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Notes and Comments

Elliot D. Samuelson, Editor

The Word's The Thing

Recently I had the good fortune of running across some quotations of interest to the matrimonial bar. At this time of great national concern, I thought a bit of levity would be appreciated, and I found many recitations to be quite fitting to our type of practice. They are shared below:

Many receive advice, few profit by it.
—Publius Syrus

The good have no need of an advocate.
—Phocion

Advice is seldom welcomed; and those who want it the most, always like it the least.
—Earl of Chesterfield

To marry is to halve your rights and double your duties.
—Arthur Shelton Haller

Divorce is the sign of knowledge in our time.
—William Carlos Williams

Divorced couples hobnobbed with each other, and with each other's co-respondents.
—Noel Coward

To forever look upon a woman, to lust after her hath committed adultery with her already in his heart.
—Matthew 5:28

What men call gallantry, and gods adultery, is much more common where the climate's sultry.
—Lord Byron

Good counselors lack no clients.
—William Shakespeare

Inside

There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicidal pact.

—Robert Jackson

How amazing it is that, in the midst of controversies on every conceivable subject, one should expect humanity of opinion upon difficult legal questions.

—Charles Evans Hughes

Some circumstantial evidence is very strong, as when you find a trout in the milk.

—Henry David Thoreau

There are three kinds of lies—lies, damned lies and statistics.

—Mark Twain

How dreadful it is when the right judge judges wrong.

—Sophocles

Justice is being allowed to do whatever I like. Injustice is whatever prevents me from doing it.

—Samuel Butler

A long line of cases shows that it is not merely important, but it is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

—Lord Hewlart

A judge is not supposed to know anything about the facts of life until they have been presented in evidence, and explained to him at least three times.

—Lord Chief Justice Parker

Lawsuit, a machine which you go into as a pig and come out as a sausage.

—Ambrose Bierce

A liar should have a good memory.

—Quintilian

"If the law supposes that," said Mr. Bumble, "the law is a ass, a idiot."

—Charles Dickens

Equity sends questions to law. Law sends questions back to Equity; Law finds it can't do this, Equity finds it can't do that; either can so much as say it can't do anything, without this solicitor instructing and this counsel appearing for A, and that solicitor instructing and that counsel appearing for B.

—Charles Dickens

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

REQUEST FOR ARTICLES

The *Family Law Review* welcomes the submission of articles of timely interest to members, in addition to comments and suggestions for future issues. Please send to:

Elliot D. Samuelson, Esq.
Samuelson, Hause & Samuelson
300 Garden City Plaza
Garden City, New York 11530

Articles should be submitted on a 3 1/2" floppy disk, preferably in WordPerfect or Microsoft Word, along with a printed original and biographical information.

Zones of Responsibility: A Judicial Beacon in Custody's Dark Passageway

By Robert Z. Dobrish and Nina S. Gross

One of the most difficult areas of decision-making for judges, and one of the most heart-wrenching areas for parents, is the determination of the custodial arrangement. In the absence of agreement, where the decision is left to the court, the tools which are available to the system for constructing the right decision are clearly inadequate to the task. Neither the skills of a trial attorney in uncovering important facts, nor the prognosticative abilities of the mental health professionals in making recommendations, are sufficiently calibrated so that judges may feel comfortable that their custodial construct rests on a firm foundation. Moreover, the lack of follow-up studies places all the participants in the position of being able to learn almost nothing from the mistakes which are inevitably made.

In intact families, the decision-making process is a fluid one, with one parent deciding certain things—or no things—at certain times and each parent lending to the process whatever he or she is capable of. In divided families, particularly where the division has involved high conflict, there is little cooperation and significant animosity. Thus, the courts in New York have traditionally been given only two choices: sole custody, with decision making in the hands of one parent, or joint custody, where decisions must be agreed upon by both. For decades, New York courts have operated with only this choice and have been restricted significantly by the Court of Appeals decision in *Braiman v. Braiman*,[1] which made it clear that joint custody was not an alternative when the parties were antagonistic to one another and demonstrated an inability to parent cooperatively. While most trial courts have adhered strictly to this rule, it was known that every now and then a trial judge would depart from it and *suggest* or even *order* a joint custodial arrangement when it was believed that the inability to get along had been occasioned by the litigation itself and that the parties would be able to make joint decisions once the litigation came to an end. These decisions were rare and there is no way of knowing whether they were efficacious.

Judges, mental health professionals and attorneys who toil in the fields of custody litigation have been frustrated by the limited choices available and the paucity of studies relevant to the decision-making process. Now, New York courts, in the forefront, seem to be prepared to consider a new choice for custody determination: a choice which blends the elements of sole and joint custody.

F. v. F.[2] involved parents who "demonstrated an unwillingness to agree on many things and have allowed the tensions between them to become the focus of their relations"—a situation which is not uncommon in contested divorces involving minor children. There, Justice Barbara Panepinto declined to follow the *Braiman* rule. Rather than choose between two otherwise "good enough" parents and grant sole custody to one, the court granted the parents joint custody "modified by an award of split decision making, or what has come to be known as 'zones' or 'spheres' of decision making." Specifically, the court carved out certain areas in which each parent would have final decision-making authority.[3] In arriving at this determination, the court expressed its concern that "awarding one parent sole decision making power will only impair [the child's] relationship with either or both of her parents," whereas this "zones" approach would "balanc[e] each parent's weaknesses with the other parent's strengths . . . so that the needs of the child would remain the focus of the parties." The use of a "zones" approach to custody determinations seems to be an emerging trend in custody cases, a trend which suggests that the New York courts are attempting to find better, more sensitive solutions for high conflict families.

Guidelines for Custody Determinations

Where divorcing parents cannot reach an agreement regarding custodial arrangements, it is left to the court to restructure the parents' rights and responsibilities. There are few firm guidelines for the court in rendering custody determinations. Pursuant to Domestic Relations Law § 240, neither parent has a *prima facie* right to custody. Rather, such determinations are to be made "as in the court's discretion justice requires, having regard to the circumstances of the case and the respective parties and the best interest of the child." The statutory basis for custody determinations is deliberately broad, allowing courts to decide each case on its own facts and to tailor the decision to fit the particular circumstances.[4] As Justice Panepinto noted in *F. v. F.*, "nothing in New York's law prevents a court from making any reasonable allocation of the parental rights and obligations, so long as the determination is in the best interest of the child."

Legal custody[5] refers to the right to make decisions regarding issues concerning a child's life. A court may award sole custody to one parent, which means that

one parent is vested with sole discretion to make all final decisions regarding a child, and the non-custodial parent does not have ultimate decision-making authority, although he or she may have the right to be consulted.[6] In the alternative, the court may award joint legal custody, which generally means that the parents share the right to make major decisions regarding a child. In considering joint custody, courts have been wary of the difficulties inherent in compelling parties who are engaged in ongoing conflict to work together and agree—not only is there a risk that the parents would never reach an agreement and no decision would be made, but such a situation invites opportunities for ongoing conflict. In its decision in *Braiman*, the New York Court of Appeals determined that joint custody should be "encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion,"[7] and that "entrusting the custody of young children to their parents jointly . . . is insupportable when the parents are severely antagonistic and embattled."[8]

Custody Determinations post-*Braiman*

In the post-*Braiman* era, the basic *rule* has been that where the parents' extreme hostility makes it impossible for them to agree to work together, an award of joint custody is impracticable. However, some have questioned whether it is best for the child if one parent has no input where that parent is otherwise capable and concerned. Is it best to deprive a child of parental influence, simply out of fear of exposing the child to conflict? Are children not entitled to love, concern and input from their parents as well as protection from exposure to parental conflict which can be so painful? In addressing these issues, some courts have found that it is possible to split decision making, thereby maintaining input from both parents, and still remain consistent with *Braiman.* For example, in *Trapp*,[9] the First Department modified a joint custody award, stating that, given the animosity between the parties, joint custody was "fraught with the potential for further and continuing discord and, thus, is inimical to the best interest of the children." However, notwithstanding the interparental discord, the Court upheld that portion of the order directing joint decision making in the areas of religion and citizenship which "form a profound part of a child's heritage," suggesting that the complete exclusion of one parent from influence in the child's life is also inimical to the child's best interest. In addition, courts have used split decision making as a remedy in situations in which the custodial parent has not exercised decision making appropriately and vested the non-custodial parent with decision-making authority in that area.[10]

While *Braiman* spoke to the issue of protecting the child from conflict, it did not address the significance of continuing a parent's input in the child's life in situations where vesting either parent with sole custody would likely lead to alienation and exclusion of the non-custodial parent from the child's life. It is generally accepted that children do better when both parents are involved.[11] Thus, it is consistent with the best interests of a child to establish a custodial relationship which encourages the participation of both parents. It is in this context that the "zones" approach, which seems to have been introduced by Justice William Rigler in *Winslow*,[12] has gained increasing attention. Thus, in *Hugh L. v. Fhara L.*,[13] Justice Laura Drager awarded each parent "spheres of decision-making responsibility," stating, "[e]ach parent shall be responsible for the ultimate decision in certain areas, but will be required to consult with the other parent." The court then went on to delineate the specific areas over which each parent has the final say. The court noted that although both parents were "caring, responsible parents," "enormous tension" existed between them. In awarding each parent "spheres" of legal decision-making responsibility, the court reasoned as follows:

> It is clear that joint custody cannot succeed because the parties are incapable of working together. It is equally clear, as noted by the social worker, that if the Wife had sole custody she would use this control to exclude the Husband from involvement with the child. The evidence reveals that this has been the pattern of the Wife's behavior both as this case has proceeded and is consistent with her behavior during and after her first marriage. Equally problematic would be to award sole legal custody to the Husband. He has the capacity to act impulsively and might use his authority to inappropriately control the Wife.

Similarly, in an unpublished decision dated May 14, 2001, Justice Joan Lobis, faced with parents who were "so embattled in the course of this divorce . . . that they are not capable of jointly making decisions," assigned different areas of decision making to each parent, where the parents had "very different strengths and weaknesses" and where the court indicated that "the son is the product of both of [the parents'] personalities and both should be able to influence and guide him in the future."

Support for dividing decision making is not merely found at the trial level. With its August 2, 2001, decision in *Mars*,[14] the First Department has offered further sup-

port for this approach. In *Mars,* an extremely contentious divorce, the father had sought zones of decision making, on the basis that such an arrangement would promote his continued involvement in the lives of the children without placing the extremely combative parents in the untenable position of having to reach an agreement. The trial court did not accept the father's argument, and awarded the mother sole legal custody and ultimate decision-making authority in all areas. In modifying the order of the trial court, the First Department observed that

> it is undisputed that each parent takes an active interest in the children's lives and that it is in the children's best interest that both parents remain involved with them, notwithstanding the parents' present intolerance for each other. Under these circumstances, the trial court should not have vested all decision making authority in one parent in a situation where it appears that neither parent can be trusted not to obstruct the other's relationship with the children. . . . We are aware of no precedent for completely depriving a non-custodial parent, who is otherwise to remain fully involved with the children's lives, of decision-making in all areas.

Appellate courts are generally reluctant to substitute their own evaluation of the factors for that of the trial court and only do so where it is determined that the trial court's determination lacks a sound and substantial evidentiary basis.[15] Until *Mars,* the appellate review of cases in this area had either resulted in affirming an award of split custody or modifying a joint custody award upon the determination that such an arrangement was inimical to the best interest of the child. The appellate decision in *Mars* marks the first instance in which an appellate court has modified an award of sole custody, to carve out certain areas of decision making for each parent.

The divorce process has a traumatic effect on the entire family. Although it is hoped that parents will be able to deal reasonably with each other, particularly regarding issues involving their children, often this is simply not possible because of the anger and disappointment that the parents experience. However, in situations where it is clear that there are two parents who love and are loved by the child, where each has something good to give to the child and where the child is obviously taking from each, the custodial arrangement should encourage the participation of both parents. In these situations, the "zones" approach is likely to be the only way to ensure that both parents will continue to have an impact on decisions regarding their children. If each parent is granted certain areas over which he or she will have final decision-making authority, the parties would always have an incentive to consult with one another in a timely and forthright manner and, perhaps, neither parent would be inclined to exclude the other from a decision for fear of being subsequently excluded from a decision over which the other parent has the final say.

As the parties' children deserve to benefit from the strengths of both parents, affording each parent decision-making authority may be the appropriate way to encourage both parents to work together for the good of their children and to ensure that all the decisions are made with the children's welfare being of paramount concern.

Endnotes

1. 44 N.Y.2d 584, 407 N.Y.S.2d 449, 378 N.E.2d 1019 (1978).
2. N.Y.L.J., Oct. 19, 2001, p. 21, col. 5.
3. The court determined that the father would have final decision-making authority in the spheres of medical and dental treatment for the child, and that the mother would have final decision-making authority in the spheres of education and extracurricular activities.
4. *See* McKinney's Consolidated Laws of New York, Book 14, DRL C240:6.
5. There are two prongs to custody determinations: physical custody, which refers to the time that the child spends with each parent, and legal custody, which refers to the right to make decisions concerning the child, regarding such areas as education, medical care, recreational activities and religious upbringing.
6. But the non-custodial parent always has the right to challenge the determination of the custodial parent if that determination is harmful to the mental, moral or physical condition of the child. *See, e.g., Marjorie G. v. Stephen G.,* 592 N.Y.S.2d 209 (Sup. Ct., N.Y. Co. 1992) (the custodial parent has absolute right to determine children's religious upbringing absent evidence that such determination was so bad as to seriously affect the health and morals of the children).
7. *Braiman*, *supra* note 1 at 451.
8. *Braiman*, *supra* note 1 at 449.
9. *Trapp v. Trapp,* 136 AD2d 178, 526 N.Y.S.2d 95 (1st Dep't 1988).
10. *See, e.g., Frize v. Frize,* 266 AD2d 753, 698 N.Y.S.2d 764 (3d Dep't 1999) (order of trial court awarding father sole decision making in the area of education for the parties' multiply handicapped child was upheld where the mother's "role in the child's education has at times been a hindrance"); *see also Tran v. Tran*, 277 AD2d 49, 716 N.Y.S.2d 5 (1st Dep't 2000) (order granting father decision-making authority regarding the child's therapy where the mother violated the custody/visitation agreement regarding therapy was upheld).
11. *See, e.g.,* Judith S. Wallerstein and Joan B. Kelly, Surviving the Breakup (Basic Books, 1996).
12. *Winslow v. Winslow,* 613 N.Y.S.2d 216 (2d Dep't 1994).
13. *Hugh L. v. Fhara L.*, N.Y.L.J., June 1, 2000, p. 29, col. 6.
14. *Mars v. Mars,* 729 N.Y.S.2d 20 (1st Dep't 2001).
15. Scheinkman, Practice Commentary, McKinney's Consolidated Laws of New York, Book 14, DRL C240:6.

Valuing and Distributing the Professional Practice, License and Maintenance— The "Double Dipping" Dilemma: New York vs. California

By Lisa Krieger-Zonder

In a matrimonial action, the court is routinely asked to value a spouse's interests in both the professional license and the professional practice; and thereafter, distribute the marital proceeds equitably. In New York, the professional license and practice are characterized as "marital" property under Domestic Relations Law § 236 (DRL).

Both the bench and bar will agree at the outset, "there is no uniform rule for fixing the value of a going business for equitable distribution purposes."[1] This article will explore the multitude of discretionary factors considered by the courts in the context of valuing a professional practice and professional license subsequent to divorce.

