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Notes and Comments

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Counsel Fees…Finally Recognized by the Courts to Be a Priority *Pendente Lite*

The fundamentals of justice are that no one shall suffer wrong and that the public good be served.

Cicero

On February 8, 2011, the Appellate Division, Second Department, issued its blockbuster decision in *Witter v. Daire*[1] which has served notice, in a loud and clear voice to all judges sitting in the Supreme Court who handle matrimonial litigation, that the day to deny or render inadequate *pendente lite* awards for counsel fees is now over, and that the awards must be made in responsible sums, to make certain the playing field is indeed made level.

In *Witter*, *supra*, the Appellate Division reversed an order of a Supreme Court Justice in Westchester County who only awarded the sum of $10,000 as an interim counsel fee where $125,000 in total[2] was requested and the entire $125,000 was awarded. In reaching this determination, the Appellate Court cited both *Prichep v. Prichep*[3] and *Penavic v. Penavic*[4] and reflected their classic holdings that "an award of interim counsel fees insures that the non-monied spouse will be able to litigate the action, and to do so on equal footing with the monied spouse." It went on to reflect that courts "should normally exercise their discretion to grant such relief made by the non-monied spouse." It is to be remembered that both *Prichep* and *Penavic* were decided months before the Domestic Relations Law was amended to provide a new § 237(a), effective October 12, 2010, which provides in part:

> There shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties to the action or proceedings and their respective attorneys, shall file an affidavit with the court detailing the finan-

Inside

> cial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. Any applications for fees and expenses may be maintained by the attorney for either spouse in his own name in the same proceeding. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.

This new section adopts the philosophy of the *Prichep* and *Penavic* Courts. In reality, the new legislation placed their holdings in the statutory language quoted above.

In reaching its extraordinary decision, the *Witter* Court noted that the resources available to the wife far exceeded those of the husband and his requests totaling $125,000 for interim fees was "reasonable under the circumstances," again citing *Prichep* and *Penavic*, *supra*. Although the decision did not include any financial information concerning the parties, in reviewing the record on appeal, it was ascertained that the wife had assets of approximately $11,000,000 and income derived from such assets of approximately $400,000. By contrast, the husband had negligible assets and earned income of approximately $85,000. It is important to recognize that the *Witter* husband also had joined a cause of action seeking to set aside a prenuptial agreement that the parties had executed before their marriage and both the lower and appellate courts reflected that he was not entitled to legal fees with respect to that cause of action.

The lower court bifurcated the case and remarked that the action to set aside the prenuptial should be tried first, since failure to do so would result in the parties dividing marital property according to the prenuptial terms. Despite such direction, the appellate court went on to hold that it is evident from the record that the legal fees incurred by the husband or those he will immediately incur in litigating matters other than with respect to the validity of the prenuptial agreement (i.e., equitable distribution considerations), amounted to at least $125,000.

What is most remarkable about this decision is that while the Appellate Division acknowledged that the trial court remarked that the bifurcation of these issues compelled the court to limit the counsel fee award, and that it might potentially be relevant in determining the propriety and amount of a final award of counsel fees, such facts *did not warrant the denial of the requested amounts of interim counsel fees* [emphasis supplied] in this case, again citing *Prichep*. The court expressed its reasoning in the following language:

> Although the Supreme Court, in limiting its award of interim counsel fees to the husband, deemed the litigation of such other matters to be unnecessary or premature, we note that such considerations, while potentially relevant in determining the propriety and amount of a final award of counsel fees, did not warrant the denial of the requested amounts of interim counsel fees in this case (*see Prichep v. Prichep*, 52 AD3d at 64-65). *Witter*, *supra*.

This result is truly a defining moment in applications for interim counsel fees, especially based on such facts. It is the first time that a reported case has awarded such a substantial interim counsel fee where it was acknowledged that necessity for such legal services might not even be required, and it contrasts sharply with the frequent decisions of the lower courts that routinely refer these matters to the trial court or make insignificant or inadequate awards. Moroever, the acknowledgment of the *Witter* court, that there should be serious consideration to the estimated services anticipated in fashioning such an award, is monumental in its scope.

Surprisingly, the Appellate Division did not note the recent amendment to the Domestic Relations Law § 237(a) which is cited above, in its decision, nor did it reflect on the still numerous lower courts' decisions that routinely refer such applications to the trial courts, or make a paltry award.

What a wonderful departure from the status quo. Now an impecunious spouse who is involved in substantial litigation involving valuations of marital properties, such as closely held businesses, professional practices and licenses, will be able to compete with a spouse who has already retained top flight counsel. No longer will a spouse without assets be relegated to retain less capable or inexperienced counsel. In the past, without the money to hire a comparable attorney that would match the qualifications of the other spouse's representation, severe prejudice would befall the poorer spouse. The playing field should never be returned to such a disparate condition.

The *Witter* decision also serves notice that even if a large sum of legal fees is requested, the amount of the request should not deter the lower court from granting such award, providing the supporting papers give sufficient factual predicate to determine that the amount requested is reasonable under all of the financial circumstances of the parties, and the motion is supported by financial documentation and not hyperbolic rhetoric.

In polling a substantial number of matrimonial practitioners, it was determined that only a fraction of the motions made for *pendente lite* fees in cases involving protracted litigation resulted in adequate or timely awards. In one anecdotal reference, an application for $50,000 was requested for interim counsel fees because the husband was engaged in a cash business, failed to report his true income on his tax returns, but nevertheless had annual expenditures of over $300,000 a year. It was clear that the litigation was complex and would span at least a year in duration. As such it would require a forensic accountant and expert testimony as well as the investigation of business records by the expert to ferret out fraudulent transactions and arrive at the husband's true worth of his business and his income. The motion papers reflected all of these financial facts. Yet, the court awarded but $10,000 and referred the balance of the application to the trial court.

These anecdotal references are commonplace, but all that should now change with the *Witter* imprimatur. I say this because the statutory pronouncement resolves any doubt of such result. Consider the statute's presumption that legal fees should be awarded to the less monied spouse, and must be made on a "timely basis" (see statutory reference above).

What is even more important, DRL §237(d) contains four points that the court must consider in determining interim motions: (1) the nature of the marital property involved; (2) the difficulties involved, if any, in identifying and evaluating the marital property; (3) the services rendered and an estimate of the time involved; and (4) the applicant's financial status. These four points must be exhaustively detailed in the supporting affidavits, and bolstered with financial documentation. Doing so should insure a successful result.

In the weeks to come, we will monitor the lower courts' decisions and report them to our readers.

Endnotes

1. 2011 NY Slip Op. 01018 (2d Dept, Feb. 8, 2011).
2. The sum of $100,000 was initially requested by the husband with the lower court awarding only $10,000. Thereafter, the husband moved for leave to reargue and sought an additional $25,000 in counsel fees, bring the total amount to $125,000. The court, upon granting leave then adhered to its initial award of $10,000.
3. 52 AD3d 61 (2d Dept 2008).
4. 60 AD3d 1026 (2d Dept 1009).

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The Child Support Lottery

By Robert S. Grossman

Whether consulting with a new matrimonial client, or reviewing strategy with an existing client, the subject of child support is often a topic of discussion. The question—how much? Based upon the statutory framework, the answer should be straightforward. However, in cases where the parties' income exceeds the statutory amount, presently $130,000,[1] the answer is far from straightforward.

In *Levesque v. Levesque*,[2] the Appellate Division, Second Department stated that "in high income cases, the appropriate determination under Domestic Relations Law § 240(1-b)(f) for an award of child support where parental income exceeds the sum of $130,000 should be based on the child's actual needs and the amount required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties (*see In re Jackson v. Tompkins*, 65 A.D.3d 1148, 885 N.Y.S.2d 228; *Ansour v. Ansour*, 61 A.D.3d 536, 878 N.Y.S.2d 17; *In re Vladlena B. v. Mathias G.*, 52 A.D.3d 431, 861 N.Y.S.2d 331; *In re Brim v. Combs*, 25 A.D.3d 691, 693, 808 N.Y.S.2d 735).

