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Notes and Comments

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The Return of Dissent to the Court of Appeals: A Much Needed Reform

When the Court of Appeals decided in the matter of *Shondel J. v. Mark D.*[1] early in July of this year, I was shocked to see that not only was there one dissent but two, both made by the judges who bear the Smith name. It was the first time in recent memory that the Court of Appeals rendered a decision in a family law appeal that resulted in a 5-2 split decision.[2] If this harbors a movement for the return of dissent in the appellate courts of this state, our system of justice will certainly be elevated and hopefully encourage appellate courts to follow in the footsteps of the Smith dissents.

In an earlier column, we criticized the lack of dissent in matrimonial appeals and suggested that justice could not be done with rubber stamp procedures. We pointed out that it was remarkable that in all the appellate divisions in the past five years there were fewer than a handful of dissents and in the Court of Appeals but two, both by the Judges Smith. This statistic is especially perplexing when one considers that any set of facts in a matrimonial case can be decided differently at the trial level depending upon the judge who hears it.

Some have argued that the lack of dissent at the appellate levels appears to be an easy way out to alleviate the crushing burden of calendar congestion, and makes dissent an untenable option. This indeed is an obtuse rationalization, because the lack of dissent equates to a lack of justice.

Whether our column criticizing the paucity of dissent had anything to do with the recent holding in *Shondel J. v. Mark D.*, is really of no moment. What *is* important is that our highest court, composed of seven jurists, actually rendered a split decision with two dissents. Hopefully, it will be the precursor for more learned disagreement.

Judge Rosenblatt writing for the majority was joined in his opinion by Judges Kaye, Ciparick, Graffeo, and Read. The dissent was written by Judge G.B. Smith, in which Judge R.S. Smith concurred.

This split decision was a case of importance in the field of child custody and support. It was one of the few times that the issue of equitable estoppel in a child support matter reached the high court, and the majority cleared up any question of whether it should be applied in these types of cases.

The rationale of the majority was summed up by Judge Rosenblatt in the last paragraph of his decision wherein he explained:

> Given the statute recognizing paternity by estoppel, a man who harbors doubts about his biological paternity of a child has a choice to make. He may either put

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> the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship. A possible result of the first option is paternity by estoppel; the other course creates the risk of damage to the relationship with the woman. It is not an easy choice, but at times, the law intersects with the province of personal relationships and some strain is inevitable. This should not be allowed to distract the Family Court from its principal purpose in paternity and support proceedings—to serve the best interests of the child.

To fully understand this result it is necessary to review some of the salient facts. In 1996, the mother, Shondel, gave birth to a daughter in Guyana where she then resided, naming Mark as the father. The couple had dated one another in Guyana and had sexual intercourse. After the child's birth, Mark declared that he was convinced he was the father of the child and accepted all responsibilities including support. Three years later he signed a Guyana registry stating that he was the father and authorized a name change of the child to his own. The father also named the child primary beneficiary on his life insurance policy identifying her as his daughter. Additionally, he sent support monies between the child's birth and June of 1999, a period of over three years.

It was not until August of 2000 that the mother brought a Family Court proceeding under Article 5, alleging Mark to be the father of her child and seeking a filiation and a support order. Initially, Mark did not contest paternity and cross moved for visitation, alleging he was the child's father. However, at the hearing which was subsequently held before the Family Court in October of that year, Mark requested DNA testing, which determined that he was *not* the father. Shondel's petition was then dismissed and the father abandoned his petition for visitation. The mother objected to the Hearing Examiner's Order dismissing her petition. The Family Court sustained her objections and appointed a Law Guardian. A year later in October 2001, the Law Guardian reported that Mark had acted as the child's father and she considered him to be her father. The matter was set down for trial to determine whether the doctrine of equitable estoppel could prevent Mark from denying paternity. A new blood genetic marking test ordered by the Family Court Judge confirmed that Mark was not the biological father. At the trial, the parties' credibility was at issue, each giving divergent views of the facts. According to the mother's version, the father spent time with her and the child during the short trips they traveled to the United States in 1996 and 1997, seeing them every day for about six weeks in the summer of 1997. Mark continued his relationship with the child after he and the mother no longer continued their own relationship, and bought toys and other presents for the child. The child met his parents and Mark told them that she was his daughter. He spoke to the child by telephone and referred to himself as daddy when he did so, and in August 1999 and January 2000, he visited the child almost every other day prior to the commencement of the litigation.

As would be expected, Mark denied all of the assertions of the mother and claimed he had seen the child only four times since her birth, he never acknowledged the child as his own, he never introduced the child to his family members or friends as his own, and he never visited her nor furnished her with gifts. Mark also asserted that he requested that Shondel submit to a blood test to determine paternity, which she refused. Shondel denied that he did so.

The Family Court Judge hearing the matter believed Shondel's testimony to be credible and Mark's incredible, and determined that in fact Mark held himself out as the father. The Court then entered an order of filiation and awarded child support retroactive to the commencement of the Family Court proceeding. The Appellate Division affirmed, holding that it was in the best interests of the child to equitably estop the father from denying paternity. The Court of Appeals explained further why the majority invoked the doctrine of equitable estoppel.

> In the best interests of the child, Family Court properly applied estoppel, to impose support obligations on Mark, after he left the child with the detrimental effects of a relationship in which she was misled into believing that he was her father. A Mother who had perfect foresight and knew that her child's relationship with a Father figure would be severed when the child was four and a half might well choose never to inform him of her child's birth.

Initially, the majority explained that the purpose of the equitable estoppel defense was to prevent a litigant from pressing a right that would be unjust to the other party who justifiably relied on that party's actions and had been misled. The majority also noted that the lower appellate courts had long applied the doctrine of equitable estoppel in paternity and support proceedings, and cited its own decision in *Popamela P. v. Frank S.*,[3] as further support for its ruling. It observed that although the doctrine was first recognized in the common law, the recent enactment of Family Court Act Sections 418(a) and 532(a) created a statutory predicate for such treatment. It then went on to remark that the Court could not change the statutory provision which must await legislative repeal, or a determination of its unconstitutionality. Apparently, Mark failed to raise the issue of unconstitutionality at the trial level but did so in his brief, but the Court of Appeals refused to entertain it.

Parenthetically it should be observed that not to do so invites further litigation. The rule that proffers an issue cannot be decided by an appellate court unless it is raised in the court below seems to have outlived its usefulness.

What purpose is to be served by failing to consider an issue that would be of importance to the matrimonial bar and the litigants who must move through the judicial process? Apart from the untold expense that bringing a new action would incur, it also denies litigants a prompt determination of such issues. To permit the Court of Appeals to determine the constitutionality of any statute whether raised in the court below or not, would seem to be more realistic and actually reduce litigation and its concomitant expense. An issue that is raised for the first time on appeal, and does not require the taking of evidence in the court below, as would a declaration of the constitutionality of a statute, should be heard at the appellate level. Refusing to do so would not be in anyone's best interest.

That aside, we now turn to the dissenting opinion written by Judge G.B. Smith, and concurred by Judge R.S. Smith. The issue was clearly seen by the minority to be: whether a non-spouse, falsely informed that he was the biological father of a child, and whose DNA tests prove that he is not the biological father, can be equitably estopped from denying paternity. In acknowledging that a man or woman should be responsible for the financial support of an offspring, it nevertheless held that such responsibility, although it may be placed upon a non-biological parent, could not be done at bar "because the best interests of a child requires more than financial support and equitable estoppel should be applicable only to someone who engages in false conduct . . . " Recitation of the facts by the dissenting opinion was somewhat different from that reported by the majority. As to the signing of a document by Mark that was submitted to the Guyanese counsel that declared him to be the father, they found that he did so solely to permit Shondel to travel to the United States and submit to a paternity test.

The dissent then tersely stated its disagreement with the majority:

> The question here is not, as the majority suggests, whether equitable estoppel "has a rightful place in New York law" (majority op at 6) or in paternity proceedings. The statute makes clear that it does. The question is whether the elements of estoppel are present in this case.

and went on to reflect:

> Once a party makes a prima facie showing of facts sufficient to support equitable estoppel in the paternity context, the opponent of equitable estoppel must demonstrate why estoppel should not be applied in the best interests of the child (*see Matter of Sharon GG. v. Duane HH.*, 95 AD2d 466 [3d Dept 1983], affd 63 NY2d 859) [,]

which essentially shifts the burden from the proponent, to the other party. The dissent disagreed with the majority position that it was respondent's burden to show that equitable estoppel should not apply because that would be in the best interests of a child. Commenting further, the court noted that Mark did not take unfair advantage nor was he guilty of other misconduct, including fraud, misrepresentation or deception. As such, the defense of equitable estoppel cannot be raised. It then concluded that the majority's decision applies the defense of equitable estoppel against a completely innocent litigant who gained no benefit, concluding that such result was a holding without precedent, at least in the research undertaken by the dissent. It also noted that Mark was being ordered to divert $12,828 (in arrears) as well as $78 a week—in lieu of providing that amount of support to his own wife and children. Siding with Mark, the dissent held that equities in the case favored the putative Father's position, explaining:

> Contrary to the majority's view (majority at 13), [*12] there is strong evidence of "fraud or wilful misrepresentation" by Shondel J. She not only told Mark D. that the child was his, she swore in Family Court that she had sexual relations with no other man during the relevant time period—testimony proven by DNA tests to be false. Perhaps more important, this is not a case where a child lived for years with, and was brought up by, a man she had always thought was her father (*cf. In re Diana E. v Angel M.*, 20 AD3d 370 [2005]). At the time of the paternity proceeding, the child had lived most of her life in a different country from Mark D., and their relationship was primarily on the telephone. This is a case in which this Court should remember "the rightful reluctance of courts in a society valuing freedom of association to impose a personal relationship upon an unwilling party," a consideration that applied with special force to "the power of the State to force a parent-child relationship" (*Matter of Baby Boy C.*, 84 NY2d 91, 101-102 [1994]).

In concluding its opinion, the dissent felt that it was not in the best interests of the child to affirm the order of filiation since the only contribution to the child's life would be financial. Mark had no contact with the child since March of 2000, nor would he have any in the future. The dissent continued, ". . . it should not be said here

that it is in the best interests of a child to have an order of filiation declare Respondent to be her father, a man, who in addition to having no biological tie, has no interest in continuing a relationship with her or her mother."

Interestingly, neither the dissent nor the majority suggested or even raised the issue that the child would be negatively impacted by the fact that the biological father's identity would be kept from her and she would be unable to ever receive support from him or obtain medical records concerning any health issues that might arise in the future.

Simply put, in our view, since Mark was not guilty of any conduct to change the position of Shondel, she should have pursued a remedy for support against the biological father—not Mark. Whether you agree with the dissent or the majority, the recurrence of judicial debate certainly preserves the best interests of parties and children going through family litigation. Of perhaps even greater importance, it elevates the standards of family practice and the status of the judicial system as a whole.

Endnotes

1. N.Y.3d, 2006, N.Y. Slip Op. 05238 (July 6, 2006).
2. Amazingly, the high court simultaneously saw two more dissents in the 4-2 *Hernandez v. Robles*, __N.Y.3d __, N.Y. Slip Op. 05239 (July 6, 2006), same sex marriage decision where Judges Kaye and Ciparick dissented. Judge Rosenblatt took no part in this decision.
3. 59 N.Y.2d 1 (1983).

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Is Fault Divorce Slowly Withering Away?