From the bench's perspective, the determination of the value of professional practices is based upon the court's assessment of the credibility of the expert witnesses and the valuation techniques they employ.[2]

In New York, following *McSparron*[3] and *O'Brien*,[4] the courts must avoid over-distributing the higher earner's income stream while valuing and distributing: (a) the professional practice, (b) the license and (c) maintenance. The discussion herein is primarily focused on the avoidance of double dipping or perhaps triple dipping[5] by awarding a duplicative interest in the asset.

Valuing a Professional Practice

Prior to trial, the retained expert valuation professional may take a number of approaches for valuing a professional practice. It is incumbent upon the practitioner to retain a competent professional who will persuade the court to utilize a particular methodology (while considering the possibility of offering several methods) for valuing a professional practice.

Respecting the **adjusted book value or asset approach**, an appraiser reviews the professional practice's or company's assets. Assets and liabilities are typically adjusted to fair market value. One problem in using this method is that the intangible asset value of a going-concern business is not measurable. Consequently, the appraiser may use an asset approach method in combination with the excess earnings or other method.

The **market approach** uses businesses in the same or similar industry to develop a multiplier. Depending on the nature of the company being valued, the appraiser might use information from the sale of private companies or, alternatively, the sale of public companies or the price of stock as of the date of valuation for comparable public companies.

The **income approach** consists of two primary methods: (1) the capitalization of cash flow method and (2) the discounted cash flow method. The basic difference between the two is based on the stability or lack thereof of expected future income. The most difficult part of the income approach is the determination of the appropriate discount or capitalization rate to be used. *A discount or capitalization rate measures the risk associated with achieving the projected income or cash flow in the future*. This is where advocacy comes into play, since reasonable minds will differ where projected income is at issue.

It should be noted that, in many states, the value of a business or professional practice in the divorce setting does not necessarily reflect the "fair market value" that the professional practice would sell for on the open market. In many states the courts disregard the difficulty of transferring the practice for valuation purposes.

The New York Approach

1. Date of Valuation

Prior to the commencement of trial, counsel should attempt to negotiate a designated date of valuation. If unable to do so, counsel will set the matter for trial. In California, it is fairly common for counsel to request that the court bifurcate or hold a separate trial solely on the issue of the date of valuation. The advantage in a bifurcated trial is the cost savings realized by obviating the need for the valuation professional to run a multitude of calculations showing the value of the professional practice at the commencement of the action and the value at the date of commencement of the action.

In New York, whether an asset is valued at the commencement of an action or date of trial ordinarily depends upon whether the asset is an active asset, val-

ued at the commencement of the action, or a passive asset, valued at the date of trial. The New York Court of Appeals has clarified the distinction between passive and active assets. An active asset is one whose value depends on the labor of the spouse and a passive asset depends on market conditions. By statute, specifically DRL § 236, the courts are empowered with discretion to determine the date of valuation of marital property by examining all the various facts and circumstances delineated in the statute.

By contrast, the California statute permits the court to value assets either at the date of separation or at the date of trial, rather than the date of the commencement of the divorce action.

2. Valuation of Law License, Professional Practice and Award of Maintenance

In the *Grunfeld* case, the trial court examined the value of the marital interest in the husband's law firm. After the Grunfelds' trial was held, *McSparron v. McSparron*[6] was decided, requiring a valuation of husband's license in addition to the valuation of his law practice. The New York Court of Appeals decision in *Grunfeld v. Grunfeld* is the most recent analysis of the need to avoid double dipping while: (a) distributing an interest in a professional practice, (b) valuing a license and (c) awarding spousal maintenance.[7]

For the *Grunfeld* appeal, each of the appraisers utilized the excess earnings approach. The Court was faced with a determination of how much the husband earned in excess of "reasonable compensation" for an attorney similarly situated. From that figure, taxes and passive investment income are "backed out" and thereafter capitalized using an agreed-upon multiplier; then, the husband's interest in the law firm's assets are added to that amount, to arrive at an interest in the practice. The Court of Appeals suggested that the income available to make spousal maintenance payments should have been reduced to the extent that the income was awarded as a stream of income into an asset. Further, the Court of Appeals noted that where income from a professional license is considered in awarding spousal maintenance, the court can avoid double counting by reducing the distributive award or reducing maintenance. The California courts follow a somewhat different approach, as will be discussed in detail below.

a. Analysis of the New York Court of Appeals Approach

To value a marital interest in a law practice using the excess earning approach (tangible assets are added to goodwill), it is necessary to make a determination of the reasonable compensation of a similarly situated attorney with similar skills. Thereafter, one compares the survey of compensation levels of senior associates in firms engaged in the same area of practice as plaintiff and adjusts the compensation upward to reflect the partner's higher billing rate.[8]

For a goodwill calculation (of a professional practice), the court would examine the difference between reasonable compensation for a similarly situated attorney and the actual salary of the professional on the date of valuation. To arrive at a computation for the value of the professional license, the court would examine the difference in income of an individual with a bachelor's degree and reasonable compensation of an attorney similarly situated to the professional spouse.

To compute the income stream that is available to pay maintenance, the court may award support based upon the income stream of an individual with a bachelor's degree. That is to say, the court may neither use the income stream that is "goodwill," nor may it use the income stream that is the professional license.

By necessity, if the court uses a multiplier to calculate goodwill then it has already taken into account the titled spouse's future earnings. If the court uses the same earnings attributable to the law license to determine the value of the professional license as a marital asset, that would be double dipping, in violation of the *McSparron* holding. If the court has valued the stream of income flowing from a professional practice using a multiplier (thereby factoring in the professional's future income), then that income—*e.g.*, $25,000—would be shifted to the non-titled spouse and no longer available for maintenance payments. Consequently, a corresponding adjustment must be made for maintenance in accordance with *Grunfeld*.

b. Post-*Grunfeld* Cases

Following the Court of Appeals' decision in *Grunfeld*, there have been a number of appellate decisions which purport to follow the rules enunciated in *Grunfeld*. The Appellate Division found that where the trial court did not value the professional's license, but awarded maintenance based upon the professional spouse's actual income and "income had he not been licensed," as well as the undistributed portion of his license, to be amply sufficient to support such an award.[9]

In *Jarrell v. Jarrell*,[10] the Appellate Division ruled that the trial court did not double count by awarding spousal maintenance along with a share of husband's MBA since after the distribution of wife's share of the value of husband's MBA, the court made a corresponding adjustment in the maintenance award.

Several months ago, the Appellate Division examined the double counting problem in *Siegel v. Siegel*.[11] *Siegel* involved the distribution of wife's interest in the

husband's: (a) accounting firm, (b) professional license and (c) maintenance. The Appellate Division modified the judgment by eliminating the husband's maintenance payment, explaining that the Supreme Court erred in counting the same future earning stream as the basis for both the distributive award to the plaintiff of a portion of the defendant's certified public accounting practice and license, and the award of maintenance. Citing *Grunfeld*, the Appellate Division reiterated that once a court converts "a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout."

There were several other decisions focused on the double-dipping conundrum following the *Grunfeld* case.[12]

3. Valuation of Professional License

Presently New York's is the only high court in the country to consider a professional license to be marital property.[13] Arguably, however, in other jurisdictions the value of the professional license is taken into account in awarding spousal support.

4. Tax Impacting

One commentator has suggested that maintenance must be tax impacted to avoid double taxation to the non-titled spouse.[14] California takes a different approach.

The California Approach

1. Date of Valuation

Under California law, the community property scheme imposes a cut-off date for the acquisition of community property after the parties legally separate, known as the "date of separation." Any income from a law practice or growth in the practice during the marriage, but prior to separation, would be characterized as community property. Under this scheme, any funds earned during the marriage resulting from the law practice would be community funds until the date when the parties "separate" as defined by statute, that is to say, the "date of separation." Thereafter, the earnings belong to the lawyer.

The court is empowered under Family Code § 2552 to value the professional practice as of the date of separation, rather than the date of the divorce trial, if the increase in the value of the business is attributable to the professional's post-separation efforts. Generally, a small law practice, which relies on the skills and reputation of the spouse who operates the business, will be valued as of the date of separation.

2. Valuation of Law License, Professional Practice and Award of Maintenance

This year, the California Court of Appeals ruled in the case *Marriage of Duncan-Hurst*,[15] that the court must divide the community estate equally, that the court has broad discretion and that the court's determination of the value of a particular asset is a factual one. *Duncan* sets forth the court's role, which is to determine which of the recognized valuation approaches will most effectively achieve substantial justice between the parties.

Mr. Duncan was a skilled manager of an investment advisory business of which he was the majority shareholder. His attorney offered three different valuation methods: (1) gross revenue multiplier; (2) buy/sell agreement; and (3) comparable sales of privately held companies. The court valued Mr. Duncan's company, Duncan-Hurst, failing to include any potential or continuing income to Mr. Duncan. The court noted that it was improper to reduce the value of the business by the speculative value of a hypothetical employment agreement.[16] This approach would be too speculative.

3. Valuation of Professional License

As discussed, *supra*, California does not value the professional license in making community property awards. Notwithstanding, the professional license is considered as a factor in awarding spousal support.[17] Further, Family Code § 2621 permits the court to assign the entire student loan liability to the professional spouse.[18]

4. Tax Impacting

A court may not consider the tax consequences unless the tax liability is imminent and specific. In *Duncan-Hurst*, the court accepted the comparable sales analysis for other private companies.

The New York approach has been criticized because, in many instances, the professional spouse is obligated to pay the value of the license, the value of the law practice and maintenance, all from the same income stream. In response to this criticism, some have argued that, if the distribution of the professional license were omitted, then the non-titled spouse would be restricted to a claim for maintenance. The obligation to pay maintenance ends upon the death or remarriage of the non-titled spouse, depriving him/her of any interest in the professional license.

In California, the courts have the discretion to make awards of maintenance or spousal support based upon the professional license. It may be a more sound approach to avoid double dipping. An analysis of the value of the professional license in the context of main-

tenance may yield a more equitable result. Such an approach seems to be treading on reverting back to the pre-*McSparron* and *O'Brien* "merger" of the professional license and practice, but there is a difference. Rather than being merged, the court would have discretion to consider the professional license in the context of awarding maintenance.

To minimize the effect of double dipping in either jurisdiction, it would make sense for the professional valuation expert to visually chart the income available to pay support in such a fashion that the court will be made aware of any over-distribution. Further, counsel should be tuned in to the period of time over which a distributive award should be paid out, particularly where there is an award of maintenance.

Endnotes

1. *See Burns v. Burns*, 618 N.Y.S.2d 761.
2. *See Douglas v. Douglas*, 722 N.Y.S.2d 87 (3d Dep't 2001) (citing *Ferraro v. Ferraro*, 684 N.Y.S.2d 274).
3. *McSparron v. McSparron*, 87 N.Y.2d 275, 286.
4. *O'Brien v. O'Brien*, 66 N.Y.S.2d 576, 498 N.Y.S.2d 743.
5. *See Family Law* Review, Vol. 32, No. 2, Summer 2000, p. 2, comment by NYSBA *Family Law Review* editor Elliot Samuelson, who noted,"[I]t is clear to this commentator that the Appellate Division was really guilty of triple dipping. Components of the only available income stream, Mr. Grunfeld's law practice were clearly used in all three valuations, i.e., the license, the practice and the award of maintenance."
6. *McSparron*, 87 N.Y.2d at 286.
7. *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000).
8. *Finocchio v. Finocchio*, 162 AD2d 1044 (4th Dep't 1990).
9. *See Erickson v. Erickson*, 723 N.Y.S.2d 521 (3d Dep't 2001).
10. *Jarrell v. Jarrell*, 714 N.Y.S.2d 462, 468 (1st Dep't 2000).
11. *Siegel v. Siegel*, 2001 WL 668909, slip op. 05373 (Apr. 15, 2001).
12. See *Douglas v. Douglas*, 722 N.Y.S.2d 87 (3d Dep't 2001), wherein the Court endorsed an excess earnings approach to determine the increase in value of the husband's partnership interest. In the *Douglas* case, the parties were married for 14 years. Husband owned a partnership interest in a New York City law firm. See also *Ami Vora v. Manoj Vora*, 2000 N.Y. slip op. 00749 (2d Dep't Jan. 18, 2000), wherein the Appellate Division found that the Supreme Court erred in awarding plaintiff a 10% interest in defendant's medical practice, since the asset, acquired after the commencement of the divorce, is characterized as separate rather than marital property. Further, the Court found that a "coverture fraction" should have been applied to the enhanced earning valuation "to account for the portion of the defendant's medical education and training, completed before the marriage. . . ." Husband physician's educational loans would not be deducted from the estimated amount of future enhancement. Finally, the Court ordered that the distributive award should be made over a 2-year rather than a 20-year period.
13. Batts, 63 N.Y.U. L. Rev. 751 (1988).
14. *Family Law Review*, Vol. 32, No. 2, Summer 2000, p. 6. The article is authored by Stuart A. Gellman.
15. *Marriage of Duncan-Hurst*, Cal. App. 4th No. D033482 (July 4, 2001).
16. *Id.* (citing *Marriage of Czapar*, 232 Cal. App. 3d 134).
17. Family Code § 4320 provides, in pertinent part,

    > In ordering **spousal** support under this part, the court shall consider all of the following circumstances:
    >
    > (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:
    >
    > (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.
    >
    > (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.
    >
    > (b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.
18. Family Code § 2621 provides, "Debts incurred by either spouse before the date of marriage shall be confirmed without offset to the spouse who incurred the debt."

Ms. Krieger-Zonder was admitted to practice law in California in 1991 and is a certified family law specialist, certified by the State Bar, Board of Legal Specialization. She is also admitted to practice law in the District of Columbia. Ms. Krieger-Zonder's application for admission to New York is pending. She is a member of the New York firm, Mohen, Craig & Treacy LLP in Locust Valley, New York.

Judicial Corner: Justice Ira Raab*

By Elliot D. Samuelson

Justice Ira Raab

The first impression one gets when meeting Justice Ira Raab, is that he is a man who thoroughly enjoys his work, is driven by a desire to accomplish a lot in a short period of time (he will reach mandatory retirement age in three years) and is modest about the unique measures he has employed that have enabled him to reduce his case load to less than 50 percent of his closest competitor's in the dedicated matrimonial part in Nassau County. When queried about this enviable record, with a glint in his eye, he gladly explained his ten-point program (which he said were management techniques) for judicial success:

1. Telephone conferences on everything. No motions can be made in my part without my having the opportunity to not only resolve the issue posed, but the entire case, the goal being to arrive at a "so ordered" stipulation.

2. Access to the court. I'm always available to counsel and litigants. I arrive at eight, and leave between six and six thirty (only because they throw me out of here by then) and I won't go home until every paper submitted to me is signed or I take it home with me and don't get to bed until it's done. Then, I'll fax it back to counsel . . . even if it's two or three a.m. Yes, I'm a workaholic. But I have always attacked everything I have ever done in the same fashion. Look, I was a litigator as a lawyer. Tried hundreds of cases. I know what it's like in the pits.

3. Any matters that have begun in the Family Court, I direct to be consolidated with the pending matrimonial action. I handle all applications for orders of protection and grant immediate hearings. There is no reason to bifurcate relief and have one case pending in two courts. Whenever I can, I attempt to get involved. If there is an action filed in the criminal part of the district court for a family offense, I try to work out ACODs for the family.