Generally, the court is not required to explain the reasons for its application of the statutory cap pursuant to Domestic Relations Law § 240(1-b)(c)(3) and Family Ct. Act § 413 (1)(c). See, e.g., *Michele M. v. Thomas F*.[3] Where the Court decides to deviate from the statutory computations, however, it must properly set forth the factors it considered in deviating from the statutory cap. See Domestic Relations Law § 240 (1-b)(f); *Cassano v. Cassano*.[4]

It appears that Supreme Court is vested with wide discretion to set a cap for combined parental income (CPI) when computing child support. Before being elevated to the Appellate Division, Second Department, Justice Ruth Balkin in *Beth M. v. Joseph M*,[5] held that

> Under the circumstances of this case, the Court will opt to apply the statutory percentage to the combined parental income over $80,000. There are several reasons why application of the statutory percentage beyond the basic child support is appropriate here. First, the statutory limit on basic child support does not reflect current economic reality. Not only was the basic child support cap adopted by the Legislature almost twenty years ago in 1989, but the economic reality of raising a family and living in New York has increased dramatically since then. Secondly, applying the statutory percentage to income over $80,000 is consistent with the standard of living enjoyed by the family herein. The parties' Statements of Net Worth and testimony reflect ordinary spending of well over $145,000 for combined family and housing expenses.
>
> As a third reason for the application of the statutory percentage to the total parental income, is that courts, including the Appellate Division, Second Department, have, in fact, routinely applied the statutory formula to combined parental income as high as and greater than $200,000 (see Scheinkman, New York Law of Domestic Relations, § 16.34, at 679; compare Matter of Brim v. Combs, 25 AD3d 691, lv denied 6 NY3d 713 [over one million dollars in income used for child support of $220,000 per year]; Anonymous v. Anonymous, 286 A.D.2d 585, 586, lv denied 97 N.Y.2d 611 [over $150,000 child support]; with Kosovsky v. Kosovsky, 272 A.D.2d 59, 60 [$300,000 cap on income for child support]). Here, the lifestyle established during the marriage, the standard of living enjoyed by the children, and the amounts expended on daily living are commensurate with a level of expenditure greater than that which would be possible if child support were limited to the basic child support required by statute. (Emphasis added.) *Beth M. v. Joseph M*.[6]

In *Francis v. Francis*,[7] the Appellate Division, Fourth Department, affirmed the lower court's setting of a cap of $160,000 for the combined parental income for child support computations, where the lower court set forth the factors it considered in deviating from the statutory cap, referencing Domestic Relations Law § 240 (1-b)(f) and *Cassano*.[8]

In *Kaplan v. Kaplan*,[9] the Appellate Division, Second Department affirmed Supreme Court's setting of the combined parental income for child support purposes at $300,000, and "the father's percentage obligation for child support was 100%." However, in making its child support determination, the Court noted that it was improper not to have deducted from the father's income the amount of maintenance ($90,000 per year) that he was ordered to pay to the mother [*see* Domestic Relations Law § 240(1-b)(b)(5)(vii)] and attributed further error to Supreme Court's FICA calculation. Interestingly, rather than remit the matter to the Supreme Court for a recalculation of child support, in the interest of judicial economy, the Appellate Division performed those calculations. After deducting maintenance in the amount of $90,000 and FICA in the amount of $9,768 from the Father's annual income for which a cap was set at $300,000, the Court applied

the 17% statutory rate, and concluded that the father's child support obligation should be the sum of $2,836 per month. The Court further ordered that the father's child support obligation should be upwardly modified to the sum of $4,112 per month [*see* Domestic Relations Law § 240(1-b)(b)(vii)(C)] upon termination of the father's maintenance obligation.

While the change in the cap to be applied to combined parental income effective as of January 31, 2010 provides a higher "bright line" cap for cases where the combined parental income is $130,000 or less, no such "bright line" cap exists for cases where the combined income exceeds $130,000. Indeed, the "cap" in high income cases is left to the "discretion" of each individual Judge who will presumably set a cap in each case based upon the specific facts of the case. Of course, upon the same facts, the discretionary high income cap can vary anywhere from $130,000 to $300,000 or more, in any given Court before any given Judge.

As Justice Balkin noted in *Beth M. v. Joseph M.*,[10] "… courts, including the Appellate Division, Second Department, have, in fact, routinely applied the statutory formula to combined parental income as high as and greater than $200,000."

We know what *should* happen in any given case. We know what may happen in any given case. We just don't know what *will* happen in any given case.

Welcome to the New York State Child Support Lottery.

Endnotes

1. Effective as of January 31, 2010, the statutory CPI cap for the computation of basic child support was increased from $80,000 to $130,000. DRL § 240(1-b)(c)(2). As is more fully set forth in McKinney's Social Services Law § 111-i, beginning January 21, 2012, and every two years thereafter, the combined parental income subject to the basic child support computation will increase by a percentage derived from a formula incorporating the consumer price index for all urban consumers.
2. 73 A.D.3d 990 (2nd Dept. 2010).
3. 42 A.D.3d 882 (3rd Dept. 2007).
4. 85 N.Y.2d 649 (1995).
5. 12 Misc.3d 1188(A) (Sup. Ct., Nassau Co. 2006).
6. See *supra* note 5, *id.*
7. 72 A.D.3d 1594 (4th Dept. 2010).
8. See *supra* note 4, *id.*
9. 21 A.D.3d 993 (2nd Dept. 2005).
10. See *supra* note 5, *id.*

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Divorces, Cyberspace and Discovery: Writing on a Wall May Not Be Private After All

By Amy L. Reiss, Lisa Zeiderman and Danielle Jacobs

The sources for discovery in matrimonial cases are expanding as the online universe evolves. "Social networks are booming,"[1] with "Facebook hosting more than 500 million active users"[2] and "LinkedIn attracting more than 30 million profiles of business professionals."[3] With a surge of shared professional and personal information available on social networking sites, information previously presumed private may now be fodder for discovery. According to an American Academy of Matrimonial Lawyers' study, over 81% percent of responders said they have seen an increase in the use of evidence discovered on social networking sites in family law cases during the past 5 years.[4] According to this survey, Facebook is the "unrivaled leader for online divorce evidence,"[5] divorce_evidence http://www.abajournal.com/news/article/facebook_survey_says/ (February 12, 2010), noting that 66% of those surveyed cited it as a "primary source."[6] The same survey also noted that 15% of lawyers said they have discovered evidence on MySpace and 5% from Twitter.[7]

In September, 2010, the New York Bar Association Committee on Professional Ethics determined that lawyers can ethically utilize the public pages of social networking websites to collect damaging information on opposing parties in lawsuits. The Professional Ethics Committee concluded:

> A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate Rule 8.4 (prohibiting deceptive or misleading conduct), Rule 4.1 (prohibiting false statements of fact or law), or Rule 5.3(b)(1) (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their direction).[8]

As the foregoing Committee Opinion indicates, public information on social networking sites can be collected and utilized in litigation. However, is the information that has been designated "private" by the social network site user also discoverable? As set forth below, "private" information contained on a social networking site may be discoverable provided it: a) is relevant and material to a case, b) is not mere speculation, and c) has not been gained through deception. All matrimonial litigants need to understand the ways in which information posted on social networks can be used in their divorce case.

Social Networking Sites

In the mid-1950s, long before Facebook and MySpace were conceived, sociologist J.A. Barnes used the term "social network" to "describe the physical interactions of people who have similar interests."[9] Social networking sites are now a virtual medium—an entirely new source for discovery of extremely useful information, in family law and matrimonial cases. Once the relevant social networking sites are identified, the matrimonial attorney needs to determine how to gain access to the relevant information for his or her cases, while at the same time protecting clients from becoming the victim of what he/she believes may be a gateway to building and advancing his/her personal and professional life.

Many practitioners know the names of the more popular social networking sites such as Facebook, MySpace and Twitter, but do we know what information exists on each site and how to access the information? The following is a brief synopsis of some of the more popular sites.

Facebook

Facebook is a social networking site that connects its users with friends, colleagues, and family members. Facebookers can post unlimited photos, friend thousands of individuals, update statuses, comment on other users' activities and maintain an inbox. Facebookers can share a broad range of information including their educational background, religious affiliations and preferences, relationship status, thoughts about raising children, interests, favorite movies, and quotes.

Facebook has established its own vocabulary. For example, "friending" someone means searching for a particular individual on Facebook, and clicking friend. Once the "friend" accepts the request, the two users are now "friends," thereby allowing more access to each other's profile. To "inbox" someone means sending a message that supposedly only both parties can see, "confidentially." Pictures, videos, and text can be discovered through these messages. Inboxes can occur between one and several people. Then there is "writing on someone's 'wall'" which allows the user to write a message, enabling "friends" to see it. However, if so called "friends" are viewing the message, the argument can be made that writing on the wall is not so private after all. Certainly, there is a reasonable expectation that even a friend can pass along this once private message to the public.