By Barton R. Resnicoff

By now, we all should be aware that the Miller Commission recommended doing away with fault-based divorce. Separate from that, on December 12, 2005, the Second Department in *Sloboda v. Sloboda,*[1] helped to put one more nail in the coffin of a need for presentation of fault to get a decree issued. Probably the first nail occurred almost thirteen years ago when the same Court, in *Mattwell v. Mattwell*,[2] radically changed the law of divisible divorce when the Court held an ex parte foreign decree permitted the New York Courts to divide property and deal with other financial issues under DRL 236B(5)(a).

Pre-equitable distribution, fault was necessary for more than granting of a divorce. If a spouse was guilty of marital fault, he or she was precluded from being entitled to alimony.[3] When equitable distribution became effective, fault was no longer a bar to an award of maintenance or equitable distribution, nor was it one of the enumerated factors.

Because of the removal of fault as a factor, over a decade before *Mattwell*, there was a procedure where the defendant-spouse would move for reverse summary judgment, i.e., that the plaintiff should be granted the fault divorce requested by him/her without the need for proof.[4] This was commented upon in the practice commentaries[5] which relates that:

> In the early 1980's, several cases appeared manifesting a seemingly bizarre turn of events: the defendant husband to obtain for the plaintiff wife one of litigation's greatest gifts, the gift of summary judgment. But on a second look the rules of human nature proved still in control. The defendant's purpose is very much a selfish one. D was looking for some advantage on a property question, or wanted the divorce granted fast (and didn't care who "got" it) so as to remarry, etc. In those highly colored but nevertheless bright lights, we can see why D would want to move for summary judgment for P. The question was: may he (or she—it was usually he)?
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> * * *
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> In 1984 the legislature amended subdivision(e) of CPLR 3212 to provide that "summary judgment may not be granted in favor of the non-moving party" in a matrimonial action. In other actions, however, it apparently remains permissible. . . .
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> * * *
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> But why would W, who is after all the plaintiff seeking the divorce, want to impede it? The answer one heard most had to do with the "equitable distribution" (Dom.Rel.L. §236) of the marital property. Equitable distribution is often a hotly contested issue, complicated to try and much in need of whatever cooperation the parties can be prevailed upon to give. It was pointed out that in many cases, H's incentive to cooperate on the subject of equitable distribution would just about vanish once a divorce was granted. The equitable distribution issues would remain, but now destined to be all the more difficult to determine. It was this that motivated the 1984 amendment.
>
> So "reverse summary judgment" passes from the scene, at least in the matrimonial action, the only one in which it had come to play a significant role.

Or has it passed from the scene? The Second Department in *Sloboda,* in my opinion, changed this. In *Sloboda*, the plaintiff-wife apparently signed a fully encompassing divorce settlement agreement which, *inter alia*, permitted her to take a divorce based upon constructive abandonment. The plaintiff-wife claimed that she executed this agreement, despite being represented by counsel, not truly understanding that it settled the overall matrimonial action and also claimed that the agreement itself, for a number of reasons, was not fair and equitable when made and was unconscionable at the time the judgment was executed. For the purposes of this article, those issues are not really relevant.

As is standard procedure, the trial Court, upon being advised of the settlement agreement, issued a "60-day" Order, based upon 22 N.Y.C.R.R. § 202.48. That provision of the Court rules provides that:

> (a) Proposed orders or judgments, with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing

> and filing of the decision directing that the order be settled or submitted.
>
> (b) Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown.

The plaintiff-wife did not wish to execute the necessary papers for her husband to be divorced for a number of reasons having to do with what she thought was an unfair agreement based upon a misrepresentation of her husband's income, which affected the child support contained in the agreement, the value of the defendant-husband's business, the overall division of the marital estate and her waiver of spousal support. This went on well after the 60 days expired until the parties were supposed to appear before the trial Court on July 29, 2003,[6] when the trial Court had the defendant-husband represent, under DRL § 253, an obligation to remove any barriers to the plaintiff's remarriage; that he withdrew, under the terms of the written agreement, his answer to the complaint and permitted the defendant to submit findings and a judgment of divorce incorporating the settlement agreement. The trial Court also had the plaintiff-wife's then counsel conditionally waive the "statutory waiting period." Based upon this, defendant's counsel had a proposed judgment submitted within one week which was signed almost immediately by the trial Court.

The actual papers submitted to the trial Court by the defendant to have the divorce decree executed by the Court did not contain any of the necessary facts to justify its signature.[7] CPLR 3212(e) very clearly requires that "In a matrimonial action summary judgment may not be granted in favor of the non-moving party." Add to this that GOL § 5-311 specifically provides that ". . . a husband and wife cannot contract to alter or dissolve the marriage . . ." and New York requires *proof* of certain statutory grounds to dissolve the marriage.[8] The trial Court took the position that it was granting relief based upon the allegations as contained in the plaintiff-wife's verified complaint. Granting relief based upon a pleading, wasn't that granting the defendant summary judgment based upon the relief requested by the plaintiff, i.e., reverse summary judgment? Summary judgment is requested after pleadings have been served, but, I always thought that based upon CPLR 3212(e), it cannot be granted to the non-moving party in a matrimonial action.

Who did the trial Court grant a judgment to? The plaintiff-wife. Who requested that judgment? The defendant-husband. Exactly the prohibited relief covered in CPLR 3212(e). Add to this that traditionally, New York law requires, from the party to whom the proposed decree is to be granted, to present proof of the necessary jurisdictional facts to base the decree upon.[9] In the leading case of *Diemer v. Diemer,*[10] the Court of Appeals held that:

> the **facts alleged and proved** unquestionably establish the husband's right to a separation on the ground of abandonment (Civil Practice Act, § 1161, subd. 3).
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> * * *
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> Marriage . . . involves something far more fundamental than mere physical propinquity and, as a consequence, abandonment is not limited to mere "technical physical separation." (*Heermance v. James*, 47 Barb. 120, 126.) The essence of desertion or abandonment, this court said in *Mirizio*[11], is a refusal on the part of one spouse to fulfill 'basic obligations springing from the marriage contract' (242 N.Y. 74, 81, 150 N.E. 605, 607, *supra*). Obviously, not every denial of a marital right will be sufficient to support a charge of abandonment. The criterion is how fundamentally the denial strikes at the civil institution of marriage. Where primary rights and duties are involved, where the denial goes to one of the foundations of the marriage, it is the policy of our law to allow a separation from bed and board.
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> That a refusal to have marital sexual relations undermines the essential structure of marriage is a proposition basic. . . . Sexual relations between man and woman are given a socially and legally sanctioned status only when they take place in marriage and, in turn, marriage is itself distinguished from all other social relationships by the role sexual intercourse between the parties plays in it. This being so, it may not be doubted that a total and irrevocable negation of what is lawful in marriage and unlawful in every other relationship, of what unmistakably and uniquely characterizes marriage and no other relationship, constitutes abandonment in the eyes of the law.
>
> Although it appears that she acted without malice and was activated by deep-felt and conscientious religious convictions, her motives were not sufficient in law to excuse the abandonment of her marital status. If, as a result of religious scruples, she considers her marriage invalid and nonexistent and, on that account, neglects the fulfillment of a primary marital obligation, in fairness and in law her husband must likewise have the power

> to free himself of its obligations . . . we may not forget that this State, 'as a matter of long-continued policy, * * * has fixed the status of the marriage contract as a civil contract', governed by civil . . . law. *Mirizio v. Mirizio*, 242 N.Y. 74, 83, 150 N.E. 605, 608, *supra*.
>
> It is our conclusion, therefore, that on the **evidence** adduced the plaintiff is entitled to a separation on the ground of abandonment. [Emphasis added]

It should be clear that evidence as to grounds should be required to sustain the granting of a divorce, see *Silver v. Silver,*[12] when it was held that:

> to establish a cause of action for a divorce on the ground of constructive abandonment, **the spouse who claims to have been constructively abandoned must prove** that the abandoning spouse unjustifiably refused to fulfill the basic obligations arising from the marriage contract and that the abandonment continued for at least one year (*Lyons v. Lyons*, 187 AD2d 415, 416, 589 NYS2d 557) 253 AD 2d 757, 677 NYS2d 594.

The husband made reference to *Lopez v. Saldana,*[13] which claimed that the plaintiff-wife should not be permitted to attack the execution of the judgment based upon her consenting to it. The plaintiff never consented to the trial Court signing a divorce decree, the agreement contained the representation that she was free to proceed, without opposition, to obtain a divorce decree. As previously noted, parties are not permitted to consent to the granting of a Judgment of Divorce.[14] The trial Court, in its decision, noted the paragraph in the agreement requiring the parties to execute all necessary documents to effectuate the agreement. While there is a provision in the agreement that anticipates the plaintiff obtaining a divorce based upon constructive abandonment, however, there was **nothing** in the agreement that **required** her to do so. If there were, it would violate the provisions of GOL § 5-311.

With all that as background, the Court held that

> The plaintiff, as the party who prevailed on her complaint for a divorce, was obligated under 22 NYCRR 202.48 to submit a proposed judgment for the court's signature (see *Funk v. Barry*, 89 NY2d 364, 367, 653 NYS2d 247, 675 NE2d 1199). Upon the plaintiff's failure to comply with this directive, the defendant submitted a proposed judgment which, upon the plaintiff's waiver of the notice period, the court signed.
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> Since all outstanding issues had been resolved, the issuance of the judgment of divorce brought a proper repose to the proceedings and was a mere ministerial act (see *Russo v. Russo*, 289 AD2d 467, 468, 735 NYS2d 594; *Obadiah v. Shaw*, 266 AD2d 521, 522, 699 NYS2d 123; *Van Pelt v. Van Pelt*, 172 AD2d 659, 568 NYS2d 160). It was entered pursuant to the terms of the stipulation of settlement and, thus, on consent of the parties.

Not surprisingly, the case law cited by the Court was not totally on point, starting with *Funk v. Barry.*[15] *Funk* was a case in which the Court of Appeals dealt with the issue whether, as part of rendering a decision, if there was no specific direction to settle or submit an Order or Judgment, did the 60-day requirements of 22 N.Y.C.R.R. § 202.48 apply and if submitted later than that, was the action abandoned, resolving a conflict among the departments, which it held it did not. In *Sloboda*, since there was no decision rendered on the facts, the plaintiff-wife simply took the position that if not submitted timely, her action could be considered abandoned.

This was confirmed in *Russo v. Russo*,[16] because there the Court held that:

> When a party is directed in a decision of the court to settle or submit an order or a judgment on notice, that order or judgment must be submitted for the court's signature within 60 days of the signing and filing of the decision. "Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown" (22 NYCRR 202.48[b] . . . ; see, *Funk v. Barry*, 89 NY2d 364, 653 NYS2d 247, 675 NE2d 1199; *Citibank v. Velazquez*, 284 AD2d 364, 726 NYS2d 678; *Brady v. Brady*, 271 AD2d 563, 706 NYS2d 151). Upon the court's direction to settle or submit an order or a judgment, the party that prevailed on the underlying decision is obligated to do so (see, *Funk v. Barry*, *supra*; *Brandes v. Board of Mgrs. of the Centra Condominium Assn.*, 262 AD2d 63, 691 NYS2d 453; *Winckel v. Atlantic Rentals & Sales*, 195 AD2d 599, 600 NYS2d 949). It is within the sound discretion of the court to accept a belated order or judgment for settlement (see, *Dime Sav. Bank of N.Y. v. Anzel*, 232 AD2d 446, 648 NYS2d 171;

Thompson v. Aim Rent-Car, 227 AD2d 614, 643 NYS2d 405).