4. Compilation of a "hit list." Oh, that's a schedule of stale cases, those over a year old. I call everyone in and give them 30 days to complete their case or go to trial. I stopped doing this in December, because I had disposed of every case on the hit list, and did not have any more in my inventory that would qualify. There were 42 cases on the list when it was started seven months ago, and I only tried 2 of those cases and settled 40.

5. I make telephone calls from the bench. I had a telephone installed. If records or experts are inaccessible, I make a call to make them accessible. It's amazing what one phone call can do.

6. My law secretary is Jennifer Feingold. Our relationship can best be described as a bigamist marriage made in heaven. I hired Jennifer after interviewing six of the most experienced attorneys I could find in the matrimonial field. We can each read the other's mind. She should share in the success of our part.

7. Speak to the litigants. I think it is important to let your clients vent, and they should have access to the court.

8. Attorneys, experts and law guardians get paid.

9. Have bagels, danish and coffee in chambers to relax everyone and enhance the possibilities of settlements.

"Yes, I'm a workaholic. But I have always attacked everything I have ever done in the same fashion. Look, I was a litigator as a lawyer. Tried hundreds of cases. I know what it's like in the pits."

10. Always keep a dish filled with candy on the bench, and reserve it for those attorneys and litigants who settle their matters. You should give out two pieces if it was a tough case.

Ira J. Raab was born 67 years ago, and grew up on the Lower East Side of New York. He accelerated through high school, college and law school, by attending summer classes and lopping off a year of each school's curriculum. He has eight children, and nine grandchildren, with three more on the way. Judge Raab is well equipped for the matrimonial bench, having himself been through the trauma of divorce. During the 45 years he has been admitted to the bar, he has served

as a city attorney, been in private practice, and was first elected Judge to the District Court in Nassau County in 1996, when he decided that he would retire to Florida if he were not elected. The matrimonial bar should be delighted that, as a Democrat in Nassau County, he was able to pull off a notable upset.

"I'm just a soldier in the army. When the administrative judge, the general, tells me what to do, I do it. I follow orders."

When I asked Judge Raab to describe his feelings as a sitting judge in the matrimonial part, he described the experience as akin to a stint in the military. "I'm just a soldier in the army. When the administrative judge, the general, tells me what to do, I do it. I follow orders." There was no sarcasm in his voice; I received the impression that he was simply stating that he genuinely likes his work and is delighted to be sitting as a trial judge in the matrimonial part.

Interestingly, when we started the interview, and the judge was asked what were his first impressions when he began his term on the matrimonial bench, he told me that it only took him two weeks to realize why things didn't run as they should. Delays, poor caseload management, lack of controls over attorneys and too much motion practice were responsible for the congestion. He set about curing the ills, and his record speaks volumes. Thirteen months later, he has reduced his backlog from 301 cases to 116, and still is able to handle 104 negligence cases assigned to him by the administrative judge. "I let lawyers come in to see me anytime," he said, obviously aware that the time spent will expedite his matters.

Judge Raab tells me his trial calendar is current. When asked how long a litigant has to wait for a trial date, he retorted, "Call your first witness!" He noted with obvious pride that each of his colleagues in the part were assigned the same case load, and that now he has 275 cases fewer than his furthest competitor, and 88 cases fewer than his closest competitor.

Finally, in summarizing the months he has spent in the matrimonial part (he now has been assigned to post-judgment matters in the main courthouse), he mused, "You have to be able to understand the problems people have and try to resolve them by encouraging the parties and lawyers to reach settlements. That's the way I see it. I try to help them avoid lengthy, expensive, aggravating trials and hearings and resolve matters by negotiation." Judge Raab also offered that "I wish I had more power to do more things that I would like to do to get cases disposed of quickly."

With a twinkle in his eye as we came to the end of our meeting, he also reminded me that he makes house calls, inspecting homes, locations, and doing inquests in infirm litigants' homes when they can't come to court. Just before we parted, I asked him if he had any advice for attorneys who practice in the matrimonial part if they appear before other judges. He responded spontaneously, "Be nice to each other. Treat each other well and be trustworthy. When you say something, follow what you say. In my day we just shook hands. I did a two-million-dollar closing without a contract, just with a handshake. That was the contract. Later we came back and prepared a deed. All on the shaking of hands."

"Be nice to each other. Treat each other well and be trustworthy."

When Judge Raab does retire, we will lose a dedicated, caring, insightful and certainly an unorthodox and unique member of the matrimonial bench.

*This is the first in a series of interviews of judges sitting in matrimonial parts throughout the state. It is hoped that it will encourage dialogue and collegiality, which will enable bench and bar to work together more effectively.

Mr. Samuelson is a partner in the Garden City, New York office of Samuelson Hause & Samuelson, and editor of the *Family Law Review*. He is a past president of the New York Chapter of the Academy of Matrimonial Lawyers and the New York Family Law Inn of Court, and is listed in *Best Lawyers in America*.

Important Interstate (International) Custody Law Enacted: Essentials About the UCCJEA

By Barbara Ellen Handschu

Two years ago, the New York State Legislature passed the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The Governor exercised his veto in December 1999 and, in June 2001, the Legislature again passed the UCCJEA. Modifications were made from the earlier version. The Governor signed the Act on October 30, 2001, and it goes into effect on April 30, 2002. The UCCJEA can be found as Chapter 386 of Laws of 2001.

This review of New York's UCCJEA covers limited highlights of the legislation. Caution is urged—carefully consult statutory provisions. This article will review the major areas of impact and discuss several areas in detail.

Overview: Purposes of UCCJEA

The new UCCJEA, repealing and replacing Article 5-A of the Domestic Relations Law (DRL), enacts, with minor revisions, the UCCJEA promulgated by the National Conference of Commissioners on Uniform State Laws. The UCCJEA has been adopted by about 25 states and is pending in a number of state legislatures.

One of the major purposes of the UCCJEA is to harmonize the prior UCCJA (DRL Article 5-A) and the Parental Kidnapping Prevention Act (the PKPA), found in 28 U.S.C. § 1738A. New York enacted its version of the old UCCJA in 1977. The UCCJA was promulgated by the Uniform Law Commissioners in 1968, and by 1981, every state had adopted its own UCCJA. That same year, Congress enacted the PKPA, attempting jurisdictional conformity in custody decisions involving two states and the full faith and credit clause. Recently, Congress enacted the Violence Against Women Act (VAWA), found in 18 U.S.C. §§ 2265–2266. The original uniform custody law—the UCCJA—had areas of conflict with the PKPA and areas not considered before enactment of the VAWA.

The drafters of the new UCCJEA initially envisioned a uniform act which would provide faster and more effective enforcement of interstate custody orders. The drafters instead undertook a complete revision of the UCCJA—harmonizing the areas where the UCCJA and the PKPA conflicted, and incorporating the protections provided for victims of domestic violence in the VAWA. In essence, the UCCJEA takes the UCCJA and conforms it with the PKPA and the VAWA.

The new legislation clarifies inconsistent interpretations of sections of the UCCJA and synchronizes the UCCJEA and the PKPA, especially as to home state priority and the exclusive continuing jurisdiction right to modify or enforce a prior custody order.

The new Act embodies efficient, speedy enforcement procedures, effectuating interstate access and custody provisions. These have been described as turbo *habeas corpus* procedures, and they utilize a public official to expedite enforcement.

The Act is sensitive to protecting victims of domestic violence or children or siblings who have been subjected to abuse or neglect and who have sought refuge in New York or in another state. It includes address confidentiality provisions and extends the jurisdiction of New York courts to act in temporary emergency situations to protect the child, a sibling or the parent of the child. If a party's address is to be kept confidential, the court clerk or a disinterested person must be designated as the agent for service of process.

While it is not a stated purpose of the Act, it should be recognized that the UCCJEA and the recently enacted Uniform Interstate Family Support Act (UIFSA), found in Family Court Act Article 5-B, establish similar jurisdictional predicates. Many procedures to establish, modify and enforce both interstate custody and support are similar—accustoming the courts, practitioners and litigants to one set of basic rules. The UCCJEA and UIFSA are not mirror images of one another—caution should be exercised before presuming that both acts are absolutely the same. For example, the UCCJEA provisions affecting registration of custody orders differ slightly from UIFSA.

We live in a mobile society. Parents with a child in common may move from state to state, with or without the child involved in the moves. Persons with court orders granting custody or access to a child, sometimes including grandparents or siblings who have statutory rights found in DRL §§ 71 and 72, may not be in the same state as a child. They may need to enforce or modify custodial determinations.

Not only do custody and access rights have to be adjudicated and established when two states or a state and or another country are involved, but custody orders are different from many other court orders. They are marked by their modifiability. While there is a body

of law in New York which indicates that there must be a significant change of circumstances to permit a custody order to be modified, other states may permit modifications under more relaxed circumstances. New York courts usually permit hearings and often allow changes in custody agreements which have been arrived at by the parents, when there has been no prior custody trial. The modifiability of custody orders—their very fluidity, until children come of age—necessitates frequent reviews of custody arrangements, often after the parties and/or the child have left the original state which reviewed custody terms. Frequently, the parents and child live in state A, which becomes the issuing state with the original custody order. Then the primary custodial parent and the child move to state B, while the non-residential parent moves to state C. The parent in state C may wish to enforce the custody order if new transportation arrangements are necessitated by both parental moves. On the other hand, the parent in state B may wish to modify state A's order. The parents need clear guidelines as to which state can modify and which state has enforcement rights. The UCCJEA provides the answers.

Major Provisions—UCCJEA

The new legislation has a number of key provisions. Among them are the following:

- home state priority;
- exclusive continuing jurisdiction;
- a clarification of emergency jurisdiction and its temporary nature;
- new enforcement procedures; and
- provisions for effective communication between courts, with the involvement of parties.

Each of these areas will be discussed in greater detail.

Home State Priority

When the UCCJA was enacted there were four bases for jurisdiction. That a state was the child's home state (residence for six months, or place of birth for a child who was less than six months old) was one of the reasons for exercising jurisdiction under the old UCCJA. While the UCCJA had a bias towards the home state's taking jurisdiction, other states might assume jurisdiction on the other UCCJA grounds (significant connections, emergency or a situation where no state is the home state—the "vacuum jurisdiction" area). This led to clear conflicts, with two states claiming or assuming UCCJA jurisdiction on different grounds. The UCCJA permitted a state other than the home state to proceed once it had assumed jurisdiction.

The drafters of the PKPA took a different view of the home state basis for jurisdiction. The PKPA prioritized home state jurisdiction, giving whatever state was designated as the home state the first opportunity to assert and assume jurisdiction. The new Act, the UCCJEA, prioritizes home state jurisdiction in the same manner as the PKPA.

In the new legislation, a state which is not the home state of the child will defer to the home state's right to make an initial custody determination.[1] New York may assume temporary emergency jurisdiction[2] but if New York is not the home state, New York jurisdiction continues until there is a custody order and a transfer to a home state[3] or a state with jurisdiction.

"Home state" is defined in section 75-a(7) of the UCCJEA as the state where a child and a parent (or a person acting as a parent) lived for at least six consecutive months before custody proceedings were commenced. (The commencement of a custody proceeding is defined in UCCJEA § 75-a[(5)] as the filing of the first pleading, not the service of a pleading.) In the event a child is less than six months old, the home state is where the child has lived from birth with a parent or parent substitute. The Act goes on to deem a temporary period of absence by a parent or parent substitute to be part of the period used in calculating the time period. This temporary absence provision encompasses a situation where there is no permanent change of residence or domicile and the person fleeing New York does not want to relinquish New York State's right to claim home state priority in decision-making affecting a child.

Exclusive, Continuing Jurisdiction

The UCCJA and the PKPA have had frequent conflicts over determinations of which state has rights to modify or enforce custody orders. At times, some determinations seemingly refuse to apply the PKPA, which preempts state law. Conflicting custody orders could issue under the UCCJA—one state claiming jurisdiction based on continuing modification rights and the other state claiming to have become the home state or the state with significant contacts. Other problems have occurred with differing treatments for a custody and a visitation order in two states. Under the UCCJA and the PKPA, states could reach different conclusions when deciding whether the state with continuing jurisdiction had relinquished rights to further modification or enforcement.

The UCCJEA provides for exclusive, continuing jurisdiction once a New York court has made a custody determination.[4] This exclusive, continuing jurisdiction continues until the child, the child and the parent or parent substitute no longer have a significant connec-

tion with New York, and New York no longer has significant evidence affecting the child. The New York jurisdiction ends when a New York court (or another state court) determines that the child, the child's parents or parent substitute do not reside in New York.[5] In other words, jurisdiction shifts if all the initial grounds for jurisdiction change. For instance, if New York was the home state and New York made the initial temporary custody order while everyone was in New York, the departure of the temporary custodial parent and the child does not deprive the New York courts of the right to make a final custody order or to modify and/or enforce custody orders, so long as the child or one parent remains in New York. The temporary custodial parent in this illustration who has left New York cannot ask the courts of the new state to modify or enforce the temporary order while New York has exclusive, continuing jurisdiction (this presumes that the new state either has enacted the UCCJEA or its courts properly apply the PKPA, preempting its UCCJA provisions).

Temporary Emergency Jurisdiction

Under the old UCCJA, jurisdictional predicates permitted New York to act in an emergency situation involving abandonment, abuse, or a child's maltreatment. Emergency jurisdiction was made an equivalent basis for jurisdiction in the UCCJA, on an equal level with the UCCJA home state jurisdictional predicate. While the New York courts have been somewhat strict in evaluating what constitutes an emergency, some courts in New York and other state courts using the UCCJA emergency jurisdiction predicate have not been clear as to when the emergency ends. By fiat, emergency jurisdiction sometimes turned into the permanent basis for a custody award.

The UCCJA had a significant shortcoming in assessing the requirements for assuming emergency jurisdiction. The UCCJA considered threats to a child, not the threats to a parent or the danger to a child's sibling.

The new UCCJEA defines the temporary nature of emergency jurisdiction, and it expands the definition of an emergency to situations where there must be protection for the child, the child's parent or sibling. In section 76-c(1) temporary emergency jurisdiction is defined as a situation where the child is physically present in New York and the child has been abandoned *or* it is necessary in an emergency to protect the child, a sibling or a parent of the child. Temporary emergency jurisdiction only can ripen into continuing jurisdiction if New York becomes the home state and there is no custody proceeding commenced in another state which would otherwise have UCCJEA jurisdiction. If New York jurisdiction is to be temporary (for instance in a situation where a custody proceeding was pending in the child's home state), the New York order must specify the period of time within which an order must be obtained from the other state,[6] and the New York court must immediately communicate with the other court.[7]

Enforcement of Custody and Visitation (Access) Orders

The most radical change in the UCCJEA from the UCCJA is the inclusion of a uniform procedure for enforcement of custody and access orders. One of the major problems with the UCCJA was the lack of any uniform mechanism to enforce custody determinations. It did little good for a parent who was entitled to have a child at a holiday to have a court order which would take months to enforce when access was denied. Under the old UCCJA, a court enforcement proceeding might occur months after the scheduled and thwarted access. The new law—the UCCJEA—takes the position that if custody or access orders cannot be rapidly enforced, it is tantamount to a denial of custody or access or a prohibited *de facto* modification of custody.

The UCCJEA mandates that a state must enforce a custody or access order from a state which substantially conforms with the UCCJEA. That state's order will have exclusive, continuing jurisdiction, and it now will be enforced by other states.

Three essential enforcement mechanisms are established in the UCCJEA. One means of obtaining enforcement involves registration of the custody or access order made by the issuing state and registered with the enforcement body of the other state (the receiving state). A receiving state other than New York may have a court or agency designated for enforcement purposes.

