235 A.D.2d 116, 120 (3d Dep't 1997).
25. 219 A.D.2d 27 (2d Dep't 2001).
26. *Id.* at 33.
27. *Scomella v. Scomella*, 260 A.D.2d 483 (2d Dep't 1999).
28. *Duguay v. Paoletti*, 279 A.D.2d 767 (3d Dep't 2001).
29. 245 A.D.2d 887 (3d Dep't 1997).
30. *Calman v. Calman*, 300 A.D.2d 487 (2d Dep't 2002).
31. *S.K. v. D.M.*, 171 Misc. 2d 169 (Fam. Ct. Westchester Co. 1996); *Grenier v. Breason*, 751 A.D.2d 703 (3d Dep't 1998).
32. 159 Misc. 2d 806 (Fam. Ct. Erie Co. 1993).
33. *Soc. Serv. Comm'r v. Rush*, 152 Misc. 2d 823, 826 (Fam. Ct. N.Y. Co. 1991).
34. 197 A.D.2d 777 (3d Dep't 1993).
35. *Iwahara v. Iwahara*, 226 A.D.2d 346 (2d Dep't 1996).
36. *Hoenig v. Hoenig*, 245 A.D.2d 262 (2d Dep't 1997); *Wildenstein v. Wildenstein*, 251 A.D.2d 189 (1st Dep't 1998).
37. 202 A.D.2d 862 (3d Dep't 1994).
38. 188 A.D.2d 130 (3d Dep't 1993).
39. DRU § 234B(6).
40. 286 A.D.2d 585 (1st Dep't 2001).
41. *Gray v. Gray*, 199 A.D.2d 644 (3d Dep't 1993).

Donald M. Sukloff is a partner in the firm of Sukloff & Schanz, Binghamton, New York, a former Vice President and member of the Board of Governors of the American Academy of Matrimonial Lawyers, New York Chapter; New York State Family Law Executive Committee; past President of the Broome County Bar Association; Chairman emeritus of the Broome County Family Law Committee; and is listed in *The Best Lawyers in America*.

Recent Decisions, Legislation and Trends

By Wendy B. Samuelson

New Rules for Briefs Filed in the Appellate Division

In the Second Department, effective January 1, 2004, section 670.10 was repealed and reorganized and modified into sections 670.10.1, 670.10.2, and 670.10.3. The most significant change is 670.10.3(a), relating to the formatting of briefs on a computer. A brief prepared on a computer "shall be printed in either a serified, proportionally spaced typeface such as Times Roman, or a serified monospaced typeface such as Courier." Therefore, the popular Arial font is excluded.

Pursuant to section 670.10.3(a), the point size must be as follows:

Font	Body of brief	Footnotes
Times Roman	14 point	no less than 12 point
Courier	12 point	no less than 10 point

Pursuant to section 670.10.3(a)(3), the length of the computer-generated briefs has changed as follows:

	Former Rule Not to exceed	New Rule Not to exceed
Appellant's brief	70 pages	14,000 words
Respondent's brief	50 pages	14,000 words
Reply brief	35 pages	7,000 words

Pursuant to section 670.10.3(a)(3)g, a certificate of compliance is required at the end of every computer-prepared brief, including the name of the typeface, point size, line spacing and word count. The party preparing the certification may rely on the word count of the processing system used to prepare the brief.

The First Department amended section 600.10 of the Rules of the Court (22 N.Y.C.R.R. § 600.10), effective January 1, 2004, which is similar to the Second Department's rules regarding the formats of appellate briefs.

Same-Sex Marriages

Author's Note: *I find this new trend in states granting the same rights to same-sex couples as heterosexual couples fascinating. Will New York be next?*

Massachusetts' Highest Court Strikes Down Gay-Marriage Ban

Goodridge v. Department of Public Health, Supreme Judicial Court of Massachusetts, Docket SJC-08860, November 18, 2003

In my last column, it was discussed that Vermont is the only state in America that allows same-sex civil unions pursuant to Vt. Stat. Ann. Tit. 15 Sec. 1201 et seq. It should be noted that Vermont law grants gays who form a civil union many of the legal rights of married couples without actually calling the union a "marriage."

Shortly after my column went to print, Massachusetts' highest court issued a landmark ruling that barring same-sex couples from marrying violated the Massachusetts Constitution, but stopped short of immediately allowing marriage licenses to be issued to the couples who challenged the law. The Court, in a 4-3 ruling, ordered the legislature to come up with a solution within 180 days.

