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Notes and Comments

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Inherent Dangers to Consider in Representation of a Client in a Contested Matrimonial Case

A recent front page article in the *New York Law Journal*[1] highlights the dangers to consider in representing a client in a contested matrimonial case, although the rules discussed affect all attorneys in all disciplines.

The rule discussed was Rule 3.3 of the Rules of Professional Conduct which was enacted on April 1, 2009 and compares it with New York's Code of Professional Responsibility which had been in use since 1970 and which could be found in Disciplinary Rule DR 7-102. Both sections deal with a lawyer's obligation to correct false evidence given by their clients. The most striking part of the new legislation is to require attorneys to *disclose* client confidences to correct falsehoods, compared to the old code provisions which *forbid* such disclosures of confidence.

To understand the thrust of this article, one must familiarize him or herself with Rule 3.3(a)(3) and 3.3(b) which requires an attorney to take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." These new rules prompted an ethics professor to conclude that "confidentiality trumped truth, but now truth trumps confidentiality," in comparing the new code provisions with the old rules.[2]

Apparently, recognizing the grave difficulty in breaching the lawyer-client relationship and the lawyer-client privilege, the recent pronouncement of the two bar groups[3] permits attorneys to take a step short of disclosure by permitting them to request withdrawal of testimony or other evidence once the lawyer learns of a falsehood. Whether a grievance committee will follow such suggestions remains to be seen. One lawyer observed that withdrawal of evidence may not be possible if an attorney learns of false evidence in the midst of trial. Interestingly, under the 1970 code, attorneys were advised by bar groups that they could continue to represent the client who provided false evidence without being required to take any remedial action, provided the lawyer did not rely on the evidence to advance his arguments either during litigation or settlement discussions. However, the old code permitted an attorney to withdraw as counsel if he determined that it was not possible to effectively represent the client without relying upon the tainted material. By contrast, both bar groups now interpret the new provision to prohibit withdrawal as a viable option. These observations contained in the *New York Law Journal's* article, highlight the issues that will be discussed in this article.

Inside

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Normally, this column not only identifies problems but offers practical solutions to the questions posed. However, short of having the statute rewritten or declared ineffective by the courts, no viable solutions can be suggested that are fail safe.

If you have practiced matrimonial law prior to April 1, 2009 and believed that you were well versed in the rules of professional conduct regarding your representation of a client in a contested matrimonial matter, you are presently misinformed. The duties imposed upon you by the new ethics rules, which were promulgated on April 1, 2009, dramatically change a lawyer's duties and obligations in diligently representing clients.

Because failure to comply with these newly enacted rules might lead to censure, disbarment or a malpractice verdict against you (c.f. new rules preamble paragraph 1.2), it is absolutely essential to be familiar with new Rule 3.3 of the Rules of Professional Conduct entitled "*Conduct Before A Tribunal*" which states in pertinent part:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Subparagraph (f) also provides as follows:

(f) In appearing as a lawyer before a tribunal, a lawyer shall not:

(1) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of the intent not to comply;

(2) engage in undignified or discourteous conduct;

(3) intentionally or habitually violate any established rule of procedure or of evidence; or

(4) engage in conduct intended to disrupt the tribunal,

Rule 3.3 (a)(1) is straightforward and requires no comment. However, subdivisions (2) and (3) are pregnant with peril, and may even seem to be contrary to a client's best interests, but nevertheless failure to obey them will be considered a violation of these ethical rules. Subparagraph (a)(2) makes it mandatory to disclose to a judge controlling legal case law or statutes known by the lawyer to be adverse to his client's position, especially when opposing counsel has failed to advance such argument. If this section is literally read and strictly enforced, it appears to direct an attorney to prejudice his own client during a litigation, which certainly could not have been the intent of the drafters of this section. It is as if the lawyer must tell the judge "my client's position is untenable" even though his adversary makes no such claim. In this regard, it is important to review and compare this section with New Rule 1.1 (c) which provides that a lawyer shall not intentionally:

1. Fail to seek the objectives of the client through reasonably available means permitted by law in these rules; or

2. Prejudice or damage the client during the course of the representation except as permitted or required by these rules;

and finally New Rule 1.2 (e) that provides "a lawyer may exercise professional judgment to waive or fail to assert a right or position of the client or, accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client."

When these three sections are read and considered together, they form a monumental oxymoron of staggering proportions or, at best, a derisive *non sequitur*.

To some, these provisions amount to an imprimatur under the ethics rules to "sell out one's client," eliminate the lawyer-client privilege, and make nugatory the confidentiality rule that for generations has enabled the legal profession to obtain the trust of their clients and adequately represent and counsel them.

These contrary provisions make it difficult, if not impossible, for the attorney to be in compliance with conflicting ethical mandates.

The most perplexing part of Rule 3.3 that correctly forbids an offer or use of evidence at trial that the lawyer knows to be false is that the attorney is required to take "reasonable remedial measures, including if necessary disclosure to the tribunal." to expose the client and possibly have the client incur criminal sanctions. While similar requirements were found in the old ethical rules, New York Lawyers Code of Professional Responsibility, DR 7-102, there was an explicit exception which permitted coun-

sel to withhold such evidence if to reveal same, would breach the lawyer-client privilege or disclose a confidence or secret. It was therefore clear under the old rules, that the lawyer-client privilege and confidentiality rules were paramount to the obligation of the lawyer to disclose adverse prejudicial material to a court. Such appears no longer to be the rule. The new code defines fraud and in essence determines it to be any acts that would deceive an adverse party or a court. So, for example, in a matrimonial proceeding, if a client knowingly misstates his assets or liabilities or misleads his spouse as to the value of an asset and the attorney is aware that the client's net worth affidavit contains misstated facts that are certainly calculated to deceive his or her spouse, the lawyer is not only required to breach the lawyer-client privilege, but is affirmatively compelled to take the least harmful remedial steps to rectify the client's wrong.

Acts of deception in matrimonial litigation abound. Misstatement of income, false and, at times, fraudulent tax returns, as well as the withholding of pertinent information that might financially mislead a spouse, all come under the umbrella of wrongful conduct that requires remedial action by the lawyer pursuant to the ethics rules.

Matrimonial attorneys are cautioned that there are a plethora of circumstances which require remedial steps under this section by the attorney, and what these "remedial steps" will consist of requires careful examination and thought. For example, the question arises, if a client discharges an attorney prior to or even during a trial, and there is no longer an attorney/client relationship, does the attorney still have the duty to appear before the tribunal trying the case and reveal the client's fraud or other wrongful behavior? If it is determined that such duty does exist pursuant to the new rules, and the attorney in fact discloses such information, could his action also be considered malpractice on his part by the client for destroying the lawyer-client privilege? Would the attorney be subjected to responding in damages to the "wronged" client?

Consider another example. If during the preparation for trial of a contested divorce, facts are learned by the attorney that prior documents submitted are false, for instance, when a client admits to the lawyer that his tax returns were fraudulent in that they failed to disclose substantial cash payments received during the tax years reported, is it an option for the attorney to then move to be relieved of the client's representation? If the client discharges the attorney, would the incoming attorney who had no direct knowledge of the fraud still be required to obtain whatever information he could from the outgoing attorney which, of course, would include his fraudulent conduct?

When confronting one's client with these remedial rules, another perplexing issue arises. Should the confronted client have his own additional counsel during such discussion with the lawyer? Does the lawyer have the duty to inform the client of his right to be represented?

Yet another dilemma arises and that is, do the new rules oblige the attorney to advise the client that he is required to breach the attorney-client privilege and that anything he discloses to the attorney may be used against him and must be disclosed by the attorney to the tribunal? If so, at what stage of a client's representation should such information be imparted?

The most frequent situation that counsel will face is the filing by the client of a fraudulent, misleading or false tax return. As part of the attorney's obligation to remedy this wrong, it would seem that it would require the attorney to counsel the client to file amended tax returns setting forth all cash payments received. In doing so, of course and as noted earlier, it would also appear that the client should have the advice of independent counsel to determine whether to make this disclosure on his own and file the necessary tax returns, especially since the filing of a false tax return is a crime. To further complicate this decision is the fact that most tax returns between spouses are joint returns and may require an amended return to contain both signatures. Nevertheless, there is some authority and it is believed that the Internal Revenue Service may accept an amended return with but one signature of the parties.

In examining further this dilemma, if depositions were taken and during the course of the depositions, a client elected to invoke his Fifth Amendment privilege which permits the court to take an adverse inference from such testimony, would it require the client to make a motion on papers to withdraw such privilege and restate his answers on the deposition?

These and other problems too numerous to even conjecture, may have no present answers or solutions. The rules are too new for them to have been interpreted by the courts.

A concluding observation must be made. Recently, the new rules pertaining to lawyer advertising have been held in part to be unconstitutional. It seems that the ethical rules may reach a similar fate if they are challenged in the federal courts by either client or attorney. Certainly, remedial legislation should be considered to further explore the lawyer's rights and obligations of these discussed provisions, and what conduct by an attorney will be permitted and not considered a breach of the ethics rules.

Endnotes

1. *"Knowledge of False Testimony Addressed in Two Ethics Opinions"* NYLJ 4/10/10, pg. 1.
2. Roy Simon, Professor at Hofstra University School of Law.
3. New York County Lawyers' Association and New York State Bar Association.

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The Need for a Marital Assessment at the Beginning of Divorce Proceedings When Children Are Involved

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

Introduction

Historically, the filing of divorce papers is assumed to mark the start of a process that will be filled with a great deal of anger, anxiety, vulnerability, threats, confrontation and lack of civility. However, the presence of such feelings, in most cases, probably started well before any filing, and has the potential to reach a point where the mental status and emotional well-being of the parents and the children can be severely impaired. When judges first review a case, they are very often completely unaware of the mental state and other pertinent information of the parents and children, as well as the dynamics that are present in the family at the time they first appear in court. Consequently, a great deal of time may be lost until a law guardian is assigned or a forensic evaluation is requested by the judge. And even then, a law guardian may not be trained to provide the judge with family dynamics.

A marital assessment at the start of divorce proceedings would provide a clear and comprehensive report informing the judge of the overall assessment of the present family interactions and dynamics. A marital assessment would not involve making recommendations or forensic suggestions. Instead, it would allow the judge to determine whether or not immediate court intervention is required for the children in the form of therapy or for the parents in the form of parent coordination, civility coaching, or re-entry therapy where professional intervention is required to repair an alienated relationship between children and a parent. These factors should be addressed right from the start so that any damage to the psychological state of the children is prevented.

What is a Marital Assessment?

There are many types of assessments used in all professions. Schools use formal and informal academic and psychological assessments at the beginning of the school year to determine the strengths and weaknesses of children so that expectations are in line with a child's ability and capability. Most schools will use a kindergarten screening before children enter school to identify high-risk children who will need special attention and support. This type of assessment reduces problems that some children would have in transitioning to school.

The medical profession uses pre-op testing to make sure that all the conditions are within acceptable limits for patients prior to surgery. Doctors will also use extensive medical tests before any intrusive and/or extensive procedures are undertaken by the physician.

Psychologists will use psychological examinations and intakes at the start of therapy to determine the mental status of a patient so that the therapist is aware of any fragility, mental illness, psychopathology, etc.

Unlike other professions, the legal profession in separation and divorce cases has no such vehicle to help determine the dynamics of parents and children at the start of this process. Consequently, judges and lawyers almost always enter the litigation process blindly. In general, the only intervention and awareness of family dynamics sometimes comes many months or years into a difficult case when a forensic evaluation is requested by the court. By the time these results are made available, so much damage may have taken place in the psychological development of the children that it may be irreversible.

A marital assessment, by a highly qualified and trained mental health professional, would be a requirement by the Court of all parents after filing for divorce where there are one or more children involved.

There are 2 parts to a comprehensive marital assessment:

Part I: Determining the Overall Functioning Levels of the Children

Part II: The Use of a Parent Civility Rating Scale

Part I of a Marital Assessment: Determining the Overall Functioning Levels of the Children

The first part of a marital assessment provides the judge with a comprehensive assessment of the overall functioning levels of the children on a variety of measures. These measures focus on the academic, emotional, social, and medical status of the children. The areas included in this part of the assessment include:

1. *The children's present school functioning and academic history:* If a child is struggling in school when his/her parents are going through a divorce, the overall levels of tension can be debilitating and dangerous to his/her well being. Many times, the stress from a separation of divorce can affect the child's ability to concentrate and perform in school despite adequate ability.
2. *The present mood and affect of the children:* The present mood of the children and their emotional affect as to what is transpiring in their family needs to be explored. How the mood and affect of the children is affected by the stress of separation and divorce is important information for the judge to be aware of during this process.
3. *The indications of high-risk factors in the children's behavior and thinking:* High risk symptoms in children's behavior may indicate serious issues in the

future. Intervention may be required but family dynamics under the stress of divorce may have created an inability to attend to the needs of the children.

4. *Medical status of the children:* A complete medical review of the children should be provided including medications, illnesses and / or disorders.
5. *The developmental history of the children:* The developmental status of children is important information for the judge to know, including social, emotional, family, economic and behavioral histories.
6. *Developmental concerns and the present interventions:* This information would provide the judge with present medical, psychological and educational interventions for children with special needs.
7. *Areas of functional impairment on the part of the children:* One of the most important factors that should be know is the impact of the family tension on the children's functioning levels in social and academic areas.
8. *Evidence of any possible educational disability:* Information on educational disabilities, including the classification of disability, special education placements and services should be information that is available.
9. *Social status of the children:* Many children who experience separation and divorce will begin to cocoon as a result of stress and tension which tends to drain their energy. As a result, they will begin to pull away from social interaction. This isolation and peer withdrawal can have serious impacts on their development.
10. *The need for therapeutic intervention for the children:* The judge should be made aware if the children are presently receiving psychotherapy. Someone should also be assigned to contact the therapists and find out the status of the treatment and present emotional status of the children. The children's therapist should be an integral part of the process of separation and divorce and should be kept up-to-date on the process.
11. *Level of alienation of the child/children towards either parent:* Objective, not interpretive observation of the children's present dynamic state with each parent should be explored. Many times in separation and divorce cases, an alignment between parents and children may take place with specific children aligning to a specific parent. The reasons for this connection would be explored by the forensic evaluator. However, the objective determination of alignment could have an impact on the well being of the children.
12. *Fears, phobias and other psychological disorders of the child:* Fears, phobias and other psychological disorders will often aggravate during the stress of separation and divorce. Psychological disorders can greatly interfere with the children's ability to cope and can add to the stress of the parents, especially since they should be working together for the sake of the children.
13. *The child's perception of the current attitude and behavior of the parents towards each other:* Sometimes, children can provide important insight into the relationship of parents during this stressful time. Parents who are under the stress of separation and divorce may not be able to be objective about how they deal with each other.

Part II of a Marital Assessment: The Use of a Parent Civility Rating Scale

The second part of the comprehensive marital assessment is the use of a Parent Civility Rating Scale to provide the judge with important information on the level of civility on the part of the parents. This scale does not provide forensic accountability but provides necessary information for the judge to determine if a Parent Coordinator or Civility Coach should be instituted immediately to monitor the situation and protect the children from being exposed to unhealthy family dynamics or psychological injury.

The factors covered on the Parent Civility Rating Scale would include the following:

1. *Overall Communication Between the Parents*: In general, are the parents able to communicate effectively with each other about issues involving their children?
2. *Medical Decisions*: Are the parents able to make joint medical decisions for their children without fighting?
3. *Educational Decisions*: Are the parents able to communicate effectively with each other about issues involving their children's education without fighting?
4. *Parent Opinions:* Are the parents able to communicate their opinions to each other about issues involving their children effectively without fighting?
5. *Feedback from Each Parent*: Are the parents are able to accept feedback from each other about issues involving their children without fighting?
6. *Attendance at School Related Events*: Are the parents able to attend school related events for their children without fighting when each other parent present?
7. *Financial Decisions*: Are the parents able to communicate effectively with each other about financial issues involving their children without fighting?
8. *Putting Children in the Middle of Disputes*: When disputes arise, do parents put their children in the middle?

9. *Using Children as Messengers to Obtain Information on the Other Parent*: Are the parents able to communicate effectively with each other about questions or concerns they may be having and thereby never use their children as messengers to obtain information on the other parent?
10. *Using Children as Messengers to Provide Information to the Other Parent*: Are the parents able to communicate effectively with each and thereby never use their children as messengers to provide information to the other parent?
11. *Communication with Each Other Via Phone:* Are the parents able to communicate via phone effectively with each other about issues involving their children?
12. *Communication with Each Other Via Email*: Are the parents able to communicate via email effectively with each other about issues involving their children?
13. *Transition of Children from Parent-to-Parent*: Are the parents able to have their children transition from one parent to the other parent without fighting?
14. *Negotiation of Extra Visitation or Change of Weekend Schedule*: Are the parents able to negotiate extra visitation time or change the weekend schedule without fighting?
15. *Family and Outside Events (weddings, birthday parties, soccer games, etc.)*—Are the parents able to attend events for their children without fighting when each other parent present?
16. *Phone Calls to Children*—Do the parents allow phone calls to come in from the other parent when the children are in their custody with no tension or problems?
17. *Providing Information (medical appointments, teacher appointments, and children's parties etc.)* —Are the parents able to communicate effectively with each other about their children's scheduled appointments and activities without fighting?

The following is a Parent Civility Rating Scale that we have created that would be filled in by the professional doing the marital assessment:

PARENT CIVILITY RATING SCALE

Please rate the parents on each of the 17 items (A through Q). You can only circle one answer (0, 1, 2 or 3) for each area being assessed.

A-Overall Communication Between the Parents

0- In general, parents are able to communicate effectively with each other about issues involving their children

1- In general, parents are able to communicate with each other about issues involving their children with limited disagreement

2- In general, parents have difficulty communicating with each other about issues involving their children.

3- In general, parents are unable to communicate with each other about issues involving their children.

B- Medical Decisions

0- Parents are able to make joint medical decisions for their children without fighting.

1- Parents are able to communicate about medical issues involving their children with limited fighting.