The registration process, set out in section 77-d, is similar to provisions in UIFSA and those found in the Uniform Enforcement of Foreign Judgments Act. Registration requires the New York court to give notice to involved parties and the child. There is a very limited time in which to contest registration (20 days from service of notice), and there are limited defenses (lack of jurisdiction for the issuing court; that the order for which registration is sought has been vacated, stayed or modified; or that notice had not been properly given to the person entitled to notice before the order issued). If the registered order is confirmed, it is entitled in the New York UCCJEA to be enforced with any relief available to enforce any domestic order,[8] and it must be recognized by the New York courts and enforced.[9]

The UCCJEA also sets up an expedited proceeding for enforcement, referred to as a turbo *habeas corpus*. When the New York court receives a verified petition, the court directs the respondent to appear for a hearing in person (with or without the child) within three court

days.[10] The intent of the expedited provisions was to use the speed of a *habeas corpus* proceeding without transforming enforcement into a modification forum. A "best interests" defense may not be raised in an expedited proceeding. That "defense" is left for the state which has exclusive, continuing jurisdiction to modify its own order, or to the proper modification forum under section 76-b (or UCCJEA § 203—the Uniform Act has a numbering system which differs from the New York legislation).

In expedited proceedings, provisions are made for a warrant to issue if there is imminent danger to a child, or if it is likely the child will suffer imminent serious physical harm, or if it appears that the child will be removed from the enforcing jurisdiction.[11] This petition generally is heard on the next court day after the warrant is executed.[12] If a warrant is issued, law enforcement officials must effectuate it and deliver the child to the petitioner or, if necessary, act jointly with local CPS.[13]

In the third enforcement device, the UCCJEA gives a public official the power to enforce custody or access orders. This is modeled after California's enforcement mechanism, where public officials throughout the state, with civil and criminal powers at their disposal, locate and return children and enforce custody determinations. These officials do not become involved in the merits of any underlying custody issues; they act on behalf of the state or local government in effectuating an order. The particular agency or authority which will act in New York has not yet been designated; the statute refers to the "prosecutor or public official."[14] Expedited enforcement applies to UCCJEA or orders under the Convention affecting abducted children, involving a country outside the U.S.[15] (UCCJEA § 75-d provides that New York courts must treat a foreign country as if it were a state, giving recognition to custody orders which comply with UCCJEA jurisdictional predicates when determinations are made outside the U.S.)

All these new enforcement powers provide speedy and effective enforcement, especially when a child's whereabouts are hidden from a person who is either entitled to custody or access by the terms of a prior order which conforms to the UCCJEA. The prosecutor or public official will have a wide variety of means—including help from criminal prosecutors—to see to it that court orders are enforced and that children are not kidnapped, harmed or otherwise kept from those persons with whom a court has entrusted these children.

Communications Between Courts

Under the UCCJA, some states had detailed provisions controlling the methods of communications between judges in their state and other states. For instance, some states, including Illinois and some Florida courts, required that all verbal communications between judges or their states and other courts be preserved in a transcribed record, available for appellate review. Under the UCCJA, New York did not require communications between courts to be transcribed; a record was not necessary. The involvement of counsel or the parties, when there was a communication between a New York judge and a counterpart in another state where a custody proceeding had been filed, varied widely according to the particular jurist. Some of these communications occurred in chambers, on a speaker phone with all counsel present. Others involved a conference call, again with all counsel. Some jurists permitted attorneys to actively participate in these inter-court communications. Other judges directed that counsel or *pro se* litigants remain silent. Some judges summarized the outcome of inter-court communiqués on the record, when counsel had not been present during communications.

The UCCJEA sets up detailed procedures for communications between courts. Once the Act has been adopted by all states it should make for long-awaited uniformity in these essential communications. Often the way discussions occur between the two courts and the articulation of facts and arguments put forth during discussions form the basis for the jurisdictional decision. Not only will the procedures be more uniform (once adopted by all the states) but there will be a record for appeal and counsel or the parties will be more likely to be involved, perhaps actively participating.

The New York judges will have discretion to allow the parties to participate in a communication between a New York court and another court.[16] Once given permission to participate, if the parties are unable to do so, they must have the right to present facts and legal arguments before a jurisdictional decision is made. (This seemingly implies that parties who participate in the inter-court communications may have the opportunity to present facts and legal arguments. Whether this actually happens during the communication between the courts is not clear from the statute.) A record of the inter-court communication is mandatory,[17] except for scheduling or calendar discussions, and parties must have access to the record.

Effective Date

The UCCJEA becomes effective 180 days after the governor's signature. The UCCJEA will apply to actions and proceedings commenced on or after the effective date. However, old or then-pending motions, or other requests for relief or for enforcement of custody deter-

minations, are controlled by the law in effect at the time the motion or request was made.

The New York UCCJEA requires careful study and review.[18] It will greatly enhance interstate and international custody determinations in terms of regularizing jurisdiction including origination, modification and enforcement proceedings. The UCCJEA revamped a 30-year old Uniform Act and brought it into the 21st century. New York should be proud that we are enacting the UCCJEA. The new law will work a great service for our children and their parents, and others entitled to be part of children's lives.

Endnotes

1. UCCJEA § 76(1).
2. UCCJEA § 76-C.
3. UCCJEA § 76-C(1), (2).
4. UCCJEA § 76-a.
5. UCCJEA § 76-a(1)(a)(6).
6. UCCJEA § 76-c(3).
7. UCCJEA § 76-c(4).
8. UCCJEA § 77-e(1).
9. UCCJEA § 77-e(2).
10. UCCJEA § 77-g(3).
11. UCCJEA § 77-j.
12. UCCJEA § 77-j(2).
13. UCCJEA § 7-j(5).
14. UCCJEA § 77-n.
15. UCCJEA § 77-n(1).
16. UCCJEA § 75-i(2).
17. UCCJEA § 75-i(4).
18. For background reading of the UCCJEA, two articles are recommended. Both appeared in the ABA *Family Law Quarterly*, Vol. 32, No. 2. One is by Patricia M. Hoff and the other is by Robert G. Spector. Copies with a cost associated are available through the ABA at 1-800-285-2221. Copies of the Uniform Act (the UCCJEA) are available from NCCUSL at 312-915-0195 or http://www.nccusl.org. For copies of the New York UCCJEA, contact your local state legislator or New York Consolidated Laws. Consult S.1834 or A.4203.

Ms. Handschu is an attorney in Buffalo, New York, with a practice limited to family law, trial and appellate proceedings. She serves on the Family Court Advisory and Rules Committee of the Office of Court Administration and was actively involved in the New York UCCJEA legislative process. She sits on the Joint Editorial Board of NCCUSL and is a Vice President of the American Academy of Matrimonial Lawyers.

Is a Substantial Increase in the Child Support Obligor's Income Sufficient Justification to Modify a Decretal Order of Child Support? It Depends on Where You Are

By Brian S. Wootan

The diverse threshold requirements for modification of child support orders can be confusing for a custodial parent seeking an upward modification of the obligation (not to mention his or her attorney). This confusion is not alleviated when the Appellate Divisions disagree on what the law is, or should be. Two recent cases, *Shedd v. Shedd*[1] and *Burnett v. Student*,[2] illustrate one such disagreement. In *Burnett*, the Third Department continues to follow the rule that a substantial increase in the obligor's income, standing alone, justifies upward modification of a decretal order of child support. In *Shedd*, the Fourth Department holds that it does not.

The legal threshold for a modification depends on the type of order being modified. An order which incorporates a stipulation or settlement agreement may be modified upon a demonstration: (1) of fraud or duress at the time of the making of the agreement; (2) that the terms of the agreement are manifestly unfair; or (3) that there has been an unreasonable or unanticipated change in circumstances[3] (the *Boden* standard). The order may also be modified if the custodial parent's resources and the child support paid are insufficient to meet the child's needs[4] (the *Brescia* standard).

In contrast, the threshold for modification of a decretal order (one entered by the court in a contested proceeding) is much lower. The Domestic Relations Law (DRL) allows a decretal order of support to be modified upon a "substantial change in circumstances."[5] The Family Court Act (FCA) sets no standard.[6] A substantial change of circumstance is defined, with the most circular of logic, as a change in circumstances warranting a modification.

> It is well settled that the court may modify a prior order or judgment of child support or maintenance payments upon a showing of a "substantial change in circumstances" (Domestic Relations Law § 236[B][9][b]; *Klapper v. Klapper*, 204 AD2d 518, 611 N.Y.S.2d 657; *Schnoor v. Schnoor*, 189 AD2d 809, 592 N.Y.S.2d 460; *Dowd v. Dowd*, 178 AD2d 330, 577 N.Y.S.2d 395). The party seeking the modification has the burden of establishing the existence of a change in circumstances warranting the modification (see, *Klapper v. Klapper*, supra). In determining whether there has been a substantial change in circumstances, the change is measured by comparing the payor's financial situation at the time of the application for a downward modification with that at the time of the order or judgment (see, *Klapper v. Klapper*, supra; *Schnoor v. Schnoor*, supra).[7]

Beyond the issue of which threshold applies, lies the question of what changes of circumstances satisfy the threshold. Two recent cases illustrate a split in the Appellate Divisions regarding a common fact scenario. Specifically, is a substantial increase in the non-custodial parent's income, standing alone, a sufficient change in circumstances to warrant modification of a decretal order?

In *Burnett v. Student*,[8] the parties' stipulation, later incorporated in the family court order, included an unenforceable provision regarding support payments from the non-custodial parent's income over $80,000. The custodial parent requested an increase in the support obligation, alleging only that the non-custodial parent's income had increased from $60,000 when the order entered to $320,000. The family court dismissed the custodial parent's modification petition on the grounds that the custodial parent failed to allege a sufficient change of circumstances or that the child's needs were not being met.

The Appellate Division reversed the dismissal, holding that the allegation of a substantial increase in the non-custodial parent's income was sufficient. "Even where the level of support has been negotiated by the parties, a 'substantial increase in [the noncustodial parent's] salary is sufficient reason, in and of itself, to warrant the increase of child support' because the children are not necessarily bound by their parents' agreement."[9]

The Third Department cited *Charrif v. Carl*,[10] which stated:

> State law provides for child support based upon the reasonable needs of the child and the means of the parents (see,

> Family Ct Act § 413; see also, *Matter of Commissioner of Social Servs. v Segarra*, 78 NY2d 220, 226). Child support is not a one-sided obligation placed upon a single parent, but rather an evaluation of the means and responsibilities of both parents and the needs and best interest of the child (see, *Tessler v Siegel*, 59 AD2d 846, 847). A substantial improvement in the noncustodial parent's income and financial condition is, in and of itself, an independent ground sufficient to sustain an increase in the amount of child support that such parent is required to pay (see, *Eisen v Eisen*, 48 AD2d 652, 653; *Matter of Delli Veneri v Delli Veneri*, 40 AD2d 735; *Matter of Handel v Handel*, 32 AD2d 946, 947, affd 26 NY2d 853; see also, *Matter of McFarlane v McFarlane*, 182 AD2d 1024, 1025; *Matter of Swerdloff v Weintraub*, 26 AD2d 826). Here, respondent has acknowledged more than a six-fold increase in his income and the record reveals that he possesses substantial holdings and may have income even in excess of that discernible from his disclosure.[11]

In the Fourth Department, however, an increase in the non-custodial parent's income alone is not a change in circumstances warranting an upward modification. In *Shedd v. Shedd*,[12] the custodial parent's sole allegation was that the non-custodial parent's income increased from $44,000/yr. in 1990 to $76,000/yr. in 1999. The Appellate Division held that, because the custodial parent failed to establish any other factor justifying an upward modification, the court did not abuse its discretion in dismissing the petition.

> When determining whether a change in circumstances warranting an upward modification has occurred, courts must consider several factors, including the increased needs of the children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children (see, *Matter of Brescia v. Fitts*, supra, at 141, 451 N.Y.S.2d 68, 436 N.E.2d 518). "While not itself determinative, this increase in the [defendant's] income may be considered as one factor in deciding whether an upward modification of child support was warranted." . . . Here, plaintiff demonstrated that defendant's income had increased gradually over the decade since the divorce, but failed to establish any other factors in support of an upward modification. Consequently, the court did not abuse its discretion in refusing to grant plaintiff's motion.[13] (citations omitted)

The provenance of this rule is less clear. The Appellate Division cited as authority decisions involving both orders entered on consent[14] and decretal orders.[15]

The Second Department follows the same rule as the Third Department.[16] Pre-Child Support Standards Act (CSSA) case law indicates that the First Department followed the rule articulated in *Shedd*.[17] However, more recent case law indicates adoption of the more liberal standard:

> While there is substantial authority to support Hearing Examiner Samotin's decision to dismiss the Commissioner's petition for failure to prove both increased needs and a parent's increased means, . . . there is also a line of cases finding that an increase in a parent's income alone may be the basis for an increase in support. . . . The more recent trend has been to look to the child's best interests.[18] (citations omitted)

If the child is in receipt of public benefits, a substantial increase in the non-custodial parent's income is sufficient grounds for an upward modification. In *Commissioner of Social Services o/b/o Jacobs v. Currie*, [19] the First Department held that where the custodial parent's income was below the poverty level, a showing of an increase in the needs of the child is not required:

> In *Brescia*, the Court held that where an upward revision of a support award involves the right of the child to receive adequate support, a showing of increased need is not required. . . . Where, as here, the income level of the custodial parent places the dependent child in a family living below the poverty level as set by the United States Department of Health and Human Services, a significant increase in the salary of the non-custodial parent constitutes a sufficient change in circumstances to warrant an increase in the support award in the best interests of the child.[20]

Finally, it should be noted that a non-voluntary loss of income or employment (accompanied by diligent efforts to find new employment), standing alone, has been found to be change of circumstance warranting a downward modification by all four Departments.[21] Thus in the Fourth Department, a reduction in the non-custodial parent's ability to pay support may justify a reduced obligation, but an increase in income will not.[22]

One of the goals of the CSSA was to insure that child support obligations were consistently and uniformly based on the non-custodial parent's income or ability to pay. Federal legislation requires each state to regularly review support obligations and adjust them pursuant to the state's child support guidelines.[23] This insures that child support orders maintain a reasonable relationship with the needs of the growing children in light of the parties' future financial circumstances. The Third Department rule recognizes that the responsibility to support and maintain children belongs equally to both parents, and that children have an ongoing right to share in the parents' standard of living. The Fourth Department's holding in *Shedd* runs contrary to these goals. Given the lack of a statutory basis for the Fourth Department rule, adoption of the more flexible standard used in the Third and Second Departments would better fulfill the legislative goals expressed in the CSSA and promote the best interests of the children.