This is further confirmed in *Obadiah v. Shaw*,[17] which held that:

> . . . the action did not abate at the time of the husband's death. The entry of the divorce judgment five months later was a mere ministerial act since the divorce had been granted and all of the issues had been resolved (see, *Cornell v. Cornell*, 7 NY2d 164, 196 NYS2d 98, 164 NE2d 395; *Brown v. Brown*, 208 AD2d 485, 617 NYS2d 48; *Jayson v. Jayson*, 54 AD2d 687, 387 NYS2d 274; *cf.*, *Matter of Forgione*, 237 AD2d 438, 655 NYS2d 552).

It should be clear that *Obadiah* involved an estate objecting the entry of the judgment after the trial Court granted it, something that never occurred in *Sloboda*.

Finally, the Court cited *Van Pelt v. Van Pelt*[18]*:*

> the trial court rendered its determination on January 20, 1988, and the entry of the final judgment of divorce on March 31, 1988, constituted nothing more than a mere formality or ministerial act. Therefore, the . . . application being meritorious, the court properly amended the judgment of divorce *nunc pro tunc* (see, *Lynch v. Lynch*, 13 NY2d 615, 240 NYS2d 604, 191 NE2d 90; *Cornell v. Cornell*, 7 NY2d 164, 196 NYS2d 98, 164 NE2d 395; *Jayson v. Jayson*, 54 AD 2d 687, 387 NYS2d 274; *Johnson v. Johnson*, 277 AppDiv 1143, 101 NYS2d 936; see generally, Annotation, Divorce—Decree Nunc Pro Tunc, 19 ALR 3d 648).

Again, there was a decision already rendered, something that was lacking in *Sloboda*.

Bottom line is that *Sloboda* made a significant modification of the law because signing the divorce settlement agreement can result in the defendant, whom is not being granted the divorce, being able to request that judgment be entered. This can occur whether or not the plaintiff presents, in appropriate form, the necessary papers requesting entry of the judgment and is one further step closer to true no fault divorce.

Endnotes

1. 24 AD3d 533, __NYS2d__, 2005 WL 3434007, 2005 NY Slip Op. 9517 (2d Dep't 2005).
2. 194 AD2d 715, 600 NYS2d 98 (2d Dep't 1993). I wrote an article on this very subject back then; see "The Current Status of Divisible Divorce Relative to Matrimonial Litigation, Family Law Review, Family Law Section, NYSBA, Vol. 25, No. 3, p. 3.
3. DRL § 236A(1), where it notes that ". . . misconduct which would itself constitute grounds for separation or divorce . . . "
4. *See Leeds v. Leeds*, 60 NY2d 641, 467 NYS2d 568, 454 NE2d 1311(1983).
5. *See* David D. Siegel McKinney's Commentaries, CPLR 3212, C3212:29.
6. According to the plaintiff-wife, the attorney who represented her at that time told her she did not have to be there, so she did not appear.
7. When the agreement was executed in the courthouse, no allocution or inquest was held.
8. *See* DRL § 170.
9. *See Lilienthal v. Lilienthal*, 192 Misc. 1022, 83 NYS2d 71 (Sup. Ct., N.Y. Co. 1948).
10. 8 NY2d 206, 203 NYS2d 829, 168 NE2d 654 (1960).
11. *Mirizio v. Mirizio*, 242 NY 74, 150 NE 605, 44 ALR 714.
12. 253 AD2d 756, 757, 677 NYS2d 593, 594 (2d Dep't 1998).
13. 309 AD2d 655, 765 NYS2d 793 (1st Dep't 2003).
14. *See* GOL § 5-311.
15. 89 NY2d 364, 653 NYS2d 247, 675 NE2d 1199 (1996).
16. 289 AD2d 467, 468, 735 NYS2d 594, 595 (2d Dep't 2001).
17. 266 AD2d 521, 522, 699 NYS2d 123, 124 (2d Dep't 1999).
18. 172 AD2d 659, 568 NYS2d 160, 161 (2d Dep't 1991).

Father? What Father?[1]
Parental Alienation and Its Effect on Children

By Chaim Steinberger

Part Two[2]

Part One of this article distinguishes alienation from estrangement.[3] Estrangement occurs when children cease having contact with a parent for justifiable reasons. Alienation is said to have occurred when the children's purported reasons do not justify the cessation of contact with the parent. Part One outlines some of the many insidious methods employed by alienating parents. It details how those parents drive a wedge between their children and the "target" parent until the children themselves continue to find fault (real or imagined) with the target parent. From that point onward the alienating parent need do no more. She has started the snowball rolling down the mountain and, thereafter, it continues to roll down forcefully under its own momentum with no further action on her part. The children have now become "corroborators"[4] to the alienation and, thereafter, will continue the "programme" themselves and independently resist reconciliation with the target.

Part One describes some of the common symptoms of alienated children. They often view one parent as a "saint" and the other as a "sinner;"[5] can often remember nothing good about their target parents; have an adversity to them that is disproportionate to their experiences with them; and are overly rigid in viewing their relationships to them. In addition, they often have distorted beliefs of reality, believing that their fathers do not love them and are fighting to see them merely to cause trouble for them and their mothers.[6] They may also reject not only the target, but the target's extended family as well. Part One lists the catastrophic long-term ill effects that will likely afflict children who unjustifiably reject one of their parents.

Part Two of the article will detail the studies that have shown that alienating behavior occurs regularly in 80% of divorcing parents. It outlines the interventions and treatments that have proven to be effective for remedying alienation and reversing its process. Finally, it discusses how the courts of the State of New York view this issue and points out the responsibility the courts bear to remedy the harm, particularly since it is usually the courts' initial grant of authority to the alienating parent that has made the alienation possible.

How Often and When Alienation Occurs

In response to the apparent increase of parental alienation,[7] the Family Law Section of the American Bar Association commissioned a long-range study of divorcing parents.[8] The study spanned more than twelve years and included more than a thousand divorcing couples.[9] It found that alienating behavior was employed by parents on a recurring basis in sixty percent (60%) of all divorce cases, and sporadically in another twenty percent (20%).[10] In only 20% of divorces did neither parent denigrate the other.[11]

Alienation is more likely to occur when a parent (i) harbors intense or abiding distrust of the other parent; (ii) is convinced that the other parent is irrelevant or a pernicious or dangerous influence to the child; or (iii) believes that the other parent has never loved or cared about the child.[12] The alienating parent, therefore, believes that the child is in "urgent" need of "protection from the [target] parent."[13] Alienation commonly occurs when there is a history of intense marital conflict, or when a child has been "triangulated" between warring parents.[14] It can occur when a child is used by the alienating parent to replace the target as the central object of her affection, and frequently occurs when a parent experiences a separation or divorce as inordinately humiliating.[15]

Children who are "temperamentally vulnerable (anxious, fearful, dependent, or emotionally troubled)" are generally less able to withstand the inordinate stress of being placed in the middle of a high-conflict divorce.[16] They are, therefore, "more likely to be drawn into an alienated stance." Pre-adolescent and adolescent children 8-15 years old can be easily alienated because "they can maintain a consistent stance of anger and are more likely to make rigid moral judgments of a parent."[17] Younger children, in contrast, can rarely be "as fully and consistently alienated unless they have older siblings whom they emulate or who keep them under strict partisan control."[18]

Parental Alienation Is a Form of Child Abuse

A child whose parent has been excluded from his life will not feel closer or yearn more strongly for him. Rather the child will forget about the parent or learn to disdain him. "Absence [in this situation] does not make the heart grow fonder; [rather] unfamiliarity breeds contempt."[19]

Moreover, parents' divorce, to their children, is a "chilling lesson" about the fleeting and impermanent nature of love.[20] Children, therefore, feel anxious and vulnerable at such a time and are especially in need of unconditional love and devotion.[21] A parent who closes off the "avenues of love and support" available from the

target is, therefore, being particularly cruel and selfish.[22] But when parents "manipulate the[ir] children into erecting barriers themselves, when they enlist the[ir children] as agents in their own deprivation, they violate their children's trust in a most cruel manner. It is a form of kidnapping; [a] stealing [of their] soul[s]."[23] Mental health professionals, and appropriately the courts too, have, therefore, recognized that parental alienation is a form of child cruelty and abuse.[24] Indeed, the Second Department, in a custody and neglect case, affirmed a finding that the mother "emotionally neglected" her child by alienating the child from the father.[25]

The Need for an Experienced Forensic Evaluator

There are few reasons that justify a child's estrangement from his parent. Children who are alienated, nevertheless, assert a multitude of reasons which, they claim, justify their desire not to see their target parent.[26] To determine whether the reasons truly justify the estrangement or are merely pretextual to conceal the alienation, a skilled investigator must catalog and test each reason. The investigator must also probe for additional reasons, including those that the children deny, to determine whether they play any role in the children's estrangement. The investigator must understand all of the dynamics at issue in the situation, and accord to each real and claimed reason an appropriate weight.[27] Only by reviewing all of the reasons in the context of their weighted significance can it be determined whether the situation is one of estrangement or alienation.

An investigator who is not skilled in recognizing alienation or one who is not familiar with the dynamics and reasons for alienation occurring, may not recognize its symptoms or probe deeply enough in undisclosed, but critical, areas. As a result of an inadequate investigation, the investigator may conclude that there is no alienation even where it actually exists. Only an investigator that is skilled in this area has the knowledge to perform the type of comprehensive investigation that is needed in alienation cases. As the Second Department stated in a different context, "in a case that raises unusual questions . . . there [must] be evidence derived from an independent specialist with *appropriate expertise*" (emphasis added).[28] Indeed, the Second Department applied this principle to reverse a trial court that denied a noncustodial parent visitation without obtaining an independent forensic report.[29]

Similarly, in *Giraldo v. Giraldo*,[30] a case which contained, *inter alia*, an allegation of alienation, the First Department reversed a Family Court for failing to obtain a forensic evaluation. *Giraldo* involved a mother who fled to the United States from her allegedly violent husband in Colombia, South America. The father then sued for custody. On the second day of the hearing the mother asked the court to appoint a forensic evaluator. The court, noting that a forensic evaluation would delay the trial by six weeks, denied the request as untimely.[31] The Appellate Division, however, reversed. It held that, "once it became evident that [the trial court's] decision would turn upon . . . an evaluation of the parties" and their children, "failing to order independent psychiatric and psychological testing" was an "abuse of discretion."[32] The important and "critical" questions raised in these matters, the court held, should not be decided on limited evidence, when additional evidence could be obtained in short order. The court emphasized that the trial court's finding that the oldest child was "brainwashed," made the need for an independent opinion even more indispensable. Although these examinations might have taken six weeks or more, the custody issue was of such critical importance as to warrant a continuance of that length.[33]

The trial court in *Zafran v. Zafran*[34] properly applied these principles. There the court noted that in cases in which alienation has been charged, "the court has the duty to become aware of and seek out every bit of relevant evidence and advice on the custody issues before it."[35] Expert testimony, the court held, "could potentially serve as a 'helpful tool'" when determining difficult custody disputes.[36] *But see Fallon v. Fallon*[37] (affirming Family Court's denial of forensic evaluation and its transfer of custody).