2- Parents have difficulty communicating with each other about medical issues involving their children.

3- Parents are unable to communicate with each other about medical issues involving their children.

C- Educational Decisions

0- Parents are able to communicate effectively with each other about issues involving their children's education without fighting

1- Parents are able to communicate with each other about issues involving their children's education with limited fighting

2- Parents have difficulty communicating with each other about issues involving their children's education.

3- Parents are unable to communicate with each other about issues involving their children's education.

D- Parent Opinions

0- Parents are able to effectively communicate their opinions to each other about issues involving their children without fighting

1- Parents are able to communicate their opinions to each other about issues involving their children with limited fighting

2- Parents have difficulty communicating their opinions to each other about issues involving their children with each other

3- Parents are unable to communicate their opinions to each other with each other about issues involving their children.

E- Feedback from Each Parent

0- Parents are able to accept feedback from each other about issues involving their children without fighting

1- Parents are able to accept feedback from each other about issues involving their children with limited fighting

2- Parents have difficulty accepting feedback from each other about issues involving their children.

3- Parents are unable to accept feedback from each other about issues involving their children.

F- Attendance at School Related Events

0- Parents are able to attend school related events for their children without fighting when each other parent present.

1- Parents are able to attend school related events for their children with limited fighting when each other parent present.

2- Parents have difficulty attending school related events for their children when each other is present without fighting.

3- Parents are unable to attend school related events when each other is present.

G- Financial Decisions

0- Parents are able to communicate effectively with each other about financial issues involving their children without fighting

1- Parents are able to communicate with each other about financial issues involving their children with limited fighting

2- Parents have difficulty communicating with each other about financial issues involving their children.

3- Parents are unable to communicate with each other about financial issues involving their children.

H- Putting Children in the Middle of Disputes

0- When disputes arise, parents never put their children in the middle.

1- When disputes arise, parents rarely put their children in the middle.

2- When disputes arise, parents often put their children in the middle.

3- When disputes arise, parents always put their children in the middle.

I- Using Children as Messengers to Obtain Information on the Other Parent

0- Parents are able to communicate effectively with each other about questions or concerns they may be having and thereby never use their children as messengers to obtain information on the other parent

1- Parents rarely use their children as messengers to obtain information on the other parent about questions or concerns they may be having

2- Parents often use their children as messengers to obtain information on the other parent about questions or concerns they may be having

3- Parents are unable to communicate effectively with each other about questions or concerns they may be having and thereby always use their children to obtain information on the other parent

J- Using Children as Messengers to Provide Information to the Other Parent

0- Parents are able to communicate effectively with each and thereby never use their children as messengers to provide information to the other parent

1- Parents rarely use their children as messengers to provide information to the other parent

2- Parents often use their children as messengers to provide information to the other parent

3- Parents are unable to communicate effectively with each and thereby always use their children to provide information to the other parent

K- Communication with Each Other Via Phone

0- In general, parents are able to communicate by phone effectively with each other about issues involving their children

1- In general, parents are able to communicate with each other by phone about issues involving their children with limited disagreement

2- In general, parents have difficulty communicating with each other by phone about issues involving their children.

3- In general, parents are unable to communicate with each other by phone about issues involving their children.

L- Communication with Each Other Via Email

0- In general, parents are able to communicate by email effectively with each other about issues involving their children

1- In general, parents are able to communicate with each other by email about issues involving their children with limited disagreement

2- In general, parents have difficulty communicating with each other by email about issues involving their children.

3- In general, parents are unable to communicate with each other by email about issues involving their children.

M- Transition of Children from Parent-to-Parent

0- Parents are able to have their children transition from one parent to the other parent without fighting

1- Parents are able to have their children transition from one parent to the other parent with limited fighting

2- Parents have difficulty transitioning the children from one parent to the other without fighting.

3- Parents are unable to have their children transition from one parent to the other parent without fighting

N- Negotiation of Extra Visitation or Change of Weekend Schedule

0- Parents are able to negotiate extra visitation time or change the weekend schedule without fighting

1- Parents are able to negotiate extra visitation time or change the weekend schedule with limited fighting

2- Parents have difficulty negotiating extra visitation time or change the weekend schedule without fighting.

3- Parents are unable to negotiate extra visitation time or change the weekend schedule.

O- Family and Outside Events (weddings, birthday parties, soccer games, etc.)

0- Parents are able to attend events for their children without fighting when each other parent present.

1- Parents are able to attend events for their children with limited fighting when each other parent present.

2- Parents have difficulty attending events for their children when each other is present without fighting.

3- Parents are unable to attend events when each other is present.

P- Phone Calls to Children

0- Parents allow phone calls to come in from the other parent when the children are in their custody with no tension or problems.

1- Parents allow phone calls to come in from the other parent when the children are in their custody but the children can sense some tension

2- Parents often avoid having phone calls come in from the other parent when the children are in their custody by not answering the phone or not being home on purpose

3- Parents do not allow phone calls to come in from the other parent when the children are in their custody.

Q- Providing Information (medical appointments, teacher appointments, and children's parties etc.)

0- Parents are able to communicate effectively with each other about their children's scheduled appointments and activities without fighting

1- Parents are able to communicate with each other about their children's scheduled appointments and activities with limited fighting

2- Parents have difficulty communicating with each other about their children's scheduled appointments and activities.

3- Parents are unable to communicate with each other about their children's scheduled appointments and activities with limited fighting.

Overall Score Interpretation

Add up the scores on items A through Q

TOTAL SCORE

0-8: Overall, parents are able to communicate effectively with each other about issues involving their children. **CIVILITY BETWEEN THE PARENTS APPEARS VERY STRONG**

8-20: Overall, parents are able to communicate with each other about issues involving their children with limited disagreement. **CIVILITY BETWEEN THE PARENTS APPEARS TO BE AMENABLE BUT COULD BE BETTER**

21-34: Overall, parents have difficulty communicating with each other about issues involving their children. **LACK OF CIVILITY BETWEEN THE PARENTS IS EVIDENT AND IS CAUSE FOR CONCERN**

35 or higher-Overall, parents are unable to communicate with each other about issues involving their children. **LACK OF CIVILITY BETWEEN THE PARENTS IS CAUSE FOR SERIOUS CONCERN AND MUST BE ADDRESSED IMMEDIATELY**

Conclusion

In conclusion, a great deal of important information must be gathered on the family and children at the beginning of divorce proceedings in order to make sure that the best decisions are made, the safety and protection of children is maintained, and civility of the parents is reinforced. With this information in hand, judges can now make their interaction with families more global and help in supporting better outcomes for parents and children. This information will also allow judges to make sure all of the needs of children are identified from the start of the legal process in divorce proceedings.

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The Art of Matrimonial Practice: The Initial Interview

By Michael P. Friedman

Nothing defines the art of matrimonial practice like the initial interview. Unlike the mechanics of preparing pleadings, managing disclosure or presenting proof, the initial interview requires an analysis of a potential client's difficulties, the application of legal principles to facts, and an effective communication of expectations. It is the time when the client sizes up the lawyer for professional skills and the ability to communicate, and you size up the client for his or her willingness to listen to your advice, to appreciate resolution with reasonable expectations, and to understand the value of your legal services. For the experienced practitioner, it is the most fun you can have in the practice of law. You have somewhat of an understanding of the final result, although you cannot necessarily predict the path to get there as that depends upon the opposing spouse and his or her expectations. While there is a great deal of literature on child support, custody, equitable distribution, Family and Supreme Court, there is very little that tells you how to handle the most important aspect of the attorney / client relationship: the initial interview. It sets the tone for the entire dispute. While you can start the client on the right path with a reasoned analysis and the presentation of options, your interview can also be the beginnings of disaster. When a client is given unrealistic expectations or an underestimation of the cost of the representation, bad things will happen. There are a variety of pitfalls that will lead to future rancor, dissatisfaction and unhappiness. I hope this article gives you some guidance to avoid the pitfalls. Although you cannot guarantee a happy client at the end of your representation, you can at least insure that the client will realize the risks that are taken, and appreciate your counsel in shepherding him through a difficult time.

Expectations

Invariably, the first question asked of a new client is, "What can I do for you?" The answer is always revealing, and often potential clients merely say they wish for a divorce or a separation. Your advice starts from this framework.

If you think about it, no client's goal is a divorce or an agreement. That is just the means to the end. Ultimately, you are going to tell the client what are his or her goals. Once the client understands, a light will go on and you can proceed to obtaining those goals through an analysis of the facts. To put it another way, you can tell a potential client that if his or her goal is an agreement, we will just ask the other spouse what they want, write it down, and you can sign it. It may not be appropriate, and it may not be fair. However, you will have an agreement. Once the potential client hears this, he will understand that the goal is not really an agreement, but something else. Tell a client that there are two ways to resolve the matrimonial difficulties. First, you can sign an agreement resolving the issues. Otherwise, you can have a judge decide after trial. The client needs to know that there is no other way to resolve matters. There is nothing "in-between." While a client can attempt to reach an agreement through mediation, collaborative law, or sitting down discussing things over a cup of coffee at the kitchen table, the client must realize that there is no other way to finally resolve matters other than an agreement or having a judge decide. Often clients have the notion that there is something else, such as the attorneys getting together and speaking, the judge telling you what is going to be in an agreement, or magic dust being sprinkled on the spouse. The potential client needs to be immediately dissuaded from all thoughts that there is any other way.

It is important to review the advantages and disadvantages of an agreement versus litigation. The client needs to be told that as between an agreement and litigation, no one would choose litigation. There are a variety of advantages to an agreement: it is less expensive, there are fewer legal fees, it is more likely to be enforceable, it can be converted into a no-fault divorce after a year, and it is relatively quick. The agreement has only one disadvantage: you need to agree. Unlike certain labor contracts, there is no such thing as "bargaining in good faith." The spouse is entitled to be as unreasonable as he or she wishes, without consequence. In spite of the fact that one may receive less after litigation, you cannot apply to the judge to review the facts and tell the parties what should be an agreement. You cannot "sue for a separation agreement." One hopes that all matrimonial parties are reasonable, and can reach an agreement. The purpose of negotiating an agreement is to obtain close to or better than what one could attain after litigation. In view of the costs of litigation, as well as the time, effort and energy, if you could even approximate what a court is likely to do, the client should be cautioned to seriously consider signing an agreement regardless of personal views of fairness and equity. Clients need to be reminded that certain statements have no significant meaning, but are stated by all people in the throes of matrimonial discord. These statements are universally espoused. "I only want what is fair." "I do not want to have to go to court." "I do not want to have to spend a lot of money on legal fees." "I want this resolved amicably." Everyone says that, but it does not help.

While litigation has many disadvantages, it has one great advantage: it does not matter what the opposing spouse offers, the Court resolve the issues. One of the great mistakes of matrimonial practitioners is to seek litigation without apprising the client of the devastating cost to have a judge resolve anything. Nothing is more expensive than litigation, and sometimes it does not work. For example, when the client does not have grounds for divorce under Section 170 if the Domestic Relations Law, he can spend tens of thousands of dollars on experts and attorney fees only to be told in nine months to a year that there are no grounds for divorce. He will have obtained nothing except a very large legal bill.

Because we are so highly regulated, the amount of the legal fee is a function of the hourly rate times the amount of time necessary to resolve a matter. Nothing is more time-consuming than divorce litigation, and therefore, nothing demands higher legal fees. Clients need to confront the reality that although there may be grounds for divorce, and a desire to no longer be married, the cost of litigation might be insurmountable and they cannot afford the divorce. I like to tell clients that divorce litigation is akin to buying a Ferrari. If you really desire a Ferrari, you would go to a dealer and test drive the Ferrari, but you will not be allowed to own the Ferrari unless you pay a lot of money. Similarly, if a client really wants a divorce, has grounds for divorce, and really desires to sever the ties with the spouse, he or she cannot do so without an agreement unless they are prepared to pay a lot of money. Do not be the practitioner who commences matrimonial litigation in the hopes of a negotiated resolution. At the end of the day, you will only have an unhappy client and a large unpaid legal bill.

The Goals

At this point, the client needs to know that litigation or an agreement is not a goal. Tell the client the real goals: (a) An appropriate time sharing of the children, with the mechanisms for deciding major issues; (b) An appropriate amount of support; (c) An appropriate division of assets; (4) If necessary, protection from violence, abuse, or neglect. In spite of the client's feelings for how these issues should be resolved, you need to review the rules, find out the facts from the client, and let the client make the final decision as to how to resolve these issues.

Custody

There are two aspects to custody, and it is often confused by clients because of our terminology. First, there must be a mechanism for decision making. Although joint custody is the preferred method, as studies show that children do better under joint custodial circumstances, it requires an ability of the parents to jointly decide major issues. Joint custody has nothing to do with the amount of time one sees the child, in spite of the common understanding to the contrary. In the event that the parties cannot make such decisions, or can communicate only in limited fashion, then sole custody would be appropriate and one parent would be designated to make such decisions. Sometimes through agreement (although generally not through litigation), there is "modified" joint custody where parents have an obligation to communicate and receive input from one another, but one parent makes the final decision in the event the parties are unable to agree. The second issue is time sharing, which varies greatly from judge to judge. As a general rule, the courts try to mirror the sharing responsibility for children that existed prior to the parties' separation, or the custodial schedule that the parties have undertaken after separation and prior to any litigation.

Support

Obviously, there are two aspects of support: maintenance and child support. Maintenance is what used to be called alimony, and is called spousal support prior to divorce. The results with respect to maintenance are difficult to predict absent of knowledge of the judge and the amount of equitable distribution.

When experienced matrimonial lawyers lecture to judges, they often give hypotheticals in terms of length of marriage, incomes, children, etc. and ask the judges to give us their impression concerning the duration and amount of maintenance. In a room of one hundred judges, the chances are no two judges will give the same answer.

Child support is a little more certain until you get above the $130,000 cap of combined income as it is driven principally by income. However, an analysis should be made of the maximums and minimums, and the "add-ons." The client should understand from your professional opinion what a reasonable offer might be within certain parameters.

The client should know that custody and support can be resolved through applications to family court which is usually far less expensive than divorce litigation, and does not require proof of fault or filing fees. That option must be explored. The disadvantage is obviously that it does not divide assets, and allows titled spouse time to dissolve assets or minimize the value of a business or income. As Johnny Carson once said, "The difference between a divorce and a legal separation is that a legal separation gives a husband time to hide his money." That being said, you do not want to go to any court and get less than is being voluntarily offered.

Equitable Distribution

There are two kinds of assets in the world: marital and separate. There is a presumption that something acquired during a marriage is marital. Separate property consists of assets acquired prior to the marriage, exchanged for separate property assets, inheritances, the

proceeds of personal injury, property so designated in an agreement, and gifts other than from a spouse. After reviewing the facts and circumstances of the case, including whether any licenses or degrees were acquired that enhanced earning capacity, the client can be advised of the likely scenario concerning the resolution of equitable distribution. The basic rule is that marital assets are sold to pay marital debt, with the exception being the marital home, which can be sold as late as a child graduating high school or attaining the age of 18.

Conclusion

The initial interview is the most critical aspect of matrimonial practice, and not only sets the tone for the ultimate resolution of matters, but allows the lawyer to size up the client as to realistic expectations and a perception of value for your services. The matrimonial lawyer's practice is defined by the clients turned away more than the clients accepted. You do not wish to represent crazy people. You do not wish to represent people with unrealistic expectations. However, nothing is more satisfying than bringing a client from the initial interview to a successful resolution of his or her matrimonial issues. If that does not make you happy, find something else to do with your life.

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Cross-border Payments of Alimony: U.S. Tax Consequences

By Asher Harris

The tax consequences of the receipt and payment of alimony are familiar to most practitioners of family law.* Assuming that the payment satisfies the relevant definitional requirements, the recipient is required to include the amount received in taxable income, and the payor is entitled to deduct the amount paid.[1] These rules are fairly simple when both the payor and the recipient of the alimony are United States persons. If either person is subject to taxation in another country, the familiar rules become much more complex. This article will discuss the tax consequences of alimony payments that are "cross-border," *i.e.,* the payments are made to a recipient who resides in a country other than the United States, or are received from a payor who resides in a country other than the United States.

One of the reasons that the tax consequences of cross-border alimony payments is complex is that alimony is treated differently in different countries. First, unlike the United States, many countries do not treat alimony as taxable income. In such a system, the recipient is not required to include the payment in income, and the payor is not entitled to a deduction. Furthermore, even among those systems that treat alimony as taxable income, there is no international consensus as to the *source* of the income. As we shall see, the United States treats the residence of the payor as the source of the alimony payment. In contrast, other countries treat the residence of the recipient as the source of the alimony payment. In the field of international tax, the source of an item of income is a critical factor in determining its tax consequences. This lack of consensus as to the source of alimony payments introduces another element of uncertainty that must be taken into account by both the payor and the recipient.

I. Taxation of Cross-Border Payments Generally

As an introduction to the discussion of the taxation of cross-border alimony, a brief overview of some basic concepts of international taxation is in order.

A. Payments from the United States to a non-U.S. Person

When certain types of income are paid from United States sources to a non-U.S. person, the Code imposes a tax of 30 percent on the gross amount of the payment.[2] The payor of the income is also subject to a corresponding requirement to withhold the tax.[3] This tax is imposed on various types of income, such as certain types of interest, rents, royalties, and other payments that are generally characterized as "fixed and determinable, annual or periodical", commonly referred to in tax law as "FDAP."

In order for a payment to be subject to U.S. withholding tax, it must be from United States "sources." The "source" of an item of income is a fairly abstract concept, which generally relates to the location in which the income-producing activity took place. The Code sets forth various rules that determine the source of different types of income.[4] As is often the case with tax law, many of the rules are based on a common sense approach, while in some circumstances the determination of source of income is technical (and perhaps arbitrary).

B. Receipt of Income from Foreign Sources by a U.S. Person

All United States persons are subject to United States income tax on their world-wide income. What happens if a United States person earns income from a foreign source, which may have been subject to tax in the foreign country? Typically, when a United States person has paid income tax to another country, he is entitled to credit the foreign income tax against any U.S. tax liability.[5] This foreign tax credit is a dollar-for-dollar reduction in the liability for tax, not merely a deduction. So, for example, if a United States person receives dividends from a foreign corporation, and the dividends were subject to withholding tax in the foreign country, the recipient only pays U.S income tax to the extent that the rate in the U.S. exceeds the tax that has already been withheld at the source.