Endnotes

1. *Shedd v. Shedd*, 277 AD2d 917, 715 N.Y.S.2d 132 (4th Dep't 2000), *lv. denied*, 96 N.Y.2d 754, 725 N.Y.S.2d 279.
2. 278 AD2d 626, 717 N.Y.S.2d 708 (3d Dep't 2000).
3. Cite *Boden v. Boden*, 42 N.Y.2d 210, 213, 397 N.Y.S.2d 701, 703 (1977); *see Merl v. Merl*, 67 N.Y.2d 359, 502 N.Y.S.2d 712 (1986).
4. *Brescia v. Fitts*, 56 N.Y.2d 132, 140–41, 451 N.Y.S.2d 68, 71–72 (1982).
5. DRL § 236 part B(9)(b).
6. FCA § 451.
7. *Prisco v. Buxbaum*, 275 AD2d 461, 712 N.Y.S.2d 891 (2d Dep't 2000); *see Franklin v. Franklin*, 268 AD2d 814, 702 N.Y.S.2d 225 (3d Dep't 2000), *Rogers v. Bittner*, 181 AD2d 990, 581 N.Y.S.2d 990 (4th Dep't 1992).
8. *Burnett v. Student*, 278 AD2d 626, 717 N.Y.S.2d 708 (3d Dep't 2000).
9. *Id*. at 628, 717 N.Y.S.2d at 710.
10. 191 AD2d 795, 594 N.Y.S.2d 377.
11. *Id*. at 796, 594 N.Y.S.2d at 377; *see Gluckman v. Qua*, 253 AD2d 267, 687 N.Y.S.2d 460 (3d Dep't 1999), *lv. denied*, 93 N.Y.2d 814, 697 N.Y.S.2d 651; *Klein v. Klein*, 251 AD2d 733, 674 N.Y.S.2d 142 (3d Dep't 1998).
12. *Shedd v. Shedd*, 277 AD2d 917, 715 N.Y.S.2d 132 (4th Dep't 2000), *lv. denied*, 96 N.Y.2d 754, 725 N.Y.S.2d 279; *see Rosenthal v. Buck*, 281 AD2d 909, 723 N.Y.S.2d 773 (4th Dep't 2001).
13. *Id*. at 917–18, 715 N.Y.S.2d 133–34.
14. *Brescia v. Fitts*, 56 N.Y.2d 132, 140–41, 451 N.Y.S.2d 68, 71–72 (1982); *Wilson v. Brunsting*, 213 AD2d 1042, 625 N.Y.S.2d 978 (4th Dep't 1995).
15. *Popp v. Raitano*, 167 AD2d 404, 561 N.Y.S.2d 813 (4th Dep't 1990) (holding that the increase in respondent's income was an appropriate factor to consider in granting an upward modification); *see Rogers v. Bittner*, 181 AD2d 990, 581 N.Y.S.2d 945 (4th Dep't 1992).
16. *Mauss v. Mauss*, 100 AD2d 576, 473 N.Y.S.2d 511 (2d Dep't 1984).
17. *Fensterheim v. Fensterheim*, 55 AD 2d 516, 389 N.Y.S.2d 13 (1st Dep't 1976).
18. *Commissioner of Social Services o/b/o Crawford v. Crawford*, 152 Misc. 2d 280, 575 N.Y.S.2d 1008 (Fam. Ct., N.Y. Co. 1991).
19. 182 AD2d 433, 582 N.Y.S.2d 86 (1st Dep't 1992).
20. *Id*. at 434, 582 N.Y.S.2d at 87.
21. *Dowd v. Dowd*, 178 AD2d 330, 577 N.Y.S.2d 395 (1st Dep't 1991); *see Meyer v. Meyer*, 205 AD2d 784, 614 N.Y.S.2d 42 (2d Dep't 1994); *Glinski v. Glinski*, 199 AD2d 994, 606 N.Y.S.2d 468 (4th Dep't 1993); *Valek v. Simonds*, 174 AD2d 792, 570 N.Y.S.2d 711 (3d Dep't 1991).
22. This does not relieve the non-custodial parent from the evidentiary obligation to show a decline in his or her overall financial circumstances (income and expenses), as opposed to merely a decrease in income. *Duerr v. Cuenin*, 280 AD2d 903, 720 N.Y.S.2d 439 (4th Dep't 2001).
23. 42 U.S.C. § 666(a)(10); 45 C.F.R. § 303.8

Brian S. Wootan is Associate Counsel, Office of Legal Affairs, New York State Office of Temporary and Disability Assistance.

Family Law Standards for Modification

By Gary Muldoon

Issue	Previous resolution	Burden / Standard	Authority
Custody	After hearing	Totality of circumstances; best interests of child.	DRL § 240(1) *Friederwitzer v. Friederwitzer*, 55 NY2d 89, 447 N.Y.S.2d 893 (1982); Scheinkman § 23.1; Foster, Freed and Brandes § 1:71
	Agreement or stipulation, no hearing	Custody award based on a stipulation is entitled to less weight than a disposition after a plenary trial.	*Holden v. Tillotson*, 277 AD2d 735, 716 N.Y.S.2d 152 (3d Dep't 2000); *Fox v. Fox*, 177 AD2d 735, 582 N.Y.S.2d 863 (4th Dep't 1992*); Glaser v. McFadden*, __ AD2d __, 731 N.Y.S.2d 576 (3d Dep't 2001); Scheinkman § 23.11; Foster, Freed and Brandes § 1:72;
Child support	No agreement, or agreement *merges* into judgment	Change in circumstances	DRL § 236 part B(9)(b), first sentence: recipient's inability to be self-supporting or a substantial change in circumstances
	Agreement *survives* divorce judgment	Unanticipated and unreasonable change of circumstances. Clear and convincing evidence. Burden is on moving party.	DRL § 236 part B(9)(b), Party seeking to modify child support incorporated into a divorce judgment must show an "unanticipated and unreasonable change in circumstances," *Boden v. Boden*, 42 NY2d 210, 397 N.Y.S.2d 701 (1977), or that the basic needs of the child are not being met. *In re Brescia v. Fitts*, 56 NY2d 132, 451 N.Y.S.2d 68 (1982); *Fatig v. DeRosa*, 261 AD2d 954, 690 N.Y.S.2d 356 (4th Dep't 1999); *Culton v. Culton*, 277 AD2d 935, 715 N.Y.S.2d 266 (4th Dep't 2000) (prior Family Court order incorporated into divorce judgment). Need to show specific increase in the costs associated with basic necessities, such as food, clothing, shelter, medical and dental as well as child's various school activities. *Miller v. Davis*, 176 AD2d 945, 575 N.Y.S.2d 681 (2d Dep't 1991); *Tripi v. Faiello*, 195 AD2d 958, 600 N.Y.S.2d 876 (4th Dep't 1993), or that Petitioner's income in combination with Respondent's child support are insufficient to meet children's needs. *Demske v. Demske*, 245 AD2d 1031, 666 N.Y.S.2d 65 (4th Dep't 1997); Scheinkman § 25.8, 25.17; Gallet and Finn § 14.7.2; Foster Freed and Brandes § 2:24
Spousal support (maintenance)	Agreement *merges* or no agreement	Substantial change of circumstances, or inability to be self supporting	DRL § 236 part B(9)(b), second sentence: extreme hardship. *Streit v. Streit*, 237 AD2d 662, 653 N.Y.S.2d 986 (3d Dep't 1997); *Wight v. Wight*, 232 AD2d 844, 648 N.Y.S.2d 799 (3d Dep't 1996*); Cavalarro v. Cavalarro*, 278 AD2d 812, 718 N.Y.S.2d 538 (4th Dep't 2000); Scheinkman § 25.18

Issue	Previous resolution	Burden / Standard	Authority
	Agreement *survives* (incorporated but not merged)	Extreme hardship	DRL § 236 part B(9)(b), second sentence; *Tufano v. Tufano*, 265 AD2d 877, 695 N.Y.S.2d 850 (4th Dep't 1999); *Luffig v. Luffig*, 239 AD2d 225, 657 N.Y.S.2d 658 (1st Dep't 1997); *Schwalm v. Schwalm*, 279 AD2d 516, 718 N.Y.S.2d 883 (2d Dep't 2001); Scheinkman § 25.12; Gallet and Finn § 14:8
	Former spouse living with another and holding self out as married		DRL § 248 Former spouse living with another and holding self out as married

References:

Foster, Freed and Brandes, *Law and the Family New York*
Scheinkman, *New York Law of Domestic Relations*
Gallet and Finn, *Spouse and Child Support in New York State*

Selected Cases

Editor's Note: It is our intention to publish cases of general interest to our readers which may not have been published in another source and will enhance the practitioner's ability to present proof to the courts in equitable distribution and other matters. The correct citations to refer to in cases that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, *e.g.*, Spring 2002) New York State Bar Association

We invite our readers and members of the bench to submit to us any decision which may not have been published elsewhere.

Anonymous v. Anonymous, District Court, Southern District of New York (Baer, Jr., Harold, December 14, 2001)

Memorandum & Order (01 Civ. 8438)

George S. removed this action pursuant to 28 U.S.C. § 1441 and 28 U.S.C. § 1331 from New York State Supreme Court ("NY state court") on the ground that the Qualified Domestic Relations Order ("QDRO") sought by Janet S.[1] in NY state court for the collection of attorneys' fees from George S.'s pension plan violated the Employee Retirement Income Security Act ("ERISA"). Janet S. moved pursuant to 28 U.S.C. § 1447 to remand the action to NY state court for lack of subject matter jurisdiction. For the reasons discussed below, Janet S.'s motion is granted.

Background

Since the history of this domestic relations action is protracted and depressing, I will confine myself to a relatively brief recitation of the facts. George S., the ex-husband, filed for divorce in 1988, and a judgment of divorce was entered in January 1999 whereby, *inter alia*, the court awarded $983,375.50 of the marital estate to Janet S., the ex-wife. Because the largest part of the marital estate was held in George S.'s pension plan, as part of the divorce the NY state court entered a QDRO which ordered the pension plan administrator to make substantial distributions to Janet S.

QDRO is a statutory exception to ERISA's general bar on the assignment of plan benefits, and is a mechanism whereby a qualified individual, known as an "alternate payee," can serve certain domestic relation orders ("DROs") on the administrator of another person's plan, including pension plans. "DRO is any order relating "to the provision of child support, alimony, or marital property rights to a spouse, former spouse, child, or other dependent of a plan participant . . . made pursuant to a State domestic relations law." 29 U.S.C. § 1056(d)(3)(ii). A DRO qualifies as a QDRO if it "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or part of the benefits payable with respect to a participant under a plan." 29 U.S.C. § 1056(d)(3)(B). An "alternate payee" is "any spouse, child, or other dependent of a participant who is recognized by a DRO as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." 29 U.S.C. § 1056(d)(3)(K).

Prior to the entry of the QDRO, George S. filed for bankruptcy and moved to strike portions of the QDRO. That motion was denied, and on July 10, 2000 the Bankruptcy Court lifted the automatic stay and permitted Janet S. to pursue her rights and remedies in state court and to serve the QDRO on Salomon Smith Barney, Merrill Lynch and Sands Brothers & Co., which she thereafter did.[2] Flush with failure at the Bankruptcy Court, George S. moved on August 20, 2000 in NY state court for an order staying the QDRO, without success, and Justice Jacqueline W. Silbermann awarded $7,500 in attorneys fees to Janet S. When George S. failed to pay the fee award, Justice Silbermann directed the Clerk to enter a money judgment for the $7,500 in favor of Janet S.'s counsel, which again George S. failed to pay. Similarly, but with respect to a different proceeding, Hearing Examiner Esther R. Furman of the Family Court, Westchester County awarded Janet S. attorneys' fees of $6,562 in connection with her contempt motion for failure to pay court ordered spousal support. Consistent with his dismal track record, George S. yet again failed to pay the judgment. Running out of options, Janet S. moved by order to show cause in state court before Judge Silbermann for an order directing her former spouse to transfer $14,062 ($7,500 + $6,562) from his pension plan to satisfy the 2 judgments for attorneys' fees. In the meantime, George S. appealed 5 separate New York Supreme Court decisions to the Appellate Division, New York State related to the post-matrimonial litigation.

Discussion

George S. removed this action on the ground that a QDRO for attorneys' fees violates ERISA. While it is true that this defense queries the application of federal law to a DRO, and while it is also ordinarily true that ERISA pre-empts state law, this Court nonetheless does not have jurisdiction over Janet S.'s request for an order directing payments from her ex-husband's pension plan.

It has long been the practice of federal courts to discourage adjudication of domestic relations disputes in federal court *see* 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 13B FEDERAL PRACTICE & PROCEDURE § 3602 (2d. Ed. 1984), and Congress has signaled its preference that such disputes be litigated in state courts by expressly exempting QDROs from the normally expansive preemptive effect of ERISA. *See* 29 U.S.C. § 1144(b)(7). Further, New York State Supreme Court is fully competent to do.[3] *See Board of Trustees of Laborers Pension Trust Fund v. Levingston*, 816 F. Supp. 1496, 1501 (N.D. Ca. 1993) ("[t]he Court finds that a careful parsing of the statutory scheme indicates that Congress intended state and federal courts to have concurrent jurisdiction in determining whether a particular domestic relations order is qualified"); *Rouse v. Chrysler Corp.*, 1997 U.S. Dist. LEXIS 18402, *14-15 (E.D. MI 1996).[4]

Furthermore, as George S. removed to this Court before the state court had an opportunity to order the requested QDRO, and as federal courts lack jurisdiction to issue a QDRO, *see Hunter v. Ameritech*, 779 F. Supp. 419, 421 (N. D. III 1991); *Jones v. American Airlines*, Inc., 57 F. Supp. 2d 1224, 1232 (D. Wyo. 1999), it makes little sense for me to determine whether what is at this point only hypothetical order is permissible under ERISA. *See id*. ("At this point it is undeniable that the issue sought to be tendered . . . is no more than hypothetical: If the Circuit Court of Cook County were to enter a QDRO, would Ameritech and Plan be bound to recognize it?"). Indeed, the very attempt to characterize this action belies George S.'s claim that it belongs in this court. In effect, it is either a declaratory judgment action that has been conjured up by another party's request for the entry of a QDRO, or it is an appeal to a federal court of a non-existent state decision. Either way it's procedurally quixotic, and, likely not even a "case in controversy." I find that this Court lacks subject matter jurisdiction over the action and remand it to New York State Supreme Court, New York County from whence it came. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded").

Conclusion

For the reasons discussed above, Janet S.'s motion to remand the case to New York State Supreme Court is granted, and the Clerk is directed to remove the case from my docket.

SO ORDERED.

Endnotes

1. For no apparent reason, Janet S., who was the plaintiff in the removed order to show cause, refers to herself as "defendant" in the federal action, and George S. identifies himself as the "plaintiff." Further complicating matters is the fact that George S. refers to Donald Greener, counsel to Janet S., as the "defendant," instead of Janet S. herself. For the sake of clarity, I will only refer to George S. and Janet S. and eschew the traditional labels of "plaintiff" and "defendant."
2. Plaintiff later withdrew his bankruptcy petition.
3. At NY state court the parties may do a better job of addressing the 3 key legal questions. (1) Can attorneys fees ever be collected from a pension plan through a QDRO? *See Trustees of the Directors Guild of America-Producer Pension Benefits Plans*, 234 F.3d 415, 426 (9th Cir. 2000) (refusal to disturb state court order that "the child support arrears owed to Tise and attorneys' fees incurred in enforcing her 1981 child support order shall be satisfied from the funds that have accrued for Myer's benefit in the Plan"); *Adler v. Adler*, 224 AD2d 282 (N.Y. App. Div. 1996) (affirming entry of QDRO to aid in enforcement of judgment for attorneys' fees incurred in ex-wife's attempts to compel payment of child support obligations); *Renner v. Blatte*, 170 Misc. 2d 579 (N.Y. Sup. Ct. 1996) (same). (2) Do either of the attorneys' fees awards here "relate[] to the provision of child support, alimony arrears, or marital property rights to a . . ."? 29 U.S.C. § 1056(d)(3)(B)(ii); *see Adler*, 224 AD2d at 282. And (3) does it change the outcome that 1 of the 2 fee awards was initially awarded to Janet S. and later entered in her counsel's name by the court when George S. failed to pay? I.e., is a spouse's attorney an "alternate payee" in that circumstance and, in fact, who is the proper plaintiff in this collection case? 29 U.S.C. § 1056(d)(3)(B)(i).
4. Remanding this issue to a state court does not risk undermining the uniform national treatment of pension benefits since state courts adjudicating the question of whether a DRO is qualified within the meaning of ERISA apply the same statutory criteria set forth in 29 U.S.C. § 1056. Furthermore, because a QDRO is made "pursuant to a State domestic relations law," 29 U.S.C. § 1 056(d)(3)(13)(ii), whether a particular domestic relations order is "qualified" will depend upon the application of state domestic relations law, about which a New York State justice is far more knowledgeable than me.