Effective Treatment for Alienation

Traditional or "regular" therapy, unfortunately, is generally ineffective to treat parental alienation.[38] Moreover, traditional therapy may aggravate the alienation and its attendant harms.[39] This type of therapy is usually designed to help people "get in touch" with their feelings. It does not generally deal with, and is therefore ineffective to counteract, the social interaction issues and programming messages inculcated in alienated children.[40]

Alienated children suffer from distorted perceptions and images of their targeted parent. These distortions cause them to feel hatred and animosity towards the target. Their hatred and animosity, though unfounded, are genuinely held. As a result, exploring their feelings will likely not dissipate the hatred and animosity and, more likely, will only amplify and exacerbate them. It is only by identifying, unraveling and then finally challenging the distortions and beliefs that underlie their feelings, that the children can begin to open their hearts and minds to the possibility of a relationship with the target. Requiring them to spend large quantities of time with the parent then enables them to see him as the caring, loving parent he often is.[41]

Unfortunately, alienated children and the parent with whom they are "aligned" will resist every such effort to have the children spend time with the target.[42] They will likely "view [any] intrusion on their belief system as evidence that others are out to harm them."[43] The alienating parent will, usually, marshal all of her resources to pre-

vent the children from spending this much-needed time with the target parent. By arranging activities and other events, all of which are "more important" than spending time with the target, the alienating parent prevents any rapprochement.[44]

As time marches on with little or no contact between the children and the target, and as the inexorable litigation continues through its mediation, negotiation, psychological evaluations, and ensuing therapy phases, the alienating parent and child perceive it as covert approval of their programme, further entrenching their position against the target.[45] "[W]ith th[is] passage of time, the child grows to be a staunch corroborator" of the alienating parent's programme.[46]

> In these instances, a judicial wish to maintain the status quo in the life of the child pending the outcome of a determination of [alienation] will only cause that minor to drift further away from the nonresident parent. Additionally, referrals to mediation or the use of attorney-client negotiations are often futile because implicit in these processes is a lack of a swift directive that is often perceived by the alienator as denoting approval of his or her behavior.[47]

Thus, traditional therapy that permits the children to determine where, when, how often and for how long they will see their target parents further empowers them and permits them to continue the alienation.[48] It usually results in continuing the reduced contact with the target and the entrenchment of the children's distorted beliefs.

Mental health professionals agree that to prevent the alienation and its resulting injuries from becoming permanent, swift decisive action by the courts is necessary.[49] If the alienation is permitted to continue, the "destructive dynamic" becomes "entrench[ed]" and the children's positions solidified.[50] Appropriate contact between the target parent and the child must be reestablished quickly because delays only "consolidate and reward the child's phobic or recalcitrant stance."[51] Unfortunately, all too often, courts are reluctant to take the required action until a child has deteriorated to a dangerous level.[52]

Moreover, because alienation can be subtle and insidious and its devastating effects potentially permanent and irreversible, most experts conclude that in severe instances the only "treatment" that prevents alienation from continuing, effectively reverses it and enables reconciliation with the target is the immediate transfer of custody to the target parent.[53] In every one of the reported studies of parental alienation, interventions that did not include a transfer of custody did not improve the target parent-child relationship while the transfer of custody almost always did.[54] The hundreds of children that were transferred and later interviewed expressed gratitude and relief that they were compelled to see and be with their parents and get to know them.[55] When therapy was instituted without a change of custody, however, the alienation often became more severe and the situation deteriorated.[56]

As can be imagined, treatment for something as complicated as alienation is itself complicated. Dr. Stanley S. Clawar, in his authoritative work, describes a 14-step regimen that must be carefully followed in sequence for treatment to be successful.[57] Moreover, a mental health professional (hereinafter, for convenience, referred to as the "therapist") who wishes to attempt to reconcile a target parent with the alienated child must possess skills, in addition to, and more finely honed than, those required for general therapeutic interventions.

It is imperative that the therapist, in the early stages of the treatment, establish rapport with the child.[58] The success of the reconciliation program will largely be dependent upon the therapist's ability to establish this rapport.[59] Establishing rapport in this situation, however, is particularly difficult since the therapist must also elicit information about the child's distorted beliefs. Questions that evince disbelief or imply judgment will prevent the rapport from occurring and, more likely, will result in the child "shutting down" and resisting the therapy. This is particularly true since alienated children already hold an "us" against "them" mentality and likely view any appointed therapist as challenging the alliance between the child and the alienating parent. The therapist must, therefore, tread carefully.[60]

In addition, the therapist must be intimately familiar with the parties' history, the different forms and methods of alienation, and the means utilized in this particular situation.[61] All this is necessary in order to know what avenues to explore or pursue.[62] The therapist must be experienced in dealing with alienation and, thereby, be capable of tailoring a plan of action specifically for this family.[63]

Generally, to effect a reconciliation or reversal of the alienation, the therapist must:

1. Investigate, identify and itemize the themes, claims and beliefs of the child which the child alleges makes him or her dislike the target.[64] This may be fear ("Daddy will take us away from mommy."), immorality ("Mommy is bad because she cheated on daddy.") or rejection ("Daddy hates us.");

2. Investigate and identify the techniques used to transmit or inculcate the themes to the child.[65] This may be done by questioning the child in a nonjudgmental manner about how he came to have the claimed knowledge, or by responding to strong emotions by saying, "That seems to be a strong feeling for you. How does a feeling like that come about?;"[66]

3. Identify the duration and intensity of the alienation;[67]

4. Attempt to obtain the motives of the programmer.[68] This may include: revenge; self-righteousness; fear of losing the child; continuation of pre-divorce denigration of the target; feelings of ownership over the child; jealousy; desire for child support; loss of identity that would occur if the child left; rendering the target nonexistent by excluding him; self-protection (if the alienating parent fears revelation of her shortcomings or illegal activities); attempts to maintain the relationship with the target through conflict; or the exercise of power, control or domination over the child or target. Knowledge of the motives helps develop a tailored treatment plan. Interestingly enough, in about 50% of the cases the alienated children were themselves aware of their alienating parents' motivations in programming them;[69]

5. Evaluate the degree and types of damage that have occurred or will likely result to the child if the alienation continues. This must be identified to develop a timely plan of action;[70]

6. Evaluate the resources available for the reconciliation, including any grandparents, religious or educational figures that might be useful in the process;[71]

7. Identify the risks of attempting reconciliation.[72] The alienating parent may intensify her efforts to alienate the child, and the child may suffer from confusion, loyalty conflicts, depression or social isolation.[73] She may also withdraw the child from the therapeutic setting or resist its effects.[74] Though intervention usually entails some "short-term consequences" to the children, "[i]t is usually more damaging socially, psychologically, educationally and/or physically for children to maintain beliefs, values, thoughts and behaviors that disconnect them from one of their parents . . . compared to getting rid of the[ir] distortions or false statements."[75]

8. Identify and prepare for any "shut down" messages implanted within the child's mind.[76] For example, the child may have been told not to believe any contrary messages presented to him or her, that "all outsiders [therapists, judges, attorneys or others intervening] are bad," or to refrain from talking about certain issues.[77]

9. Determine whether the inculcation has been so intense and enduring, that reconciliation is futile.[78] Care, however, must be taken that hope not be given up too soon. Except in the most extreme cases alienation can be achieved by either therapy or, in more extreme cases, the transfer of custody from the alienating parent to the target parent;[79]

10. Set goals, and prepare for the therapeutic part of the reconciliation program;[80]

11. Begin actively intervening in the alienation and continue to solidify the rapport, by exploring and testing the child's discomfort or grief at the current situation. This could be done by asking non-judgmental probing questions such as, "Wouldn't it be nice if you were able to have a good relationship with your dad?;"

12. Prepare and introduce objective facts that challenge or question the child's distortions of reality.[81] This may be done by asking questions such as, "Why do you think your father's going to court is evidence that he hates you?" This can be done successfully only by following a careful sequence that begins by accepting the child's starting position, and then asking for an explanation of that position and why the child holds it. That can be followed by separating the child's feelings from those of others and then carefully raising contradictory questions ("Dad's motives are only to see you. Is that the same as 'hatred'?"), which then creates an emotional connection between the child and the target, and cognitive dissonance with the child's claimed beliefs;[82]

13. At the same time, the foregoing steps facilitate the reconciliation and prevent further programming by greatly increasing the time spent with the target parent and limiting or eliminating the time spent with the alienating parent.[83] Significant additional contact with the target parent, even when it was court-ordered over the objections of the children, greatly improved the relationship between the target and children in ninety-percent (90%) of the cases studied.[84] Conversely, slow "phase in" of additional visitations were usually counter-productive,[85] in part because the alienated children, fully aware that their behavior was being monitored and would determine future visitations with the target, acted out and misbehaved to undermine the reconciliation efforts.[86] Though there is some difference of opinion on this issue, "every published study . . . has reached the same conclusion: If a child's alienation is unjustified, the most reliable path to recovery is to get the child together with the target parent."[87] Moreover, "[m]any alienated children require more [than a day visit] to emerge from the shadow of the alienating parent and respond positively to the target."[88] In older children, it may take as long as a full month for the alienated child to "thaw" out and begin to be receptive to the love and attention shown by the target.[89] This

can only be accomplished by moving the child into the target parent's home.[90] If that is dangerous (because of threats to self or others) the child can be moved to some neutral location such as a friend's home, a member of the target's family or other residential facility, so long as it is away from the alienating parent and her ability to transmit messages to the child.[91]

14. Reeducation, counseling and therapy for the alienating parent, if the alienation was inadvertent, to teach her the harmful effects of the alienation,[92] and for the child and target parent to teach new ways of communicating with each other and to overcome the hurt and emotional strain of the period of alienation. This therapy, however, is far different from "traditional" or "regular" therapy.[93] Here, the children learn to think for themselves and by themselves judge the accuracy of each parent's allegations against the other.[94] They are taught that they do not have to hate one parent just to please the other, and learn skills to deal with and handle the unfair characterizations of an alienating parent.[95] Children might also be reminded that their cruelty toward the target would never have been tolerated by either parent when they were together.[96] Even when this kind of therapy does not bear immediate results, it oftentimes plants seeds that later affect the children dramatically.[97]

Alienation Cases in New York

New York courts have long recognized the inviolate nature of visitation with the non-custodial parent. Visitation is "a joint right of both the noncustodial parent and the child,"[98] because "the best interests of [each] child [is] furthered by being nurtured and guided by both of [its] natural parents."[99] The Court of Appeals recognizes that the natural right of visitation "is more precious than any property right."[100] Thus, "[a] noncustodial parent should have reasonable rights of visitation, and [those rights can only be abridged] upon substantial evidence that visitation would be detrimental to the welfare of the child."[101] Even a court may not deny visitation without first conducting an expert forensic evaluation with expertise in the relevant issues and holding a hearing.[102]

"One of the primary responsibilities of [the] custodial parent is to assure the meaningful contact between the children and the other parent."[103] "[T]he willingness of a parent to assure such meaningful contact . . . is a factor [that must] be considered in making a custody determination."[104] "[A] custodial parent's interference with the relationship between a child and [the] noncustodial parent [is] 'an act so inconsistent with the best interests of the child as to per se raise a strong probability that the offending party is unfit to act as a custodial parent.'"[105] Interference with visitation, therefore, is a sufficient reason to change custody away from the heretofore custodial parent.[106]

The Appellate Division, Second Department, has recognized the detrimental and insidious effect of alienation.[107] In *Young v. Young*, it recognized that "the psychological poisoning of a young person's mind to turn him or her away from the noncustodial parent" has "the potential for greater and more permanent damage to the emotional psyche" of the child than merely denying access to the child.[108]