The Court reasoned as follows:

> Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support. It brings stability to our society. . . . For those who choose to marry, and for their children, marriage provides an abundance of legal, financial and social benefits. In return, it imposes weighty legal, financial, and social obligations.

The Senate passed a civil unions bill in December, and asked the state's high Court to determine whether it met the conditions of the Court's November ruling. The Court rejected using civil unions as a remedy and reasoned, "because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. . . . The history of our nation has demonstrated that separate is seldom, if ever, equal."

In an attempt to defeat legal entitlement to same-sex marriages, the Massachusetts House and Senate are scheduled to meet in March for a constitutional convention to consider a proposed change in the state constitution limiting marriage to opposite-sex couples and banning same-sex marriages. Under the high Court decision as it currently stands, the nation's first gay marriages could take place in Massachusetts on May 17. It would not be until November 2006 that a constitutional amendment could be passed.

New Jersey Domestic Partnership Act (January 12, 2003)

This new bill grants unprecedented legal, health and financial rights to domestic partners, including but not limited to the ability to visit a domestic partner in a hospital, make critical health care decisions, receive sur-

vivor benefits and receive state income deductions and inheritance-tax exemptions. However, it stops short of granting gays the legal right to marry. The law will not force private businesses to offer health coverage to same-sex partners of employees but does require insurance companies to make it available.

To obtain domestic-partner status, a couple must share a residence and show proof of joint financial status, property ownership or designation of the partner as the beneficiary in a retirement plan or will.

San Francisco: Marriage Licenses Issued to Gay Couples

On or about February 13, 2004, San Francisco began issuing marriage licenses to gay and lesbian couples. Nearly 3,000 gay and lesbian couples have been married at City Hall in the period of one week. San Francisco filed a lawsuit against the state, challenging the constitutionality of a state law prohibiting same-sex marriages. Two groups opposing the gay weddings in San Francisco filed lawsuits to stop the flood of ceremonies at City Hall. On February 20, 2004, the judge denied their request to issue a temporary restraining order, declaring that there was no proof the marriages would cause "irreparable harm."

On or about February 20, 2004, a Sandoval County clerk's office granted licenses to at least 15 same-sex couples before New Mexico Attorney General Patricia Madrid issued a late-afternoon opinion saying the licenses were "invalid under state law." Time will tell how this issue will pan out in that state.

Equitable Distribution

Wife Precluded from Bringing an Equitable Distribution Action in New York Based on Vermont Divorce

O'Connell v. Corcoran, 2003 N.Y. LEXIS 3946 (N.Y. Nov. 20, 2003)

The wife was denied a divorce in New York, and ten years later, she moved to and brought an action in Vermont pursuant to Vermont's no-fault law. The wife's counsel informed the court that she was only seeking a divorce and not equitable distribution based on his erroneous belief that Vermont did not have jurisdiction over the couple's assets in New York.

Thereafter, plaintiff's former wife commenced an action in New York against her former husband seeking equitable distribution of the marital property, pursuant to DRL § 236(B)(5)(a). The husband moved to dismiss on the ground that the complaint was barred by res judicata and collateral estoppel. The Supreme Court denied the motion and the Appellate Division affirmed, reasoning that no provision was made for equitable distribution and the issue was not litigated. After a bench trial, the husband appealed.

The Court of Appeals reversed, and held that notwithstanding DRL § 236(B)(2), (5)(a), where a foreign divorce decree would serve as a bar to a subsequent action for equitable distribution brought in the courts of the decree-rendering state, the decree also had that effect in New York. The Court then reviewed Vermont law and determined that the Vermont court had personal jurisdiction over the parties and that it could have distributed the marital property, wherever it was situated. Moreover, the doctrine of res judicata in Vermont barred the litigation of the wife's property distribution claim because it could have been litigated in the divorce action. Thus, applying the principles of full faith and credit, the wife's divorce action had the same conclusive effect in New York as it did in Vermont.

Judge Smith was the only judge who dissented, and wrote a strong opinion showing the inequities of the case, including that after a 22-year marriage, and raising eight children, the 62-year-old wife received no property from the marriage, despite the fact that the husband was dead. The crux of the dissent was that the issue of equitable distribution was never litigated on the merits, and neither the defendant nor the Vermont judge challenged the assertion that Vermont did not have jurisdiction over the couple's property, and therefore res judicata nor collateral estoppel should be applied.