* * *

Winthrop, Brown & Co., Inc. (Bonnie P. J.) v. Williams, Brown & Co., Inc., et al. (Richard J. F.), Supreme Court, New York County (Louis York, J.)

Order, Supreme Court, New York County (Louis York, J.), entered on or about July 6, 2000, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, without costs.

The motion court properly pierced plaintiff's corporate veil. While the claims made herein are not barred by the prior divorce action between plaintiff's principal and the individual defendant, in which the court never reached matters of equitable distribution, neither are such claims amenable to resolution by way of corporate law given the transparency of the corporate entities.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

Recent Decisions, Legislation and Trends

By Joel R. Brandes

Agreements—Prenuptial—Validity

***Bloomfield v. Bloomfield*, ___ NY2d ____, ___ NYS2d ___ (2001)**

In *Bloomfield v. Bloomfield, supra*, the Court of Appeals held that a prenuptial agreement executed over 30 years ago did not constitute a waiver of maintenance but must be reviewed by the trial court as to whether it is unconscionable.

The plaintiff-husband, a 62-year-old practicing attorney, and defendant-wife, a 55-year-old self-employed antiques dealer, were married on May 30, 1969. The parties separated in January 1995. Before the parties married, plaintiff drafted, and requested that defendant sign, a prenuptial agreement in which she waived her spousal property and elective rights. Specifically, in pertinent part, defendant agreed to waive and renounce any and all rights that, and to which, [she] would otherwise be entitled to because of such marriage, whether present or future rights, to any and all property which [plaintiff] has now, or which he may acquire in the future, whether the same be real, personal, [or] mixed property or of any kind or nature and wherever situated.

At the time the agreement was executed, plaintiff was 30 years old, a practicing attorney, and the son of a practicing attorney who owned various real estate properties that he placed in plaintiff's name. Defendant was 24 years old and had completed one year of college. Defendant claimed that the parties were alone in her apartment when she signed the agreement. Plaintiff claimed they were at his father's office with a notary present. Defendant was not represented by counsel in the negotiating, drafting or signing of the document.

In 1995, plaintiff initiated divorce proceedings. Defendant answered and counterclaimed demanding equitable distribution. Two years into the discovery phase of the action, plaintiff first raised the existence of the prenuptial agreement and asserted his intent to rely on that agreement as a defense to defendant's claim for equitable distribution.

Supreme Court adjudged the prenuptial agreement void on its face both because it violated the 1969 version of General Obligations Law § 5-311, which prohibited a wife from waiving her entitlement to support, and because it lacked compliance with the execution formalities under the current Domestic Relations Law § 236 part B(3).

The Appellate Division affirmed, finding that the agreement contained broad waiver language that necessarily constituted an impermissible waiver of support. The Appellate Division further found that even if the agreement were not void on its face, the parties' marriage would toll the statute of limitations, thus allowing defendant to challenge the validity of the agreement on other grounds.

The Court of Appeals reversed, concluding that the agreement did not encompass a waiver of support, and remitted the case to Supreme Court for a determination as to whether the agreement is unconscionable.

At the outset, the Court noted that defendant was not time-barred from challenging the validity of the prenuptial agreement because this particular argument arises from, and directly relates to, plaintiff's claim that the agreement precludes equitable distribution of his assets. It held that

> it is axiomatic that claims and defenses that arise out of the same transaction as a claim asserted in the complaint are not barred by the Statute of Limitations, even though an independent action by defendant might have been time-barred at the time the action was commenced (New York McKinney's CPLR 203[d]; 118 East 60th Owners, Inc. v Bonner Props., Inc., 677 F2d 200, 200, 202–204; Rebeil Consulting Corp. v Belle Levine, 208 AD2d 819, 820; Maders v Lawrence, 49 Hun 360 ; see generally, 1 Weinstein-Korn-Miller, NY Civ Prac ¶ 203.25, at 2-140.2 to 2-142).

The Court of Appeals, applying settled principles of contract law to the instant appeal, found that the plain language of the agreement indicated that defendant waived only her right to distribution of property either then owned or later acquired. The agreement neither expressly nor implicitly referred to a release of plaintiff's support obligations to defendant. A waiver of rights to present and future interests in plaintiff's property, without more, does not constitute a waiver of the right to receive support. It held that the courts below incorrectly construed the provision to be a waiver of the right to receive support, which would have invalidated the agreement under the 1969 version of the General Obligations Law § 5-311. This construction belied the intent of the parties, who never contested plaintiff's

duty to provide support until the courts below voided the agreement by grafting into the property waiver an additional waiver of support.

Mindful of the fact that, under New York law, wives had no legal interest in their husbands' property in 1969, the Court of Appeals read the agreement to state that defendant simply waived any present interest she may have had to plaintiff's property when the agreement was executed and also waived any future property rights she might acquire through subsequent changes in the law.

The Court concluded that the validity of support waivers in marital agreements is governed by the newly enacted version of General Obligations Law § 5-311, not the version of General Obligations Law § 5-311 that was repealed by the New York State Legislature. The general principle that the validity of a contract depends upon the law that existed at the time the contract was made does not appertain to variations of the law that are made due to changes in public policy. The Court of Appeals stated that it would have applied the version of General Obligations Law § 5-311 that was in effect at the time plaintiff attempted to enforce the agreement. This version, which still exists today, allows either spouse to contract to relieve the other of a requirement of support, except to the extent that the spouse may become a public charge, and represents a change in the public policy of this state. It noted that noncompliance with the execution formalities contained in Domestic Relations Law § 236 part B(3) does not invalidate the prenuptial agreement, given that the agreement was made prior to the effective date of that subdivision.

Since the Supreme Court did not address the issue of unconscionability, the Court of Appeals held that defendant should now be permitted to contest the conscionability of the agreement before the trial court.

Editor's Note: *Once again, the Court of Appeals renders a decision that presents an enigma to the matrimonial bar and one that fails to clarify conflicting decisions.*

Arbitration of Fee Disputes, 22 N.Y.C.R.R. Part 137

As of January 1, 2002 all attorneys in New York are required to participate in a fee dispute resolution program, which differs from the arbitration program that has been in existence since 1995 governing matrimonial fee disputes. Unlike the matrimonial fee dispute program, promulgated as Part 136 of the Rules of the Chief Administrator, the new Fee Dispute Program permits a *de novo* trial after the fee dispute is resolved by arbitration. Matrimonial attorneys should be aware of the fact that the provisions of Part 136, the matrimonial fee arbitration rules, continue to apply to fee disputes in domestic relations matters subject to that Part, in which representation began prior to January 1, 2002. If an attorney fails to participate in the arbitration process without good cause, the attorney must be reported to the appropriate grievance committee of the Appellate Division.

Part 137 of the Rules of the Chief Administrator applies where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the state of New York who undertake to represent a client in any civil matter. However, it does not apply to representation in criminal matters; amounts in dispute involving a sum of less than $1,000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented; claims involving substantial legal questions, including professional malpractice or misconduct; claims against an attorney for damages or affirmative relief other than adjustment of the fee; disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court, or where the fee has been determined pursuant to a court order; disputes where no attorney's services have been rendered for more than two years; disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the state of New York, or where no material portion of the services was rendered in New York; and disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

In the event of a fee dispute between the attorney and the client, the client may elect to resolve the dispute by arbitration, which is mandatory for the attorney if requested by the client. Where the attorney and the client cannot agree as to the attorney's fee, and the client has not consented in advance to submit fee disputes to arbitration, the attorney is required to forward a written notice to the client by certified mail or personal service, in a form approved by the Board of Governors. The notice must contain a statement of the client's right to arbitrate and advise the client that he or she has 30 days from the receipt of the notice in which to elect to resolve the dispute under Part 137. The notice must also contain written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explore how to commence a fee arbitration proceeding. A copy of a Request for Arbitration form must accompany the notice, which is necessary to commence an arbitration proceeding.

If the attorney forwards to the client, by certified mail or personal service, the notice of the client's right to arbitrate and the client does not file an arbitration request within 30 days after the notice was received or served, the attorney may commence an action in a court

of competent jurisdiction to recover the fee in dispute and the client relinquishes the right to request arbitration as to the fee dispute at issue. The complaint in such an action must allege that the client received notice under Part 137 and did not file a timely request for arbitration or that the dispute is not covered by Part 137. The rules provide as follows:

> Section 137.0 Scope of program.
>
> This Part establishes the New York State Fee Dispute Resolution Program, which provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged.
>
> Section 137.1 Application.
>
> (a) This Part shall apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.
>
> (b) This Part shall not apply to any of the following:
>
> (1) representation in criminal matters;
>
> (2) amounts in dispute involving a sum of less than $1,000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;
>
> (3) claims involving substantial legal questions, including professional malpractice or misconduct;
>
> (4) claims against an attorney for damages or affirmative relief other than adjustment of the fee;
>
> (5) disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;
>
> (6) disputes where no attorney's services have been rendered for more than two years;
>
> (7) disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York ; and
>
> (8) disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.
>
> Section 137.2 General.
>
> (a) In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8 of this Part.
>
> (b) The client may consent in advance to submit fee disputes to arbitration under this Part. Such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the official written instructions and procedures for this Part, and that the client agrees to resolve fee disputes under this Part.
>
> (c) The attorney and client may consent in advance to arbitration pursuant to this Part that is final and binding upon the parties and not subject to de novo review. Such consent shall be in writing in a form prescribed by the board of governors.
>
> (d) The attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part. Such consent shall be in writing in a form prescribed by the board of governors. Arbitration in that arbitral forum shall be governed by the rules and procedures of that

forum and shall not be subject to this Part.

Section 137.3 Board of governors.

(a) There shall be a Board of Governors of the New York State Fee Dispute Resolution Program.

(b) The board of governors shall consist of 18 members, to be designated from the following: 12 members of the bar of the State of New York and six members of the public who are not lawyers. Members of the bar may include judges and justices of the New York State Unified Court System.

(1) The members from the bar shall be appointed as follows: four by the Chief Judge from the membership of statewide bar associations and two each by the Presiding Justices of the Appellate Divisions.

(2) The public members shall be appointed as follows: two by the Chief Judge and one each by the Presiding Justices of the Appellate Divisions.

Appointing officials shall give consideration to appointees who have some background in alternative dispute resolution.

(c) The Chief Judge shall designate the chairperson.

(d) Board members shall serve for terms of three years and shall be eligible for reappointment for one additional term. The initial terms of service shall be designated by the Chief Judge such that six members serve one-year terms, six members serve two-year terms, and six members serve three-year terms. A person appointed to fill a vacancy occurring other than by expiration of a term of office shall be appointed for the unexpired term of the member he or she succeeds.

(e) Eleven members of the board of governors shall constitute a quorum. Decisions shall be made by a majority of the quorum.

(f) Members of the board of governors shall serve without compensation but shall be reimbursed for their reasonable, actual and direct expenses incurred in furtherance of their official duties.

(g) The board of governors, with the approval of the four Presiding Justices of the Appellate Divisions, shall adopt such guidelines and standards as may be necessary and appropriate for the operation of programs under this Part, including, but not limited to: accrediting arbitral bodies to provide fee dispute resolution services under this Part; prescribing standards regarding the training and qualifications of arbitrators; monitoring the operation and performance of arbitration programs to insure their conformance with the guidelines and standards established by this Part and by the board of governors; and submission by arbitral bodies of annual reports in writing to the board of governors.

(h) The board of governors shall submit to the Administrative Board of the Courts an annual report in such form as the Administrative Board shall require.

Section 137.4 Arbitral bodies.

(a) A fee dispute resolution program recommended by the board of governors, and approved by the Presiding Justice of the Appellate Division in the judicial department where the program is established, shall be established and administered in each county or in a combination of counties. Each program shall be established and administered by a local bar association (the arbitral body) to the extent practicable. The New York State Bar Association, the Unified Court System through the District Administrative Judges, or such other entity as the board of governors may recommend also may be designated as an arbitral body in a fee dispute resolution program approved pursuant to this Part.

(b) Each arbitral body shall:

(1) establish written instructions and procedures for administering the program, subject to the approval of the board of governors and consistent with this Part. The procedures shall include

a process for selecting and assigning arbitrators to hear and determine the fee disputes covered by this Part. Arbitral bodies are strongly encouraged to include non-lawyer members of the public in any pool of arbitrators that will be used for the designation of multi-member arbitrator panels;

(2) require that arbitrators file a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them;

(3) be responsible for the daily administration of the arbitration program and maintain all necessary files, records, information and documentation required for purposes of the operation of the program, in accordance with directives and procedures established by the board of governors;

(4) prepare an annual report for the board of governors containing a statistical synopsis of fee dispute resolution activity and such other data as the board shall prescribe; and

(5) designate one or more persons to administer the program and serve as a liaison to the public, the bar, the board of governors and the grievance committees of the Appellate Division.

Section 137.5 Venue.

A fee dispute shall be heard by the arbitral body handling disputes in the county in which the majority of the legal services were performed. For good cause shown, a dispute may be transferred from one arbitral body to another. The board of governors shall resolve any disputes between arbitral bodies over venue.

Section 137.6 Arbitration procedure.

(a) (1) Except as set forth in paragraph (2) of this subdivision, where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward a written notice to the client, entitled Notice of Client's Right to Arbitrate, by certified mail or by personal service. The notice:

(i) shall be in a form approved by the board of governors;

(ii) shall contain a statement of the client's right to arbitrate;

(iii) shall advise that the client has 30 days from receipt of the notice in which to elect to resolve the dispute under this Part;

(iv) shall be accompanied by the written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explain how to commence a fee arbitration proceeding; and

(v) shall be accompanied by a copy of the request for arbitration form necessary to commence the arbitration proceeding.

(2) Where the client has consented in advance to submit fee disputes to arbitration as set forth in section 137.2(b) and (c) of this Part, and where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward to the client, by certified mail or by personal service, a copy of the request for arbitration form necessary to commence the arbitration proceeding along with such notice and instructions as shall be required by the rules and guidelines of the board of governors, and the provisions of subdivision (b) of this section shall not apply.

(b) If the attorney forwards to the client by certified mail or personal service a notice of the client's right to arbitrate, and the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue. An attorney who institutes an action to recover a fee must allege in the complaint:

(1) that the client received notice under this Part of the client's right to pursue

arbitration and did not file a timely request for arbitration; or

(2) that the dispute is not otherwise covered by this Part.

(c) In the event the client determines to pursue arbitration on the client's own initiative, the client may directly contact the arbitral body having jurisdiction over the fee dispute. Alternatively, the client may contact the attorney, who shall be under an obligation to refer the client to the arbitral body having jurisdiction over the dispute. The arbitral body then shall forward to the client the appropriate papers set forth in subdivision (a) of this section necessary for commencement of the arbitration.