There is an important limitation on the ability to credit foreign income taxes, and once again it is based on the concept of source of income. Foreign tax credits are only available to the extent of the person's "foreign source" income.[6] Furthermore, the Code requires the U.S. person to group his income and deductions into categories (referred to as "baskets"), and to calculate the portion of the net income in each basket that consists of foreign source income.[7] The foreign tax credit for each income basket is only available to the extent that the income within that basket consists of foreign source income. As a result, when a United States person receives income from outside the United States, its characterization as foreign or domestic source will determine whether he will be able to offset his U.S. income tax liability with a credit for any foreign income taxes paid.

C. Definition of a United States Person

The last issue in this analysis is determining whether an individual is a "United States person" for United States income tax purposes. The Code generally defines three categories of individuals as United States persons.[8] The first two categories are fairly straightforward: United States citizens and lawfully admitted permanent residents

(green card holders).[9] In addition, there is a third category of United States persons: temporary residents. A non-resident alien can be treated as a temporary resident, and thus a United States person, if he satisfies the "substantial presence" test for any calendar year. Under this test, a person is treated as having a "substantial presence" if he was present in the United States for more than 30 days within the year, and the sum of the number of days spent in the United States during the year, plus one-half the days spent in the United States during the previous year, plus one-third of the number of days spent in the United States in the second preceding year, exceeds 183.[10] Under an exception to the substantial presence test, an individual will not be treated as a United States resident if he is present in the United States for fewer than 183 days in any year, and can establish a closer connection to a foreign country for that year.[11]

In addition, a non-resident alien who has elected to join in the filing of a joint return with a spouse who is a United States person is treated as a United States resident for income tax purposes, and thus becomes subject to United States income tax on his worldwide income.[12] This election terminates as of the *beginning* of any taxable year in which the couple has a divorce or legal separation.[13] Accordingly, if a married couple living in United States divorces, and the alimony recipient leaves the country, any election that had previously been in effect would be terminated before the alimony payments commence. As a result, the recipient would only be treated as a "United States person" if he otherwise would be so treated.

The definition of non-resident alien may also be modified by an applicable tax treaty. If a person meets the definition of a U.S. resident, but is also a resident of a country with which the United States has a tax treaty, the treaty will typically provide a set of rules, referred to as the "tie-breaker" provisions, that determine which of the two countries will be treated as the individual's country of residence.[14] If the individual is treated as a resident of the foreign country under the tie-breaker provisions, his income will only be subject to income tax by the United States to the extent provided in the tax treaty.[15]

II. Cross-Border Payments

What are the tax consequences of the payment of alimony by a U.S. resident to a non-U.S. person? What are the tax consequences of the payment of alimony by a U.S. resident to a U.S. person who lives outside of the United States? What are the tax consequences of the receipt of alimony by a U.S. person from a non-resident of the United States? In each case, the consequences may be impacted by a tax treaty between the United States and the relevant foreign country.

A. Alimony Paid by a U.S. Resident to a Non-U.S. Person

What are the tax consequences of the payment of alimony by a U.S. resident to a non-U.S. person? The payor is entitled to deduct the payment, just as if the payment had been made to a United States person. However, the payor is generally required to withhold 30 percent of the payment as United States withholding tax, and to remit the amount withheld to the Internal Revenue Service. As explained above, the United States imposes a 30 percent tax on payments from United States sources to a non-resident alien of income that is "fixed and determinable, annual or periodical," or FDAP.[16] Although the Code does not explicitly include alimony as a category of FDAP income, courts have held that alimony is subject to the 30 percent withholding tax when paid to a nonresident alien, since it would have been includible in income if the recipient were a United States person.[17] Similarly, courts have held that the source of the alimony payments is based upon the residence of the payor.[18] In effect, the United States tax system analyzes alimony as the recipient's share of the income of the payor, which should be taxed by the country in which the payor resided, and (presumably) in which the income was earned.

Many tax treaties to which the United States is a party provide for an exception to the withholding requirement for payments of alimony to a resident of the treaty country. There is, however, a significant limitation on this treaty-based exception to the withholding requirement. Typically, this exception will apply *only* if the alimony is includible in the income of the recipient under the law of the country in which the recipient resides.[19] Therefore, in order for the payor to verify that the treaty-based exception applies, the payor must receive some assurance as to the tax treatment of alimony in the recipient's country of residence.

Two specific examples illustrate this rule. There are treaty-based exceptions to the withholding requirement under the U.S. treaties with Canada and with Israel.[20] For Canadian tax purposes, alimony is includible in taxable income. Accordingly, if a resident of the United States pays alimony to a Canadian resident who is not a United States person, the payor is not required to withhold U.S. tax. In contrast, under Israeli tax law, alimony is *not* includible in taxable income. Accordingly, payment of alimony by a resident of the United States to a resident of Israel who is not a United States person *is* subject to United States withholding tax. Despite the fact that the treaty provisions are similar, the U.S. tax consequences differ simply because of the tax treatment in the country in which the recipient resides.

B. Alimony Paid by a U.S. Resident to a U.S. Person Living Abroad

What are the tax consequences of the payment of alimony by a U.S. resident to a U.S. person who lives outside of the United States? Because the recipient is a U.S. person, the payor has no obligation to withhold U.S. income tax. The payor simply reports the recipient's social security number, and deducts the payment. At that point, payment of the income tax becomes the recipient's responsibility. As a result, a person who pays alimony to a

recipient living outside the United States may be relieved of the burden to withhold U.S. tax based on the tax status of the recipient. In the case of someone who may be a temporary resident, this may not be easy to determine.

From the recipient's perspective, there are two major issues raised by the receipt of the alimony. First, the recipient must include the payment in taxable income. Second, the recipient must determine the source of the income in order to be able to calculate his tax liability properly. As you recall, a United States person is subject to United States income tax on net income, regardless of whether the person actually lives in the United States. A recipient living in a country in which alimony is generally not includible in taxable income may be surprised to learn that the alimony payments are subject to U.S. income tax.

As an example, consider the situation in which alimony is received by a resident of Israel who is a United States person, such as a dual U.S./Israeli citizen. The alimony will be taxable for U.S. purposes, despite the fact that it is tax-free under Israeli principles. In this scenario, the receipt of the alimony creates an unexpected U.S. income tax liability.

The situation of a United States person living in Canada illustrates the other major issue—source of income. Like the United States, Canada treats alimony as includible in taxable income. Unlike the United States, Canada generally treats alimony as sourced at the residence of the recipient. Under the Canadian concept of alimony, it is treated for tax purposes as if it had been earned by the recipient—in the country in which the recipient resides. As a result of this subtle difference, there is the potential for double taxation. If a United States person residing in Canada receives alimony from a payor who resides in the United States, both taxing systems could claim the right to tax the income.

Fortunately for the large number of Americans residing in Canada, this situation is resolved by the US/Canada Tax Treaty. The treaty specifically provides that income that is taxed in one of the two countries is treated as sourced in that country.[21] Since the treaty provides that alimony may be taxed by the country in which the recipient resides, the source-of-income problem is taken care of. If a U.S. person residing in Canada receives alimony payments from a United States resident, the US/Canada Tax Treaty allows the recipient to treat the payments as Canadian-source income. This permits the recipient to credit any tax paid to Canada against the related U.S. income tax liability.

The opposite approach is taken by the tax treaty between the U.S. and Australia.[22] The US/Australia Tax Treaty provides that alimony is taxable only in the country in which the payor resides, and exempts the alimony from tax in the recipient's country of residence.[23] As a result, if a U.S. citizen residing in Australia receives alimony from a U.S. payor, the income is includible in the recipient's U.S. taxable income, but is excluded from Australian taxable income.

As these examples demonstrate, tax treaties take varying approaches to the question of whether and where alimony should be taxed. These can have a critical impact on U.S. citizens living abroad who receive alimony. If alimony is not taxable in the recipient's country of residence, the treaty will typically not exempt the recipient from U.S. tax (as in the case of Israel). If alimony is taxable in the recipient's country of residence, the treaty may have the effect of subjecting the alimony to tax only in the country of the recipient's residence (as in the case of Canada), or in the country of the payor's residence (as in the case of Australia).

C. Alimony Paid by a Non-Resident of the United States to a U.S. Resident

What are the tax consequences of the receipt of alimony by a U.S. person from a non-resident of the United States? In most circumstances, the recipient is required to include the alimony in taxable income, regardless of the residence of the payor. From a U.S. tax perspective, the income is treated as foreign source, so that any foreign income tax paid or withheld may be credited against the U.S. income tax liability. However, under some circumstances a U.S. resident may be allowed to exclude the alimony from U.S. taxable income. For example, if a U.S. resident receives alimony from a payor who resides in Australia, the US/Australia Tax Treaty permits the recipient to exclude the alimony from U.S. taxable income, even if the recipient is a U.S. citizen.[24] Although tax treaties almost never change the manner in which the United States taxes its own citizens, this is one rare case in which the treaty has that effect.

The general U.S. tax treatment of alimony received from non-U.S. residents can lead to the double taxation of income. As discussed above, many countries do not treat alimony as includible in income, and accordingly do not permit a deduction for alimony paid. If the payor resides in a country in which alimony payments are non-deductible, while the recipient lives in the United States, the two parties are both paying tax on the same income. If that had not been taken into account when the amount of alimony was first determined, either the payor is paying more on an after-tax basis, or the recipient is receiving less on an after-tax basis, than had originally been intended.

III. Summary

The payment of alimony between persons who have different nationalities or residences may give rise to complex tax issues. These issues involve not only questions of U.S. law, but may also require analysis of the tax treatment of the payments under foreign law. Furthermore, a careful analysis of any applicable tax treaties must be undertaken and the results taken into consideration. Because the outcomes can change over time if the parties change countries of residence or citizenship, or as new tax

treaties are entered into, those who are advising clients at the time of a divorce should take into account the potential for future changes in the tax status of their clients, and any adverse tax consequences that those changes may bring about.

Endnotes

1. Code Section 71(a), 215(a). All section references herein, unless otherwise specified, are to the Code and the Treasury Regulations promulgated thereunder.
2. Section 871(a)(1).
3. Section 1441(a).
4. *See generally* Sections 861-865 and the Regulations thereunder.
5. Section 901(a).
6. Section 904(a).
7. Section 904(d).
8. Section 7701(a)(30)(A).
9. Sections 7701(a)(30)(A), 7701(b)(1)(A)(i).
10. Section 7701(b)(3).
11. Section 7701(b)(3)(B).
12. Section 6013(g).
13. Section 6013(g)(4)(C).
14. *See* United States Model Income Tax Convention, Article 4(3).
15. Section 894(a)(1).
16. Section 971(a)(1)(A).
17. *Trust of Welsh v. Commissioner*, 16 T.C. 1398 (1951).
18. *Howkins v. Commissioner*, 49 TC Memo 689 (196875); *Housden v. Commissioner*, TC Memo 1992-91 (1992).
19. United States Model Income Tax Convention, Article 17(4).
20. Convention between the United States and Canada with Respect to Taxes on Income and on Capital (Sep. 26, 1980), Article 18(6) (the "US / Canada Tax Treaty"); Convention between the Government of the United States of America and the Government of the State of Israel with Respect to Taxes on Income (Dec. 30, 1994), Article 20.
21. US / Canada Tax Treaty, Article 24(3)(a).
22. Convention between the Government of the United States of America and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the "US / Australia Tax Treaty"), Oct. 31, 1983.
23. US / Australia Tax Treaty, Article 18(6) and Article 1(4)(a).
24. *Id.*

***Because this article discusses tax issues, maintenance payments will be referred to as "alimony," the terminology used in the Internal Revenue Code of 1986 (the "Code").**

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New Law Provides Uniform Standards for Assessing Medical Child Support and Protections for Low Income Parents

By Susan C. Antos

Chapter 215 of the Laws of 2009 became effective October 9, 2009 and makes significant changes to sections 413 of the Family Court Act and 240 of the Domestic Relations Law. The new law creates uniform standards for the collection of medical support, including the collection of confinement costs (birthing expenses). The federal Deficit Reduction Act of 2005 (DRA) and its implementing regulations mandate some of these changes. 42 U.S.C. §§ 652(f) and 666(a)(19); 29 U.S.C. § 1169; 45 CFR 303.31 and comments at 73 Fed. Reg. 42416, et. seq.

For years, § 416(c) of the Family Court Act (FCA) and Domestic Relations Law (DRL) § 240(1)(a) have required that health insurance be provided in child support orders if "available," and FCA § 416(d) and DRL § 240(1)(b)(2) have provided that health insurance can not be considered available when health insurance was not affordable or accessible. However, the statutes gave no guidance as to how courts were to determine affordability or accessibility. The DRA regulations require that states implement such guidelines and the federal regulations provide default guidelines for states that fail to do so.

The new law will improve access to health care for low-income families by providing specific guidelines for cost and accessibility when courts make determinations as to whether health insurance is available. In the event that the Court determines that health insurance is not available and health coverage is obtained through Child Health Plus or Medicaid, the law sets forth reasonable guidelines for parental reimbursement to the Department of Health for the cost of these programs. The new law creates for first time ever, long overdue standards for the establishment of liability for confinement costs—birthing expenses to be assessed against fathers when the cost of childbirth is paid for by Medicaid.

The new law repeals FCA § 413(1)(c)(5) and DRL § 240(1-b)(c)(5) and replaces the sub-paragraphs with new provisions which require the proration of health care expenses between both parents. "Cash medical support" is defined and the law sets forth different rules for imposing a medical support requirement depending upon whether private health insurance is available or whether the child receives health coverage through Medicaid or Child Health Plus.

Guidelines for Health Insurance Availability

A judicial determination as to whether health insurance is available is critically important for low income children because when a court makes a determination that private health insurance is effectively not available to a child because of its cost or geographic limitations, the child will likely be eligible for Medicaid or Child Health Plus. This new law creates guidelines for making a determination as to whether health insurance is available, by defining "reasonable in cost" and "reasonably accessible."

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Cost is defined as the cost of extending health insurance benefits to the child or children where the parent has coverage or the difference between self-only benefits and extending health insurance benefits to the child or children when there is no existing coverage. The new law adds a new subdivision (d) to 416 of the Family Court Act and a new paragraph 3 to DRL 240(1)(b) to define health insurance as reasonable in cost if the cost of health insurance premium and deductible does not exceed five percent of the "combined parental gross income." This means that the income is assessed before the deductions in FCA § 413(1)(b)(5)(i)-(iv). In an important protection for low-income families, the new law further provides that in no instance shall health insurance be considered reasonable in cost if a parent's share of the cost would reduce the income of that parent below the self-support reserve. The self-support reserve is 135% of the poverty level for a household of one, adjusted annually on April 1. FCA 413(b)(6) and DRL 240(1-b)(6). Currently the self-support reserve is $14,620.

The new law also describes health insurance benefits as presumptively "reasonably accessible" when the child lives within the geographic area covered by the plan or within 30 minutes or miles from the child's residence to the services covered. This presumption may be rebutted for good cause shown.

Guidelines for Allocating the Cost of Health Insurance

Where health insurance is available, the cost of providing health insurance is pro-rated between the parties. If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro-rata share is added to the basic support obligation; if the non-custodial parent is or-

dered to provide such benefits, the custodial parent's pro-rata share is deducted from the basic support obligation.

Where Health Insurance is Not Available

Where the Court has made a determination that health insurance is not available, the new law applies different rules depending upon whether the child is eligible for Medicaid Managed care, Medicaid fee for service or Child Health Plus, as laid out below. In all cases, the court must separately state the non-custodial parent's monthly obligation which cannot exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

- Where the child is eligible for Medicaid managed care, the parents are required to pay the lesser of the amount that would be the family contribution under Child Health Plus if the children were in a two parent household with income equal to the combined income of the parents, or the premium paid by the medical assistance program on behalf of the child or children to the managed care plan. The Child Health Plus (CHP) family contribution charts are posted on the Empire Justice Center website in the child support section at: http://www.empirejustice.org/issue-areas/child-support/birthing-expenses-confinement-cost-medical-support/child-health-plus-2009.html. The State's cost to enroll a child in Medicaid managed care is $115 per month per child. Although it is not likely that the CHP contribution will exceed $115, the parental contribution should be capped at this amount.[1]
- Where the child is eligible for fee for service coverage under the Medicaid program, the Court shall determine the non-custodial parent's maximum annual cash medical support obligation, which shall be equal to the monthly amount that would be required as a family contribution under Child Health Plus if the children were in a two parent household with income equal to the combined income of the parents times twelve or the number of months that the child or children are authorized for fee for service coverage during any year.
- Where Medicaid expenses were incurred prior to the Court's order, the Court shall calculate liability as described in the two preceding paragraphs, provided that the amount that the non-custodial parent is ordered to pay shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less for the year in which the expense was incurred. Such amounts shall be considered to be arrears/past due support. This bullet describes the new method for determining liability for confinement costs which are paid by the Medicaid program as more fully set forth in the Confinement Costs section, below.
- Where the child is eligible for Child Health Plus, the court shall prorate each parent's share of the cost of the required family contribution in the same proportion as each parent's income is to the combined parental income.

In addition, the court shall prorate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, Medicaid or Child Health Plus in the same proportion as each parent's income is to the combined parental income, and state the non-custodial parent's percentage in the order. The non-custodial parent's share determined to be due and owing shall be considered support arrears/past due support.

The court retains the power to deviate from the foregoing guidelines, provided that the order sets forth in the factors the court considered.