The privacy policy page for Facebook states that: "Facebook is about sharing information with others...."[10] The policy page also informs the user that Facebook "may

disclose information pursuant to subpoenas, court orders or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law."[11]

User settings on Facebook control how much information the user chooses to share with "friends" versus outsiders. Facebookers have the option of sharing or limiting statuses, photos, posts, bios, family relationships, email, aim, phone numbers, and addresses. Pursuant to 18 U.S.C. section 2701 et seq., Facebook advises its users that the Electronic Communications Privacy Act ("ECPA") limits Facebook from producing any "content" without notarized user consent or a search warrant.[12] "A subpoena and prior notice are needed to compel an Internet Service Provider (ISP) to turn over content information and noncontent information (such as logs and 'envelope' information from email). In addition it limits the ability of commercial ISPs to reveal content information to non-government entities."[13]

MySpace

MySpace is also a social networking site, which permits its members to create personal profiles online with the goal of finding and communicating with old and new friends. It is a self-described online community that makes it possible to share photos, journals, and interests with a growing network of mutual friends. A portal reaching millions of people around the world, the MySpace Privacy Policy pages inform the user that there may be instances where MySpace provides information about an account without the user's permission, including compliance with the law or legal process.[14]

Twitter

Twitter, an entity based in San Francisco, California, is a "real-time information network"[15] where users "tweet," updating their statuses for the world to read.[16] Users can be followed by their spouses by viewing their daily and sometimes minute-by-minute updates. Used improperly by the Tweeter and properly by the Tweeter's spouse, a person may be tweeting the day away as his or her spouse follows his or her every move. The user's profile may provide their name, location, e-mail address, and biography.[17] To limit viewers of their tweets, users may adjust their privacy settings. However, utilizing the privacy setting may not protect the user from the court ordered subpoenas or even the authorization that he/she may be directed by a court to sign in order to retrieve the information.[18]

Privacy Versus Relevancy

Long before computers, email, texts and social networking sites were contemplated, the Fourth Amendment of the U.S. Constitution was drafted to protect the security of citizens, papers, houses, and effects against unreasonable searches and seizures. With the advent of cyberspace, several acts were passed to protect online security and fill in the gaps of the Fourth Amendment formed by the computer age.

In 1986, Congress passed the ECPA[19] to expand government wiretapping restrictions with respect to telephone calls to include transmissions of electronic data by computer. As part of the ECPA, Congress also enacted the Stored Communications Act ("SCA"), formally known as the Stored Wire and Electronics Communications Act, to protect online third party stored communications.

The SCA pertains to voluntary and compelled disclosure of third party internet service providers. Pursuant to the SCA, 18 U.S.C. section 2701 et seq., an entity such as Facebook or MySpace is prohibited from disclosing information about an individual's current and historical Facebook and MySpace pages and accounts, subject to certain exceptions. [See, 18 U.S.C. section 2702(b)] for exceptions to disclosure of communication. For the matrimonial law attorney, one relevant exception is the attorney's ability to discover so called private information upon securing the authorization of the user or by court ordered subpoena.

Recent case law indicates that discovery of an individual's so called "private" information on social networking sites is possible. In the 2010 case of *Romano v. Steelcase Inc. Educational & Institutional Cooperative Services Inc.*,[20] defendant Steelcase submitted a motion requesting access to plaintiff Romano's "current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information." In arguing their case, Steelcase asserted that Romano had placed certain information on Facebook and MySpace which was inconsistent with her claims about her injuries, and loss of enjoyment of life. Steelcase claimed that Romano's MySpace and Facebook pages would demonstrate Romano's active lifestyle, her ability to travel, contrary to her claimed inability to do so, as a result of such injuries.

The Court held that Steelcase was entitled to receive the private portions of Romano's social networking sites, since the public portions contained material contrary to her claims and deposition testimony. The Court also cited the reasonable likelihood that the private portions of Romano's sites may contain further evidence such as information pertaining to her activities and enjoyment of life, all of which were material and relevant to Steelcase's defense. The Court stated that:

> Preventing Defendant from access to Plaintiff's private postings on Facebook and MySpace would be in direct contravention to the liberal disclosure policy in New York State.

In reaching its decision, the Court noted that although there was no other New York Case law directly addressing the issues raised, there were other instructive cases from other jurisdictions including *Ledbetter v. Wal Mart Stores Inc.*[21] and *Leduc v. Roman*,[22] a Canadian case.

In *Ledbetter*, Wal-Mart Stores sought information from several social networking sites regarding the personal in-

formation of the plaintiff. The Court denied the plaintiff's request for a protective order, finding that the subpoena could lead to discovery of relevant evidence that would be admissible in trial. A confidentiality agreement was already in place to protect the privacy of information obtained from the sites.

In *Leduc v. Roman*, plaintiff Leduc was involved in a car accident, which he claimed resulted in a diminished enjoyment of life and his inability to engage in sports activities. During his examination by an expert psychiatrist with respect to the litigation, Leduc mentioned to the psychiatrist that he had several friends on Facebook. As a result, defense counsel attempted to access Leduc's Facebook account and discovered it was restricted to Leduc's Facebook "friends." Defendant's counsel moved for production of all information in Leduc's Facebook profile. Having been denied his request, the defendant appealed. On appeal, the Court held it was reasonable to infer that plaintiff's Facebook site could contain content relevant to the issue of Leduc's post-accident lifestyle, given the social networking nature of Facebook. However, the Court also stated that while defendant's request for production was not a fishing expedition, mere proof of a Facebook profile did not entitle the defendant to access all of the material placed on the site—there must be evidence of relevant content to compel production. The Court determined that the defendant had the right to cross examine Leduc regarding the relevance of content posted by Leduc on his site. The Court also ordered Leduc to preserve his Facebook postings, thus leaving the door open for defendant to gain access upon a showing of relevance.

With respect to the question of production of the access limited contents of a Facebook profile, such issue was addressed by Judge Rady in the Canadian case of *Murphy v. Perger*.[23] In *Murphy*, plaintiff claimed a loss of enjoyment of life as a result of injuries sustained in a car accident. Murphy, however, had posted photographs on her publicly accessible Facebook profile showing her engaged in various social activities. Perger moved for production of all photographs maintained on Murphy's private Facebook profile in which Murphy controlled. Regarding the issue of relevancy versus speculation, Judge Rady stated:

> It seems reasonable to conclude that there are likely to be relevant photographs on the site for two reasons. First, www. facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.
>
> On the issue of relevancy, in this case, clearly the plaintiff must consider that some photographs are relevant to her claim because she has served photographs to the accident, notwithstanding that they are only "snapshots in time."

With respect to the privacy issue, Judge Rady stated the following:

> Having considered these competing interests, I have concluded that any invasion of privacy is minimal and is outweighed by the defendant's need to have photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 266 people have been granted access to the private site.

In *McCann v. Harleysville Insurance Company of New York*,[24] also a personal injury case, the Appellate Division held that while the Court properly denied the defendant's motion seeking to compel plaintiff to produce photographs and an authorization for plaintiff's Facebook account information, it improperly granted plaintiff's motion for a protective order and abused its discretion in prohibiting defendant from seeking disclosure of plaintiff's Facebook account at a future date. The Appellate Division left the door open for such discovery.

As the foregoing cases indicate, information previously perceived as private information by the user of social networking sites may be discoverable. Taking a cue from the personal injury cases, it is possible to discover information from "private" social networking sites. The attorney seeking such discovery must be prepared to establish relevancy and show that such demands for private material are not equivalent to a fishing expedition. To prove such relevancy, researching the public information available may be beneficial.

If such public information set forth in social networking sites indicates that relevant financial and/or data regarding custody exists on public postings, a Court may be convinced that so-called private postings may also contain relevant data. Information about a spouse's career, business successes and failures, business schedules, lifestyle and emotional state may all be relevant in matrimonial/custody matters. In *Bishop v. Minichiello*,[25] defendant's motion for production of plaintiff's computer's hard drive was granted to perform an analysis of how much time plaintiff spent on Facebook. The foregoing analysis could certainly be relevant to custody/access issues where the amount of time a parent actually spends with a child during access time may be compared to his or her time online during the same time period.

Practical Advice

Social networking sites present a new challenge for the matrimonial/family law attorney. Clients should be advised to: a) think carefully before clicking the send button, b) guard their password, email accounts and computer information from nosy online trespassers via illegal spyware, and c) exercise caution with social networking

postings. In addition to advising clients to maintain records of emails, texts and other technological information sent to them from their spouse and other sources that may prove helpful in settlement and/or litigation,[26] clients may be counseled to mine for the public information on social networking sites and to the extent that one is legitimately and legally "friended," the equivalent, private information as well.

Attorneys should also advise clients to diligently supervise their children's online sites. No client embroiled in a custody case, sitting in the witness box, wants to identify evidence revealing his or her child spending countless hours on Facebook instead of completing homework assignments; nor does any parent want to identify pictures of his/her child engaging in inappropriate conduct such as drinking or Facebook posts boasting of drugs, sex and alcohol use while in that parent's care. Teaching good judgement regarding online social networking sites is now included in good parenting skills. Finally, it doesn't behoove any parent to see pictures and postings of herself/himself on Facebook demonstrating poor judgement.