(d) If the client elects to submit the dispute to arbitration, the client shall file the request for arbitration form with the appropriate arbitral body, and the arbitral body shall mail a copy of the request for arbitration to the named attorney together with an attorney fee response to be completed by the attorney and returned to the arbitral body within 15 days of mailing. The attorney shall include with the attorney fee response a certification that a copy of the response was served upon the client.

(e) Upon receipt of the attorney's response, the arbitral body shall designate the arbitrator or arbitrators who will hear the dispute and shall expeditiously schedule a hearing. The parties must receive at least 15 days notice in writing of the time and place of the hearing and of the identify of the arbitrator or arbitrators.

(f) Either party may request the removal of an arbitrator based upon the arbitrator's personal or professional relationship to a party or counsel. A request for removal must be made to the arbitral body no later than five days prior to the scheduled date of the hearing. The arbitral body shall have the final decision concerning the removal of an arbitrator.

(g) The client may not withdraw from the process after the arbitral body has received the attorney fee response. If the client seeks to withdraw at any time thereafter, the arbitration will proceed as scheduled whether or not the client appears, and a decision will be made on the basis of the evidence presented.

(h) If the attorney without good cause fails to respond to a request for arbitration or otherwise does not participate in the arbitration, the arbitration will proceed as scheduled and a decision will be made on the basis of the evidence presented.

(i) Any party may participate in the arbitration hearing without a personal appearance by submitting to the arbitrator testimony and exhibits by written declaration under penalty of perjury.

Section 137.7 Arbitration hearing.

(a) Arbitrators shall have the power to:

(1) take and hear evidence pertaining to the proceeding;

(2) administer oaths and affirmations; and

(3) compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the proceeding.

(b) The rules of evidence need not be observed at the hearing.

(c) Either party, at his or her own expense, may be represented by counsel.

(d) The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client may then present his or her account of the services rendered and time expended. Witnesses may be called by the parties. The client shall have the right of final reply.

(e) Any party may provide for a stenographic or other record at the party's expense. Any other party to the arbitra-

tion shall be entitled to a copy of said record upon written request and payment of the expense thereof.

(f) The arbitration award shall be issued no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall specify the bases for the determination. Except as set forth in section 137.8 of this Part, all arbitration awards shall be final and binding.

(g) Should the arbitrator or arbitral body become aware of evidence of professional misconduct as a result of the fee dispute resolution process, that arbitrator or body shall refer such evidence to the appropriate grievance committee of the Appellate Division for appropriate action.

(h) In any arbitration conducted under this Part, an arbitrator shall have the same immunity that attaches in judicial proceedings.

Section 137.8 De novo review.

(a) A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.

(b) Any party who fails to participate in the hearing shall not be entitled to seek de novo review absent good cause for such failure to participate.

(c) Arbitrators shall not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial de novo.

Section 137.9 Filing fees.

Upon application to the board of governors, and approval by the Presiding Justice of the Appellate Division in the judicial department where the arbitral program is established, an arbitral body may require payment by the parties of a filing fee. The filing fee shall be reasonably related to the cost of providing the service and shall not be in such an amount as to discourage use of the program.

Section 137.10 Confidentiality.

All proceedings and hearings commenced and conducted in accordance with this Part, including all papers in the arbitration case file, shall be confidential, except to the extent necessary to take ancillary legal action with respect to a fee matter.

Section 137.11 Failure to participate in arbitration.

All attorneys are required to participate in the arbitration program established by this Part upon the filing of a request for arbitration by a client in conformance with these rules. An attorney who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action.

Section 137.12 Mediation.

(a) Arbitral bodies are strongly encouraged to offer mediation services as part of a mediation program approved by the board of governors. The mediation program shall permit arbitration pursuant to this Part in the event the mediation does not resolve the fee dispute.

(b) All mediation proceedings and all settlement discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration.

Custody—Hague Convention

Diorinou v. Mezitis, 237 F.3d 133 (2d Cir. 2001)

In *Diorinou v. Mezitis*, *supra*, the Second Circuit affirmed an order of the United States District Court for the Southern District of New York directing the respondent-father to return the children to Greece. The order was entered upon a petition filed by the children's mother, pursuant to the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601–11610. Although the case was complicated by the issuance of conflicting custody awards made by the courts of Greece and New York, the Circuit Court concluded that

the District Court correctly deferred to the Hague Convention ruling made by the courts of Greece in favor of Diorinou on the critical issue of whether she had wrongfully retained the children in Greece.

Mezitis, a citizen of the United States, and Diorinou, a citizen of Greece, were married in 1988. They had two children, Elias, born in New York in 1993, and Alexandra, in 1994. Both children, now seven and six, were dual citizens of the United States and Greece. The family lived in New York, except for summer vacations in Greece, at least until the beginning of the summer of 1995. At that time, the parties and their children flew to Greece for another summer vacation.

During the summer of 1995, the marriage began to fall apart. Mezitis and Diorinou separately returned to New York at the beginning of September 1995, with the children remaining in Greece at the home of Diorinou's parents. Diorinou soon returned to Greece. The children, then ages 23 months and 9 months, lived in Greece with their mother from the fall of 1995 until October 1, 2000. On that date, Mezitis took possession of the children in Greece pursuant to his visitation rights under a Greek judgment awarding custody to Diorinou and, without the knowledge or consent of Diorinou, brought the children back to New York, conduct that has given rise to the pending ICARA lawsuit.

The Second Circuit stated that in an ICARA suit a United States district court has the authority to determine the merits of an abduction claim, but not the merits of the underlying custody claim. The abduction claim is limited, initially, to a determination of whether the defendant has "wrongfully removed or retained" the child; on this issue the plaintiff bears the burden of proof.

In the pending case, Diorinou contended that, in October 2000, Mezitis wrongfully removed the children from Greece, which she contended is their "habitual residen[ce]" within the meaning of Article 3 of the Convention. Mezitis contended that, in September 1995 and thereafter, Diorinou wrongfully retained the children in Greece, that their habitual residence at that time was (and, since then, is) New York, and that her prior wrongful retention precluded a finding that his subsequent removal of the children was wrongful.

The Court noted that under Article 3 of the Convention a "removal" or a "retention" is "wrongful" if

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

Article 12 requires the return of a child wrongfully retained or removed:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.[1]

Article 13 provides defenses to an order for return:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person . . . which opposes its return establishes that—
>
> (a) the person . . . having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.[2]

The Convention contemplates that a person exercising custody rights over a child will use the remedies of the Convention (and its domestic implementing statutes) to redress the wrongful removal or retention of the child. Thus, in this case, when Mezitis believed that Diorinou had wrongfully retained the children in Greece in September 1995, he caused a Hague petition to be filed on his behalf in Greece. This litigation concerns Diorinou's Hague petition to return the children to Greece, in which she challenged what she alleged was the wrongful removal of the children by Mezitis from Greece to New York in October 2000.

The Second Circuit Court of Appeals noted that Judge Stanton correctly began his analysis of the parties' competing contentions by focusing first on the

issue of the children's habitual residence in October 2000, just prior to the removal by Mezitis that Diorinou was challenging in this proceeding. At that time, she had, and was "exercis[ing]" within the meaning of Article 3(b), custody rights granted her on January 30, 1998, by the Court of First Instance of Athens, in a decision affirmed on May 6, 1999, by the Court of Appeals of Athens. Although a further appeal is pending before the Supreme Court of Greece, Mezitis has not claimed, or attempted to establish, that the Greek custody award has been stayed. Thus, Mezitis's removal was in breach of Diorinou's custody rights in Greece, and the removal was wrongful under Article 3(a) if Greece was then the children's habitual residence.

Mezitis contended, without dispute, that the children's habitual residence from their birth until the summer of 1995 was New York. He further contended that Diorinou wrongfully retained the children in Greece in September 1995 and that her wrongful retention cannot create habitual residence for them in Greece. In his view, their habitual residence continued to be New York. If that were so, his removal of the children in October 2000 would not be wrongful under Article 3(a) because Diorinou would not then be exercising custody rights under the laws of New York. The New York courts had awarded custody to Mezitis on November 17, 1997.

Focusing on the issue of the children's habitual residence in October 2000, Judge Stanton stated:

> That the children have been exclusively living in Greece with their mother for the past five years, during which time they have been attending school, establishing friendships, receiving medical treatment, and enjoying active involvement with Ms. Diorinou's extended family is conclusive evidence that, from their perspective, they are "settled" in Greece.

Judge Stanton recognized, however, that "Greece may not be [the children's] habitual residence if their original removal to Greece was wrongful, because a parent cannot create a new 'habitual residence' by the wrongful removal and sequestering of a child." The District Judge then noted that the Greek courts considering Mezitis's Hague petition had ruled that Diorinou's retention of the children in Greece in 1995 was not wrongful, and he felt bound to accord full faith and credit to those adjudications by virtue of section 4(g) of ICARA.[3] In addition, he noted that he "would in any event, as a matter of comity and respondent judicata, adopt the determination that the children were not wrongfully retained in Greece." Thus, the degree of deference due the adjudications of the Greek Hague petition became critical.

Though ultimately not decisive for the outcome, the Second Circuit was in disagreement with Judge Stanton that section 4 of ICARA requires a federal or state court in the United States to accord full faith and credit to a Hague petition adjudication of another country. Section 4 of ICARA provides:

> Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter. 42 U.S.C. § 11603(g). Section 3(8) of ICARA defines "State" to mean "any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States." Although it might be possible to read "States" in section 4 to mean "Contracting States" (if the definition of section 3 were understood to define only the singular "State" and not the plural "States"), the legislative history clearly indicates that the word "States" in section 4 refers to the states of the United States.

Nevertheless, it pointed out that American courts will normally accord considerable deference to foreign adjudications as a matter of comity.

Mezitis contended that, because section 4 of ICARA limits full faith and credit deference to judgments of courts within the United States, it carries a negative implication that no deference is to be accorded foreign adjudications. The Second Circuit disagreed. It held that even if the limited scope of section 4 implies a legislative preference not to extend formal full faith and credit recognition to foreign judgments, there was nothing in ICARA or its legislative history to indicate that Congress wanted to bar the courts of this country from giving foreign judgments the more flexible deference normally comprehended by the concept of international comity. Although deference as a matter of comity often entails consideration of the fairness of a foreign adjudicating system, a case-specific inquiry is sometimes appropriate. A particular case may disclose such defects as to make the particular judgment not entitled to recognition. Although it had no reason to question the fairness of the Greek system of jurisprudence, the complicated sequence of litigation and the force of the parties' contentions warranted careful consideration of the

determinations in Greece to which Diorinou asks the court to defer.

Although the court started out with an inclination to accord deference to the Greek Hague petition adjudications as a matter of comity, it was given pause by some aspects of those rulings. The courts' acceptance that Mezitis expressly agreed to let the children remain in Greece was troublesome. This finding rested solely on an affidavit of Diorinou's mother and is contradicted by his initiation of a custody proceeding in New York just one week after his return from Greece. It was also dubious about the Greek courts' upholding of an Article 13(b) defense to the children's return.

Despite these concerns, it saw no reason not to defer to the Greek courts' fundamental ruling that Diorinou's retention of the children in Greece in September 1995 was not wrongful, even if not expressly agreed to by Mezitis. Those courts reasonably found that Mezitis ignored the children during what was to have been the 1995 family summer vacation in Greece and stayed with his mother. At the end of the summer, he cancelled his ticket to return with one child on the flight for which Diorinou was to return with the other child, and did not inform Diorinou of his abrupt change of plans. She tried to return with the children on his flight, but could not get tickets. After she flew alone to New York, he refused her offer to return to Greece with her to bring the children to New York pending the divorce proceeding. Having found these circumstances, the Greek Hague petition courts made an entirely supportable determination that Diorinou had not wrongfully retained the children in Greece.

The court's deference to the Greek Hague petition rulings that Diorinou did not wrongfully retain the children in Greece in 1995 did not necessarily end its consideration of whether Mezitis's removal of the children in 2000 required an order for their return. The Convention contemplates that any wrongful removal (or retention) will be remedied by an order for return so that the issue of custody can be properly determined by a court of competent jurisdiction.

> Considering first the New York custody award, we note that Article 17 of the Convention provides:
>
> The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.
>
> In the pending ICARA action, Judge Stanton faithfully heeded Article 17, neither denying an order for return simply because of the New York custody award nor failing to "take account of" that award. He noted that the New York custody award had resulted from "a one-sided and defective presentation." As he pointed out, Diorinou was not present, and Justice Heitler was advised by Mezitis's counsel that there had been no final decisions with regard to any of the Greek proceedings, although the Greek Hague petition had already been denied, and the denial affirmed.

As to the Greek custody award, it had no bearing on the Greek Hague petition decisions by the Court of First Instance and the Court of Appeals of Thessaloniki, because the custody award came after those decisions.

Although it was troubled by the existence of conflicting custody awards from the New York and Athens courts, it saw no basis for declining to defer to the principal ruling in the Greek Hague petition litigation that Diorinou did not wrongfully retain the children in Greece in 1995. Thereafter, with custody validly awarded to Diorinou by the Athens courts, she was entitled to continue retention of the children in Thessaloniki and to seek an order requiring the children's return to Greece after Mezitis had violated her custody rights by wrongfully removing the children to New York.

Editor's Note: *Must reading for anyone dealing with the tenets of the Hague Convention.*

Custody—Law Guardian Standards

The Statewide Administrative Judge for Matrimonial Matters promulgated a "Law Guardian Definition and Standards" which, we have been advised, is only in effect in the First Department. The rule attempt to define the role of the law guardian. Although the child is not a party to such an action, the rules clearly indicate that the law guardian should act as any other attorney representing a litigant in a contested custody matter.

The rule defines a law guardian "as an attorney representing a child in a custody or visitation proceeding and in any appeals therefrom. It is the responsibility of the law guardian to act as an advisor to the child, and to advocate for the child's position in the litigation." Since the law guardian is representing a person who is under a disability, his/her is directed to assess whether the child is impaired or unimpaired. "Impairment" is defined as a child's inability to make knowl-

edgeable, voluntary and considered judgments or to work effectively with his/her attorney. In assessing a child's impairment the law guardian is instructed to consider such factors as the child's age, level of maturity, developmental ability, emotional status, ability to articulate his/her desires and any other facts that impact upon the child's ability to make knowledgeable, voluntary and considered judgments or to work effectively with his/her attorney. The assessment may also take into account factors external to the child including a parent's mental illness, substance abuse or domestic violence.

The Standards provide that the law guardian must advise the court of his/her conclusion as to the child's impairment and, if the child expresses a position, report to the court the child's stated position. He is directed to "advocate for the child's stated position if the law guardian, on his/her own or with the assistance of a mental health professional and after investigation and assessment of the situation, determines that the child is unimpaired." Thereafter, he is charged to "assist the Court" in making its decision "by ensuring that relevant evidence is obtained and presented to the Court, including evidence that otherwise might not be presented to the Court, and by otherwise fully participating in the adjudicative process."

The Standards clearly indicate that the role of the law guardian is only to serve as the child's attorney, just as any other attorney for an adverse party. This is crystalized by the admonishments that "a law guardian shall not act as an advocate for any party other than the child," that he/she shall ask the court to assign additional counsel if he discovers a potential or actual conflict in his/her representation of multiple children in the same family, and that he/she "will act in a manner consistent with the Lawyer's Code of Professional Responsibility." In the absence of counsel's permission, a law guardian may not engage in *ex parte* communications with the court, may not communicate with the parties, and may not act as a witness or submit any written reports to the court at any point during the proceedings or in any subsequent proceedings.