This decision has the effect of ensuring that future plaintiffs will either seek equitable distribution of property in the foreign state (assuming the court has personal jurisdiction over the spouse), or make it clearer than the plaintiff did in this case that the court did not wish to exercise jurisdiction over the marital property.

CFO's Large Earning Capacity Is Not a Marital Asset for Purposes of Equitable Distribution

J.C. v. S.C., N.Y.L.J., Oct. 31, 2003, p. 20, col. 1, (New York Co.) (J. Drager)

The parties were married for 20 years. The husband was the CFO for the U.S. subsidiary of a foreign investment banking firm and earned $600,000 per year. The husband passed a Series 27 exam which license was required to sign certain documents filed with regulatory agencies and to become CFO of a NASDAQ firm. To prepare for the exam, the husband took a one-day crash course, and the exam lasted three hours. The wife argued that as a result of the First Department's holding in *Hougie v. Hougie*, her husband's exceptional wage-earning capacity was converted into a marital asset for equitable distribution purposes. The court held

that although the husband's earnings increased substantially during the marriage, his career progression does not constitute marital property.

The court held that the brief summary judgment decision in *Hougie* did not offer guidance as to what components of an investment banker's career make up a "thing of value," affording enhanced earning capacity. "This court does not believe that one sentence in a summary judgment motion decision, without further elucidation, should be read as having created a new kind of asset. If so, *Hougie* could ultimately result in every career advancement, no matter what the source, being subject to equitable distribution." The court distinguished this case from *Moll v. Moll*,[1] where the court relied on *Hougie*, and held that a high-paying investment banker's book of business (client list) constituted the "thing of value" which was analogous to "good will." By contrast, in this case, the husband did not have a book of business nor was he responsible for developing new business, and he did not have an ownership interest in the business.

Agreements

Court, Not Arbitrator, Must Decide on Whether an Agreement Was Obtained by Coercion and Should Be Set Aside

***Jacob v. Jacob*, N.Y.L.J., Dec. 8, 2003, p. 20, col. 1 (Kings Co.) (J. Sunshine)**

In a case of first impression, the court ruled that the issue of whether a divorce agreement, allegedly obtained through coercion, should be set aside should not be submitted to arbitration, but must be decided by a court as a matter of public policy.

The wife sought to set aside the parties' divorce agreement and judgment of divorce on the grounds of duress and overreaching based on her allegations that the husband threatened not to give her a Get (Jewish divorce) unless she signed the agreement, the agreement was far more favorable to him, she was not represented by counsel, and the husband's income and assets far surpassed that of the wife. The agreement also provides that the parties must arbitrate all issues that arise as a result of the marriage.

The court reasoned that pursuant to CPLR § 7503, a party may resist enforcement of an agreement to arbitrate on any basis that could provide a defense to or revocation of any contract, including but not limited to duress or a violation of public policy. The legislature enacted DRL § 253 based on the public policy to prevent a spouse from the oppressive misuse and economic coercion of the refusal to supply a Get. The court reasoned that if the wife's allegations that she was coerced into signing the agreement because the husband threatened to refuse her a Get, are true, then the agreement will be set aside on the grounds of coercion. Therefore, the court must first determine the issues of fact.

Editor's Note: *This article was written on February 20, 2004.*

Proposed Legislation

Under new legislation, a recent bill has been introduced in the State Assembly by Assemblyman Adam Bradley which will amend the Family Court Act in the use of expert witness testimony in child custody and visitation hearings. The bill requires an expert to file a written report and raw data with the court 60 days prior to their testimony, and applies also to rebuttal witnesses. The court is given discretion to waive such requirements based upon the circumstances of the case.

Endnote

1. 187 Misc. 2d 770; 722 N.Y.S.2d 732 (Monroe Co. 2001).