The following is a check-list of practical online advice for divorcing spouses:

1. Instruct your client to refrain from participating in online networking sites during the pendency of a divorce action. While popular, they are a hotbed of information that may prove harmful to your client's case. On the other hand, lawful discovery of such information about your client's spouse on such a social networking site may be fruitful.
2. Advise your client not to be dishonest on a social networking site, e.g., anyone who is unemployed shouldn't claim they are working.
3. Tell your client not to post pictures of girlfriends and boyfriends while married. (Obvious, but prevalent.)
4. Tell your client to "Defriend" his/her spouse from a Facebook page, unless your client can utilize total self-control.
5. Have your client print his/her own Facebook pages and that of his/her spouse for your files (so long as such Facebook pages for the spouse are received by legal and legitimate means).
6. Remind clients that while using all privacy controls available to prevent others from viewing what they want to maintain as private is essential, it is not necessarily a protection during litigation. Overly informative statuses and pictures should simply not be posted.
7. Remind clients to log out of all sites when they are finished using such sites (the same sites they shouldn't be using during the divorce action anyway).
8. Inform clients that certain information can be subpoenaed or obtained through authorization and that it is advisable not to post at all until after a Judgement of Divorce is entered, and to always exercise caution.

Endnotes

1. http://www.abanet.org/media/youraba/200812/article04.html/.
2. http://www.facebook.com/press/info.php?statistics.
3. *Supra*, note 1.
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Devastating Parental Behaviors That Impact Children During the Separation and Divorce Process

By Roger Pierangelo, Ph.D. and George Giuliani, J.D., Psy.D.

Abstract

Parents involved in matrimonial cases will often expound on their virtues when it comes to the welfare of their children. They will speak about how they truly want their children to have a healthy relationship with their spouse, want the children to be happy, be willing to do anything to prevent scars for their children, cooperate with their spouse, etc. However, all too often their behavior and words never line up, and what occurs is often the complete opposite. The parents' fragile emotional state, brought on by a sudden fears involving possible severe changes in finances, safety, sense of protection, environmental living conditions, social connections, emotional and sometimes vocational needs become the new and overwhelming focus in their lives. Since these fears now drain energy like never before, the judgment and perceptions of parents from issues that might be in the best interests of their children now become distorted. What may result are actions and behaviors toward each parent that do not take into account the impact on the well-being of children. The focus of this article is to address devastating parental behaviors that impact children during the separation and divorce process.

* * *

The period of time when parents are involved in the legal process of separation and divorce can become a very artificial, unnatural and psychologically destructive time for their children. This is a time when logic, common sense and fairness may not be the driving force behind the parents' behavioral choices. Consequently, parents may exhibit or initiate behaviors that create extreme stress on their children, almost sacrificing their well-being, in an attempt to get revenge, control, or express extreme anger towards the other parent.

The choices of behavior on the part of the parents will need to be identified as quickly as possible by judges, law guardians or parent coordinators assigned to the case. If these destructive and unhealthy parental behaviors are not identified quickly, and intervention does not take place, then permanent damage to the children's mental health has a very high probability of becoming a reality. There is no excuse on the part of the legal or psychological system to allow such destructive behaviors to continue once identified. While parents may deny that they do these things, the behavior of the children almost always provides a record of what is actually taking place and what true messages are being conveyed, direct or indirect, to the children. Behavior is always a message and it is very important that professionals involved in separation and divorce cases learn to better understand children's behavior so that they can intervene quickly and reduce their stress.

The psychological devastation that can occur in children as a result of unhealthy parental behaviors during the divorce process may first show up in school and sleep patterns. The tension brought on by the child's hesitation in saying things, fear of hurting the other parent, guilt, fears of retaliation and abandonment etc. add so much tension that concentration, focus, motivation, judgment, and patience, completion of tasks, grades, and appropriate behavior, all deteriorate quickly because the required energy for these factors is drained away to deal with the inner turmoil brought on by the parental behaviors.

These destructive and stress-provoking behaviors on the part of parents may at times be very subtle. Some may be motivated by personal neurotic needs, while others are motivated by nothing more than to hurt and neutralize the other parent's role in the life of the child as much as possible.

The following behavior patterns are frequency seen in separation and divorce cases where children are involved. The article discusses each of these parental patterns and when necessary provides examples of how these patterns may be seen in the children and parent's behavior.

1. Exhibiting Hostile Parent Behavior

Sometimes a child's reluctance towards visitation with a parent results from the hostile behavior of the other parent. In our opinion, there are three states of hostile behavior that greatly affect the psychological well-being of children and molds their negative opinions and feelings for one of their parents. In order of severity, these are: (1) Subtle Passive State; (2) Hostile Indirect State; and (3) Hostile Direct State.

A. Subtle Passive State

In the Subtle Passive State, nothing is ever actually said by the parent. The parent provides subtle messages to the children, such as looking angry or becoming quiet to the children when they are leaving to see the other parent. Nothing overt is said. However, this act of emotional removal creates enormous tension within the children because the loss of approval by the parent is interpreted as a loss of love, one of the most frightening fears of children.

B. Hostile Indirect

The second state, Hostile Indirect, occurs when the child gets a false impression of the other parent without

hearing both sides. An example of this occurs when the parent may argue over the phone with the other parent with the children in close proximity. The arguments can become emotionally turbulent, and many hostile words can be said. However, since the conversation has taken place over the phone, the children will only hear one side. The parent will then get off the phone and be nice to the children. Regardless, the damage is done and the child gets the clear message—don't mess with me or make me unhappy.

C. Hostile Direct State

The third state, Hostile Direct, is the most serious type. In this case, the parent doesn't care who is around, often exhibiting "out of control" behavior (e.g., hitting the other parent or throwing things in front of the children). The messages here are three-fold: (1) "No one can stop me"; (2) "I will do anything I want"; (3) "Do not trust your father or mother. This type of behavior will normally have the most negative effect on children. Not only do such acts constitute a serious issue of emotional instability on the part of the parent, but they indicate a complete disregard for the emotional well-being of the children. In our experience, if Hostile Direct State is occurring, then it is almost certain that the two other levels are also being used.

2. Creating an "Identification with the Aggressor" Mentality in Their Children

"*Identification with the Aggressor*" is a concept that can readily be seen in children during hostile stages in separation and divorce. When children feel overwhelmed by an inescapable threat such as a hostile, angry parent they identify with the aggressor. Hoping to survive the onslaught being directed at them, they sense and become precisely what the aggressive parent expects them to be—in their behavior, perceptions, emotions, and thoughts and negative and hostile actions towards the other parent.

But habitual identification with the aggressor also frequently occurs in people who have not suffered severe trauma, which raises the possibility that certain events not generally considered to constitute trauma are often experienced as traumatic. Emotional abandonment or isolation, and being subject to a greater power, are such events. In addition, identification with the aggressor is a tactic typical of people in a weak position (Frankel, 2002). What often happens with children who are in this type of weakened state is that they will side with whom they perceive as the most aggressive and potentially rejecting parent against the other parent in hopes that the aggressor will not turn on them. A child's behavior in this case will too often be to always make excuses for not wanting visitation, feigning illness, wanting to go home early, creating tension to cause shortened visitation and outright refusal to go on visitation. Examples may include

- A parent making sure the child's cell phone does not take messages or is constantly full despite being asked to clear the messages by the other parent. The message here is, "*I run the show, and I will determine who and when you speak to your father/mother*."
- A parent being told by the child that he/she can do whatever he/she wants in terms of not coming for visitation. This heightened sense of empowerment for no logical reason is usually always reinforced by the aggressive parent to minimize the other parent's power over the child or a message to the aggressive parent that I am on your side, so do not attack me.
- A parent telling a child something and the other parent openly telling the child he/she does not have to do it if he/she does not want to or it's up to the child to make the decision. This is also a subtle message of neutralizing the other parent and having the child listen to the rules of the aggressive parent. "*I am telling you that is ok not to follow your other parent's rules or requests*" is the clear message heard by the child.
- A parent arguing in public, at school, etc. in front of the child and other people while the other parent begs him or her to stop. The message here is, "*I am powerful and I can do what I want, anytime I want*." The child sees the power of one parent and the refusal to follow rules, which makes the child frightened. As a result, the child aligns with the more aggressive parent in order not to be victimized.
- A child yelling at a parent about child support payments, how mean the parent is to the other parent, how little money he/she gives, etc. These messages are clearly being planted by the aggressive parent in an attempt to make the child a "soldier" of the aggressive parent.