The law guardian is also directed not to "assume the role of social worker or mental health professional," but to seek the assistance of such professionals on behalf of the child when appropriate.

A law guardian may not participate in contested monetary issues raised in a matrimonial proceeding such as equitable distribution, maintenance and child support, except where relevant to custody and visitation determinations. The following are the new rules:

APPELLATE DIVISION
First Department
Statewide Administrative Judge
for Matrimonial Matters
25 Beaver Street
New York, New York 10004
(212) 428-2140

Law Guardian Definition and Standards

Definition

LAW GUARDIAN. A law guardian is an attorney representing a child in a custody or visitation proceeding and in any appeals therefrom. It is the responsibility of the law guardian to act as an advisor to the child, and to advocate for the child's position in the litigation. The law guardian shall assess whether the child is impaired or unimpaired. Impairment is a child's inability to make knowledgeable, voluntary and considered judgments or to work effectively with his/her attorney.

Standards

Assessment of impairments by the law guardian shall include consideration of the child's age, level of maturity, developmental ability, emotional status, ability to articulate his/her desires, and any other facts that impact upon the child's ability to make knowledgeable, voluntary and considered judgments or to work effectively with his/her attorney. Assessment of a child's impairment may also take into account factors external to the child including a parent's mental illness, substance abuse or domestic violence.

The law guardian shall advise the Court of his/her conclusion of impairment and, if the child expresses a position, report to the Court the child's stated position. Thereafter, the law guardian shall assist the Court in making an informed decision in the best interests of the child by ensuring that relevant evidence is obtained and presented to the Court, including evidence that otherwise might not be presented to the Court, and by otherwise fully

participating in the adjudicative process.

A law guardian shall not act as an advocate for any party other than the child.

A law guardian shall advocate for the child's stated position if the law guardian, on his/her own or with the assistance of a mental health professional and after investigation and assessment of the situation, determines that the child is unimpaired.

A law guardian shall ask the Court to assign additional counsel if the law guardian discovers a potential or actual conflict in his/her representation of multiple children in the same family.

A law guardian shall act in a manner consistent with the Lawyer's Code of Professional Responsibility.

A law guardian shall not assume the role of social worker or mental health professional, but shall seek the assistance of such professionals on behalf of the child when appropriate.

A law guardian shall not engage in ex parte communications with the Court absent waiver by all parties.

A law guardian shall not communicate with the parties in the absence of their counsel or without counsel's written permission.

A law guardian so long as she/he is the legal representative, advisor and advocate for a child in a custody and/or visitation matter, shall not act as a witness or submit any written reports to the Court at any point during the proceedings or in any subsequent proceedings.

A lawyer who has met the necessary training and certification requirements established by the Committee to Certify Law Guardians for Appointment in Domestic Relations Matters may apply for and be accepted as law guardians in the First Judicial Department. Agencies or private law firms may not be qualified as a whole to represent children in the First Judicial Department, but individual attorneys employed by such agencies or private law firms may do so if they meet the necessary training and certification requirements.

A law guardian shall not participate in contested monetary issues raised in a Matrimonial proceeding such as equitable distribution, maintenance and child support except where relevant to custody and visitation determinations.

Editor's Note: *It is hoped that these rules will become mandatory throughout the state.*

Equitable Distribution—Variable Supplement Fund

DeLuca v. DeLuca **___ NY2d ___, ___ NYS2d ___ (2001)**

In *DeLuca v. DeLuca*, *supra*, the Court of Appeals, in a unanimous opinion written by Judge Ciparek, held that retirement benefits from the Police Superior Officers Variable Supplements Fund (PSOVSF) are marital property subject to equitable distribution.

The parties were married on May 29, 1966. The following year, the husband began his career with the New York City Police Department (NYPD), eventually attaining the rank of Detective, First Grade. Thirty years later, he filed this action for divorce. Before the judgment of divorce, he retired from the NYPD after 31 years of service and began receiving PSOVSF benefits in addition to regular pension benefits. Supreme Court granted the husband a divorce and, as part of the equitable distribution of his assets, awarded the wife half of his past and future PSOVSF payments. The Appellate Division modified the award (276 AD2d 143), holding that PSOVSF benefits were not marital property. It based that conclusion on language in the Administrative Code of the City of New York indicating that PSOVSF benefits were not pension benefits. The Court of Appeals reversed and remitted the matter to the Appellate Division for further proceedings in accordance with its opinion.

The Court of Appeals pointed out that the PSOVSF, along with its counterpart for police officers below the rank of sergeant, the Police Officers' Variable Supplements Fund (POVSF), were the result of contract negotiations between the city of New York and the unions representing police officers. In 1968, both sides jointly proposed legislation allowing the Police Pension Fund, whose pension investments were limited to fixed-income obligations, to invest some of its assets in equities, such as common stock, with the hope of creating higher earnings. The additional earnings could then be

used as extra post-retirement compensation to attract qualified individuals and induce long-term service. The Legislature responded by enacting chapter 876 of the Laws of 1970, which created the two Police Variable Supplement Funds (VSFs). Originally, the funds deposited into the VSFs represented the difference between the amount of money that the pension fund would have earned had all its investments been in fixed-income instruments and the amount actually earned from equity investments. In the years that equity investment income exceeded the hypothetical amount that would have been earned in fixed-income investments, a statutory formula divided the excess between the two funds. Conversely, the pension fund put no money into the VSFs in years when equity earnings were less than the hypothetical fixed-income earnings. Pursuant to statute, boards of trustees authorized payments from both VSFs in an amount and in such form as in their discretion they deemed appropriate. In 1993, the Legislature altered both the funding and payment structure of the PSOVSF. Instead of using an excess earnings formula, the amendment mandated the pension fund to place only as much money into the PSOVSFs as was necessary to make benefit payments. In addition, the amendment replaced board of trustees' discretion as to benefit amounts with a fixed schedule of lump sum payments to eligible retirees.

Both VSFs were structurally linked to the Police Pension Fund. The money placed in the VSFs is derived from earnings on investments of the Police Pension Fund which, in turn, is partly funded by member contributions. Moreover, to be eligible to receive distributions from the PSOVSF, a superior officer must be a "pension fund beneficiary." Notwithstanding its ties to the pension system, the Legislature has declared that the PSOVSF, like the other variable funds, is not and should not be construed to be a pension fund.

The Court of Appeals held that whether the VSF benefits at issue constituted marital property could not be determined by the Administrative Code provisions relied on by the Appellate Division. Rather, that question must be answered by the relevant provisions of the Domestic Relations Law. If the benefit is a thing of value and was earned in whole or in part during the marriage, it may be considered marital property subject to equitable distribution. Domestic Relations Law § 236 part B defines "marital property" as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held." In identifying nothing less than "all property" acquired during the marriage as marital property, this section evinces an unmistakable intent to provide each spouse with a fair share of things of value that each helped to create and expects to enjoy at a future date. The court stated that there is a presumption of marital property "premised on the contemporary view of marriage as an economic partnership, crediting each party's contributions, whether monetary or not, to the growth and value of the marriage." Thus, marital property consists of "a wide range of intangible interests which in other contexts might not be recognized as divisible property at all."

Judge Ciparek referred to the Court's decisions in *Majauskas v. Majauskas*,[4] where it held that rights in a vested but non-matured pension were marital property, and noted that under the broad interpretation given marital property, formalized concepts such as "vesting" and "maturity" are not determinative of what is marital property. She noted that the Court held, in *Olivo v. Olivo*,[5] that compensation received after dissolution of the marriage for services rendered during the marriage is marital property. In that case it rejected a blanket "length of service" rule, finding it could lead to absurd results. However, it recognized that a length-of-service requirement could be some evidence that the benefit in question is a form of compensation for past services. Effectuating the intent of Domestic Relations Law § 236 part B, it held that these post-divorce benefits were marital property to the extent that they were compensation for past services rendered during the marriage. In contrast, payments intended to compensate for events after the divorce, such as severance pay, were separate property not subject to equitable distribution. In *DeJesus v. DeJesus*,[6] the Court demonstrated its preference for a view of marital property that emphasized the purpose of the post-retirement benefit. At issue in *DeJesus* were stock gift and stock option plans issued to a husband shortly before his wife commenced an action for divorce. Under the plans, the employer would issue stock, or the right to purchase stock, at future dates, assuming the husband stayed at his job. Although the husband argued that the plans were solely an incentive to continued employment and thus primarily separate property, the Court held that the stock plans might also be considered marital property if they represented compensation for past services. To the extent such plans were compensation for past services, the fact that they came into being shortly before the divorce was not determinative of their status as marital property.

The key question in *DeLuca* was whether VSF benefits were intended as compensation for past services rendered during the marriage or another form of compensation, such as an incentive to continued employment, which is separate property post-divorce. The Court concluded that VSF benefits were a supplement to pension fund payments and, as such, a form of compensation for past services related to the first 20 years

of police employment, notwithstanding the date they mature.

As evidence that they were a supplemental enhancement of retirement benefits, the Court noted that VSF payments are made only to service retirees who are members of the pension system. Moreover, the money in the VSF originates with the general pension fund and is subordinate to that fund in that the VSF may not impair rights of any member. From its design, it was clear that the purpose of the VSF is to provide a supplement to the pension benefits of certain long-term uniformed employees. Because VSF benefits are compensation for past services, they do not raise the same concerns as *Olivo* about reliance on the "length of service" measure of marital property.

The Court of Appeals pointed out that Mrs. DeLuca was not claiming a share of a new benefit conferred after the marriage. Rather, the benefits at issue were compensation for the husband's past employment services while the couple was still married. It held that to the extent those past services occurred during the marriage, the non-titled spouse should receive an equitable share of this deferred compensation-type fund.

The Court reiterated that while issues such as "vesting" and "maturity" do not raise serious obstacles to the determination that VSF benefits are marital property, they do affect valuation and distribution. It noted that courts are capable of fashioning domestic relations orders that equitably distribute the proceeds of future contingencies, if and when they are realized. Because the Appellate Division held that PSOVSF benefits were separate property, it did not pass on the merits of the 50 percent equitable distribution, and was instructed to consider this issue on remittal. The order of the Appellate Division, insofar as appealed from, was reversed, and the case was remitted to that court for further proceedings in accordance with the Opinion.

Editor's Note: *A well-reasoned and well-written decision that further liberalizes the scope of marital assets.*

Visitation—Non-Parent Visitation

In *Multari v. Sorrell*,[7] the Third Department refused to find that petitioner was a parent by estoppel and agreed with the Fourth Department that a non-parent does not have standing to seek visitation with a child. Petitioner was the former boyfriend of respondent Renee B. Sorrell. They never married but lived together for six years during which time petitioner formed a close and loving relationship with respondents' son, who was approximately 18 months old when petitioner and respondent met and eight years old when their relationship ended. The child had regular unsupervised contact as an infant with his biological father, which eventually became supervised and then stopped altogether when the child was about two years old. His biological father recently resurfaced, and visitation between the two was reestablished.

After their breakup in August 1998, respondent permitted petitioner to have contact with the child to ease the transition of their separation for the child. These visits decreased in frequency and duration and terminated altogether in May 1999. Petitioner thereafter commenced a proceeding seeking visitation, which he alleged would be in the best interest of the child. Petitioner claimed that he was "requesting the Court to intervene in this situation based upon the doctrine of equitable estoppel." Following a hearing as to whether the court could invoke this doctrine, the court found that he failed in this burden and dismissed the petition.

Although concluding that Family Court correctly determined that petitioner failed to make out a *prima facie* case of equitable estoppel, the Third Department found that affirmance was mandated on the more fundamental ground that petitioner lacked standing to seek visitation and "cannot get around this insurmountable legal hurdle by attempting to offensively invoke the doctrine of equitable estoppel." It found that the facts of the case were governed squarely by the Court of Appeals' decisions in *In re Ronald FF.* and *In re Alison D.*

The Third Department found that as firmly established in *In re Ronald FF.* the rights of a custodial parent "include the right to determine who may or may not associate with [that parent's] child," and the state may not interfere with this fundamental right absent a showing of "some compelling State purpose which furthers the child's best interest." As there was no dispute that respondent was a fit parent and the proper custodian for the child, *In re Alison D.* further established that, no matter how close and loving petitioner's relationship was with respondent's child, petitioner, as a biological stranger to that child, lacked standing to seek visitation. It noted that in *In re Alison D.*, the Court of Appeals specifically rejected the petitioner's claim that her status as a parent "'by estoppel'" was sufficient to confer standing to seek visitation.

It reviewed the briefs in that case to both the Court of Appeals and the Second Department and noted that the petitioner specifically argued in both courts for the application of the doctrine of equitable estoppel to prohibit the respondent from denying her visitation, an argument which both courts rejected. The grounds advanced for application of the doctrine in that case were nearly identical to those advanced by petitioner in this case. Also of note, was

> Alison D. explicitly argued to the Court of Appeals that "[a]t the very least, [she had] raised a factual question regarding whether Virginia M. should be estopped from denying visitation" (an argument which the Court obviously rejected) and requested "a full hearing on her claim of equitable estoppel" (which the Court obviously denied). Thus, no matter how terse its language on the issue of equitable estoppel, and no matter how much we might be inclined to agree with our concurring Justice philosophically, we are bound to adhere to the Court of Appeals' decision in *Matter of Alison D. v. Virgina M.* (77 N.Y.2d 651, *supra*) which stands for the proposition that a nonbiological parent cannot invoke equitable estoppel to get around his or her lack of standing to assert visitation.

The Court noted that any change in the state of the law in this regard is for the Legislature or the Court of Appeals.

The Court acknowledged that some courts have ruled that the doctrine of equitable estoppel may be applied to custody and visitation disputes in certain circumstances, particularly circumstances far more compelling than those in the instant matter but it declined to expand the use of this doctrine by applying it to the facts of this case.

Editor's Note: *Is this ruling truly in the best interests of the child?*

Endnotes

1. *See* ICARA, 42 U.S.C. § 11603(e)(1).
2. *See* ICARA, 42 U.S.C. § 11603(e)(2)(A), (B).
3. 42 U.S.C. § 11603(g).
4. 61 N.Y.2d 481.
5. 82 N.Y.2d 202.
6. 90 N.Y.2d 643.
7. 287 AD2d 764, 731 N.Y.S.2d 238 (3d Dep't 2001).

Joel R. Brandes has law offices in Garden City and New York City. He is a Fellow of the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers. He co-authored *Law and the Family New York*, 2d Edition (nine volumes, West Group) and co-authors the annual supplements. He also co-authored *Law the Family New York Forms* (four volumes, 1995, West Group 1995) and writes a regular monthly column in the *New York Law Journal* entitled "Law and The Family."

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Editor-in-Chief
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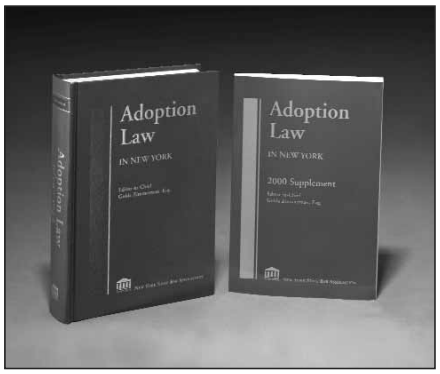

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