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

MAR 01 2004

HARVEY G. LANDAU

FELLOW, AMERICAN ACADEMY
OF MATRIMONIAL LAWYERS
MEMBER, NY & FL BARS

OF COUNSEL
WILLIAM D. LONDON

ATTORNEY AND COUNSELOR AT LAW
222 BLOOMINGDALE ROAD, SUITE 301
WHITE PLAINS, NEW YORK 10605-1513

(914) 761-5200

LARISSA B. VITOLA
CLAUDINE N. BONCI
Paralegals

FACSIMILE (914) 761-5999
e-mail: landlaw@earthlink.net

February 26, 2004

Elliot Samuelson, Esq.
New York State Bar Association
Family Law Review
300 Garden City Plaza
Garden City, NY 11530

Dear Elliot:

After having yet another experience where a judge did not allow adequate opportunity for the production of a forensic expert's file prior to testifying at a hearing, I discussed the problem with Assemblyman Adam Bradley and wrote him a letter concerning the same. I am pleased to enclose a letter I received from Adam dated February 23, 2004, together with the bill that he is introducing to require that in the Family Court the filing of such reports are to be filed 60 days in advance and with the production of the witnesses' notes and raw test data, etc. This goes even further than what is currently permitted in some of the matrimonial parts of the Supreme Court. Perhaps the Family Law can write a letter to the judiciary committee in support of this bill. Hopefully you can put a brief statement in the next newsletter advising committee members of this pending legislation.

Cordially,

Harvey G. Landau

HGL:lbv
Encs.
cc: Brian J. Barney

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

ADAM T. BRADLEY
Assemblyman 89TH District
Westchester County

COMMITTEES
Children & Families
Corporations, Authorities & Commissions
Election Law
Environmental Conservation
Veterans Affairs

February 23, 2004

Mr. Harvey Landau Esq.
222 Bloomingdale Road, Suite 301
White Plains, NY 10605-1513

Dear Mr. Landau, Harvey

Thank-you for contacting my office to express your concerns regarding expert witness testimony in Family Court cases. Based on your specific recommendations, I have introduced legislation amending the family court act, in relation to the use of expert witness testimony in child custody and visitation hearings. The bill will now require expert witnesses to file a written report and raw data with the court 30 days prior to their testimony. Additionally, the provisions will apply to rebuttal witnesses as well. In both cases the courts may waive the requirements if such action would be impracticable based on the circumstances of the situation.

I have enclosed a copy of the legislation along with the bill memo for your records. I will keep you informed of the bill's progress, and would welcome any further input you would like to provide.

If I can be of any further assistance, please do not hesitate to contact me.

Very truly yours,

Adam Bradley

Hon. Adam Bradley
Member of the Assembly

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
Submitted in accordance with Assembly Rule III, Section 1(f)
Memo on original bill

Bill No. A 9785
Sponsors: M. of A. Adam Bradley

TITLE OF BILL:

An act to amend the family court act, in relation to the use of expert witness testimony in child custody and visitation hearings.

PURPOSE OR GENERAL IDEA OF BILL:

This bill amends the family court act to have expert witnesses file a written copy of their findings along with raw data available to all parties involved in the action 30 days prior to the presentation of their testimony.

SUMMARY OF SPECIFIC PROVISIONS:

Section one amends Section 624 of the family court act by adding a new subdivision (a) which requires expert witnesses to file a written report, including copies of the report and the corresponding raw data 30 days prior to when they will be presenting their testimony. Copies of the report and raw data must also be forwarded to each party of the action. The court may waive any or all of the provisions upon a finding that such action would be impracticable.

EFFECTS OF PRESENT LAW WHICH THE BILL WILL ALTER:

This bill amends the family court act to have expert witnesses file a written report with their findings, including copies of the report and raw data 30 days prior to the date which they are expected to testify. Currently, in family court cases under article 6, witnesses are not mandated to submit their findings prior to their testimony.

JUSTIFICATION:

Pursuant to the Supreme Court rules, a written report is to be filed 60 days of the date of hearing. The Family Court Act does not have such a requirement. In addition, neither the Domestic Relations Law or the Family Court Act directly address the discovery issue of the attorneys obtaining the forensic expert witness file prior to their testifying. Obviously if an attorney is obtaining the file on the day the witness is testifying it does not allow a reasonable opportunity to review the records and certainly not to consult with an outside expert in preparation of the cross-examination. In addition, the underlying data often consists of not only the doctor's notes, but the raw scores of tests usually administered by a psychologist. This information should be discoverable, and in most jurisdictions outside of New York is discoverable in these types of proceedings.

PRIOR LEGISLATIVE HISTORY:

None.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None.