3. Parent Dependency Syndrome

There are times when a parent will not intentionally alienate his or her children from the other parent but will instead create an unhealthy dependency through a series of subtle and/or emotional reactions. When a parent has serious fears of isolation and abandonment, low self esteem, a lack of adult anchors or meaningful relationships or sometimes unresolved issues from his/her past he or she may turn to an unhealthy dependent relationship with his/her child to fill the void that he/she is feeling. We call this Parent Dependency Syndrome. While not an alienation process, the secondary effects of Parent Dependency Syndrome results in an unwillingness of the children to leave the dependent parent. The reactions of the dependent parent give the children the message that the parent is a victim, unhappy without them, in turmoil if they are not with him/her, and can only survive if the

children stay with him / her. Statements by parents exhibiting Parent Dependency Syndrome include:

> "It's O.K., I'll find something to do when you are not here."
>
> "Mommy will miss you so much when you are with Daddy."
>
> "I get so sad when you leave me to go to Mommy's."
>
> "I will be here waiting for you to come home from Daddy's."
>
> "I will wait for your call from Mommy's."

Such guilt makes it very hard, if not impossible, for the children to leave the parent's orbit. The effects on children of this dependency syndrome can be seen not only in the unwillingness to leave the parent but may also limit the children from venturing out to new social, educational, recreational, and any other experiences that would leave the parent "alone." What inevitably occurs is an extreme limitation of the children's safety zone, the area in which the children feels safe.

Further, Parent Dependency Syndrome often results in illogical and obsessive amounts of time spent with the children regardless of the reality of the other parent's visitation, schedule, boundaries, or needs. This behavior is anxiety driven and defies logic, common sense and fairness. The sole purpose and goal are the dependent needs of the parent to have the child maintained in his / her orbit, which is seen as the only safe place. Examples of Parent Dependency Syndrome include:

- Calling the children multiple times a day.
- Frequently cancelling visitation indicating the child or children are not feeling well.
- Providing a cell phone to call the parent several times a day during the visitation time of the other parent.
- Frequently being at school when the other parent picks the children up for visitation.
- Frequently fostering the children to stay with them during events when the other parent has visitation.
- Constantly texting the children "I miss you," "Wish you were here," "Can't wait to see you."
- The children requesting to constantly go home early from visitation with the other parent because of a fear that the other parent is angry over them being there.
- Long drawn-out phone calls by the parent on the visitation time of the other parent.
- Constantly dropping off items to the children during the visitation time of the other parent.
- Frequently changing the pick-up time for visitation to a later time at the last minute.

4. Reinforcing Loyalty Fears and Fears of Betrayal

Children know when parents hate each other. Since we communicate 55% non-verbally, it is not difficult for children, who by nature are very visual, to read the intense disgust that one parent may harbor for the other. In many cases, this is not even kept to a non-verbal level but is consistently reinforced by verbal barrages, innuendos and subtle destructive comments. At this point, the child is deathly afraid of having one parent reject him or her for having a relationship with the other. Further, children often fear openly verbalizing any love, caring or need for the other parent. These verbalizations may be interpreted as betrayal or disloyalty to the angry parent. In many cases, these negative reactions or the angry environment may intensify quickly when another individual is brought into the life of the other parent, e.g., dating, engagement, and remarriage. Often, the loss of hope for any reconciliation, fears of abandonment, and the unequal playing field involving relationships aggravates the already tense situation. The tension and turmoil that arise within the child can be devastating, since he / she is emotionally being blackmailed by one parent to reject the other parent, a process that often instills intense fear and guilt.

5. Reinforcement of Transitional Anxiety

Transitional anxiety stems from the fears generated when children go from one parent to the other, knowing that both parents hate each other. Many parents will report a long period of adjustment for children after picking them up for visitation. During that adjustment period, parents will report agitation, confrontation, withdrawal, anger, intense criticism, etc. What is actually occurring is the psychological state of transitional positioning on the part of the children who can then, if necessary, report the tension back to the other parent if the environment upon return is hostile or tense. We have witnessed numerous sessions with a parent and his / her children in our offices having a great time until the children are told that only a few minutes are left and they will be getting into the car of the other parent. At this point, in many situations, some criticism, fighting, agitation or withdrawal is directly observed on the part of the children. This occurs because the children have been conditioned to learn that reporting any positive experiences is not acceptable and only makes mommy or daddy unhappy. What the children are then armed with are the agitation and tension created by the impending situation.

Further, angry parents reinforce this transitional anxiety by making it verbally and non-verbally obvious that they are not happy that the other parent is here and taking the child. Behaviors such as complete silence, arms

folded, angry look, walking away without acknowledging the other parent, leaving the child to watch for the parent or be left totally alone waiting to be picked up, making snide comments to the child about the other parent's new car, or new clothes, or girlfriend / boyfriend waiting in the car, not kissing the child goodbye, etc. are all very subtle and overt messages that create tremendous anxiety on the part of the child. This all makes transitioning to the other parent so very difficult. What often occurs is a fear on the part of the child to transition into the arena of the other parent. Examples of parents of creating transitional anxiety exhibited by behaviors of their children include:

- Fear of leaving clothes or toys at the other parent's house.
- Not talking to the parent for hours after being picked up.
- Starting arguments as soon as he / she gets into the car.
- Starting arguments on the way back to the other parent.
- Not allowing for any relationship with the parent's friends or relationships for no apparent reason.
- Wanting to go home and curtail the time with the parent.
- Yelling at the parent as soon as the other parent is in sight.
- Creating arguments by making irrational demands on the parent.

6. Open Denigration

Denigrating comments from one parent about the other parent may force children to be placed in a position of defending the attacked parent. It is not uncommon for one or both parents to openly denigrate the other parent either within earshot of the child or right in front of the child. The hope here by the parent is to "convince" the child that he / she (the parent) is the "good" one and the other parent is bad or should not be trusted. However, this sometimes backfires and forces the child to defend the other parent leading to confrontation, punitive consequences or rejection.

7. Scheduling of Appointments on the Visitation Time of the Other Parent; Communication of Information vs. Communication of Permission

A further disregard of a parent's rights occurs when one parent schedules activities on the visitation time of the other parent. In essence, this is an attempt to control the other parent's visitation. The message to the child is a minimization of the importance of that parent in the child's life and the lack of rights he / she has during their time with the child. Civility should result in no scheduling of appointments, activities, etc. made on the visitation time of the other parent without his / her input or agreement unless it is something that is not determined by the parent, i.e., school or religious activity. For instance, if one parent wants to sign up his / her daughter for ballet lessons which are only during that parent's time with the child, then communication of information, not communication for permission, is expected. However, if one parent signs up the child for an activity that requires practice every day including the other parent's visitation, then communication of permission, not communication for information, is expected. What is usually avoided here for purposes of minimization of the other parent is one parent signing the child up and then saying, "Let's ask your father / mother if it is O.K with him / her." This is so destructive and places the other parent in a no-win situation, since the child is already excited and refusal will make that parent seem like an ogre. Examples of this include:

- Buying tickets for events or concerts during the visitation time of the other parent without prior consent.
- Initiating and / or scheduling social events, play dates and / or parties for the child during the other parent's visitation without prior consent.
- Scheduling all doctor and dentist appointments on the visitation time of the other parent.
- Planning vacations that intrude into the visitation time of the other parent and having the child ask the parent if it is O.K.
- Planning after-school activities that cut into the visitation time of the other parent.

8. The Conscious Undermining of the Importance of the Other Parent in the Children's Lives

There are times when one parent will attempt to reinforce control over the child by disregarding the other parent's role, rights or time with the child. This pattern of behavior, frequently seen in separation and divorce cases, is a conscious attempt to let the child know who has the real power. It sends a message to the child that the other parent is not important or can be disregarded without consequence. Eventually the child mimics the same disregard for the other parent. The responses by the child often lack empathy for the parent that is being left out or any concern about the rights of that parent. If this pattern is allowed without intervention, the controlling parent becomes empowered, and the intrusion and dismissal of the other parent becomes more frequent and blatant.

9. Using the Children as Messengers

One of the most destructive behaviors shown by some parents during the divorce process is the continuous use of the children as messengers to the other parent. Further, the messages are usually not positive but rather

critical, incendiary, or demeaning in nature. A child, who fears retaliation or anger if he / she does not deliver the message, is devastated by fear of retaliation on one side and rejection and guilt on the other. The child is literally placed in a no-win situation. This technique will eventually lead to angry confrontations between the receiving parent and the child, further adding stress to the child. Examples that we have seen include :

- "Tell your father that the child support payment is late."
- "Tell your mother that I deducted some things from the child support check."
- "Tell your father I will be taking you away next week and we will be late getting home."
- "Tell your mother not to have her boyfriend in the car when they drop you off."
- "Tell your father to bring back all your clothes from his house."