Young involved four children who ranged in age from 7 to 12. Their mother interfered with the father's visitation by "frequently ma[king] other plans or arrangements for the children on the dates and times that the father was to have visitation" and by making several false allegations of sexual abuse.[109] The father moved for a change of custody but the Supreme Court denied his motion. The Second Department, however, reversed. The Appellate Division found that "[t]he mother's testimony was devoid of any understanding or recognition of why it is important for her children to have a relationship with their father."[110] "[I]f left with their mother," the Appellate Division found, "the children would have no relationship with their father given the mother's constant and consistent single-minded teaching of the children that their father is dangerous. She has demonstrated that she is unable and unwilling to support the father's visitation; and it was, therefore, an improvident exercise of discretion to deny the father's petition for a change of custody."[111] This holding is consistent with many others of the Second Department.[112]

The First Department too, in *Renee B. v. Michael B.*,[113] reversed a Family Court that refused to transfer custody from the mother to the father. "It has been shown that [the mother] attempts to exclude [the father] from the child's life. The Clinical Director and the psychiatrist who met with all concerned believe that, if awarded custody, she will continue to do so. Such acts are 'so inconsistent with the best interests of the children as to, per se, raise a strong probability that the mother is unfit to act as custodial parent.'"[114]

R.B. v. S.B.[115] involved a father who had a strong relationship with his son until the commencement of the divorce action. Thereafter, the mother embarked on a "vindictive and relentless" "crusade" to alienate the child from his father. She told the father, in the son's presence, that he would never see his son again without her present, "because all you do is lie. And my son will not be subjected to a liar and a cheat and a thief and embezzler." She told the father that she wanted the son to hate his "f— guts." Needless to say, the son stopped speaking to his father for nearly four years. In one letter, he told his father that:

> I would see you if you did things better. Like paying for bar mitzvah pictures. Or getting Mom a lawyer (in case you forgot, you have three). I'd be glad to see you if you paid bills and stuff like that. I miss playing sports with you, really. Like I've said I would see you if you acted like an honorable parent.

Justice Silbermann, presiding over that case, noted that, "Obviously, problems regarding lawyers, bills and payment for bar mitzvah pictures is not the usual domain of a fourteen year old boy. Once again, the court is left to conclude that [the mother] was fueling acrimony between [the son and father] in order to further her own agenda." She found that the mother had "permanently damaged [the father's] relationship" with the son.

The court, however, denied the father's application to deem his son constructively emancipated and, therefore, no longer entitled to support. "[I]t was not [the son's] free choice to reject the love and guidance of his father. The evidence clearly established that [the son] was a hostage in [his mother's] war against [his father]. Time and again he was fed inflammatory and hurtful information regarding adult issues in [his mother's] attempt to retaliate against [the father] for leaving the marriage." Therefore, the court held, it would be inappropriate to punish the child by cutting off his support.

The mother, however, was not entitled to such favorable treatment. Though long accustomed to a lavish lifestyle, Justice Silbermann held that it was inappropriate to require the father to continue paying a high level of support and maintenance while his son refused to see him. She reduced the mother's maintenance from her "prior standard of living" to just enough to meet her "reasonabl[e] needs to meet her daily living expenses." Justice Silbermann then warned the mother that she would "entertain a motion by [the father] to decrease or terminate child support upon establishing that [the seventeen year old] is not complying with the ordered visitation schedule."

In *Zafran v. Zafran*[116] (*Zafran I*) the mother accused the father of alienating the children against her. Justice Ross cited to one of Justice Silbermann's decisions in which she noted that parental alienation "has become increasingly prevalent in troubled marriages."[117] He noted that courts have been sensitive to parental alienation though they have not formally adopted it as a "syndrome"[118:]

> New York courts appear to have embraced the concept of parental alienation in custody/visitation cases, but have not yet recognized the theory through expert opinion evidence. Generally, the New York Courts, in the context of a custody/visitation case, rather than discussing the acceptability of "PAS" [parental alienation syndrome] as a theory, have discussed the issue in terms of whether the child has been programmed to disfavor the non-custodial parent, thus warranting a change in custody.[119]

The *Zafran 1* court noted that in cases in which alienation is charged, "the court has [a] duty to become aware of and seek out every bit of relevant evidence and advice on the custody issues before it, and such expert testimony could potentially serve as a `helpful tool' in determining [] difficult custody dispute[s]."[120] Accordingly, the court directed the parties to proceed to a *Frye* hearing on parental alienation syndrome.[121]

At the conclusion of the trial (*Zafran II*), the court found that alienation had in fact occurred, although the court did not discuss such alienation "syndrome."[122] The court noted that while the mother "endured" the alienation, "the emotional abuse only escalated and this seemingly interminable litigation lingered on."[123] The court characterized the proceedings as "custody litigation purgatory."[124] The alienation of a parent, the court noted, "is a struggle that no parent should endure and one which this Court felt compelled to act upon."[125] The court permitted custody of the two older children to remain with the father, and of the younger child to remain with the mother, but directed that all of the parties and children attend a psychologist who was appointed to serve as case manager and family therapist for the family. The court hoped that this scheme would stop the alienation and warned that noncompliance with its directives would result in a referral to the county attorney for possible commencement of neglect proceedings. Justice Ross was affirmed on appeal.[126]

In *J.F. v. L.F.*[127] the court transferred custody from the mother to the father because of the mother's alienation of the children:

> The animosity that the mother, the physical "custodial" parent has long harbored for the father has not lessened with time. As predicted by the mental health professionals at the inception of these matters, the mother has succeeded in causing parental alienation of the children from their father, such that they wish no longer to have frequent and regular visitation or anything much else to do with him. Given this parental interference, the issue before this court is whether it is in the best interests of the subject children, now 11 and 13 years of age, to modify the custody order and to grant the father sole custody. Ultimately, with much deliberation, this court has determined that the long-term emotional best interests of

> these children mandate a change of custody to the father.[128]

The court further noticed that the children exhibited the saint/sinner dichotomy, one of the strongest indicators of alienation, by the fact that the children viewed their mother as all perfect and their father all evil.

> The loving way in which the children perceive their mother, and the way in which they uncritically describe her as being perfect, stands in stark contrast to their descriptions of their father. Their opinions about their father are unrealistic, misshapen and cruel. They speak about and to him in a way which seems, at times, to be malicious in its quality. Nothing in the father's behavior warranted that treatment. The psychiatrists testified that the children are aligned in an unhealthy manner with the mother and her family. This is evidenced not only in the testimony of the father but also in the in camera interview. They repeatedly refer to the mother's family as "my family," but they do not refer to the father or his family that way. Both children used identical language in dismissing the happy times they spent with their father as evidenced in the videotape and picture album as "Kodak moments." They deny anything positive in their relationship with their father to an unnatural extreme.[129]

The mother in *J.F.* protested her innocence, claiming that she encouraged the children to have a good relationship with their father and that it was the father's "lack of concern, inattention, insensitivity and poor parenting that resulted in the current position of the children."[130] The court, however, rejected her argument. The "custodial parent has a duty to protect and to nurture the child's relationship with the noncustodial parent, and to ensure access by the noncustodial parent."[131] The court found that the mother "psychologically poisoned [the minds of the children] despite her love and devotion to them."[132] "After having done the damage, she cannot now sit back and pretend that none of this is of her making."[133] Despite the children's refusal to see their father, the court held that it was in their best interest to be compelled to do so:

> In the instant case, the children do not want to visit with their father. With the passage of time, these children have become "staunch corroborators" of their mother's ill opinion of the father. They call their father names, they make fun of his personal appearance, they treat him as though he were incompetent, and they speak of and treat his wife similarly. Yet the research on the effects of separation and divorce, as reflected in the case law, indicates that children are healthier when they maintain a close relationship with both parents, and that the loss of one parent is detrimental to the child. (*See, Young v Young*, 212 AD2d 114, 115, *supra*.) Even though the children have expressed a preference for living with their mother, while it is a factor to be considered, it is not determinative.[134]

Fortunately for the children there, the court in *J.F.* noted, "[t]he father . . . continued to keep fighting to have access to his children over the years, despite the clear attempts on the part of the mother to undermine his relationship with them."[135] Thus, despite the law guardian's opposition to a transfer of custody, and after "consider[ing] at length less drastic approaches," the court concluded that the only effective intervention would be a change of custody:

> In the instant matter, as in *Young* . . . if the children were to be left with the mother the children would have no relationship with their father given the mother's constant and consistent single-minded teaching of the children that their father is dangerous. She has demonstrated that she is unable and unwilling to support the father's visitation.[136]
>
> * * *
>
> The court acts with a weighty awareness of the gravity of its decision. The court has considered at length less drastic approaches, such as granting the father summer visitation and ordering immediate therapy for the children and parties. The court has concluded that such remedies would be ineffective. Although the children may be upset, angry and disappointed and may grieve, the court has faith that in the long run, the children's resiliency, lust for life and underlying goodness and purity will bring them to a place where they can love and be loved by both parents. To this end, the court directs that the children be in therapy with an appropriate therapist with experience in parental alienation and that the parents cooperate in such therapy.[137]

Accordingly, the court transferred custody to the father and cut off all contact between the children and the mother until the children's therapist "familiar with and experienced in treating cases involving parental

interference," thought it appropriate.[138] The Appellate Division, Second Department, affirmed this decision.[139]

Similarly, in *Karen B. v. Clyde M.*[140] the court transferred custody from the mother and awarded it to the father because of the mother's alienation. The court held that any parent who would abuse her children for so foul a purpose was not fit to continue as their custodian. In that case:

> the mother programmed her daughter to accuse the father of sexually abusing the child so that she could obtain sole custody and control or even preclude any contact that the father might have with his daughter.
>
> In the opinion of this Court, any parent that would denigrate the other by casting the false aspersion of child sex abuse and involving the child as an instrument to achieve his or her selfish purpose is not fit to continue in the role of a parent.[141]

The court removed the child from the mother and awarded custody to the father. Its decision was affirmed by the Appellate Division.[142]

In *Vernon v. Vernon*[143] the Appellate Division and then the Court of Appeals affirmed Justice Silbermann, who transferred custody to the father because the mother was withholding visitation:

> we also agree with the trial court that a change of custody was necessary. Initially, it is evident from [the mother's] repeated, willful frustration of [the father's] visitation rights and from the expert testimony, that [she] is intent on thwarting any relationship between her daughter and the child's father . . .
>
> Moreover, "that a change in custody may prove temporarily disruptive to the child is not determinative, for all changes in custody are disruptive."[144] . . .
>
> In view of [the mother's] adamant refusal to cooperate with visitation, the only means of vindicating the child's very substantial and, under the particular circumstances presented, overriding interest in having a relationship with both parents, is to award legal and physical custody of the child solely to her father. . . . Accordingly, the order of the Supreme Court . . . [is] affirmed, without costs.[145]
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> In *Walden v. Walden*,[146] the Second Department affirmed the transfer of custody from an alienating father to the targeted mother:
>
> The conclusion of both forensic evaluations was that it was the father who was primarily responsible for the children's emotional disturbance, as a result of his attempts to alienate their natural affection for their mother. The father's influence was most evident in the son, who, at age 8, no longer referred to the defendant as his mother, but derogatorily called her by her given name and mimicked the abusive names which he had heard the plaintiff direct at her. Finding it unlikely that the father would cease this harmful conduct, the court transferred custody of the son to the mother in order to remedy the deteriorating relationship.[147]

So too, in *Gago v. Acevedo*,[148] the Second Department affirmed the award of custody to the father. There, the father "fostered the mother-son relationship" while the mother, in contrast:

> persistently interfered with the father's visitation rights by making unfounded allegations of child abuse against the father, by coaching the child to make false allegations of abuse, and by causing disruption to the child's visitation and vacation plans with his father.[149]

K.L. v. M.L.[150] involved a mother who made false allegations against the father during the divorce action. Her *paramour* filed a complaint against the father accusing him of sexually molesting his six-year-old son. The mother also told her oldest daughter that she was "a horrible daughter," "didn't deserve to live" and sent her to live with her father.[151] Another time she told her daughter that the father was abusive and that "she hoped [she] did not end up with someone like him."[152] She took the daughter's cell phone away, preventing her father from contacting her, and did not forward notices of school or other important events, causing the father to miss many of them. The trial court found that the record "clearly establishes parental alienation" by the mother against the father.[153] It concluded that the mother's "anger and hostility . . . made her unfit to be the custodial parent since her attitude would substantially interfere with her ability to place the needs of the children before her own in fostering a continued relationship with the noncustodial parent."[154] Accordingly, the court awarded the father custody of the parties' children.