Where a child is in receipt of Medicaid or Medicaid managed care, the New York State Department of Health Office of Health Insurance Programs has developed a Medicaid Medical Support Transmittal Form OHIP-0030 which is to be completed by the local social services district Medicaid worker and provided upon request to the local child support enforcement unit and the Family Court Support Magistrate. The form is a certified document which may be offered as evidence during a court proceeding and contains information about whether the Medicaid received by the child at issue is fee for service Medicaid or managed care. When the child receives Medicaid managed care, the amount of the monthly premium is specified. Additionally, where the local district is seeking reimbursement for past medical expenditures, these must be detailed in the OHIP-0300 form as well. The form and instructions are available in a GIS message, 09 MA/029, which is available on-line at: http://onlineresources.wnylc.net/pb/docs/09ma029.pdf.

Although not explicitly set forth in the language of the new law, where the cash support order or the cash medical support order bring the individual's income to the self-support reserve, no additional amount should be added for unreimbursed medical expenses since the new law defines both cash medical support and unreimbursed health care expenses as part of the "basic support obligation," triggering the self-support reserve protections in FCA 413(d) and DRL 240(1-b)(d)).

One area where the new law fails to give guidance is the treatment of non-custodial parents with second families. With respect to individuals supporting second families, the utilization of the self-support reserve as an income floor may be so low that it compromises their ability to support the children currently in their care. This is of particular concern in the area of unreimbursed

medical expenses and Medicaid expenses incurred prior to entry of the order of support which are immediately and automatically treated as past due support subject to the provisions for arrears collection such as the "add-on" and seizure of bank accounts. Particularly where these "instant arrears" are Medicaid expenses owed to the State Department of Health and not to the custodial parent, it would make sense to give a higher level of protection than the self-support reserve to those respondents who are supporting second families.

Confinement Costs

From the perspective of those representing pregnant women who are reluctant to access publicly funded prenatal care for fear that the father of their child may be sued to recover all costs expended for such care and the child's delivery, the new law makes significant and important changes to sections 514 and 545(1) of the Family Court Act.

The new law amends section 514 of the Family Court Act to include confinement costs in the definition of "cash medical support," and requires that liability for confinement costs be set in accordance with the new medical support guidelines. This means that where confinement costs are paid for by Medicaid, liability for confinement costs and any other medical support obligations incurred by the father on behalf of that child, should not exceed five percent of the non-custodial parent's gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less, for the year when the expense was incurred. Until this change, the standards for recovery of confinement expenses varied dramatically across the state, with some social services districts not pursuing the recovery of such expenses and others seeking to impose liability for the entire expense regardless of the non-custodial parent's income.

Priority of Distribution: Child Support and Medical Support

The new law amends CPLR 5241(h) to make clear that where any income deduction is imposed, current support (child support that is collected in the month that it is due) shall be given priority over any deductions for health insurance premiums. The new law also states that deductions for health insurance premiums have priority over all other deduction authorized by CPLR 5241(g). OTDA has indicated that in terms of priority of arrears distribution, arrears owed to the family will always be paid first.[2]

"The new law amends CPLR 5241(h) to make clear that where any income deduction is imposed, current support (child support that is collected in the month that it is due) shall be given priority over any deductions for health insurance premiums."

Endnotes

1. Where the statute uses the phrase "combined income" instead of "combined gross income" as in this section, the calculations include the deductions in FCA § 413(1)(b)(5)(i)-(vii).
2. OTDA Training Materials, "Establishing and Enforcing Medical Support Orders," distributed at the New York State Public Welfare Association 2009 Summer Conference on July 21, 2009 (on file at the Empire Justice Center).2 Brian Wootan, Esq., Office of Temporary and Disability Assistance, July 21, 2009, in answer to a question posed by the author at the New York State Public Welfare Association 2009 Summer Conference on July 21, 2009.

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No Choice for Children

By Catharine M. Venzon

The Memorandum and Order by the Third Department *In re Mark T. v. Joyanna U. et al.*, decided and entered July 30, 2009, highlights the flaws in the New York State law guardian process governing matters of custody, visitation, and guardianship proceedings. In this case, the attorney for the child failed miserably in fulfilling his essential obligation. His actions show the need for better education and mandatory guidelines to be implemented so children will be afforded quality representation.

The current system of certification does not ensure a minimum level of competency or expertise to handle issues arising from the representation of children. This article will discuss proposed changes to the current New York State standards for representing children in custody and visitation proceedings.

Roles of the Attorneys

Guardian Ad Litem	Advocate	Officer of the Court
Responsible for gathering information and taking a position which represents the best interest of the child.	Required to zealously advocate and argue for the client's wishes, even if those wishes are contrary to the best interests of the child.	Expected to gather relevant information about the child and investigate the legal issues and inform the court, allowing the judge to render an informed decision.

The rules of the Chief Judge direct that in all proceedings other than juvenile delinquency and Person In Need of Supervision cases, the attorney for the child "must zealously advocate *the child's* position" and that, in order to determine the client's position, the attorney "must consult with and advise the child to the extent of and in a manner consistent with the child's capacities."

The attorney must provide client-directed representation in the form of an advocate where a client's judgment is knowing, voluntary and considered. Furthermore, the rule states that "the attorney for the child should be directed by the wishes of the child, *even if the attorney for the child believes that what the child wants is not in the child's best interests*" and that the attorney "should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests."

The attorney for the child is only justified in advocating a position that is contrary to the child's wishes when he "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent serious harm to the child." However, in such situations the attorney must still "inform the court of the child's articulated wishes if the child wants the attorney to do so."

The Family Court Act states that the law guardian system was designated to "help protect [children's] interests and to help them express their wishes to the court." This is the origin of many complicated issues that arise in representing children. This system encompasses three traditional roles that are often in conflict with one another: guardian ad litem, attorney as advocate, and attorney as an officer of the court.

Statutorily, a law guardian is required to advocate for both the child's wishes *and* his best interests. However, a law guardian may also be required to inform the court on relevant issues so as to allow the court to render a decision in the best interest of the child. A court may also assign this role to a separate guardian ad litem, pursuant to N.Y. C.P.L.R. 1201-02 (McKinney 1997). This role may best be served by a social worker, particularly when the child is very young. Several problems arise when law guardians assume one aspect of their role, while excluding the duties of the others. However, the current system lacks guidance or training as to how these competing roles are best balanced.

The problem with solely adopting the role of an advocate is that the child may neither be able to formulate an opinion nor express it. This could be due to the child's age, mental capacity, an internal force within the child causing indecision, or an external force exerting pressure on the child to communicate a certain position. This possibility of incapacity requires the law guardian to determine whether the client is able to comprehend the situation and express an opinion. Clearly, there is no bright-line test for determining when a child is capable of such a task and, in the absence of statutory guidelines, the decision is left to the law guardian's personal speculation.

Further difficulties arise when judges give great weight to a child's expressed wishes. It allows the child to be in a position of control over the parties and dictate the outcome of a custody or visitation battle. While it is clear

that a child's wishes should be expressed to the court if the child is capable of formulating such opinions, no decision should be based solely on the wishes of a child. This places undue pressure on a child to make a choice or the "right" decision. Furthermore, it allows parents the opportunity to influence their child. This can seriously disrupt the dynamics of a family or cause a controlling or wealthy parent to have an unfair advantage.

The problem with solely adopting the role as a guardian is that it requires the attorney for the child to superimpose his or her own personal preferences and values on to the client and make a recommendation to the court based on his personal judgment. In essence, the law guardian becomes the trier and finder of fact. This gives the law guardian a tremendous amount of power over the case.

When the attorney for the child acts as an arm of the court, his duties often overlap with the Department of Social Services, forensics experts, custodial supervisors and evaluators. These outside agencies perform objective assessments and submit reports to the court. These assessments and reports are subject to cross-examination, and the rules of evidence apply. However, attorneys for the child are not subject to cross-examination when they render their oral reports and findings to the court. This procedure hinders the adversarial nature of the proceedings, and subjects the entire process to the possibility of bias inherent in the attorney's opinion.

The attorney for the child receives inadequate guidance as to how to determine the capacity in which he should act for his client. The unique situation of the attorney for the child requires that he either advocate for the expressed interest of his client, or, if the child is determined by the attorney to be incapable of considered thought, the attorney must advocate for what they consider to be the best interest of the child. These duties are obviously quite different but are not differentiated under the law. It falls to the attorney for the child to distinguish his role as either a guardian ad litem, advocate or officer of the court.

Choice

Mark T. v. Joyanna U., No. 06053 (N.Y.2d July 30, 2009) highlights the fact that, unlike adults, children have no choice in their legal representation. This case also exposes the harm created by the attorney's failure to assume the proper role in representing his client. The lack of input by the child was clear. In the case at bar, the appellant-attorney took a position contrary to the expressed position by his 11½ year-old client, despite having never met nor spoken with him.

Children have an impossible task in expressing dissatisfaction to the court in their lawyers' services. Children are usually unable to determine if their lawyer has provided adequate representation because they are usually not present at the actual court proceedings. However, what a child does know is whether he has a working relationship—translating to whether he likes his lawyer—and if he is comfortable speaking to his lawyer. A child's reason for disliking his lawyer must be deemed irrelevant because a child should be comfortable with his representation. A child currently has no means of terminating their attorney-client relationship, and little opportunity to express their dissatisfaction to the court.

As a practicing matrimonial and family law attorney, I have come into contact with attorneys for the child who do not meet and speak to their clients. These attorneys for the child will then advocate a position that suits their personal preference. Obviously, this is a gross miscarriage of justice.

Many times, parents are the only people in the court proceeding who are able to note their child's dissatisfaction with their lawyer. Oftentimes, the parent I represent will tell me how upset their child becomes when talking to their lawyer and that their child has told them that they do not like their lawyer. The child may express their dislike of their lawyer only to their parents, and the parents may be the only persons in a unique position to notice that their child is uneasy, frustrated, or unusually quiet during or after a meeting with their lawyer. Children must be given a valid means by which they can express their dissatisfaction.

Elevated Status

The attorney for the child often has an elevated status in the courtroom. They may receive preferential treatment by the court, undermining the adversarial nature of our legal processes. Generally, the court hears the attorney for the child first, despite the fact that he is not representing either of the parties. The attorney for the child will then present his argument, which invariably includes his opinion. This opinion is not subject to cross-examination.

The attorney for the child, especially where one party is unrepresented, often assumes the role of mediator between the parties, exposing his opinion to manipulation. The reverence observed toward the opinion of the attorney for the child neglects this partiality and exposes the court to prejudice.

Qualifications

In order to be appointed as attorney for the child, attorneys in the Fourth Department must attend a two-day seminar. This program is to provide training for counsel representing minors involved in various proceedings.

While this training does address substantive issues, there is little instruction as to *how* to interact with clients. These clients are most often intellectually immature and require a special sensitivity if one is to find out what they really want. The attorney for the child is not a social

worker or a psychologist and has absolutely no expertise in dealing with minors. This type of expertise cannot be achieved by attending a two-day seminar.

How Can We Improve?

A system of checks on the adequacy of the attorney for the child must be set in place. In light of the considerable room for error on the part of the attorney for the child in conjunction with the quasi-judicial protection accorded to them, remedies must be made available to the child.

Frequency of Contact

Location and frequency of meetings are very important parts in representing a child. The current rules only require an attorney for the child to meet with their client once. In prolonged cases, it is likely that the child's position may change. The attorney for the child will not know this if he does not stay in contact with his client. This problem is exacerbated by the current system's inadequacy in monitoring the attorney for the child in order to ensure that standards are followed.

It is suggested that, to ensure compliance, the court could inquire, at each appearance, what the attorney for the child has accomplished since the previous court appearance. The attorney should also be required to report the frequency, duration and location of contacts made with their client. A minimum number of meetings proportionate to court appearances between the attorney for the child and the client should also be mandated. It is suggested that the attorney for the child be required to contact the child after each court proceeding if age appropriate.

Age Standards

In our current system, the attorney for the child must assume the role of judge in two senses: the attorney must judge whether the child has the capacity to determine his interests, a psychological function in which the attorney for the child is most likely neither trained nor experienced, and secondly, the attorney for the child must independently determine the best interests of the child. These philosophical conundrums should not be resolved by the attorney's superimposition of his own beliefs and values; this must be the realm of the court.

Under the current rules, the attorney for the child is the one who determines if his client lacks the capacity for knowing, voluntary and considered judgment. There are mandatory age standards that tell us when a person can drive, drink and join the military. Why should there be no age standards in the representation of children? The only age standard that comes to mind is that a law guardian can be appointed only up to a child's 18th birthday. However, that same person can receive child support until they are 21.

Implementing an age standard would divide the current ambiguity into two distinct categories between which the law would automatically and consistently assist the attorney for the child, instead of demanding the attorney to subjectively judge whether to act as an attorney or a guardian ad litem. Such a standard would further the objective of uniform application of due process.

Client Satisfaction

Finally, if courts made it a practice to have the child in court, or have an in-camera interview, a court could determine if the wishes of the child were correctly expressed by his lawyer, and that the child is satisfied with their lawyer. The court meeting with a child could serve as a means to protect the child's rights and allow the court to determine if the attorney for the child has met the mandatory guidelines. This meeting would also allow for an all-important opportunity for the child to express his concerns with their representation. This opportunity to speak directly with the court would undoubtedly give a child more control over their representation. Unlike adults, who must declare their comprehension of the proceedings to the judge as well as the sufficiency of their representation, child-clients are currently without a voice before the court.

Conclusion

The attorney for the child system as it exists is flawed. The training and certification process is insufficient. Reform is needed, which requires the input of judges, attorneys and experts. Minimum standards and enforcement mechanisms must be implemented to ensure sufficient competency. It is hoped that these few suggestions will be considered to encourage reform, and assist the attorney for the child.

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CO-PARENTING: How Ex-Spouses Turn into Co-Parents and Children Survive Divorce

By Laurie Hollman, Ph.D.

Divorce is a complex phenomenon. The family dissolves as it was known. The family loses its emotional constancy as new rules and arrangements for parents and children evolve. Custody arrangements are made but are they compromises for the parents or for the children? Can they work for all?

Too many children seem to fall between the cracks as the parents continue to see themselves as ***ex-spouses*** rather than as ***co-parents***. Co-parenting is a term that follows the idea that even though the parents have dissolved their marital relationship they are parents for life and face the task of guiding their children through infancy, childhood and adolescence hoping to bring them successfully into a full and healthy adulthood.

A symptom of divorce distress is when parents call their lawyers to make parenting decisions instead of being able to make those decisions themselves. When this begins to happen a co-parenting specialist is called for. A co-parenting specialist is a mental health professional who is a psychotherapist with extensive psychotherapy training who does not set out to do therapy though she may have co-parenting meetings while a child is in therapy. She meets with the parents together if possible (or separately if the hostility and conflict is so great that the parents cannot initially sit together in the same room) to sort out custody arrangements and make decisions that bear on their children's lives. The therapist begins to acquaint the parents with the difficult task of finding themselves as ex-spouses but also as co-parents.

Litigation becomes confined to the process of the divorce settlement and the finalization of custody arrangements. When lawyers are advised that a co-parenting specialist is involved they can defer everyday arguments between the co-parents to the specialist and support the co-parenting process. Co-parenting appointments can be set up on a weekly or more frequent basis to start and then progress to an as-needed basis. Lawyers find that they appreciate the chance to just do their jobs and not play the role of therapist that makes them feel frustrated and sometimes helpless. Co-parenting counselors would alleviate litigation, cut legal fees, and change the attorney's role from giving therapeutic advice to giving legal advice, the role they are trained for.

Co-parenting is a cooperative respectful process that requires the ability to differentiate oneself from your children rather than see them as narcissistic extensions of yourself. In the co-parenting literature there is a term, "parent-alienation syndrome." This means that the parent is so enmeshed with his or her child that it is expected that the child will function as the parent's emissary and companion. This designated child is often given messages from one parent to convey to the other parent. The child often sleeps with the same-sex parent. The result is the child is overburdened with parental concerns and does not live the life of a child. School work and friendships suffer. Often developmental delays result.

Sometimes the messages that are requested aren't true but serve the purpose of retaliation. One mother for example told her seven-year-old daughter to tell her father that she was dating when in fact she wasn't. It wasn't only the lie that was deleterious to the child, but the child was being treated as a peer and as an extension of the mother. The father, in this case, did have a girlfriend who managed to confide her private life to the child. The child's life was being muddled with adult matters. Child therapy was tried on and off until the father eventually did not agree to it. He decided unfortunately that his child did not have problems and was not suffering. He was afraid of changes in his child that would affect how he used the child for his own purposes. Co-parenting was, however, a viable option by a co-parenting specialist who was not intending to do therapy. Clearly, this was a very difficult case and the parents did not agree to meet in the same room. However, the mother agreed to stop her messages and the father took control of his girlfriend's irresponsible outspokenness. The child became less afraid to visit her father as a result and eventually child therapy was agreed to that addressed the sleeping-with-mom problem as well as the discomfort in the father's home.

Each case is different and has its own nuances, but none are easy. Sometimes co-parenting sessions are held while therapy is going on in order to make the therapy continue to be feasible. Mr. Smith and Ms. Brown were divorced for several years and shared the responsibility for two sons. Despite the fact that four years had gone by since the divorce decree the parents remained in litigation about the financial settlement. Despite Mr. Smith's unusual wealth or because of it Ms. Brown couldn't agree to a monetary conclusion to the divorce. The children heard constant acrimonious debate on the telephone or when the children were picked up or dropped off at a parent's home. The younger six-year-old child, Steven, was in therapy with me.

Steven initially played at my dollhouse and called the play family, the "Trouble Family." He identified a mother and father and who argued explosively with each other. I suggested to him that he was playing out his troubles, so that I might fix the problems. He came one day and

played that he was a puppy. He used the couch cushions to build a room and asked for some pretend water and dog food. He told me in his puppy voice that the puppy had no one to take care of him and he was lonely and hungry. The parents' open disputes had clearly taken their toll and Steven felt cast out and alone. In time, he gathered his inner resources and identified with the aggressor continuing to play out his parents' activities and struggles. He played a haughty waiter in an exclusive restaurant. He asked me to play his customer. As his patron, I was given an expensive cuisine to choose from and charged enormous amounts for the meal. I said that he wanted me to understand the life he was living and how money seemed too important to his parents.