Conclusion and Recommendations

In conclusion, parents can be willfully or unconsciously destructive to their children during the separation / divorce process. While they may be unwilling to see their behaviors, or unaware of their destructive forces, the professionals around them usually see them quite clearly. If the therapists, lawyers, law guardians, judges, etc. say nothing or impose no restrictions or monitoring of factual destructive parental behavior then they may also contribute to the child's struggles and possible psychological damage. Therefore, we as professionals will need to intercede more quickly to prevent these behaviors from destroying the psychological well-being of children. Consequently we suggest the following:

1. Appoint a Parent Coordinator to any case involving children at the very beginning of a case to monitor the parent's behavior and the psychological well-being of the parents.
2. Require a marital assessment at the beginning of the case by a highly qualified and trained psychologist of any family with children filing separation and divorce litigation. This comprehensive assessment, which considers 16 factors designed to determine the children's present overall functioning and mental status, provides the judge with crucial information.

Factors Assessed to Determine Children's Present Overall Functioning and Mental Status

1. The children's present school functioning and academic performance.
2. The indications of high-risk factors in the children's behavior and thinking.
3. Medical status of the children, including medications, illnesses and / or disorders.
4. The developmental history of the children.
5. Developmental concerns and the present interventions.
6. Areas of functional impairment on the part of the children.
7. Evidence of any possible educational disability.
8. Social status of the children.
9. The need for therapeutic intervention for the children.
10. Level of alienation of the child / children towards either parent.
11. Fears, phobias, etc. on the part of the children.
12. The children's perception of the current attitude and behavior of the parents towards each other.
13. The alignment, if any, of the children with one specific parent.
14. The need for a Parent Coordinator, Civility Coaching, or therapy for either or both parents.
15. Each parent's perception of the children's present level of academic, social, psychological and educational functioning.
16. The level of civility on the part of the parents.

Since separation and divorce will have an impact on the lives of all children, the court system and all the individuals working with parents in the divorce process have a professional obligation to minimize the potentially damaging effects on children involved in this life process.

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Recent Legislation, Decisions and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages

Five states permit same-sex marriage: Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia. Three more states officially pledge to honor out-of-state same-sex marriages: Maryland, Rhode Island and New York. Ten foreign countries also grant full marriage rights: The Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland, and Argentina. Only Mexico City in Mexico permits same-sex marriage; however, all jurisdictions in Mexico will recognize marriages performed in Mexico City.

New York Update

Although New York does not permit same-sex marriage (and the New York Senate recently turned down a bill permitting same-sex marriage), it does recognize same-sex marriages performed outside of its jurisdiction, based on the principles of full faith and credit and comity. Governor Paterson issued a broad executive order in 2008, directing state agencies to review their policies to recognize gay marriages performed in other states. Several New York trial judges have ruled that same-sex couples who marry in other jurisdictions (or have civil unions in other jurisdictions) can access New York courts for divorce, because New York will follow established comity / full faith and credit rules to recognize those marriages.

DRL §110 was amended, effective September 17, 2010 which permits two unmarried persons to adopt a child together, which effectively permits same-sex couples who are not legally married to adopt children together.

New York has jurisdiction to dissolve a Vermont civil union

Parker v. Waronker, __ NYS2d __, 2010 WL 5653528, No. 2010-M-0517, 2010 NY slip op 20543 (Sup Ct Onondoga County Oct 21, 2010) (Young, J.)

The parties entered into a valid civil union in Vermont. At the time of the proceeding, one party lived in New York, and the other lived in Ohio. Vermont could not have jurisdiction over the matter because there is a residency requirement. The court determined that New York has jurisdiction over the dissolution of the civil union, but since the parties are not married, the New York divorce statute is not available to them. On his own motion, Justice Young elected to convert this action to one for "declaratory relief," and without any explanation, applied the Vermont statute to determine whether dissolution would be granted, i.e., that the parties had lived apart for six consecutive months and that resumption of their relationship was not reasonably probable, a no-fault divorce standard. The court granted the dissolution of the civil union. Under the circumstances of the case, the court did not have to determine any issues of property division or child custody and so had no need to determine which state's law would be applied to those issues.

The court observed that the Third Department, in *Dickerson v. Thompson*, 73 AD3d 52 (3d Dept 2010) (which I summarized in one of my previous columns) had found that a New York court has subject matter jurisdiction over an action for declaratory and equitable relief to dissolve a civil union entered in another jurisdiction, but given the procedural posture of that case—an interlocutory appeal of the question of subject matter jurisdiction—the appellate court had not ruled on the question of what substantive law would be applied to determine the case on the merits.

This still leaves open the question of what body of law a court would use to decide custody or property division issues. The most likely answer would be New York law, in light of the Court of Appeals' decisions in *H.M. v. E.T.*, 14 NY3d 511 (2010) and *Debra H. v. Janice R.*, 14 NY3d 576 (2010), lv to reargue denied, 15 NY3d 767 (2010); cert denied, 2011 WL 55415, 79 USLW 3228 (USNY Jan 10, 2011), both of which I summarized in my previous column. There will not be a more definite answer until a court actually rules on the merits of a child custody dispute (as opposed to a jurisdiction issue) or a property division matter involving a couple who are dissolving their civil union.

Vermont has adopted a same-sex marriage law more recently and civil unions are no longer available there. Civil unions are available in New Jersey, and as of December 1, 2010 in Illinois.

Massachusetts overturns DOMA as unconstitutional

On July 8, 2010, Judge Joseph Tauro of the U.S. District Court in Boston ruled in two separate lawsuits that a critical part of the federal Defense of Marriage Act (DOMA), a law barring the federal government from recognizing same-sex marriage, is unconstitutional. In one lawsuit, *Commonwealth of Massachusetts v. Health and Human Services*, the court ruled that DOMA violated the Tenth Amendment to the U.S. Constitution by taking from the states powers that the Constitution gave to them, including the power to regulate marriage. In the other lawsuit, *Gill v. Office of Personnel Management*, he ruled that DOMA violates the equal protection clause of the Fifth Amendment. Both of the lawsuits targeted Section 3 of DOMA which states

that, for federal government purposes, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. Neither lawsuit challenged the section of DOMA that enables any state to ignore valid marriage licenses issued to a same-sex couple in other states.

On October 11, 2010, the U.S. Department of Justice filed notices of appeal to the U.S. Court of Appeals in these two cases. If the cases make their way to the U.S. Supreme Court and are upheld, gay and lesbian couples in states that recognize same-sex marriage will be eligible for federal benefits that are now granted only to heterosexual married couples, including but not limited to Social Security survivors' payments, the right to file taxes jointly, and guaranteed leave from work to care for a sick spouse.

California's Proposition 8 held unconstitutional

In May 2008, the California Supreme Court in its decision *In Re Marriage Cases* granted same-sex couples the right to marry. However, in November 2008, Proposition 8, a constitutional amendment designed to supersede the court's decision, narrowly passed, and gay couples could no longer marry in California. The two powerhouse attorneys who were opposite each other in Bush v. Gore, Ted Olson and David Boies, joined forces to overturn Proposition 8 in *Perry v. Schwarzenegger*. On August 4, 2010, District Court Chief Judge Vaughn Walker, in a landmark decision, ruled that the amendment to the California Constitution barring marriage for same-sex couples violates the U.S. Constitution's guarantees of equal protection and due process. Judge Walker lifted a temporary stay on his ruling, but the Ninth Circuit Court of Appeals granted a stay. Oral arguments were had on December 6, 2010, and as of this writing, no decision has been rendered yet.

Recent Legislation

In my prior column, I comprehensively discussed the most sweeping changes that divorce and family law has not experienced in decades, some of which are so important that I will mention them again here, in brief.

- **No fault divorce: DRL § 170, amended by adding a new subdivision 7, effective October 12, 2010.** A divorce will be granted for one party's asking if there have been irreconcilable differences for a period of six months. See Heinz and Strack below, for new cases involving "no fault" divorce.
- **Counsel fees: DRL § 237(a) and (b) and § 238 amended, effective October 12, 2010.** This statute provides a presumption of counsel fees to be awarded to the lesser monied spouse, and a mandate to determine counsel fees pendente lite and not defer the issue to trial.
- **Temporary maintenance awards: DRL § 236B amended, adding a new subdivision 5-a, effective October 12, 2010.** This statute devises a new formula for calculating pendente lite maintenance, and adds new equitable factors to consider after determining that it would be unjust to apply the formula.
- **Post-divorce maintenance awards: DRL § 236B6, amended, effective October 12, 2010.** This statute adds new factors the court may consider in awarding maintenance.
- **New child support modification standards: FCA § 451 and DRL § 236B(9)(b) amended, effective October 13, 2010.** A uniform standard for both courts of a "substantial change in circumstance" is the basis for modification of an order of child support or an order incorporating without merging an agreement or stipulation. The section provides two new bases for modification: the passage of three years since the order was entered, last modified, or adjusted; or a 15% or greater change in either party's gross income since the order was entered, last modified or adjusted.
- **Various statutes affecting orders of protection**, including the service by fax or electronic means, the extension of an order of protection for a reasonable time period, and that the petition for one will not be automatically dismissed if the allegations are not contemporaneous with the filing of the petition.