In other recent decisions too, the Second Department awarded two fathers custody because the fathers were "more likely to ensure meaningful contact between the children and the noncustodial parent."[155]

The Court's Duty and Role

In a custody or visitation contest the court sits, not merely as an arbiter between two adversary parties, but "as *parens patriae*[156] of the young children."[157] As *parens patriae*, the court must protect these children who, because of their ages, are unable to protect themselves, and because of their feuding parents, have no effective protectors.[158] As the Court of Appeals noted, "The burden on a Judge when he acts as *parens patriae* is perhaps the most demanding which he must confront in the course of his judicial duties. Upon his wisdom, insight and fairness rest the future happiness of his wards."[159] The court must place itself in the position of a "wise, affectionate and careful parent" and provide for the child accordingly.[160] Thus, even when a child has been programmed to believe that contact with the non-custodial parent is harmful and that he is better off having no contact with that parent, the court must look behind the reasons and do what is in the long-term best interests of the child. Courts bear a particular responsibility to undo the damage since, typically, it was the court's initial grant of authority to the alienating parent that made the alienation possible. Courts may not simply throw their hands up in abdication of this very difficult situation.[161]

Endnotes

1. Although alienation might be employed by either parent, because it is more likely to be employed by mothers than by fathers, *see generally* Stanley S. Clawar & Brynne V. Rivlin, Children Held Hostage: Dealing with Programmed and Brainwashed Children Ch. VII, ("The Female Factor: Why Women Programme More Than Men") (American Bar Association Section of Family Law, 1991), and because mothers are more likely to obtain custody than fathers, Brandes, 4 Law and the Family, New York §§ 1:2, 1:3. For ease of reading, this article will at times refer to the target parent in the masculine gender and the alienating parent in the feminine.
2. Part One of this article originally appeared in Vol. 38, No. 1 of the *Family Law Review* (Spring, 2006).
3. *See, e.g.*, Joan B. Kelly & Janet R. Johnston, *The Alienated Child, A Reformulation of Parental Alienation Syndrome* 39 Family Court Review 249, 251 & 253 (2001).
4. *See, e.g., J.F. v. L.F.*, 181 Misc2d 722, 730, 694 NYS2d 592 (Family Court, Westchester County, 1999), *aff'd sub nom., Faneca v. Faneca*, 270 AD2d 489, 705 NYS2d 281 (2d Dept. 2000).
5. Richard A. Warshak, Divorce Poison 248 (2001).
6. *See, e.g., Clawar, supra*, at 146.
7. *See, e.g., Zafran v. Zafran*, 191 Misc2d 60, 64, 740 NYS2d 596 (Supreme Court, Nassau County 2002) (Robert A. Ross, J.), *quoting* Justice Jacquelyn Silbermann in *R.B. v. S.B.*, NYLJ, Jan. 21, 2000 at 25, that "Parental Alienation (the term of art for conduct resulting in the poisoning of a child's mind against a parent) has become increasingly prevalent in troubled marriages."
8. *Clawar, supra*, at 173; Deirdre Conway Rand, *The Spectrum of Parental Alienation (Part I)*, 15 Am. J. of Forensic Psychology No. 3 (1997).
9. *Id.*
10. *Clawar, supra*, Table 17 at 180.
11. *Id.*
12. Janet Johnston, *Rethinking Parental Alienation and Redesigning Parent-Child Access Services for Children Who Resist or Refuse Visitation* 6 (2001) (hereinafter "Rethinking").
13. *Id.*
14. *Id.*
15. *Id.* at 6.
16. *Id.* at 6-7.
17. *Id.* at 6-7.
18. *Id.*
19. *Brandes*, 4 Law & The Family, N.Y., Child Custody § 1:16 at 78 (2d ed., 1997).
20. *Warshak, supra*, at 5.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Kelly & Johnston, Reformulation, supra*, at 257 ("these behaviors of the aligned parent (and his or her supporters) constitute emotional abuse of the child"); *Karen B. v. Clyde M.*, 151 Misc2d 794, 574 NYS2d 267 (Family Court, Fulton County, 1991), *aff'd sub nom., Karen PP v. Clyde QQ*, 197 AD2d 753, 602 NYS2d 709 (3d Dept. 1993) ("any parent that would denigrate the other by . . . involving the child as an instrument to achieve his or her selfish purpose is not fit to continue in the role of a parent"); *Bragar v. Bragar*, NYLJ 6/21/02 (Sup. Ct., NY Co.) (Jacqueline Silbermann, J.), *quoting Safah v. Safah*, NYLJ 1/8/92 p. 26, col. 5 (Sup. Ct., Suffolk Co.) (brain-washing of children is "equivalent to . . . physical abuse" and amounts to egregious misconduct); *Warshak, supra*, at 14 ("Experts regard the attempt to poison a child's relationship with a loved one as a form of emotional abuse. As with other forms of abuse, our first priority must be to protect the children from further damage."); *Joel R. Brandes*, Parental Alienation, NYLJ 3/28/00 at 3 ("inducing parental alienation in a child is a form of child abuse, which should be punishable as abuse under the Family Court Act").
25. *In re Ramazan U.*, 303 A.D.2d 516, 756 N.Y.S.2d 442 (2d Dept. 2003) ("The documented efforts of the mother to interfere with the visitation of the noncustodial parent and to alienate the child from his father are sufficient to support a finding of neglect.").
26. Joan B. Kelly & Janet R. Johnston, *The Alienated Child, A Reformulation of Parental Alienation Syndrome*, 30 Family Court Review 249 at 264 (2001) (hereinafter "Reformulation").
27. *Id.*
28. *In re Wesley R.*, 307 AD2d 360, 763 NYS2d 76, 77-78 (2d Dept. 2003).
29. *Grisanti v. Grisanti*, 4 AD3d 471, 772 NYS2d 700 (2d Dept. 2004).
30. *Giraldo v. Giraldo*, 85 AD2d 164, 447 NYS2d 466 (1st Dept. 1982).
31. 85 AD2d at 169.
32. 85 AD2d 174.
33. *Giraldo*, 85 AD2d at 175.
34. *Zafran v. Zafran*, 191 Misc2d 60, 64, 740 NYS2d 596 (Supreme Court, Nassau County 2002) (Robert A. Ross, J.).
35. *Id.*
36. *Id.*
37. *Fallon v. Fallon*, 4 AD3d 426, 427, 771 NYS2d 381(2d Dept. 2004).
38. Elizabeth Ellis, *Divorce Wars, Interventions with Families in Conflict* 225 (American Psychological Association, 2000); *Clawar, supra*, at 152.
39. *Id.*
40. *Clawar, supra*, at 152.

41. Michael R. Walsh & J. Michael Bone, *Parental Alienation Syndrome: An Age-old Custody Problem*, 71 Fla. Bar J. 93 (1997).
42. *Id.* at 224-225.
43. *Id.*
44. *Ellis, supra*, at 224.
45. *Ellis*, *supra*, at 224.
46. *Walsh & Bone, supra.*
47. *Walsh & Bone, supra.*
48. *Clawar, supra*, at 107.
49. *See, e.g., Johnston, Rethinking, supra,* at 7; Dr. Joan Kelly, 2005 Annual New York State Interdisciplinary Forum on Mental Health and Family Law, Resolving Custody Disputes: What Helps Children? What Hurts? (presented at the New York City Bar, June 4, 2005) at 8.
50. *Id.*
51. *Id.*
52. *Clawar, supra*, at 149, citing a case in which a boy had to be hospitalized before the court would transfer custody to the father, and Deirdre & Randy Rand & Leona Kopetski, *The Spectrum of Parental Alienation Syndrome, Part III: The Kopetski Follow Up Study*, 23 Am. J. Forensic Psychology 15 (2005), citing two more cases "in which children under the age of 10 had to be hospitalized before the court was willing to take the strong action needed.
53. *Ellis, supra*, at 223-27 (citing several studies and concluding, at 225, that many experts in the field "clearly support rapid and immediate changes of custody," and, at 224, "The similarity of PAS to *folie á deux* suggests that removal of the child from the custody of the alienating parent and immediate placement with the targeted parent may be the best intervention."). In severe instances in which the child threatens to harm himself or others, physical custody can be transferred to some interim residence such as a friend, extended family or residential or psychiatric facility, away from the alienating parent. *Warshak, supra*, at 275.
54. *Ellis, supra*, at 223-24; *Warshak, supra*, at 256; *Clawar, supra*, at 150 ("phase in" of merely some additional contact was not "especially effective" in reconciling the children with their parents but in the approximately 400 cases in which courts made severe increases of contact, often over the objections of the children, there was "positive change in 90 percent" of them); John Dunne & Marsha Hedrick, *The Parental Alienation Syndrome: An Analysis of Sixteen Selected Cases*, 21 Journal of Divorce & Remarriage 21 (1994) ("There were no cases in which a change of custody occurred but the alienation continued. In the other thirteen cases, various interventions were tried, ranging from therapy for each of the parents individually, therapy for the parents together, therapy for the children with the alienated parent, therapy for the children with the alienating parent, and the assignment of a Guardian Ad Litem to the case. In two of these cases, the children were evaluated as having experienced "some" or "minimal" improvement in their relationship with the alienated parent. In the other eleven cases, there was no improvement and in two of these cases, the alienation was evaluated as "worse" after the interventions."); *Rands & Kopetski, supra* (summarizing these and other studies and concluding, on the basis of their own study, that a "court's decision with respect to custody and visitation [was] essential for interrupting or preventing [the completion of] alienation. Therapy as the primary intervention was ineffective for interrupting alienation and sometimes made things worse. . . . Placing the child in the custody of the [target parent] was found to be the most effective means of helping children in alienation scenarios to maintain relationships with both parents.").
55. *Clawar, supra*, at 151.
56. *Ellis, Clawar, Dunne & Hedrick and Rands & Kopetski, supra* n.55.
57. *Clawar, supra*, at 131 *et seq.*
58. *Clawar, supra*, at 139.
59. *Clawar, supra*, at 140.
60. *Clawar, supra*, at 132-33.
61. *Id.* at 147.
62. *Id.*
63. *Clawar, supra*, at 152.
64. *Clawar, supra*, at 132.
65. *Id.* at 133.
66. *Clawar, supra*, at 133. Dr. Clawar describes how one child, in response to this question, replied, "I listened to my mother, who talks on the phone every night. She tells all her friends about my dad, and I know all those stories are true." *Id.*
67. *Id.* at 134.
68. *Id.* at 134-36.
69. *Clawar, supra*, at 136.
70. *Id.* at 136-38.
71. *Id.* at 138.
72. *Clawar, supra,* at 141.
73. *Id.* at 141.
74. *Id.*
75. *Id.*
76. *Id.* at 144.
77. *Id.*
78. *Id.* at 142.
79. *Id.* at 144. As stated earlier, *supra* n.55, alienation was able to be reversed in 90% of the cases.
80. *Clawar, supra*, at 153.
81. *Id.* at 144-48; *Warshak, supra*, at 251.
82. *Clawar, supra*, at 147.
83. *Id.* at 148-51.
84. *Id.* at 150.
85. *Id.*
86. *Id.* at 144.
87. *Warshak, supra*, at 256; nn. 55-57, *supra*.
88. *Warshak, supra*, at 273.
89. *Warshak, supra,* at 273.
90. *Warshak, supra*, at 274.
91. *Warshak, supra*, at 275.
92. *Id.* at 152.
93. *See* text at nn. 39-57, *supra*.
94. *Warshak, supra*, at 251.
95. *Id.*
96. *Id.* at 252.
97. *Id.* at 252; *Clawar, supra*, at 154.
98. *Young v. Young*, 212 AD2d 114, 122, 628 NYS2d 957 (2d Dept. 1995) (*quoting Bostinto v. Bostinto*, 207 AD2d 471, 472).
99. *Id.*
100. *Young, supra*, 212 AD2d at 115 (*quoting Resnick v. Resnick*, 134 AD2d 246, 247).
101. *Klutchko v. Baron*, 1 AD3d 400, 768 NYS2d 217 (2d Dept. 2003) (citations and quotations omitted).
102. *In re Grisanti v. Grisanti*, 4 AD3d 471, 772 NYS2d 700 (2d Dept. 2004).
103. *Young*, 212 AD2d at 122 (*quoting Raybin v. Raybin*, 205 AD2d 918, 921).