In addition to therapy and child guidance sessions, the time for a co-parenting meeting had come. I told the parents I wanted them both to meet with me and that this was not therapy but a meeting about being parents. I laid down strict rules that had to be enforced while the therapy continued. Fortunately, they were both in agreement that therapy was warranted and displayed no resistance to that process and came to the co-parenting session willingly. I told them that a driver could no longer bring their son to treatment. I explained that I expected them to drive him to therapy and wait in the waiting room ready to greet Steven when he came out of my office. I explained that there was to be no more arguments in front of Steven and strongly recommended they complete their litigation, so they could stop being ex-spouses that bound them together and could start being the co-parents that Steven was asking for. I suggested that less emphasis be on expensive dinners and clothes and more time spent talking and playing with Steven. I felt that despite their tremendous resources that Steven was lonely and bereft of their company and good wishes. I suggested that they set a time once a week to discuss Steven's activities and plans for the week and any distress he was feeling. This was to be only a half hour and not a time for discussions about litigation. They listened attentively and began to follow my rules. Steven became a better student in school, made friends, and shared his feelings with each parent. The co-parenting interlude strengthened the therapy process.

As can be seen from these very different and difficult cases, co-parenting is a flexible process that includes both parents in a cooperative effort to support their children as they move through the divorce process. The transition from ex-spouse to co-parent is a trying one that requires a great deal of resilience from the specialist. While results are not miraculous, they take the burden off the matrimonial attorney and offer a cooperative solution to the parents. The children are chosen as the priority. Decisions are made in their interest and in a reasonable amount of time. Instead of seeing the other parent as the problem, the parents learn to face what is needed for their children. They learn to compromise as they face that their persisting marital problems create severe disappointment and conflict for their children. Successful co-parenting reduces hostility and brings forward recognition that the children need two parents.

Laurie Hollman Ph.D. is a psychoanalyst and psychotherapist who works with infants, under-fives, children, adolescents, adults and couples. She is a co-parenting specialist who has done extensive work with families of divorce. Her co-parenting work involves helping parents cooperate in settling custody disputes, in carrying out custody agreements, and in making small daily decisions and large significant decisions in the best interest of the children. She is a columnist for the ***Long Island Parents Magazine.*** She has taught psychotherapists at New York University and the Society for Psychoanalysis and Research. She is affiliated with the Institute for Psychoanalytic Training and Research and the Freudian Society in Manhattan, NY. She practices in Cold Spring Harbor and can be reached at (631) 692-9120.

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 case that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, e.g., Spring 2010) 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.

Sara F. v. Gregg F., Family Court, New York County (Lori S. Satter, J., December 23, 2009)

Petitioner Sara F. (hereinafter "Mother"), commenced this proceeding pursuant to Article 6 of the Family Court Act. She seeks to modify the parties' Colorado Decree of Dissolution dated December 8, 2006 (hereinafter "Decree") to permit her to relocate from Manhattan to Scarsdale with the parties' daughter, A.F. ("A."), born on January 25, 2005. Respondent Gregg F. (hereinafter "Father") opposes the petition and cross-petitions to enforce the Decree. A trial was conducted on June 4, 2009, July 23, 24, 27 and 28, 2009, as well as September 8, 14 and 15, 2009.

This matter presents interesting issues with respect to the determination of a request to relocate, especially in light of the short distance of the proposed move and the fact that the Mother had previously been granted permission to relocate from Colorado to Manhattan with A. The Mother contends that the law is clear and favors a "modest" move of only twenty miles. She claims that there are economic and lifestyle benefits which support the move and that the Father will have increased time with the child during weekends and vacations. The Father points to the quality of his parenting time with A. He asserts that if the Mother is permitted to relocate, he will be reduced to a "weekend dad" and will be marginalized in the child's life. He specifically points to the fact that the Mother has already relocated once with A. from Colorado to New York.

Findings of Fact

The parties met in New York and moved to Denver, Colorado after their engagement in May 2003. They were married on January 17, 2004 and A. was born approximately one year later. The Father filed for divorce on May 20, 2005. Thereafter, the Mother sought to relocate to New Jersey / New York. In Findings of Fact and Conclusions of Law dated August 22, 2006 (hereinafter "Findings"), the Hon. Juanita Rice of the Colorado District Court granted the Mother's request to relocate. The Mother moved with A. at the end of August 2006 when she was 20 months old. Three months later, in or about November 2006, the Father moved from Colorado to New York to be closer to A. The parties' marriage was dissolved by Decree of the Colorado Court dated December 8, 2006 (hereinafter "Decree").

The parties both testified and the Colorado Findings support that they moved several times within Colorado generally at the Mother's request. Both parties acknowledge that there were issues between the Mother and the paternal grandmother. After moving to Denver in May of 2003, the Mother suggested that the parties look into relocating to Los Angeles, California. Ultimately, they moved from Denver to Boulder in August 2003. The Father indicated that the parties started to build a life in Boulder and that he was happy there. Despite his reservations, he honored the Mother's request to move back to Denver after she learned that she was pregnant. The parties' purchased a home in a suburb of Denver in April 2004 for $1,200,000. A month or so after A. was born, in early 2005, the Mother stated to the Father that she wanted to move back to the east coast. Thereafter, the Father filed for divorce.

In the Colorado divorce proceeding, the Mother requested permission to move to New Jersey where she grew up and where her family still resides. She also indicated that her ultimate goal was to move to Manhattan. She detailed a plan where she would live in New Jersey with her family and where she had a job offer. It would appear that Mother was less than candid with the Colorado Court as to the time frame for her move. Despite her representations to the Court, the Mother moved to New Jersey with A. at the end of August 2006 and then only a few weeks later, in September 2006, she moved A. again from New Jersey to Manhattan.

After the Father moved from Denver to Manhattan, the parties' negotiated a partial separation agreement that set forth their respective parenting time with A., which was executed on December 6, 2006 (hereinafter "Parenting Agreement") and was incorporated into the Decree. The Parenting Agreement provides that the Father is to have 3 days each week with A. and that the Mother is to have 4 days. The Father's time includes weekday overnights from Monday to Wednesday and weekend parenting time from either Friday to Saturday or Saturday to Sunday. Thus, Father has 6 days out of every 14 days and Mother has 8. The Parenting Agreement conforms to the recommendations of the Colorado Court.

The Mother remarried in August 2007 and on November 5, 2008, she and her husband had a son named B. The Mother currently lives with her husband, A. and B. in. a three bedroom apartment on the Upper East Side. Since his relocation to New York, the Father has purchased an

apartment in Manhattan within walking distance to A.'s school and the Mother's apartment. He also owns a home in Fairfield, Connecticut to which he takes A. on some weekends.

The parties' child, A., is now almost 5 years old. She was admitted to a private school in Manhattan, namely the T.S. She is currently in her second year at the T.S. The parties acknowledged that A. could remain at the T.S. until the eighth grade. Records from the school indicate that A. is adjusted and doing well there.

The testimony adduced at trial shows that the Mother and her husband began to discuss moving from Manhattan as early as August 2007, only one year after the Mother's first relocation with A. from Colorado. Indeed, it would appear that the Mother had no intention of following the Parenting Agreement, which had been recommended by the Colorado court, for the long term. In October 2007, ten months after the parties signed the Parenting Agreement, the Mother and her husband went to contract on a home in Rye, New York. While she may have raised the idea of moving to the suburbs with the Father in earlier emails, the Mother never informed him of her specific plan to reside in Rye with their daughter until after the deposit on the home had been made.

The Father, through the assistance of counsel, opposed the move. Ultimately, the Mother and her husband backed out of the deal and lost their deposit. Thereafter, the Mother and her husband began their continued efforts to move out of the city with little focus in their search. They looked at Short Hills and Summit, New Jersey and then later they looked at homes in Irvington and Chappaqua in Westchester County. The Mother also contacted the Father about a possible move to Washington, D.C. The Mother's actual relocation plan appears to have been a moving target. It was only at the commencement of trial that she declared that her new plan was to relocate to Scarsdale. The Court notes that neither party has family that live in Westchester County.

The Mother's reasons for relocation are undefined. She contends that she and her husband have suffered a financial decline. The joint income tax returns for the Mother and her husband were introduced into evidence at trial and show that they had an adjusted gross income of $623,118 in 2007 which rose to $1,122,757 in 2008 due to an early payment of a bonus that was to be paid in 2009 in the amount of approximately $338,000. Thus, in reality, the Mother and her husband had adjusted gross income of approximately $784,000 in 2008. If the bonus that had been paid in 2008 were paid when it was supposed to have been made in January 2009, the Mother and her husband would have had income of approximately $873,000 this year (not including Mother's income). Thus, after reviewing the tax returns over the past three years, it is apparent that the Mother and her husband have had a fairly stable, if not increasing, income level even when one considers that the Mother has indicated that she will earn $37,000 this year from work that she did last year. She states that she has not made any placements this year, In prior years the Mother claimed that she had earned between $90,000-$140,000.

The Mother further contends that A. will benefit from certain lifestyle changes that a move to Scarsdale would afford her. The Mother testified that she lives in a thirteen hundred square foot, three bedroom rental, which is not comfortable or ideal for her family. She asserts that her family will benefit from the extra space provided by a home in the suburbs. She would like A. to live in house with a backyard with trees and grass and in a community with a town pool. The Mother acknowledged that her current apartment building has a children's playroom and is adjacent to a park, which also contains a playground and a swimming pool.

The Father opposes the move. He points to the Mother's propensity to move and the fact that she has already once asked to relocate with A. and was granted that relief in Colorado. He contends that he followed them, leaving his family behind in Colorado so that he could be a continued and significant presence in A.'s life. He asserts that he has now established himself in Manhattan. He has created a life in which he is actively involved in A.'s weekly activities. In addition to his other business ventures, the Father works part-time at the Dalton School. The Father believes that if he were reduced to a weekend / holiday parent that he would be missing the most important part of A.'s life; her daily routine, growth and development.

Both parties testified that the Father has a good relationship with A. At present, the Father has A. on Mondays through Wednesday and one weekend night. He testified that he frequently saw A. on days that she was with her Mother. It is undisputed that the parents had enjoyed a flexible schedule so that the Father could spend time with A. on days that the child was in her mother's care. That arrangement, however, changed in February 2009 when. the Mother indicated that she no longer wanted the Father to be present on her days with A. While the Mother had previously mentioned seeing a child psychologist in 2007 and discussed the importance of adhering to a set plan, it was only later that she actually sought to enforce the strict plan. Notably, this change in access arose at the same time that the Mother filed her petition to relocate.

The Father testified as to his day to day involvement with A. As she stays with him during the week, he takes her to school on the days that she is with him and picks her up on the days that he is not working. He explained that he is a "hands-on" father by reading to her class, going on some and hosting some of her play dates, going with her to paint and pottery classes and her soccer and gymnastic activities. The Court found credible the testimony of the mother of one of A.'s closest friends, who

testified at trial as to the nature of the Father's relationship with A. She indicates that he speaks to A.'s teachers every day on the days that he takes her to school and that he is involved with the other parents that pick up or drop off their children at the school. She was accustomed to seeing him when he brought A. to school and had been on several play dates with the Father, A. and her daughter. A.'s school records also support the Father's claims of involvement in A.'s life stating in September 2008 that "Biol. Dad picks her up several times / week" and in May 2009 that "Father is *v.* involved parent."

The Mother proffers that the Father will not be prejudiced by the 20 mile move, particularly under the parenting plan that she proposes, which she contends will offer him more time with A. That plan would give Father 5 out of every 14 days but would change the visits to one midweek overnight and alternate weekends. The Mother claims that she will arrange for A. to be transported from Scarsdale on Wednesdays after school and that the Father can then drop her off at school first thing the following morning. It appears that Mother contemplates that A. will be driven back and forth between Manhattan to Scarsdale, which will likely occur during rush hour traffic. Thus, although the distance may be 20 miles, the commute each way during rush hour may be lengthy.

Conclusions of Law

The Court finds that the Mother has not proved by a preponderance of the evidence that a relocation to Scarsdale would be in A.'s best interests.

The Mother cites ample case law demonstrating what she claims is support for a move of this short distance. The Court of Appeals, however, has acknowledged that each relocation case must be considered on its own merits with due consideration of the relevant facts and circumstances. *Tropea v. Tropea*, 87 N.Y.2d 727, 739 (1996). Under *Tropea*, there is no general rule that supports anyone specific outcome in relocation cases. Thus, it is almost impossible to compare one relocation to another as each centers on the very unique facts applicable to that family.

In *Tropea* the Court of Appeals provides a starting framework for analysis. Each relocation request is to be "considered on its own merits with due consideration of all of the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child." *Tropea v. Tropea*, *supra* at 739. The parent seeking relocation must show by "a preponderance of the evidence that a proposed relocation would serve the child's best interest []" (*Matter of Tropea v. Tropea*, *supra* at 741), taking into account, *inter alia*, the "quality of the relationships between the child and the custodial and noncustodial parents." *Id.* at 740.

The Court of Appeals has found that "no single factor should be treated as dispositive or given such disproportionate weight as to predetermine the outcome." *Tropea*, *supra* at 738. Instead, the Court of Appeals enumerated certain relevant factors to be considered, including, but not Iimited to "each parent's reasons for seeking or opposing the move, the quality of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and the child through suitable visitation arrangements." *Tropea supra* at 738, 740-741. Overall, "[w]hile the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered [case citation omitted], it is the rights and needs of the child [] that must be accorded the greatest weight, since [she is an] innocent victim [] of [her] parents' [] divorce…" *Id.* at 739.

At trial, the Mother presented only superficial reasons for the move to Scarsdale. As to her assertion that she and her husband have experienced a financial decline, the Court finds that there was no evidence to support this claim. It is apparent based on the tax returns for the last two years and the Mother's husband's projected income for 2009, that there has been no significant decline in income for the family. The Mother also testified that they are looking for homes in the $1,200,000 to $1,3000,000 range which further undercuts her claim that the family has experienced a financial decline necessitating a move to Scarsdale.

The Mother further claims that it would be detrimental for her children to attend different schools, which she contends would be the case if she continues to reside in Manhattan. She first testified that she could not afford to send her younger son to the T.S. Yet, she later admitted that she would choose not to send her son to that school as she would prefer to spend her money in other ways. Notably, the Father has offered to pay all of A.'s tuition at the T.S., which would help lesson any alleged burden on the Mother's finances. The Court discredits the Mother's claims that her children would be detrimentally impacted by attending different schools. Not only did the Mother not establish that the children would have to attend separate schools, but she presented no relevant evidence to support her bare assertion that they would not fare well in separate schools. It would appear unlikely that the purported detrimental effects on the children could be evidenced at this point especially in light of the fact that the Mother's younger child, B. is approximately 1 year of age.

The Mother's other reasons for the move center around what she perceives as the lifestyle benefits of living in a suburb. She points to things like having a backyard, being able to ride bicycles in the driveway,

barbeques and the town pool where kids can go and hang out. While the Mother discussed several of these lifestyle benefits for children, she presented no concrete evidence as to how these purported lifestyle benefits are enough to warrant a second relocation in under five years for A. and bow these benefits demonstrate that the move to Scarsdale would be in A.'s best interests.

Similarly, the Mother failed to demonstrate how A.'s life will be enhanced economically, emotionally and educationally. The evidence adduced at trial demonstrates that there will be no significant economic benefit for the proposed move. The Mother does not ask to move for any professional advancement on her or her husband's behalf. The Mother failed to present any evidence, other than her claims as to private school tuition and the cost of her rent, to show an economic enhancement. The Mother and her husband contemplate spending a substantial amount of money on a new home. Yet, she did not present any information as to mortgage payments or taxes for the new home as opposed to the amount that she currently pays in rent. Therefore, the Court finds that it cannot find any economic enhancement as the Mother failed to show that such enhancement would result from the proposed move.

In addition, the Mother presented absolutely no evidence at trial that A.'s life would be enhanced from an emotional standpoint from the move. To the contrary, the testimony adduced at trial demonstrates that A. is a happy, well adjusted child. It appears that she is doing very well in school and that she has flourished during her time at the T.S. She is comfortable with the present parenting plan in which she spends significant periods of time with both parents during every week. The testimony presented at trial showed the level of the Father's involvement in A.'s life. This is not an alternate weekend father. This is a father who spends three nights with his child every week. This is a father who attempted to see his child every day, which the Mother permitted until February 2009 when she unilaterally decided that it was no longer in the child's best interest. This is a Father who walks his child to school two mornings each week and knows his child's teachers, friends and their parents. He is a hands-on, full-time father. A. is a young child. To change her schedule in such a drastic way as to change the quality of her relationship with her father cannot be construed as being in A.'s best interests or as an emotional enhancement to her life.

In addition, the Court is mindful of the fact that the Mother proposes that A. attend three different schools in a nine month period under her plan. The Court finds that the possible detrimental impact of A. being switched to multiple schools, along with her move and the reduction of her father in her day to day life, cannot be found to be an emotional enhancement or in her best interests. *Salich*, *supra* at 171.

Similarly, the Mother did not demonstrate how A. would receive an educational benefit from attending the Scarsdale public schools. There was no evidence presented regarding the differences between the T.S. and the Scarsdale public schools. While the Mother expressed dissatisfaction with the fact that A. would have the same students in her classes until the eighth grade, there is no indication that A. would not see the same students year after year in a public school setting. The Court notes that no documentary evidence was submitted with respect to the quality of education A. would receive in Scarsdale as opposed to the T.S. or the relative benefits or detriments of either school.

The Court of Appeals has listed other factors which must be examined in a relocation case including (1) whether the custodial parent has stated a legitimate reason for wanting to move; (2) whether the motivation behind the move is made in good faith; (3) whether the non-custodial parent's loss of access may be preserved through an alternate visitation schedule that enables regular and meaningful access; and (4) whether there are "any other facts or circumstances that have a bearing on the parties' situation…with a view toward minimizing the parents' discomfort and maximizing the child's prospects for a stable, comfortable and happy life." *Matter of Tropea v. Tropea*, *supra* 739-740.