Money judgments and homestead exemptions: CPLR §§ 5205 and 5206 amended, effective January 21, 2011

An effective tool for support enforcement is to secure a money judgment and collect on it. The creditor has enough grief chasing after the debtor to collect, and now these new amendments only add salt to the wound.

Under the amended CPLR § 5206, the homestead exemption increased from $50,000 to $150,000 in Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam counties and $125,000 in Dutchess, Albany, Columbia, Orange, Saratoga and Ulster counties.

CPLR § 5205 was amended to increase the amount of certain real and personal property that are exempt from money judgments and bankruptcy, including the following:

- Added "one computer and associated equipment, one cell phone"
- Added one motor vehicle worth up to $4,000 in value above liens and encumbrances, or $10,000 in value above liens and encumbrances if it is equipped for use by a disabled debtor. However, this addition does not apply if the debt is for "child

support, spousal support, maintenance, alimony or equitable distribution."

- Added that if no homestead exemption is claimed, then $1,000 of personal property, bank account or cash.

Uniform Interstate Depositions and Discovery Act: new CPLR § 3119, effective January 1, 2011

This new statute provides a procedure for service of an out-of-state subpoena upon a person in New York by serving said subpoena on the county clerk in the county where discovery is sought to be conducted. In turn, the county clerk must then serve it upon the New York resident. If the party to an out-of-state proceeding retains an attorney licensed to practice in New York, the attorney may serve the subpoena rather than the county clerk.

22 NYCRR § 202.16, amended, adding new (k)(3) and (k)(7), effective October 5, 2010:

> (3) ....No motion for counsel fees shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, the hourly amount charged by the attorney, the amounts paid, or to be paid, to counsel and any experts, and any additional costs, disbursements or expenses, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee. Fees and expenses of experts shall include appraisal, accounting, actuarial, investigative and other fees and expenses to enable a spouse to carry on or defend a matrimonial action or proceeding in the Supreme Court.
>
> (7) Upon any application for an award of counsel fees or fees and expenses of experts made prior to the conclusion of the trial of the action, the court shall set forth in specific detail, in writing or on the record, the factors it considered and the reasons for its decision.

22 NYCRR § 202.15, amended (f)(3), effective October 25, 2010

The amendment changes the use of the term "law guardian" to "attorney for the child." It deletes the requirement for the court to request that the parties submit a list of experts from which the court shall choose a neutral expert, and dispenses with the requirement for a compliance conference or the need for the parties to personally appear at the compliance conference.

Court of Appeals Round-up

Where down payment of marital home derived from separate property, but mortgage paid during the marriage, marital home deemed "marital property"

In my prior column, I summarized the case, *Fields v. Fields*, 15 NY3d 158 (2010), in depth, where the court ruled that the marital residence was marital property despite that the down payment was one spouse's separate property, since the mortgage was paid with marital funds throughout the marriage. After publication of the column, reargument was denied. 15 NY3d 819 (2010)

In the wake of *Mahoney-Buntzman v. Buntzman*, 12 NY3d 415 (2009)

Cohn v. Cohn, 80 AD3d 419 (1st Dept 2011)

The court below erred by granting the wife a credit of more than $128,000, representing monies paid by the husband to satisfy his maintenance, child support and other obligations towards his former wife and their son. The court below properly determined that the wife was not entitled to recoup maintenance from a previous marriage that was lost as a result of her remarriage to the defendant.

Other Cases of Interest

Domestic Violence

Family Court has jurisdiction over family offense proceeding where alleged acts take place outside of New York

Richardson v. Richardson, 80 AD3d 32 (2d Dept 2010)

In six related family offense proceedings in the Nassau County Family Court, the petitioners (mother and children) sought orders of protection against the respondent (petitioners' mother and grandmother, respectively) and vice versa, all of whom resided in the same household in Nassau County. At a pre-trial conference, respondents counsel objected to the court's exercise of subject matter jurisdiction because the alleged offenses occurred on the island territory of Anguilla. The orders of protection were affirmed by the Second Department. In a case of first impression, the Second Department held that FCA § 812 grants the Family Court subject matter jurisdiction to hear family offense proceedings where the alleged acts take place outside of the state or country since there is no specific geographic limitation under the statute nor does the legislative history of the statute express an intention to make such limitation. The court noted that the criminal court would not have subject matter jurisdiction over the matter because the Penal Law has a specific geographic limitation to where the alleged offense occurred.

Custody and Visitation

Relocation granted

Vargas v. Dixon, 78 AD3d 1431 (3d Dept 2010)

Family Court had a sound and substantial basis to conclude that it was in the child's best interest to permit the mother to relocate with her nine-year-old daughter to Florida. The child expressed her wishes to relocate to Florida in order to maintain her close relationships with her mother and half-sister. There was evidence that the mother was significantly more involved in managing the child's educational and medical needs, and had concrete plans for the child's future education, while the father presented no evidence regarding his plans for the child's education or childcare if he received custody. The court also credited the mother's testimony that the father had failed to regularly exercise visitation with the child until the year prior to the application. The court crafted a generous visitation schedule that would permit the child to spend more time with the father than she had in the past.

Child Support and Maintenance

Lifetime maintenance

Landgraf v. Neuhaus, 77 AD3d 590 (1st Dept 2010)

The court upheld the award of lifetime maintenance because the wife subordinated her career to that of her husband, and she was unable to be self-supporting. (There are no facts stated regarding the "advanced age" of the wife, the length of the marriage, nor the wife's educational background.) However, the award of an automatic increase in maintenance upon the emancipation of the child by an amount equal to 50% of the husband's then basic child support obligation was error "because it ignores the possibility of change in other factors affecting the computation."

Bayer v. Bayer, 80 AD3d 492 (1st Dept 2011)

The court below's award of $10,000 per month lifetime maintenance to the wife was affirmed, because it "properly took into account, inter alia, the marriage's duration; the distribution of marital assets; the parties' lavish standard of living before dissolution; their income potentials, property and future earning capacity; and plaintiff's reasonable needs and ability to become self-supporting." The appellate court failed to specify the duration of the parties' marriage, the ages of the parties, the respective incomes and assets of the parties, and other details, and therefore this case is not helpful to use as precedent. The court below also properly awarded to the wife 35% of the husband's medical licence as a result of her "economic and non-economic contributions to defendant's acquisition of a medical license and his subsequent lucrative career, as well as the termination of her own career in order to maintain the marital household, and her absence from the job market during marriage "

Counsel Fees

In the wake of *Prichep v. Prichep*, 52 AD3d 61 (2d Dept 2008) and the newly amended DRL §§ 237(a) and (b) and § 238 effective October 12, 2010, two recent cases provided large noteworthy interim counsel fees awards:

- *Witter v. Daire*, No. 6004/08, 2011 NY slip op 01018 (2d Dept Feb 8, 2011), husband awarded $125,000 interim counsel fees for matrimonial matters excluding legal work spent on overturning the prenuptial agreement, where wife's financial resources far surpassed his. (The court did not specify the parties' respective net worth or incomes.)
- *Amante v. Amante*, 78 AD3d 622 (2d Dept 2010) award to wife of $25,000 of $75,000 requested reversed, and wife awarded $75,000.

Discovery

Parnes v. Parnes, 80 AD3d 948 (3d Dept 2011)

The plaintiff-wife discovered on the defendant husband's work desk in the marital residence one page of an e-mail that he had exchanged with his counsel, and then discovered the user name and password for her husband's new e-mail account scribbled on a piece of paper. The plaintiff then searched her husband's e-mail account, printed out the e-mails between her husband and his counsel, including ones in which advice was provided to the husband before she commenced the action, and turned them over to her counsel. The plaintiff amended her complaint to include allegations that the defendant and his counsel conspired to cause her anguish, and subpoenaed her husband's counsel to produce documents and appear for a deposition. The husband's counsel moved to quash the subpoena, and preclude plaintiff's use of any privileged communications between client and attorney. The court held that the defendant took reasonable steps to keep the e-mails confidential by setting up a new e-mail account. However, he waived the privilege with respect to the one hard copy page of a five page e-mail that he left on his desk, because the room was used by multiple people, including the plaintiff. Leaving his password and username on the desk of the home office was not considered a wavier of the privilege since this was a private e-mail account, and not one shared by the parties.