EFFECTIVE DATE:

120 days after it has become a law.

At nysba.org you can . . .

❖ conduct legal research ❖ take CLE courses ❖ keep pace with the latest developments in your area of practice ❖ access member discounts and more … without leaving your desk.

Use this handy table of contents to locate key areas on nysba.org.
Simply click on each of the headings opposite a topic to reach that subject area.

Archived Content:	Bar Journal:	Attorney Resources —› Bar Journal
	New York State Law Digest:	Attorney Resources —› NY State Law Digest Online
	State Bar News:	Attorney Resources —› State Bar News
	Section Publications:	Sections/Committees —› "Section Name" —› Publication Name
CLE:	Live programs:	CLE —› Live Programs —› Schedule
	Audio Visual:	CLE —› Audio and Video Tapes —› Select Subject Area
	Online:	CLE —› Online Programs —› Available Programs
	Credit Tracker:	MyNYSBA (must be logged in) —› My CLE
Client's Rights and Responsibility:	Attorney Resources —› Clients Rights and Responsibilities	
Code of Professional Responsibility:	Attorney Resources —› Lawyers Code of Professional Responsibility (free download)	
Court Calendar:	Attorney Resources —› CourtAlert (must be logged in)	
Ethics Opinions:	Attorney Resources —› Ethics Opinions —› Choose "Opinion Number" (or use Search to find opinions by topic)	
Guide to the NYS Court System:	Public Resources —› The Courts of New York	
Handbook for Newly Admitted Attorneys:	Attorney Resources —› The Practice of Law in New York State	
Lawyer Referral:	Public Resources —› Find a Lawyer	
Legal Links:	Attorney Resources —› Legal Links	
Legal Research:	Attorney Resources —› Online Reference —› Choose Loislaw or (Free for members) Lexisone.com	
Letters of Engagement:	Attorney Resources —› Letters of Engagement	
Member Discounts:	Membership —› Member Discount Programs or Attorney Resources —› Member Discount Programs	
Pro Bono:	Attorney Resources —› Pro Bono	
Publications	CLE —› Publications	
Section Content:	Sections/Committees —› Section Name —› Section Home	
Section/Committee Rosters:	Sections/Committees —› Section Name —› Committees —› Choose Committee Name	
Helpful Hints:	Advanced Search: Enter Keywords—Click boxes next to areas of interest—Click Search	

Customizing your "MyNYSBA" page: MyNYSBA ® My Interests (Check Boxes for Areas of Interest; Select e-mail Notification of changes) —› Submit

Logging In: NYSBA Home Page (or any internal page)-Enter Username and Password-Click Login or Go (to request username and password, please e-mail Webmaster@nysba.org or follow the directions for lost passwords under Login Help.)

To submit requests for ethics rulings: E-mail ethics@nysba.org. All ethics requests must be made in writing.

NYSBA.ORG

Your convenient information source for everything legal.
One more way NYSBA members have the edge.

Start Saving Time on Document Preparation!

AUTOMATED FORMS

New York State Bar Association's Family Law Forms

Automated by HotDocs

■ AUTHORITATIVE

Developed in collaboration with LexisNexis, New York State Bar Association's Family Law Forms is the most authoritative and efficiently automated set of forms in this field. **Included are the official forms promulgated by the New York State Office of Court Administration (OCA), as well as model matrimonial law forms drafted by the distinguished Willard H. DaSilva,** a veteran matrimonial law practitioner at DaSilva, Hilowitz & McEvily LLP.

■ CONVENIENT

Enter case-specific information once and it is automatically inserted throughout the form where that information is required. After completing a form, save the data you enter into an "answer file" and use it to automatically complete other forms.

■ QUICK & ACCURATE

The forms are fully automated with industry-leading HotDocs® software so everything is complete and accurate in a fraction of the time it used to take. You can dramatically reduce your proofreading time thanks to Smart Formatting, which performs all formatting and calculations automatically.

Say good-bye to cutting and pasting, and the increased chance of error that goes along with traditional document preparation.

Now there's a better way...
the New York State Bar Association's Family Law Forms.

To order or for more information

CALL 800/582-2452
or go to www.nysba.org/familyforms.
Mention source code CL2133 when ordering.