The Court finds that the Mother has presented no legitimate reason for the proposed move. While the Court understands that the Mother feels that her new family will benefit from some purported lifestyle changes afforded by a move to a suburb, she presented no concrete evidence as to how these purported benefits are in A.'s best interests or how they would be significantly better than the life she is living in Manhattan.

In addition, the Court questions whether the Mother's motivation behind the move is in good faith. The testimony adduced at trial shows how the Mother has consistently said or done at the moment what she felt necessary to achieve the outcome which she desired. In Colorado, she testified to a move to New Jersey to be near family and in an environment that would benefit A. This plan was specifically described in the Findings. Yet, the Mother stayed in New Jersey but a few weeks, admitting that she never even unpacked her bags, and then moved to New York.

In relation to the Parenting Agreement, it is evident that the Mother never felt bound by it. Her own testimony shows that she was planning to break it only months after it was entered. She demonstrated no regard for the fact that the Father had moved some 2,000 miles across the country in reliance on that agreement. It also shows a disturbing lack of consideration for the Father's determination to be a significant presence in A.'s life and the benefits that A. receives from having two full-time

parents available to her at all times. This perhaps is the most troubling factor to the Court.

The Mother has proposed a parenting plan which would allow the Father to have alternate weekends with A. from Friday to Monday and Wednesday night overnight visitation. This would reduce the Father's parenting time from six days every fourteen days to five days. She further indicates that the Father could have additional days for holidays and vacations. This proposed plan changes the very nature of the Father's relationship with A. He will no longer be a significant participant in her weekly schooling and activities. A. will lose out on having her father be actively involved in her education and daily life. That type of a relationship cannot be replicated by the stipulation, and unless the proposed modification is shown to be in the best interests of the child. Family Court Act § 652(b); *Sergei P. v. Sofia M.*, 44 A.D.3d 490 (1st Dept. 2007). The Court has considered whether the Mother has shown the requisite sufficient subsequent change in circumstances since the time the parties' entered into the Stipulation and whether the proposed modification is in the child's best interests. The Court finds that the Mother has not demonstrated a sufficient change in circumstances. She failed to provide any documentation or evidence that demonstrates how and to what extent her circumstances have changed, Overall, the Court finds that the Mother's request for relocation is based on speculative and frivolous reasons. Moreover, the Court has found that such modification of the parties' Stipulation would not be in the child's best interests for the reasons set forth in this decision.

For all of the above stated reasons, the Court finds that A.'s best interests are best served by maintaining the stability and continuity of the present custodial arrangement under which she has been thriving. That arrangement has put into place a strong family unit for A. where her parents are sharing parenting time in a manner consistent with the well-being for the child.

This constitutes the decision and order of the court.

* * *

M.M.H. v. William D.H., Family Court, Dutchess County (Joan S. Posner, J., March 5, 2010)

Attorney for Petitioner	Cynthia Kasnia, Esq. Kasnia & Kidd, PLLC 19 Dutchess Avenue Poughkeepsie, NY 12601
Attorney for Respondent	Ronald J. McGaw, Esq. 25 Market Street, 5th Fl. Poughkeepsie, NY 12601
Attorney for the child	Kelly Myers, Esq. P.O. Box 805 Hyde Park, NY 12538

In this modification proceeding filed on June 16, 2009 pursuant to Article 6 of the Family Court Act, M. M. H (mother) seeks an order granting her sole custody of the parties' child, J. H, born October 27, 2000, as well as an order allowing her to move with J. (child) to North Carolina. The respondent, William D. H (father), opposes the application but does not seek custody as an alternative to the mother's relocation application.

Throughout these proceedings the parents and the child have been represented by counsel. At the fact-finding hearing held on January 4, 2010 only the mother and father testified. In addition, documents were received into evidence; the mother having submitted the child's school records and the father having submitted correspondence between himself and the child, photographs of himself and the child and documents regarding his unemployment. The Court took judicial notice of its own records, including all prior orders (see, Richardson, Evidence § 2-209, 11th edition; *Matter of Lane v. La*ne, 68 AD3d 995; *Matter of Terrance L.*, 276 AD2d 699).

On January 5, 2010, the Court conducted an *in camera* interview with the child (*Matter of Lincoln v. Lincoln*, 24 NY2d 270).

Following the conclusion of the fact-finding hearing, the attorneys were given an opportunity to submit written summations, which the Court has reviewed and considered. Although the Court invited the attorneys to submit proposed visitation schedules, based upon the Court either allowing or disallowing the mother to move with the child, only the attorney for the child did so.

EVIDENCE AND FINDINGS

Based upon the evidence and the Court's assessment of the credibility and demeanor of the parties, the Court finds the following:

The parties have a long history before this Court and before the Supreme Court, Dutchess County. On August 25, 2003 the mother obtained an order of protection from this Court against the father which required that he attend substance abuse counseling and Alcoholics Anonymous meetings. The order was issued for a period of six months pursuant to an adjournment in contemplation of dismissal of the mother's family offense proceeding. The order also required that the father refrain from conduct such as assault, stalking, harassment, menacing, reckless endangerment, intimidation, threats or any other criminal offense against the mother.

The parties then separated in 2004 when the mother obtained an order of protection which ordered the father removed from the house. They were divorced by judgment of the Supreme Court, Dutchess County, dated Sep-

tember 26, 2007 (Amodeo, AJSC). During the pendency of the divorce proceedings, the parties entered into an order of custody on consent dated October 27, 2006, which provided, among other things, for joint custody of the child, with the mother having primary physical residence and final decision making authority with respect to all major matters affecting J.'s welfare. The father was granted custodial time on alternate weekends from Saturday until Sunday, and on Tuesday after school until 7:30 PM. All overnight visitation had to take place at the paternal grandparents home and had to be "generally supervised" by them. The father could only attend school functions at which the child was present if a supervisor was also present. The order further provides that the father not consume any intoxicating substances; that he provide the law guardian[1] with a copy of his alcohol rehabilitation discharge papers; and that he not drive an automobile with the child in the car until further order of the Court and until he obtained a valid New York State driver's license.

The custody order also provides that neither party may move more than 25 miles from his / her current residence without giving the other party 90 days' notice.

The mother credibly testified that she agreed to this custody order on advice of counsel after being told that these provisions were standard and because she hoped that the father would successfully complete rehabilitation to address his alcohol and substance abuse issues.

As noted above, over the years, the mother had obtained several orders of protection against the father. On October 19, 2006, at the same time that the custody order was agreed to, an order of protection was issued by the Supreme Court in the divorce action. The order provided, *inter alia*, that the father was to have no contact with J., other than as was specified in the written custody order.

This Supreme Court order of protection expired on August 18, 2008. The mother did not seek to have it extended because the father was incarcerated when it expired and she did not feel she needed it. In March 2008, although the father was prohibited by the terms of this order of protection from having contact with J. at school, he showed up at the child's school, creating an incident. The child was embarrassed by what occurred and did not want to go back to school the next day.

A temporary order of protection was issued by this Court on July 30, 2009, pursuant to Family Court Act § 656 in favor of the mother and J. This order was amended several times and expired on January 30, 2010.

The father has a long history of alcohol and substance abuse. In 1995 he was convicted of driving while intoxicated. Since 2003, he has spent time in the county jail and state prison. He has been on probation and is presently on parole. He has been in rehabilitation programs between seven and nine times. In October 2004, one week after being released from a rehabilitation program, he was arrested for a felony charge of driving while intoxicated. J. was in the car at the time and the father was also charged with endangering the welfare of a child. He pled guilty and was sentenced to 5 years on probation, with six months of electronic monitoring. He resided at his parents' home while on electronic monitoring. He violated the terms of his probation because he tested positive for alcohol and cocaine. In March 2007, the father was incarcerated in the Dutchess County jail for a period of six months. From October 2007 until May 2008 he was at Hope House, a rehabilitation facility. He drank while at the program and was expelled for not following the rules. He was then re-sentenced to New York State prison where he remained until August 2009. The father has been on parole since August 22, 2009 and although one of the conditions of his parole is to refrain from drinking alcohol, when he testified in Court on January 4, 2010, he admitted to drinking as recently as December 2009.

During each of the periods of incarceration and rehabilitation, the father had no "in person" contact with his son, except when he was out on a "day pass" from a program. The father testified that he did not want J. to visit him while he was at any of the various rehabilitation programs or in jail. He did have contact through letters and by telephone.

During the substantial periods that the father was absent from his son's life, he never told J. where he was. He just said he was away and that he would be home soon. During these times the mother voluntarily allowed J. to have contact with the father's family, who would give the father updates about J. The mother allowed this contact although there was no court order requiring her to do so.

In the last 5 years, the father has been physically available to his son for a total of about 13 months. By his own admission, the longest the father has maintained sobriety has been 11 months.

The father testified that he has fun when he visits with his son and likes to buy him presents. J. seems to enjoy seeing his father. Although the father described himself as a committed and involved father, he has in fact not been involved in the child's daily upbringing since the October 2006 custody order was issued. He has not been involved in the child's schooling or medical care. Indeed, for two years following entry of the order, the father had no contact with his son at all.

As to the father's financial support of J., the judgment of divorce obligates him to pay child support in the amount of $113. per week, as well as 40% of the child care expenses. At the time of the divorce settlement, the mother forgave child support arrears in the amount of approximately $20,000. She testified that she forgave the arrears because she wanted to be divorced.

The father is not presently employed although he asserted that he is looking for work. He previously worked as a construction project manager.

Since the father has been released from prison, he has paid only about $350 in child support. His is currently about $15,000 in arrears. He recently filed a petition which at the time of trial was pending before the Support Magistrate asserting he does not have the ability to support his son and seeks to reduce his child support obligation and eliminate his child support arrears. The mother filed a petition alleging that the father has wilfully failed to obey the judgment obligating him to pay child support.

The mother is a registered nurse and earns approximately $60,000 per year. She works 45 hours per week. In 2008 she had to refinance her home so she could pay the attorneys fees she owed from the divorce and so she could replace the windows in the house. She presently has a mortgage of $285,000 and pays yearly property and school taxes of about $8,000. Additionally, she pays another $5,000 annually for day care expenses. During the summer, when school is not in session, the mother sends J. to a camp, which costs her $225. per week. The father is not contributing to the cost of day care, although the divorce judgment requires him to pay 40% of these costs.

The mother can no longer make the mortgage payments on her house which is presently in foreclosure. Whether or not she is allowed to relocate, she and J. will shortly be displaced from their home. Further, she will not be able to afford a house in the same school district the child presently attends, so even were she to stay in New York, J. will be changing schools. The house may not even be worth what the mother owes on it, given the current real estate market, and she stated that she may have to turn it over to the bank.

The child has been in therapy for various periods since 2004. One of the reasons has been to allow the child to address the issue of the loss of his relationship with his father caused by the father's absences when incarcerated or in a rehabilitation facility.

The mother seeks to move to an area in North Carolina near where her parents live, for several reasons. She believes it will result in a significant improvement in her financial situation. Her nursing license is portable; she has investigated the employment opportunities in North Carolina and believes it will be easy to find a job. There are five top hospitals in the North Carolina area to which she would like to move[2]. Although the mother has been in touch with nurse recruiters, she has not actually applied for a job because she did not have court permission to move. She testified credibly that she did not want to accept a job before obtaining permission from this Court to move. She did not feel it would be right to accept a position and then possibly have to tell an employer that she could not actually accept a job offer. Further, she did not know how long the court process would take, and would not have been able to keep a job on hold. She also indicated that in North Carolina she would be able to work fewer hours to earn the same salary, enabling her to spend more time with her son.

The mother has no family support in New York and has received no help from the father in providing for J.'s needs. In North Carolina her parents will be able to assist her by providing day care, which would save her a substantial amount of money. They will also provide her with housing on a temporary basis, while she looks for a home to purchase. She testified that the housing costs are lower in North Carolina and that she could purchase a home for about $135,000. The taxes would be about $350 per year compared to the $8,000 she pays in New York.

The mother has investigated the schools in North Carolina and testified that there are more academic programs available to her son there than in his school here in New York. She has also spoken to two social workers about the impact of the move on J. and his ability to make friends.

If permitted to move, the mother suggests continued contact with the father by telephone and letter and visits during the summer and school vacations, supervised by the paternal grandparents.

The mother has another child from a prior relationship, M., who is 17½ years old and presently lives with her own father. M. will be starting college in the fall and if the mother relocates, M., will remain in New York with her father. M. will likely be going to college in New York and the mother will return at times to visit her.

The mother credibly testified that her plan to move is not motivated by a desire to "get away from the father" but rather based upon a need to improve her financial situation and because in North Carolina she would have the support of her extended family. There is absolutely no evidence that the mother has ever interfered with J.'s relationship with his father.

IN CAMERA INTERVIEW

After the conclusion of the fact-finding hearing, the Court conducted an *in camera* interview with J. in the presence of his attorney. The Court does not make a practice of describing in detail the content of its *in camera* interview with the child in these types of cases. However, the Court does note that during the interview, J. spoke mostly about his mother and volunteered little about his father or their relationship. While he seems to have mixed feelings about moving to North Carolina, he felt confident he would make new friends and could play more sports there, because of the weather. He suggested that he could communicate both with his father and his sister by telephone and by using a "web cam." He could visit his father at his paternal grandparents' home in the

summer. He likes talking to his father on the telephone and he would like to go to a sports camp in New York in the summer. He has a positive relationship with both his maternal and paternal grandparents.

POSITION OF THE ATTORNEY FOR THE CHILD

The attorney for J. has taken a very active part in these proceedings and submitted a written summation. She also represented the child in the prior divorce proceeding and has extensive experience in family law. Her position, on behalf of J., is that he and the mother should be permitted to move to North Carolina. She points to the fact that given the father's history of alcohol abuse and incarcerations, he is neither a reliable resource for the child financially nor has he been an active, involved parent. The child will benefit from a move to North Carolina where he can be cared for by his maternal grandparents while the mother is working and where the mother's financial circumstances will be enhanced. Moreover, the mother's move will not adversely affect the child's relationship with his father which for long periods of time has been limited to telephone and letter contact, as a result of the father's own actions. Telephone and written contact clearly can continue. Further, she recommends that the father have visits with J. during school breaks and during the summer, supervised by the paternal grandparents, as is presently the case.

APPLICABLE LAW

Where parties have entered in to a stipulation resolving custody, that stipulation will not be modified unless there is a sufficient change of circumstances since the time of the stipulation and unless modification is in the best interests of the child (*Roelofsen v. Tiberie*, 64 AD3d 603*; Matter of Said v. Said*, 61 AD3d 879). There must be a showing of a change in circumstances such that modification is required to protect the best interests of the child as determined by a review of the totality of the circumstances (*Bonthu v. Bonthu*, 67 AD3d 906). The need of a custodial parent to relocate may constitute such a change in circumstances if good cause is shown for the move (*Mooney v. Ferone*, 34 AD3d 679).

Each relocation case must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is more likely to serve the best interests of the child (*Tropea v. Tropea*, 87 NY2d 727). The custodial parent must establish good faith reasons for wanting to relocate. Factors to be considered include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and non-custodial parents, the impact of the move on the quantity and quality of the child's future contact with the non-custodial parent, the degree to which the custodial parent's and the child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the non-custodial parent and the child through suitable visitation arrangements (*Martino v. Ramos*, 64 AD3d 657 [2009]; *Wisloh-Silverman*, 39 AD3d 555 [2007]). A court must be satisfied by a preponderance of the evidence that the child's best interests would be served by permitting the relocation (*Mathie v. Mathie*, 65 AD3d 527).

Joint custody involves the sharing by the parents of the responsibility for and control over the upbringing of their children, and imposes upon the parents an obligation to behave in a mature, civilized and cooperative manner in carrying out a joint custody arrangement *(Fedun v. Fedun*, 227 AD2d 688; *Matter of Drummond v. Drummond*, 205 AD2d 847, 847-848). While total agreement on all issues is not essential (*Palmer v. Palmer*, 223 AD2d 944, 945; *Matter of Monahan v. Monahan*, 178 AD2d 829, 830; see also *Hight v. McKinney*, 164 Misc 2d 983), a joint custodial arrangement is appropriate only in those cases involving "relatively stable, amicable parents behaving in a mature civilized fashion" and who have demonstrated an ability to communicate and cooperate with one another, at least as to matters involving the children. (see e.g. *Braiman v. Braiman* 44 NY2d 584; *Reed v. Reed*, 240 AD2d 824*; Taber v. Taylor*, 238 AD2d 696; *Matter of De Losh v. De Losh*, 235 AD2d 851, 854*; Matter of Ellis v. Ellis*, 233 AD2d 678, 680; *Brown v. Skalwold*, 228 AD2d 749; *Forzano v. Scuderi*, 224 AD2d 385; *Matter of Davis v. Kostin*, 208 AD2d 975, 976, *Juneau v. Juneau*, 206 AD2d 647, 648; *Sooy v. Sooy*, 101 AD2d 287, 288-289, aff'd sub nom., *Matter of Louise E.S. v. W. Stephen S.*, 64 NY2d 946). When the parties' relationship becomes so acrimonious, embattled and embittered that a joint custody is no longer a workable option and is no longer in the best interests of the child, modification to sole custody is warranted (*Dhingra v. Puri*, 62 AD3d 935; *Pambianchi v. Goldberg*, 35 AD3d 688; *Granata v. Granata*, 298 AD2d 527).

Consideration should be given to the effect which any inappropriate behavior of either parent may be having on the well-being of the children (See e.g. *Dornbush v. Dornbush*, 110 AD2d 808; *Auffhammer v. Auffhammer*, 101 AD2d 929; *Anne D. v. Raymond D.*, 139 Misc 2d 718).

When the circumstances permit, children are usually best served when they are nurtured by and have significant contact with both parents (*Daghir v. Daghir*, 82 AD2d 191, aff'd 56 NY2d 938; *Olmo v. Olmo*, 140 AD2d 191).

Finally, any custody determination depends to a very great extent upon the court's assessment of the demeanor and credibility of the witness and of the character, temperament and sincerity of the parties (*Louise E. S. v. W. Stephen S.*, 64 NY2d 946, 947*; Canazon v. Canazon*, 215 AD2d 652, lv denied, 86 NY2d 710; *Kuncman v. Kuncman*, 188 AD2d 517, 518).