104. *Young*, *supra* (*citing O'Connor v. O'Connor*, 146 AD2d 909, 910; *Lohmiller v. Lohmiller*, 140 AD2d 497, 498).

105. *Young*, 212 AD2d at 115 (*quoting Maloney v. Maloney*, 208 AD2d 603, 603-04).

106. *Young*, *supra; but see John A. v. Bridget M.*, 16 AD3d 324, 791 NYS2d 421 (1st Dept. 2005) (Friedman, J., concurring) (even false allegations of sexual molestation does not invoke a "per se rule requiring the transfer of custody from the interfering parent . . . . or gives rise to a rebuttable presumption in favor of a change of custody").

107. *Young*, 212 AD2d at 115.

108. *Id.*

109. *Young*, 212 AD2d at 120.

110. *Id.*

111. *Young*, 212 AD2d at 115.

112. *See, e.g., Prugh v. Prugh*, 298 AD2d 569, 748 NYS2d 695 (2d Dept. 2002) (affirming transfer of custody to the father because of the mother's interference with the relationship between him and the children); *Fallon v. Fallon*, 4 AD3d 426, 427, 771 NYS2d 381(2d Dept. 2004) (affirming a Family Court determination that "the mother's animosity toward the father and her attempts to exclude him from his children's lives were harmful to the children and rendered her the less fit parent"); *Green v. Gordon*, 7 AD2d 528, 776 NYS2d 73 (2d Dept. 2004) (affirming transfer of custody to father because, *inter alia*, "the mother was openly hostile toward the father, deliberately frustrated and interfered with the father's visitation rights, filed petty or baseless violation petitions, made false allegations of child neglect, and instigated a physical altercation with the father's wife in front of the child"); *Bobinski v. Bobinski*, 9 AD3d 441, 780 NYS2d 185 (2d Dept. 2004) ("mother's conduct . . . in alienating the children from their father, interfering with their relationships, and disregarding the father's rights as a joint custodial parent, were acts so inconsistent with the best interests of the children" that it justified the trial court's transfer of custody to father).

113. *Renee B. v. Michael B.*, 204 AD2d 57, 611 NYS2d 831 (1st Dept. 1994).

114. 204 AD2d at 59.

115. *R.B. v. S.B.*, NYLJ 3/31/99 at 29 (Supreme Court, NY County) (Jacqueline Silbermann, J.).

116. *Zafran v. Zafran*, 191 Misc2d 60, 63-64, 740 NYS2d 596 (Supreme Court, Nassau County 2002) (Robert A. Ross, J.).

117. *Id.* 191 Misc2d at 64.

118. For a discussion of the distinction between parental alienation and parental alienation syndrome see Part One n.13, *infra*.

119. *Zafran v. Zafran*, 191 Misc2d 60, 63-64, 740 NYS2d 596 (Supreme Court, Nassau County 2002) (Robert A. Ross, J.) (*quoting* Gassman and Tippins, *Evidence in Matrimonial Cases*, at 93); *accord Matter of J.F. v. L.F.*, 181 Misc2d 722, 723, 694 NYS2d 592 (Family Court, Westchester County, 1999).

120. *Id.* 191 Misc2d at 64.

121. *Id.*

122. *Zafran v. Zafran*, NYLJ 10/21/02 at 26, col. 2 (Supreme Court, Nassau County) (Ross, J.), *aff'd*, 306 AD2d 468, 761 NYS2d 317 (2d Dept. 2003).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Zafran v. Zafran*, 306 AD2d 468, 761 NYS2d 317 (2d Dept. 2003).

127. *J.F. v. L.F.*, 181 Misc2d 722, 694 NYS2d 592 (Family Court, Westchester County 1999), *aff'd, sub nom., Faneca v. Faneca*, 270 AD2d 489, 705 NYS2d 281 (2d Dept. 2000).

128. *J.F.*, *supra*, 181 Misc2d at 723.

129. *Id.* 181 Misc2d at 725.

130. *Id.* 181 Misc2d at 728.

131. 181 Misc2d at 729 (*citing Daghir v. Daghir*, 82 AD2d 191, *aff'd*, 56 NY2d 938).

132. 181 Misc2d at 731-32.

133. 181 Misc2d at 731.

134. *Id.* 181 Misc2d at 730 (footnote omitted).

135. 181 Misc2d at 731.

136. 181 Misc2d at 730.

137. *Id.* 181 Misc2d at 732.

138. *Id.* 181 Misc2d at 732-33.

139. *Faneca v. Faneca*, 270 AD2d 489, 705 NYS2d 281 (2d Dept. 2000).

140. *Karen B. v. Clyde M.*, 151 Misc2d 794, 574 NYS2d 267 (Family Court, Fulton County 1991), *aff'd sub nom., Karen PP v. Clyde QQ*, 197 AD2d 753, 602 NYS2d 709 (3d Dept. 1993).

141. *Id.* 151 Misc2d at 801.

142. *Karen PP v. Clyde QQ*, 197 AD2d 753, 602 NYS2d 709 (3d Dept. 1993).

143. *Vernon v. Vernon*, 296 AD2d 186, 746 NYS2d 284 (1st Dept. 2002), *aff'd*, 100 NY2d 960, 768 NYS2d 719 (2003).

144. *Citing Nehra v. Uhlar*, 43 NY2d 242, 248.

145. *Vernon v. Vernon*, 296 AD2d 186, 746 NYS2d 284 (1st Dept. 2002), *aff'd*, 100 NY2d 960, 768 NYS2d 719 (2003).

146. *Walden v. Walden*, 112 AD2d 1035, 492 NYS2d 827 (2d Dept. 1985).

147. *Id.*

148. *Gago v. Acevedo*, 214 AD2d 565, 625 NYS2d 250 (2d Dept. 1995).

149. 214 AD2d at 566.

150. *K.L. v. M.L.*, 9 Misc.3d 1128(A), 2005 WL 3017654 (N.Y. Sup.), 2005 N.Y. Slip Op. 51822 (U) (Supreme Court, Suffolk County Oct. 28, 2005) (Slip copy) (Joseph Pastoressa, J.).

151. *Id.* at 4.

152. *Id.* at 6.

153. *Id.*

154. *Id.* at 7 (quotations and citations omitted).

155. *See, e.g., Galanos v. Galanos*, 28 AD3d 554, 816 NYS2d 90 (2d Dept. 2006); *Fisher v. DeFlora*, 25 AD3d 552, 806 NYS2d 438 (2d Dept. 2006).

156. *Parens Patriæ* literally means "parent of the country," and refers to the role of the state as sovereign and guardian of persons under disability. *Black's Law Dictionary* 1114 (6th ed., 1990).

157. *Perlstein v. Perlstein*, 76 AD2d 49, 57, 429 NYS2d 896 (1st Dept. 1980).

158. *In re Sayeh R.*, 91 NY2d 306, 670 NYS2d 377 (1977)*; see, e.g.*, NY Const, art XVII, § 3.

159. *Lincoln v. Lincoln*, 24 NY2d 270 (1969) (gender changed).

160. *Finlay v. Finlay*, 240 NY 429 (1925).

161. *Smith v. Smith*, 283 AD2d 1000, 723 NYS2d 804 (4th Dept. 2001) (error for judge to abdicate responsibility by claiming that the situation was hopeless and that the court could not "do miracles").

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U.S. Sponsors of Foreign Nationals Beware!

By Catharine M. Venzon and William Z. Reich

If you think that New York State Supreme and Family Courts are the only avenues to sue for spousal support, think again. A foreign national spouse may be eligible for support from a sponsor and can sue to enforce that support through federal court. Thus, a caution to U.S. sponsors that by signing Form I-864, you are agreeing "to provide the sponsored immigrant(s) whatever support is necessary to maintain the sponsored immigrant(s) at an income that is at least 125 percent of the Federal poverty guidelines." (See Affidavit of Support Form I-864 at 4.)

"Foreign nationals, don't be fooled! A sponsor is required to support your annual income equal to 125% of the federal poverty line even after divorce."

This form, which appears on pp. 23-28 in this issue, is most commonly used for family-sponsored immigrants seeking admission to the United States or adjustment of their immigration status as a lawful permanent resident. Form I-864 is required as an affidavit of support filed by a U.S. citizen on behalf of an immigrant to establish that the immigrant is not excludable from the U.S. as a public charge. The Immigration and Naturalization Act (INA) requires that this affidavit of support be enforceable as a contract. 8 U.S.C. § 1183a(a)(1). Additionally, several federal courts have "consistently found that Form I-864 constitutes a legally binding and enforceable contract between a sponsored immigrant and the sponsor executing the form." *Cheshire v. Cheshire*, 2006 U.S. Dist. LEXIS 26602 at *9 (M.D. Fl. May 4, 2006). Government agencies *as well as the sponsored immigrant* have standing to sue the sponsor for enforcement of the affidavit and support for the alien. By signing Form I-864, the sponsor "acknowledge[s] that section 213A(a)(1)(B) of the INA grants the sponsored immigrant(s) . . . standing to sue . . . for failing to meet . . . obligations under this affidavit of support." (See Form I-864 at 6.)