List Price:
$339*
1 compact disc (single-user, annual subscription)
PN: 6260
Annual Renewal $276

Member Price:
$291*
1 compact disc (single-user, annual subscription)
PN: 6260
Annual Renewal $240

* Multi-user pricing is available. Please call for details.
Price includes shipping and handling.
Prices subject to change without notice.

NYSBA

Model Forms by Willard H. DaSilva

Statement of Client's Rights and Responsibilities

Retainer Letter (Separation Agreement)

Statement of Net Worth

Client/Attorney Certification

Letter to Spouse

Request for Preliminary Conference

Verified Complaint (UD-2)

Verified Complaint (Blank Form with Instructions) (UD-2)

Verified Answer (Uncontested Divorce)

Verified Answer (Contested Divorce)

Acknowledgment of Service By Attorney

Notice to Take Deposition

Statement of Proposed Disposition

Judgment (Uncontested Action)

Plaintiff's Affidavit in Support of a Judgment of Divorce and Support Collection Unit Information

Child Support Enforcement Services Affidavit

Part 130 Certification

Letter to Other Party's Attorney

Letter to Client re: Proposed Separation Agreement (Confidential)

Letter to Attorney re: Proposed Separation Agreement (Open)

Letter to Client re: Tax Consequences

Separation Agreement and Memorandum of Separation Agreement

Prenuptial Agreement

Uniform Uncontested Divorce Packet

Uncontested Divorce Packet: This Divorce Packet May Not Be For You

Introduction: What You Need to Know Before Starting Your Divorce Action

Summons with Notice (UD-1)

Summons with Notice (Blank Form with Instructions) (UD-1)

Summons (UD-1a)

Summons (Blank Form with Instructions) (UD-1a)

Affidavit of Service (UD-3)

Affidavit of Service (UD-3) (Blank Version)

Affidavit of Service (Blank Form with Instructions) (UD-3)

Sworn Statement of Removal of Barriers to Remarriage (UD-4)

Sworn Statement of Removal of Barriers to Remarriage (Blank Form with Instructions) (UD-4)

Affirmation (Affidavit) of Regularity (UD-5)

Affirmation (Affidavit) of Regularity (Blank Form with Instructions) (UD-5)

Affidavit of Plaintiff (UD-6)

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

Affidavit of Defendant (UD-7)

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

Child Support Worksheet (UD-8)

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

Support Collection Unit Information Sheet (UD-8a)

Support Collection Unit Information Sheet (Blank Form with Instructions) (UD-8a)

Qualified Medical Child Support Order (UD-8b)

Qualified Medical Child Support Order (Blank Form with Instructions) (UD-8b)

Note of Issue (UD-9)

Note of Issue (Blank Form with Instructions) (UD-9)

Findings of Fact/Conclusions of Law (UD-10)

Findings of Fact/Conclusions of Law (Blank Form with Instructions) (UD-10)

Judgment of Divorce (UD-11)

Judgment of Divorce (Blank Form with Instructions) (UD-11)

Part 130 Certification (UD-12)

Part 130 Certification (Blank Form with Instructions) (UD-12)

Request for Judicial Intervention (RJI) (UD-13)

Request for Judicial Intervention (RJI) (Blank Form with Instructions) (UD-13)

Notice of Entry (UD-14)

Notice of Entry (Blank Form with Instructions) (UD-14)

Affidavit in Support of Application to Proceed as Poor Person

Affidavit in Support of Application to Proceed as Poor Person (Blank Form with Instructions)

Poor Person Order

Poor Person Order (Blank Form with Instructions)

Post Card — Matrimonial Action

Post Card — Matrimonial Action (Blank Form with Instructions)

Certificate of Dissolution of Marriage

Certificate of Dissolution of Marriage (Blank Form with Instructions)

Notice of Settlement

Notice of Settlement (Blank Form with Instructions)

Income Deduction Order

Income Deduction Order (Blank Form with Instructions)

New York State Case Registry Filing Form

New York State Case Registry Filing Form (Blank Form with Instructions)

Child Support Summary Form (UCS-111)

IRS Forms

Request for Copy or Transcript of Tax Return (4506)

Release of Claim to Exemption for Child of Divorced or Separated Parents (8832)

Publication of Articles

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

The *Family Law Review* is published for members of the Family Law Section of the New York State Bar Association. The opinions expressed herein are those of the authors only, and not those of the Section Officers or Directors.

ISSN 0149-1431

Family Law Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155