DISCUSSION

Relocation cases, where a move by one parent to a distant location will necessarily impact the other parent's contact with their child, are never easy. The Court must focus on what will serve the best interests of the child, balancing the factors enumerated by the Court of Appeals in the *Tropea*, supra.

If required to remain in New York, the mother faces an untenable financial situation. Her house is in foreclosure; she is already working 45 hours per week and is unable to make ends meet financially; and, the father is not paying child support. He is in significant arrears and is without any serious prospects of employment at this time. She receives no assistance from him for the costs of day care and when school is out of session during the summer she has to pay a significant amount for J. to attend camp while she works. She has no family in New York to assist her.

At no time since 2004 has the father had unsupervised contact with J. The father's "in person" contact with his son only resumed in August 2009, after he was released from state prison. Significantly, the father did not have to file an application to begin supervised visitation, as the mother herself assisted in arranging for the father to visit in a supervised setting. At the time the mother filed this application the father was still incarcerated and his contact with his son was limited to letter writing and telephone calls. The mother's application must be viewed in this context and against the backdrop of the father's lengthy history of alcohol and substance abuse, his failed attempts at rehabilitation, his long periods of absence from his son's life due to incarcerations and attendance in rehabilitation programs, his failure to support his son, his failure to be an involved parent in his child's education or medical care, and his limited supervised visitation.

If permitted to move, the mother will enjoy a lifestyle with fewer financial struggles, greater family support and more time with her child. Likewise, J. will benefit from his mother's financial security and availability and the regular contact with his maternal grandparents who will be providing child care.

The mother has never impeded or interfered with the child's relationship with his father. Based upon her past conduct and the Court's assessment of her credible testimony at trial, if allowed to move, the Court is confident that the mother will take steps to encourage a meaningful relationship between J. and his father.

Additionally, in considering the application to modify the parties' joint custodial arrangement, the Court is not presented with a situation in which both of the child's parents have actively shared in raising and caring for the child. Clearly, the joint custodial arrangement contemplated in the 2006 order has never been a reality. Since the parties separated, the mother has been the one to attend to all of the child's needs and has been the *de facto* sole custodian parent for more than half the child's life. Further, since entry of the consent order, the father has not exercised his joint custodial rights and obligations and has had only limited contact with J. The father, by his own actions and admissions of his long history of alcohol and substance abuse and incarcerations, has not been available to care for and support his son emotionally, physically or financially. The parents' relationship has been acrimonious resulting in several orders of protection being issued against the father. The mother's hope and anticipation that, after the joint custody order was agreed to, the father would successfully address his alcohol and substance abuse issues has not been realized.

CONCLUSION AND HOLDING

Based upon the foregoing, the Court concludes that there has been a significant change in circumstances since entry of the consent order and that modification of the prior custody arrangement to award the mother sole custody is in the best interests of the child (*Mathie v. Mathie*, 65 AD3d 527). The joint custodial arrangement agreed to by the parties is no longer appropriate or viable given the father's personal difficulties, parenting history and the breakdown in the relationship between the parties.

Further, based upon the totality of the circumstances and after weighing the appropriate factors set forth by the Court of Appeals in *Tropea*, supra, the Court finds by a preponderance of the evidence that the mother has established a good faith basis for relocation and that her move with the child to North Carolina will serve the long-term best interests of the child.

The Court has searched the statewide registry of orders of protection, the sex offender registry and the Family Court's child protective records and has considered the results of that search in making this determination.

The order of custody and visitation dated October 27, 2006 is modified as follows:[3]

1. The mother shall have sole legal and physical custody of the child, J. (DOB: 10 / 27 / 2000).

2. The mother may relocate with the child to the State of North Carolina.

3. The mother may not hereafter move from the State of North Carolina with the child without first giving the father at least 90 days' prior notice, in writing, by regular and certified mail, return receipt requested.

4. The father shall have visitation with the child as follows:

    a. Two weeks during the summer vacation period observed by the school district the child is

attending. The father shall notify the mother, **in writing, by certified mail, return receipt requested**, on or before April 1st of each year, specifying the weeks selected for visitation.

b. One week each school year during either of the child's winter or spring school recess in accordance with the child's academic school calendar. This week shall be selected by the mother and she shall notify the father of her selection in writing no later than October 1st of each year.

c. Transportation to and from all visitation shall be the responsibility of the mother, unless otherwise agreed by the parties.

d. The father shall have such other visitation as the parties may agree. If the mother is planning to be in New York, she shall give the father two weeks' notice and he shall be entitled to reasonable visitation during that period supervised by the paternal grandparents; any overnight visits shall be at their home.

e. Unless agreed to by the parties or pursuant to further order of the Court, all overnight visitation periods between the father and the child shall take place at the home of and be generally supervised by the paternal grandparents. If upon agreement the child will be anywhere other than the paternal grandparents' home for a period in excess of more than 24 hours, the mother shall be provided with the location and the telephone number where the child may be reached.

f. The father shall not consume any alcoholic beverages during periods of visitation. The father shall not drive a vehicle with the minor child in the vehicle until such time as he has a valid New York state driver's license and further order of the Court.

5. The father may have written and/or e-mail communication with the child. If the mother believes the communication is inappropriate, she shall forward the letter/e-mail to the attorney for the child for her review.

6. The father may have communication with the child through the use of a "web cam" at such times as the parties can agree provided both parties have access to such device.

7. Each parent shall have complete access to all health care records, information and providers concerning all matters relating to the mental and physical well-being of the child; each parent, while the child is in his or her care, shall inform the other of any illness, injury or condition which confines a child to bed for more than three days or which requires medical intervention; each parent shall sign releases or other documents necessary and/or required to permit the other to have access to health care information and/or providers.

8. Each parent shall have complete access to all school records and all personnel involved with the education of the child; a copy of all report cards shall be provided to the father within 48 hours of receipt; the mother shall sign releases or other documents necessary and/or required to permit the father to have full access to such educational records and/or providers.

9. Both parents shall be listed with all schools, day care providers, health care personnel and facilities, camps and similar individuals and institutions to receive all records and information from such individuals, institutions and agencies with respect to the child of the parties.

10. Each parent shall encourage the free exercise of the visitation/custodial rights of the other; neither parent shall do any act or make any statement which would directly or indirectly tend to defeat or make exercising visitation/custodial rights of the other parent more difficult; which would tend to disappoint the child; which is derogatory of the other parent; or, which would discourage the child from contact with the other parent. Neither parent shall allow, condone or encourage any other person to engage in any conduct which is contrary to the above provisions. In exercising custodial/visitation rights each parent shall consider the wishes, plans and activities of the child.

11. The child shall be provided with clean, adequate and suitable clothing for any scheduled visitation period and the same or comparable clothing shall be returned at the conclusion of the visit.

12. Neither parent shall expose the child to any conduct or activity which would endanger the physical, mental or moral well-being of the child.

13. Each parent shall keep the other advised of his/her current address and telephone number.

14. During any period that the child is with one parent, reasonable and peaceful telephone contact between the child and the other parent shall be allowed between the hours of 5:00 PM and 7:00 PM.

15. The appointment of the attorney for the child shall continue until October 1, 2010.

16. The father shall attend and successfully complete an alcohol treatment program and provide written

proof of successful discharge to the attorney for the child.

17. The "BILL OF RIGHTS FOR CHILDREN WHOSE PARENTS ARE SEPARATED" attached hereto is made a part of this order and both parents shall respect and comply with each of those rights.

18. The terms of this order shall remain in effect until modified by this Court which specifically retains jurisdiction of this matter, unless another court has acquired jurisdiction pursuant to the terms of the Uniform Child Custody Jurisdiction and Enforcement Act or the Parental Kidnaping Prevention Act or any superseding legislation.

The foregoing shall constitute the decision and order of this Court.

Endnotes

1. "Law Guardian" is now referred to as the "attorney for the child".
2. The area the mother intends to move to is only about 20 minutes from South Carolina, where there are additional job opportunities for nurses.
3. Concomitantly with the decision, the Court is issuing a separate custody and situation order containing the provisions set forth herein.

BILL OF RIGHTS

FOR CHILDREN WHOSE PARENTS ARE SEPARATED

1. **THE RIGHT NOT TO BE ASKED TO "CHOOSE SIDES" BETWEEN THEIR PARENTS.**
2. **THE RIGHT NOT TO BE TOLD THE DETAILS OF BITTER OR NASTY LEGAL PROCEEDINGS GOING ON BETWEEN THEIR PARENTS.**
3. **THE RIGHT NOT TO BE TOLD "BAD THINGS" ABOUT THE OTHER PARENT'S PERSONALITY OR CHARACTER.**
4. **THE RIGHT TO PRIVACY WHEN TALKING TO EITHER PARENT ON THE TELEPHONE.**
5. **THE RIGHT NOT TO BE CROSS-EXAMINED BY ONE PARENT AFTER SPENDING TIME WITH THE OTHER PARENT.**
6. **THE RIGHT NOT TO BE ASKED TO BE A MESSENGER FROM ONE PARENT TO THE OTHER.**
7. **THE RIGHT NOT TO BE ASKED BY ONE PARENT TO TELL THE OTHER PARENT UNTRUTHS.**
8. **THE RIGHT NOT TO BE USED AS A CONFIDANT REGARDING THE LEGAL PROCEEDINGS BETWEEN THE PARENTS.**
9. **THE RIGHT TO EXPRESS FEELINGS, WHATEVER THOSE FEELINGS MAY BE.**
10. **THE RIGHT TO CHOOSE NOT TO EXPRESS CERTAIN FEELINGS.**
11. **THE RIGHT TO BE PROTECTED FROM PARENTAL WARFARE.**
12. **THE RIGHT NOT TO BE MADE TO FEEL GUILTY FOR LOVING BOTH PARENTS.**

Recent Legislation, Decisions and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages

Five states (Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire) plus the District of Columbia permit same-sex marriage. Three more states (Maryland, Rhode Island and New York) officially pledge to honor out-of-state same-sex marriages. Seven foreign countries also grant full marriage rights: The Netherlands, Belgium, Canada, Spain, South Africa, Norway, and Sweden.

On December 18, 2009, Mayor Adrian Fenty of the District of Columbia signed a marriage bill which ended the exclusion of same-sex couples from marriage. As of March 3, 2010, following a congressional Review period, same-sex couples can apply for marriage licenses.

On February 24, 2010, the Maryland Attorney General issued an opinion that Maryland law should honor out-of-state marriages with no gay exception. http://www.oag.state.md.us/Opinions/2010/95oag3.pdf.

California voters changed its constitution to ban gay marriage by defining marriage as between a man and a woman, known as Proposition 8, which was discussed in my prior column. In Spring, 2008, the plaintiffs in Perry v. Schwarzenegger, represented by powerhouse attorneys David Boies and Ted Olson (who opposed each other in the U.S. Supreme Court battle over the 2000 presidential election, Bush v. Gore) claim that such proposition was unconstitutional. The federal chief judge, Vaughn Walker, held a two and a half week non-jury trial on the issue in January, 2010, and the case is on hold until closing arguments are heard, which are expected this month. Even after the decision, both sides expect that the case will be appealed to the U.S. Supreme Court.

The Respect for Marriage Act is pending before the U.S. Senate

On September 15, 2009, Congress introduced a bill, The Respect for Marriage Act, to repeal the 1996 Defense of Marriage Act (DOMA). The bill is sponsored by Congressman Jerrold Nadler of New York, Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties; House Judiciary Chairman John Conyers, Jr. of Michigan; and two openly gay members of Congress, Congresswoman Tammy Baldwin of Wisconsin and Congressman Jared Polis of Colorado. The purpose of the bill is that same-sex marriages are taking place in some states, and those married couples should be treated with equal respect by the federal government. For example, as a result of DOMA, same-sex married couples cannot file federal income tax returns as a married couple and receive the same tax advantages, and cannot receive federal employment and retirement benefits, Social Security payments, and health insurance coverage.

Same-sex marriage progress in New York

Although New York does not permit same-sex marriage (and the New York Senate recently turned down a bill permitting same-sex marriage), it does recognize same-sex marriages performed outside of its jurisdiction, based on the principles of full faith and credit and comity. Governor Paterson issued a broad executive order in 2008, directing state agencies to review their policies to recognize gay marriages performed in other states.

Godfrey v. Spano, 13 N.Y.3d 358, 892 N.Y.S.2d 272 (2009)

Gay marriage opponents, in two taxpayer suits, challenged decisions in 2006 by the New York State Department of Civil Service and Westchester County to give health insurance and other benefits to same-sex couples legally married in other states or countries. The Court of Appeals upheld the policies on a technicality—that the taxpayers failed to specify any circumstance in which money was spent that would not have been spent in the absence of the order. The Court's ruling was very narrow, and it did not rule on whether out-of-state same-sex marriages will be recognized in New York for all purposes, and left this issue open to the legislature.

New York's recognition of civil unions

Dickerson v. Thompson, 2010 New York Slip Op. 02052, 2010 WL 959930 (3d Dep't Mar. 18, 2010)

In a case of first impression, the Third Department held that the Supreme Court has subject matter jurisdiction to entertain an action for equitable and declaratory relief seeking dissolution of a civil union validly entered into outside of this state.

In April 2003, the parties, who were New York residents, went to Vermont for the sole purpose of obtaining a civil union. The parties were New York residents during their relationship, and neither party was a resident of Vermont. When their relationship deteriorated 4 years later, neither party could seek a dissolution of their civil union in Vermont because that state's statute requires one of the parties to be a resident of Vermont at least a year prior to the dissolution.

The Supreme Court dismissed the action, finding that New York does not have subject matter jurisdiction because New York's public policy "does not recognize

any legal relationship between same-sex partners, does not confer any rights or impose any obligations on such a relationship and does not afford any means by which to dissolve such a relationship." The Appellate Division reversed, and held that New York does have subject matter jurisdiction over the recognition of same-sex civil unions as a matter of comity, since New York's public policy is to protect same-sex couples in various ways; however, that does not in any way determine the ultimate question of what, if any, relief is available on the merits.

Author's note: It will be interesting to see what the court will do on remand, since New York does not have any equivalent of civil unions.

Recent Legislation

In my previous column, the following new statutes were discussed that will dramatically affect matrimonial practice.

- New CPLR § 5205(o), effective May 4, 2009: New exemption provisions for the collection of money judgments are not applicable to the collection of support
- DRL § 177 repealed and new DRL § 255 is added, effective October 9, 2009: new COBRA language
- DRL § 236(B)(2) amended to add subdivision b, effective September 1, 2009: Automatic restraining orders language to be served simultaneously upon the commencement of a matrimonial action
- DRL **§** 236B(6) amended, effective September 14, 2009: Loss of health insurance benefits as a factor to be considered in awarding maintenance
- DRL **§** 240(1-b)(c)(2), FCA **§** 413(1)(c)(2), SSL **§** 111-i(2)(a), (b), (c); effective January 31, 2010: Child Support Modernization Act: CSSA combined parental income threshold raised from $80,000 to $130,000

Two other statutes have been recently passed:

- DRL 236B(2)(b) "Automatic Orders" has been amended to provide an exemption to the restraint for retirement plans which are in pay status. It was signed March 30, 2010 and is deemed effective as of the date of the original statute, to wit: September 1, 2009
- Governor Paterson has signed legislation that amends provisions of the Civil Practice Law and Rules, the Domestic Relations Law, the Executive Law, the Judiciary Law, the Family Court Act, the Public Health Law and the Social Services Law to substitute the term "attorney" or "counsel" for "law guardian." The law took effect on April 14, 2010

Author's note: In cases where the parties signed a separation or settlement agreement before the effective date of this statute, but where the judgment of divorce was submitted after the effective date, some courts have been requiring that the parties execute an addendum agreement to reflect calculations based on the new statutory threshold of $130,000, and submit the divorce papers based on the new calculations. This appears problematic because not all parties will be cooperative after the agreement is executed. Moreover, the agreement complied with the CSSA at the time of its execution; therefore, the parties should not be required to recalculate (or renegotiate) their settlement.

1. Amendment to DRL § 240(1)(a-1) and FCA § 651(e), effective August 11, 2009: In custody matters, record checking from the statewide registry of Orders of Protection, the Sex Offender Registry, and the Family Court child protective records and warrants
2. FCA § 249-b amended, effective December 16, 2009: Domestic violence or child abuse must be considered on the record in determining custody and visitation
3. IRS Form 8332 has been amended: Revocation of release of claim to child exemption form

Cases of Interest

Grounds

Social abandonment does not constitute constructive abandonment

Davis v. Davis, 71 A.D.3d 13, 889 N.Y.S.2d 611 (2d Dep't 2009)

In an action for divorce, the wife pled, *inter alia*, constructive abandonment based upon the husband's refusal to engage in social interaction by refusing to celebrate with her, or acknowledge Valentine's Day, Christmas, Thanksgiving, and her birthday; refusing to eat meals together, attend family functions or accompany her to the movies, shopping, restaurants and church services; leaving her once at a hospital emergency room; and otherwise ignoring her. The husband's motion to dismiss the cause of action for failure to state a cause of action was affirmed. Constructive abandonment is limited to the refusal to engage in sexual relations. "Social abandonment," which is really a claim of "irreconcilable differences" between spouses, would establish "no-fault" divorce in New York, which is a matter that should be addressed by the state's legislature.

A court's plea to change New York to a "no fault" state

Andrew T v. Yana T, 26 Misc. 3d 1039, 894 N.Y.S.2d 362 (Sup. Ct., N.Y. Co. Dec. 24, 2009) (J. Cooper)

Following an uncontested divorce by the husband against the wife on the grounds of constructive abandonment, the ex-husband moved for paternity testing of a child born to the ex-wife during the course of the marriage, but conceived well after the date on which the husband alleged his sexual relations with the wife ended. The wife cross-moved for an order finding that if the husband was the father of the child, he had committed perjury in the second degree by alleging sexual abandonment as a fault ground for divorce.