Enforcement

Notice of pendency impermissible in divorce action

***Arteaga v. Martinez*, 79 AD3d 951 (2d Dept 2010)**

The imposition of sanctions against the plaintiff's attorney was upheld on appeal where the plaintiff's attorney filed a notice of pendency against the defendant's property based upon a claim of equitable distribution. Once the divorce action was dismissed for lack of jurisdiction, the attorney unreasonably delayed in canceling the notice of pendency, causing unnecessary motion practice. Filing such a notice is without merit, since "title, possession, use, or enjoyment of the subject property will not necessarily be affected."

Automatic restraining orders: Is contempt a remedy for a violation?

***P.S. v. R.O.*, __ NYS2d __, 2011 WL 322465, No. 312643/10, 2011 NY slip op 21031 (Sup Ct NY County Feb 1, 2011) (Gesmer, J.)**

The court held that it may use its contempt powers to enforce the automatic orders set forth in DRL 236(B)(2)(b) and 22 NYCRR 202.16-a. contrary to the one reported case on point, *Buoniello v. Buoniello*, 243-80 NYLJ 28 (Suffolk County Sup Ct, May 7, 2010) (Bivona, J.) that it may not do so. The court reasoned that it does not have to follow another lower court's opinion and that although the DRL may not be considered a "lawful mandate of the court," the applicable Uniform Court Rule is.

However, the court denied the motion because the husband failed to prove that the wife in fact violated the orders. The husband alleged that after the wife was served with the summons and automatic restraining order, she moved $6,000 from a joint account into one in her own name because she feared that the husband would not spend the funds on their vacation home expenses and instead dissipate them based on his prior acts of using funds for expenses other than the vacation home. The wife claimed that she moved them into her separate account in order to preserve them, and later replaced those funds into the account. The court found that the wife did not spend the funds, and even if she did so, it would be permissible to spend them on household expenses because expenditures for ordinary household expenses are permissible under the rule. Also, since the funds were replaced in the account, the husband's rights were not prejudiced. Finally, after the court determined the issue on the merits, it determined that since the contempt motion was not personally served on the wife (but rather on her attorney), the motion should be dismissed for failure to comply with Judiciary Law § 761.

Equitable Distribution

Equitable distribution of Madoff account

***Simkin v. Blank*, 80 AD3d 401 (1st Dept 2011)**

The order denying the ex-wife's motion to dismiss the ex-husband's complaint requesting reformation of contract based on mutual mistake was affirmed (3-2) where the husband alleged that $2.7 million of the $6.25 million that he paid to his former wife under their divorce settlement agreement was attributable to the former wife's half-share of what the parties believed was their investment account with Bernard Madoff Investment Securities, which account the parties later discovered did not, in fact, exist because of the notorious Ponzi scheme.

Grounds

No fault divorce

Heinz v. Heinz, __ NYS2d__, 2011 WL 555683, No. 203438/10, 2011 NY slip op 21049 (Sup Ct Nassau County Feb 16, 2011) (Palmieri, J.) where one spouse commences an action for divorce prior to the effective date of the "no fault" ground under DRL § 170, the other spouse may commence his own action on such ground thereafter.

Strack v. Strack, __ NYS2d __, 2011 WL 356058, No. 841-10 2011, NY slip op 21033 (Sup Ct Essex County Feb 03, 2011) (Muller, J.). The defendant's motion to dismiss a "no fault" divorce complaint based on failure to state a cause of action was denied where the plaintiff alleged the following:

The relationship between husband and wife has broken down such that it is irretrievable and has been for a period of at least six months. For a period of time greater than six months, Defendant and Plaintiff have had no emotion in their marriage, and have kept largely separate social schedules and vacation schedules. Each year Plaintiff and Defendant live separately throughout most of the winter months. Though they share the residence for several months out of the year, Plaintiff and Defendant have not lived as husband and wife for a period of time greater than six months. Plaintiff believes the relationship between she and Defendant has broken down such that it is irretrievable and that the relationship has been this way for a period of time greater than six months.

The court held that the plaintiff's cause of action is not barred by the statute of limitations. Although DRL § 170(7) is subject to the five-year statute of limitations, the court determined that any allegations prior to five years are considered part of a "continuing course of conduct." The plaintiff's unilateral statement under oath is not irrefutable, and the court therefore directed an immediate trial on the issue. The court noted that this new ground "is not a panacea for those hoping to avoid a trial." Since the phrase "broken down such that it is irretrievable" is not defined in the statute, the fact finder must determine whether a breakdown of a marriage is irretrievable. The

court held that "whether a marriage is so broken that it is irretrievable need not necessarily be so viewed by both parties."

Stipulations

***Fragin v. Fragin*, __ 80 AD3d 725 (2d Dept. 2011)**

The parties' separation agreement, which was incorporated but not merged into the parties' divorce judgment, provided for the wife to contribute to the "unemancipated" children's graduate school expenses. The former husband moved to enforce the terms of the agreement. The Supreme Court denied the relief on the grounds that the six-year statute of limitations barred the proceeding. The Appellate Division affirmed, on different grounds. Pursuant to CPLR § 213(2), only actions are subject to the six-year statute of limitations, not motions. The court strictly interpreted the agreement, and held that since the children were emancipated, no relief could be granted.

Author's note: The clause in the agreement was an obvious error, which was construed against the drafter. Children who enter graduate school are almost always emancipated, as they generally start graduate school at age 21 or beyond. It appears that the court ignored the true intent of the parties.

***Mullen v. Mullen*, 80 AD3d 981 (3d Dept 2011)**

The parties' divorce settlement was incorporated, but not merged, into their divorce judgment, which provided that "the children will be raised in the Catholic religion and that they will undertake their efforts to ensure that the children attend such important events relative to their being raised Catholic." The plaintiff sought to hold the defendant in contempt based on her alleged failure to regularly take the children to Sunday mass during her custodial time. Supreme Court denied the motion without a hearing, which was affirmed on appeal. Contempt is not appropriate unless the order clearly expresses an "unequivocal mandate." Here, the parties' stipulation does not explicitly require the mother to take the children to regular weekly mass.

Author's note: It would appear that if a child is to be raised Catholic, attending mass would be considered an "important event." However, under this holding, the precise religious activities should be detailed in a stipulation drafted by the matrimonial practitioner.

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E-mail to the Editor

From: "Attorney Chaim Steinberger" <csteinberger@mindspring.com>

To: "ESamuelson" <esamuelson@samuelsonhause.net>

Subject: Re: Judge Ross

Date: Thursday, November 04, 2010 12:17 PM

In a decision published in the NYLJ Justice Robert A. Ross sentenced a mother to six weekends in jail for her continued undermining of the father's relationship to the children. *Lauren R. vs. Ted R.* (NYLJ, 6/2/2010 at 17 col. 3) (Supreme Court, Nassau County). In his decision, Justice Ross cites my article, "Father? What Father? Parental Alienation and Its Effect on Children," NYSBA *Family Law Review* (Spr. 2006) (available for download off the publications page of www.theNewYorkDivorceLawyer.com or at www.nysba.org/FamilyLawReview).

In that case, Justice Ross found that the mother tried to replace the father with her new husband, vilified him to the children, and falsely (and without any "semblance of good faith") accused him of sexual abuse. Her actions turned the "joint custodial arrangement into a farce," and her "alienating conduct" was "as daunting as it was indefensible." The Court, therefore, found her to be in contempt of Court (for violating the Judgment of Divorce and its incorporated Stipulation of Settlement), and sentenced her to six weekends in a Nassau County jail.

In addition, the Court found that the mother:

- castigated the children any time they expressed a desire to spend time with their father;
- scheduled theater tickets, family events and social activities during the father's visitation time;
- enlisted the children and converted them into agents by having them make her demands upon the father;
- relegated the father to waiting endlessly at the bottom of her long driveway (even when the children would have to drag their heavy bags in a torrential rain);
- disparaged the father in front of the children by calling him a "deadbeat," "loser," "scumbag," "f-----g asshole," and telling him, "We all hope you die from cancer," and "Judge Ross will not be around forever, d____";

A particularly poignant incident, recounted by the Court, occurred when the father testified about how the mother prevented him from exercising his parenting-time rights during Hanukah, 2007. The decision states:

I [the Court] observed the [mother] smirk in the courtroom as [the father] emotionally related how he was deprived of spending Hanukkah with his children, and was relegated to lighting a menorah and watching his daughters open their grandparents' presents in the back of his truck at the base of [the mother's] driveway on a December evening.

In support of the proposition that "[p]rotraction or delay in parental alienation cases often serve to reinforce the offending conduct and potentially undermine any remediation that a court could fashion," the Court cites my article, "Father? What Father? Parental Alienation and Its Effect on Children," NYSBA *Family Law Review* (Spr. 2006).

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Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word (pdfs are NOT acceptable), along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

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