The court granted the husband's motion, finding that the presumption of legitimacy, equity, and the child's best interests warranted an order directing paternity testing, and held that referring the matter of whether the husband committed perjury in the second degree to the District Attorney for investigation or prosecution was not warranted, especially in light of the fact that the wife may have participated in such alleged perjury.

The court poignantly advocated for the legislature to change New York to a "no fault" state, which is worth repeating verbatim here. Judge Cooper began his opinion as follows:

> This is yet another case that shows how New York's inexcusable failure to allow no-fault divorce is destructive both to individual litigants and to our legal system as a whole. Much has been written before about the toll that is taken on the parties, the parties' children and on the court itself in contested divorce proceedings where "grounds contests" can rage on for months or even years. But even in the context of uncontested divorce proceedings—where both spouses want to end their marriage on agreed upon terms—the lack of a true no-fault basis for granting a divorce poses significant problems. Not only does it often force the person obtaining the divorce to swear to things that everybody knows are untrue, but it forces judges and special referees who preside over these cases to in effect turn a blind eye—or at least a myopic one—to what is technically perjury.

Id. at 1040, 894 N.Y.S.2d at 363.

Judge Cooper ended his opinion as follows:

> Unfortunately, our state, which prides itself on being so forward-thinking in so many ways, is positively regressive as concerns the institution of marriage. When it comes to forming the marriage bond, we do not allow loving, consenting adults who happen to be of the same sex to enjoy the same rights as others. When it comes to dissolving the marriage bond, we do not allow no-longer-loving, consenting adults to obtain a divorce for reasons that are real rather than fabricated so as to meet some archaic legal requirement. It is clearly time for the Empire State, as it is known, to reject a view of marriage that is more reflective of the time of the Empire of Queen Victoria than it is of the second decade of the 21st Century and at long last adopt the reforms that bar associations and citizens groups of all kinds have been demanding for years. Until that happens, the integrity of our legal system here in New York will continue to be needlessly compromised.

Id. at 1047, 894 N.Y.S.2d at 368-69.

Child Support

UIFSA

Matter of Epstein v. Shoshani, 66 A.D.3d 1014, 889 N.Y.S.2d 48 (2d Dep't 2009)

Petitioner (father) sought to terminate his child support obligation under a Pennsylvania stipulation that was incorporated, but not merged, into the parties' Pennsylvania divorce judgment, where his support obligation for the parties' child would end upon the child reaching 18 years of age or graduating from high school, whichever occurred last. In opposing the father's motion, the respondent (mother) contended that a previous upward modification order in New York superseded the Pennsylvania stipulation and support order, thus requiring the petitioner to support the parties' child until he reached 21 years of age in accordance with New York law. The order denying the mother's objections and terminating the petitioner's support obligation was affirmed. Pursuant to the Uniform Interstate Family Support Act (UIFSA) [Family Court Act article 5-B], the law of the state issuing a child support order governs the duration of the parent's child support obligation. Therefore, Pennsylvania law governs the duration of the father's child support obligation. Contrary to the mother's contention that New York's modification of the order superseded the Pennsylvania support order, the UIFSA expressly prohibits a tribunal of this state from modifying "'any aspect of a child support order that may not be modified under the law of the issuing state' (Family Ct Act §§ 580-611[c], 580-613[b])." *Id.* at 1017, 889 N.Y.S.2d at 50. Thus, the Family Court was without authority to modify the Pennsylvania child support order.

Author's note: It is unclear why the father did not move to dismiss and/or appeal the New York modification order. Nevertheless, the appellate court deemed such order to be void regardless of when it was granted.

Imputed income to business owner

Beroza v. Hendler, 2010 New York Slip Op. 01751, 896 N.Y.S.2d 144 (2d Dep't Mar 2, 2010)

The court below properly imputed the personal expenses the husband wrote off through his veterinarian practice and horse boarding business as income to the husband when determining his child support obligations in this divorce action.

Where the wife transferred in excess of $600,000 from her marital bank account to the children's custodial accounts without the husband's knowledge or consent, the court awarded the husband ½ of the funds transferred.

Custody

Jurisdiction under the UCCJEA

Sanjuan v. Sanjuan, 68 A.D.3d 1093, 892 N.Y.S.2d 146 (2d Dep't 2009)

The wife commenced an action in New York for divorce and custody against the husband, who had already commenced a similar action in the Philippines where he and the parties' child were living. The husband moved to dismiss the custody portion of the complaint, arguing that the Philippines was the child's "home state" pursuant to DRL §§ 75-a(7), 76(1)(a) because she had been living there with him for thirteen months.

The order granting the husband's dismissal motion was affirmed. The court held that the father's conduct in leaving New York with the child to live in the Philippines was not unjustifiable, and this was not considered child abduction, as the mother knew of the child's whereabouts, the mother's family visited with the child in the Philippines on several occasions, and there was no existing custody order preventing his actions. Further, by waiting approximately one year before recommencing her action in New York, after it was initially dismissed for lack of personal jurisdiction (for failure to effectuate service), the wife effectively acquiesced to Philippines jurisdiction.

Relocation from Brooklyn to Staten Island denied

Schwartz v. Schwartz, 70 A.D.3d 923, 895 N.Y.S.2d 206 (2d Dep't 2010)

The court's grant of the father's motion to enjoin the mother from relocating with the parties' children, of whom the parties had joint custody, from Brooklyn to Staten Island, was affirmed on appeal.

The parties were divorced four years ago, and had joint custody of the children, now ages 8 and 10, with the mother having residential custody. Both parties continued to live in Brooklyn Heights, where the children attended school and both parties worked. The father had custodial access with the children from Sunday at 5 p.m. until Tuesday morning, alternate weekends from Friday at 5 p.m. through Tuesday morning, and one-half of the holidays and school recesses.

Approximately two months prior to the filing of the father's motion, the court denied the mother's motion to move with the parties' children to East Brunswick, New Jersey, in order to live with her fiancé and to be closer to a university in Pennsylvania, where she was offered employment. Soon after, without seeking or obtaining the approval of the court, the mother made a nonrefundable deposit on a house located in Staten Island, to share with her daughters, her current husband, and the husband's three children, who frequently visited him. The mother intended to keep her position in Brooklyn Heights.

After weighing the factors contained in *Tropea*, the court found that the mother failed to establish, by preponderance of the evidence, that the children's best interests would be served by permitting the relocation. The court determined that the father had frequent contact with the children, including substantial time during the week, and although the proposed relocation was within New York City, and only involved a change of 20 miles, it would be difficult for the father and children to maintain the quality and quantity of contact while traveling between Brooklyn Heights and Staten Island during rush hours, and such onerous travel arrangements would likely affect the children's willingness to visit the father frequently.

Custody award reversed where child lived with mother most of her life

Marrero v. Centeno, 2010 New York Slip Op. 01967, 896 N.Y.S.2d 157 (2d Dep't Mar 9, 2010)

The parties have an out-of-wedlock child born in 2001. The parties ended their relationship when the child was an infant. Thereafter, the mother and the child resided in the Bronx, and the father resided in Rockland County with his parents. There was no order awarding custody to either parent. When the child was age 5, the mother, her boyfriend, and the child moved to Puerto Rico. The father was aware of the mother's relocation and the paternal grandfather, who also had a home in Puerto Rico, attended the child's kindergarten graduation. In addition, the child spent the summers of 2006 and 2007 in Rockland County with her paternal grandparents.

In January 2008, when the child was approximately age 7, the mother and the child returned to New York City because the mother had commenced a personal injury action, on behalf of the child. The mother and the paternal grandparents agreed that the child would reside with the paternal grandparents and attend school in Rockland County while the lawsuit was pending, and

that the mother would return to Puerto Rico with the child once the lawsuit was completed. During this time, the mother lived in the Bronx with her sister, and visited with the child on the weekends.

Four months later, in May 2008, after the lawsuit was settled in the child's favor, the mother announced her intent to return to Puerto Rico with the child. However, the father commenced the instant child custody proceeding, alleging that the mother voluntarily gave the child to him to raise. The mother subsequently filed a cross petition seeking custody.

Following a hearing in which the Family Court heard testimony from the parties, the forensic evaluator (who did not specifically recommend custody to either party), and from a member of the Rockland County Probation Department, the Family Court granted the father's petition for sole custody of the child.

The appellate division reversed, ruling that the Family Court's decision "lacks a 'sound and substantial basis' in the record" because it gave insufficient weight to the fact that the mother has been the child's primary care provider since the child's birth, providing for the child's emotional, financial and intellectual development. *Id* at 159, New York Slip Op. 01967 at 2. By contrast, the father failed to prove that he sought to have any relationship with the child prior to 2008. Although the father resided in his parents' home, it was the paternal grandparents who tended to the child's daily needs during the time that the child resided with them. Moreover, the father failed to pay child support and was in arrears of more than $40,000. Finally, the father had an admitted history of drug abuse, and repeatedly avoided drug testing during the pendency of the custody matter.

Equitable Distribution

Equitable distribution of licenses and degrees

McAuliffe v. McAuliffe, 70 A.D.3d 1129, 895 N.Y.S.2d 228 (3d Dep't 2010)

The court below erred in awarding a percentage of the value of the wife's undergraduate degrees to the husband. The wife obtained her degrees through night and weekend courses, while working full time for her employer who reimbursed all of her expenses for tuition and books. There was no evidence that any marital funds were used for unreimbursed expenses nor that the husband made any contributions in a meaningful and substantial way beyond that of "'overall contributions to the marriage.'" *Id.* at 1136, 895 N.Y.S.2d 236 (citation omitted). Therefore, the husband failed to meet his burden to establish that the degrees resulted from anything other than the wife's "'own ability, tenacity, perseverance and hard work.'" *Id.* (citations omitted). Also, the record did not support the lower court's determinations that the degrees had enhanced the wife's earnings or, if they had, of the value of the enhancement because the wife did not earn any substantial income after 1993, when she left full-time employment to raise the parties' three children during this almost 30 year marriage, and the court's neutral evaluator's report was considered defective and disregarded.

Author's note: It seems that the analysis was backwards. The court should have first analyzed whether the wife's degrees had a value, and then whether the husband should be awarded a percentage of it.

Rodriguez v. Rodriguez, 70 A.D.3d 799, 894 N.Y.S.2d 147 (2d Dep't 2010)

The appellate court agreed with the lower court's award of 30% of the husband's enhanced earnings derived from his medical license and 25% of defendant's medical practice. However, it found that "the Supreme Court erred in failing to apply an appropriate 'coverture fraction' to the enhanced earning valuation" of the husband's medical licenses to account for the portion of the husband's medical education and training completed before the marriage. *Id.* at 801, 894 N.Y.S.2d at 150 (citation omitted). The husband received a medical degree in Spain from a combined undergraduate/graduate medical school program and there was no evidence that the specific course of study he undertook prior to the marriage would only have resulted in the equivalent of an undergraduate degree in the United States. Rather, the appellate court found that the husband completed one-half of his medical training prior to the marriage, and remitted the matter to the court below for a recalculation of the amount to be awarded to the wife as her share of the husband's enhanced earnings.

The court below improperly engaged in the "double counting" of income in valuing the husband's medical practice, which was equitably distributed as marital property and in awarding maintenance to the wife by converting a certain amount of the husband's projected future income stream into an asset. *Id.* (citation omitted). The court below also improperly calculated the amount of the wife's maintenance based on the husband's total income, which included the excess earnings produced by his business. Therefore, the issue was remitted to the court below to recalculate the maintenance and cash distributive awards.

The court below properly granted the 69 year old wife nondurational maintenance based on the long term marriage and the fact that the wife was the homemaker and primary caretaker of the parties' children during the parties' lengthy marriage. (No other facts were provided such as the ages of the husband and children, the income of the husband, the value of the assets awarded to each party, etc.) Also, the court below properly declined to consider the wife's eligibility for Social Security when determining the maintenance award, as the husband failed to provide proof of her eligibility, or the relevant laws pertaining to her eligibility.

Author's note: The practitioner who is representing the monied spouse should be mindful to present evidence of the non-monied spouse's entitlement to Social Security benefits in order for the court to consider this factor when determining a maintenance award.

Failure to Prove Appreciation in Law Practice

Albanese v. Albanese, 69 A.D.3d 1005, 892 N.Y.S.2d 631 (3d Dep't 2010)

Where the non-titled spouse proved only the value of the husband's separate property law practice as of the commencement of the action and failed to prove the base-line value as of the date of the parties' marriage, the wife was not awarded any share of the husband's business.

Maintenance

Baron v. Baron, 2010 New York Slip Op. 02079, 2010 WL 970306 (2d Dep't Mar 16, 2010)

The court below providently exercised its discretion in awarding the wife a 20% share of the husband's company in this long term marriage because of the "minimal" direct and indirect involvement in the husband's company, while not ignoring her contributions as the primary caretaker for the parties' children.

The court below awarded the wife maintenance for 10 years in the sum of $5,769.23 per week. The appellate division modified the length of the award, until the wife becomes eligible for full Social Security benefits at the age of 66 (which is presumably more than the 10 years awarded to her), remarries, or dies, in light of the parties' ages (not provided) and their lifestyle during the marriage (not provided either).

The court below erred in failing to award the wife any counsel fees or expert fees The appellate division granted the wife one-half of the fees incurred, to wit, $125,000 in counsel fees and $50,000 in expert fees as a result of the husband's obstructionist tactics, which warranted the appointment of a referee to supervise discovery.

The court below erred by failing to award to the wife prejudgment interest on the distributive award of $4,566,858 from the date that the marital assets were valued (i.e. June 30, 2002). The court reasoned that this was appropriate also in light of the husband's failure to provide certain financial documents, falsely claiming to have transferred 49% of his business to a third party, and attempting to conceal the valuation of the business and prolonged the litigation.

Author's note: This case seems to follow three recent trends. 1) No facts are provided, making it difficult for the practitioner to use as precedent. There is no indication of the length of the marriage, ages of the parties, number and ages of the parties' children, respective income and earning capacity of the parties, etc. All the reader can discern is that the wife received a distributive award of $4,566,858. 2) There is a 20-30% distribution of a business to a wife who did not contribute directly to the business but instead was a housewife and mother. 3) Maintenance terminates upon the date Social Security benefits commence.

Enforcement

Barany v. Barany, 2010 New York Slip Op. 01750, 2010 WL 733133 (2d Dep't Mar 2, 2010)

The former wife brought a contempt motion for the former husband's failure to pay child support totaling more than $50,000 in arrears. The Supreme Court denied the wife's motion and sua sponte vacated the child support provisions of the parties' separation agreement as unenforceable, because the child support agreement did not contain the recitation requirements of the Child Support Standards Act DRL 240(1-b)(h), and set the child support down for a de novo hearing The Second Department reversed, reasoning that the proper vehicle for challenging the propriety of child support provisions contained in an agreement incorporated, but not merged, into a divorce judgment is by either commencing a separate plenary action in which such relief is sought or by motion within the context of an enforcement proceeding. The matter was remitted to the court below to determine the former wife's motion for contempt .

Hopkins v. Gelia, 70 A.D.3d 1335, 894 N.Y.S.2d 311 (4th Dep't 2010)

The mother was properly held in willful violation of a prior child support order, where it was established that she repeatedly failed to pay $25/month as ordered and failed to meet her burden of establishing her inability to make the required payments. The court found that her substance abuse issues did not render her unable to make the payments. The mother failed to present evidence that she was financially unable to satisfy her obligation during the time the arrears accrued or that she made any efforts to obtain employment.

Tenorio v. Tenorio, 70 A.D.3d 812, 894 N.Y.S.2d 143 (2d Dep't 2010)

The former wife moved to compel the former husband to comply with his obligations under certain stipulations that were incorporated into the parties' judgment of divorce, and to hold him in contempt if he did not comply. The motion was adjourned and, during the period of adjournment, the parties entered into a stipulation pursuant to which they purported to resolve the issues raised by the motion so long as the defendant paid the agreed upon arrears. The defendant failed to satisfy his obligations. The lower court ultimately granted the plaintiff's motion, directed the defendant to comply with the judgment and the stipulation, and held the defendant in contempt for a period of not to exceed six months, with

an opportunity to purge the contempt by satisfying his obligations. The appellate court affirmed, and reasoned that the plaintiff was not under any obligation to withdraw the contempt motion since the stipulation was based on his compliance with payment of the arrears.

Counsel Fees

In the wake of *Prichep v. Prichep*, 52 A.D.3d 61, 858 N.Y.S.2d 667 (2d Dep't 2008)

As discussed in my previous columns, the Second Department in *Prichep* held that pursuant to DRL **§** 237, an application for interim counsel fees by the non-monied spouse in a divorce action should not be denied nor deferred to trial without good cause, articulated by the court in a written decision "because of the importance of such awards in the fundamental fairness of the (divorce) proceedings." *Id.* at 62, 858 N.Y.S.2d at 668. In my previous columns, I reported several cases that followed *Prichep*, including but not limited to *Mueller v. Mueller*, 61 A.D.3d 652, 878 N.Y.S.2d 74 (2d Dep't 2009), $10,000 interim counsel fee award modified to $25,000; and *Penavic v. Penavic*, 60 A.D.3d 1026, 877 N.Y.S.2d 118 (2d Dep't 2009) order deferring wife's request for $250,000 in interim counsel fees to the trial court modified by awarding wife interim counsel fees of $100,000 without prejudice to make a future application for further counsel fees; *Meltzer v. Meltzer*, 879 N.Y.S.2d 722 (2d Dep't 2009) award of an additional $35,000 in interim counsel fees; ***Frase v. Frase***, 24 Misc. 3d 1235A , 2009 WL 24776334 (Sup. Ct., Westchester Co. July 31, 2009) (J. Jameson) (wife awarded $50,000 in prospective legal fees to proceed to trial despite her significant $1.5 million assets).

One new case has been reported since last quarter, *Lauria v. Usak-Lauria*, 866, 65 A.D.3d 1017, 884 N.Y.S.2d 866 (2d Dep't 2009) where the wife was awarded $25,000 in prospective legal fees in light of the disparity of the parties' respective income. No facts were provided as to the parties' respective ages, incomes or careers.

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