A sponsor's obligation to support the sponsored foreign national continues until the obligation expires by law. *Cheshire*, 2006 U.S. Dist. LEXIS 26602 at *19. For U.S. citizens who sponsor their spouse, the obligation to support does not end upon separation or divorce. There are only five circumstances that terminate the financial obligations of an affidavit of support: 1) the sponsor's death; 2) the sponsored alien's death; 3) the sponsored alien becomes a U.S. citizen; 4) the sponsored alien permanently leaves the U.S.; or 5) the sponsored alien obtains 40 qualifying quarters of work. 8 U.S.C. § 1183a(a)(2), (3). Therefore, divorce *does not* invalidate the contract or its enforceability. Foreign nationals, don't be fooled! A sponsor is required to support your annual income equal to 125% of the federal poverty line *even after divorce*. If you are not receiving your support, you have the right to sue for enforcement of the affidavit of support in federal court and to receive your full entitlement to support, even back support. You also do not have to be receiving public benefits or be a permanent resident alien to sue for enforcement of the affidavit of support. *Stump*, 2005 U.S. Dist. LEXIS 26022 at *3-5.

However, if you thought you could just sit back and collect support in the amount of 125% of the poverty line, think again. The Affidavit of Support only requires the sponsor to provide whatever support is necessary to maintain the sponsored immigrants' annual income at a level of at least 125% of the federal poverty guidelines. The statute "does not say a sponsored immigrant is entitled to a lifetime of payments in the amount of 125 percent of the poverty level. It simply ensures that an immigrant will have access to support that is at least that much. That means that sponsors are only required to pay support if the sponsored immigrant has an annual income of *less* than 125% of the poverty line. Any income a sponsored immigrant makes is deducted from the amount that the sponsor is required to pay in support. In addition, one court has indicated that once a sponsored immigrant has sufficient assets, earnings or earning capability of at least 125 percent of the federal poverty level, she would not be entitled to continuing payments from the sponsor. *Ainsworth*, 2004 U.S. Dist. LEXIS 28962 at *5. It is not clear whether the court meant that the sponsored immigrant would not be entitled to support payments for that year (which is consistent with other case law) or that acquiring such assets and income would actually terminate the support obligations under the Affidavit of Support.

However, a sponsored immigrant "is not precluded from enforcing an Affidavit of Support if she has not attained employment or otherwise sought to support herself." *Stump v. Stump*, 2005 U.S. Dist. LEXIS 26022 at *19 (N.D. Ind. Oct. 25, 2005). Rather, such information will be considered in calculating the amount of damages to be awarded to the sponsored immigrant. While courts have not specifically required sponsored immigrants to mitigate their damages and show that they have been actively working or seeking employment in order to collect support from their sponsor, the court in *Stump* held that "the duty to mitigate, or avoid, damages is a basic tenet

of contract law." *Stump*, 2005 U.S. Dist. LEXIS 26022 at *20. The court further held that as long as the sponsored immigrant could show that reasonable efforts had been made to obtain employment and be self-sufficient, the sponsored immigrant would be able to collect support from their sponsor. In another recent federal court decision, the court noted that there was no requirement that the sponsored immigrant continue to work. *Cheshire*, 2006 U.S. Dist. LEXIS 26602 at *20, footnote 12. By contrast, the court in *Ainsworth v. Ainsworth* held that "[i]f the sponsored immigrant is earning, or is capable of earning, that amount or more, there obviously is no need for continued support."

"U.S. sponsors of foreign nationals beware of what you are agreeing to when signing a Form I-864. And foreign nationals, be sure that you know your rights associated with being financially supported by your sponsor."

The federal poverty guidelines are based on household size. Therefore, the amount of support for a sponsored immigrant will differ depending on whether the foreign national is married to the sponsor or divorced. The court in *Stump* held that the appropriate household size for an alien who is no longer married to and living with the sponsor is one person, and that such a sponsored immigrant would not be entitled to 125% of the poverty level for the original household size. 2005 U.S. Dist. LEXIS 26022 at *15-16. This amount may be significantly less than the original amount of support that the alien was receiving while married to the sponsor. In addition, because the federal poverty line is subject to change annually, the amount of the sponsor's financial obligation will also change annually.

In addition, a foreign national that is divorced from her sponsor is not required to seek maintenance in connection with the divorce in order to enforce the Affidavit of Support or to collect the full amount. *Stump*, 2005 U.S. Dist. LEXIS 26022 at *20.

U.S. sponsors of foreign nationals beware of what you are agreeing to when signing a Form I-864. And foreign nationals, be sure that you know your rights associated with being financially supported by your sponsor. You may be entitled to more than you might think.

Catharine M. Venzon, President of the Western New York Matrimonial Trial Lawyers Association, has been practicing family law in Buffalo, New York, for over 23 years. Ms. Venzon is the founder and partner of Venzon Law Firm, P.C., which provides a full range of matrimonial and family law legal services. Ms. Venzon has published articles and handled many matrimonial matters involving foreign nationals.

William Z. Reich, named in ***Best Lawyers in America*** is recognized as an exceptional lawyer by his clients and colleagues. Founder and senior partner of the Buffalo, New York, immigration law firm of Serotte Reich Wilson, LLP, Mr. Reich has extensive expertise in handling family and employment immigration issues pertaining to foreign nationals.

OMB No. 1115-0214

U.S. Department of Justice
Immigration and Naturalization Service

Affidavit of Support Under Section 213A of the Act

START HERE - Please Type or Print

Part 1. Information on Sponsor (You)

Last Name	First Name	Middle Name	
Mailing Address *(Street Number and Name)*		Apt/Suite Number	
City		State or Province	
Country		ZIP/Postal Code	Telephone Number

Place of Residence if different from above *(Street Number and Name)*		Apt/Suite Number	
City		State or Province	
Country	ZIP/Postal Code	Telephone Number	
Date of Birth *(Month, Day, Year)*	Place of Birth *(City, State, Country)*	Are you a U.S. Citizen? ☐ Yes ☐ No	
Social Security Number	A-Number *(If any)*		

FOR AGENCY USE ONLY

This Affidavit
[ ] Meets
[ ] Does not meet
Requirements of Section 213A

Officer or I.J. Signature

Location

Date

Receipt

Part 2. Basis for Filing Affidavit of Support

I am filing this affidavit of support because *(check one)*:

a. ☐ I filed/am filing the alien relative petition.

b. ☐ I filed/am filing an alien worker petition on behalf of the intending immigrant, who is related to me as my _____ *(relationship)*

c. ☐ I have ownership interest of at least 5% _____ *(name of entity which filed visa petition)* which filed an alien worker petition on behalf of the intending immigrant, who is related to me as my _____ *(relationship)*

d. ☐ I am a joint sponsor willing to accept the legal obligations with any other sponsor(s).

Part 3. Information on the Immigrant(s) You Are Sponsoring

Last Name	First Name	Middle Name	
Date of Birth *(Month,Day, Year)*	Sex ☐ Male ☐ Female	Social Security Number *(If any)*	
Country of Citizenship		A-Number *(If any)*	
Current Address *(Street Number and Name)*		Apt/Suite Number	City
State/Province	Country	ZIP/Postal Code	Telephone Number

List any spouse and/or children immigrating with the immigrant named above in this Part: *(Use additional sheet of paper if necessary.)*

Name	Relationship to Sponsored Immigrant			Date of Birth			A-Number *(If any)*	Social Security *(If any)*
	Spouse	Son	Daughter	Mo.	Day	Yr.		

Form I-864 (Rev. 11/05/01)Y

ScriptObject

Part 4. Eligibility to Sponsor

To be a sponsor you must be a U.S. citizen or national or a lawful permanent resident. If you are not the petitioning relative, you must provide proof of status. To prove status, U.S. citizens or nationals must attach a copy of a document proving status, such as a U.S. passport, birth certificate, or certificate of naturalization, and lawful permanent residents must attach a copy of both sides of their Permanent Resident Card (Form I-551).

The determination of your eligibility to sponsor an immigrant will be based on an evaluation of your demonstrated ability to maintain an annual income at or above 125 percent of the Federal poverty line (100 percent if you are a petitioner sponsoring your spouse or child and you are on active duty in the U.S. Armed Forces). The assessment of your ability to maintain an adequate income will include your current employment, household size, and household income as shown on the Federal income tax returns for the 3 most recent tax years. Assets that are readily converted to cash and that can be made available for the support of sponsored immigrants if necessary, including any such assets of the immigrant(s) you are sponsoring, may also be considered.

The greatest weight in determining eligibility will be placed on current employment and household income. If a petitioner is unable to demonstrate ability to meet the stated income and asset requirements, a joint sponsor who *can* meet the income and asset requirements is needed. Failure to provide adequate evidence of income and/or assets or an affidavit of support completed by a joint sponsor will result in denial of the immigrant's application for an immigrant visa or adjustment to permanent resident status.

A. Sponsor's Employment

I am: 1. ☐ Employed by _____ *(Provide evidence of employment)*

Annual salary _____ or hourly wage $ _____ *(for _____ hours per week)*

2. ☐ Self employed _____ *(Name of business)*

Nature of employment or business _____

3. ☐ Unemployed or retired since _____

B. Sponsor's Household Size

	Number
1. Number of persons (related to you by birth, marriage, or adoption) living in your residence, including yourself *(Do NOT include persons being sponsored in this affidavit.)*	_____
2. Number of immigrants being sponsored in this affidavit *(Include all persons in Part 3.)*	_____
3. Number of immigrants **NOT** living in your household whom you are obligated to support under a previously signed Form I-864.	_____
4. Number of persons who are otherwise dependent on you, as claimed in your tax return for the most recent tax year.	_____
5. Total household size. ***(Add lines 1 through 4.)*** **Total**	_____

List persons below who are included in lines 1 or 3 for whom you previously have submitted INS Form I-864, *if your support obligation has not terminated.*

(If additional space is needed, use additional paper)

Name	A-Number	Date Affidavit of Support Signed	Relationship

Part 4. Eligibility to Sponsor ***(Continued)***

C. Sponsor's Annual Household Income

Enter total unadjusted income from your Federal income tax return for the most recent tax year below. If you last filed a joint income tax return but are using only your *own* income to qualify, list total earnings from your W-2 Forms, or, *if* necessary to reach the required income for your household size, include income from other sources listed on your tax return. If your *individual* income does not meet the income requirement for your household size, you may also list total income for anyone related to you by birth, marriage, or adoption currently living with you in your residence if they have lived in your residence for the previous 6 months, or any person shown as a dependent on your Federal income tax return for the most recent tax year, even if not living in the household. For their income to be considered, household members or dependents must be willing to make their income available for support of the sponsored immigrant(s) and to complete and sign Form I-864A, Contract Between Sponsor and Household Member. A sponsored immigrant/household member only need complete Form I-864A if his or her income will be used to determine your ability to support a spouse and/or children immigrating with him or her.

You must attach evidence of current employment and copies of income tax returns as filed with the IRS for the most recent 3 tax years for yourself and all persons whose income is listed below. See "Required Evidence " in Instructions. Income from all 3 years will be considered in determining your ability to support the immigrant(s) you are sponsoring.

☐ I filed a single/separate tax return for the most recent tax year.
☐ I filed a joint return for the most recent tax year which includes only my own income.
☐ I filed a joint return for the most recent tax year which includes income for my spouse and myself.
  ☐ I am submitting documentation of my individual income (Forms W-2 and 1099).
  ☐ I am qualifying using my spouse's income; my spouse is submitting a Form I-864A.

Indicate most recent tax year	_____ *(tax year)*
Sponsor's individual income	$ _____
or	
Sponsor and spouse's combined income *(If spouse's income is to be considered, spouse must submit Form I-864A.)*	$ _____
Income of other qualifying persons. *(List names; include spouse if applicable. Each person must complete Form I-864A.)*	
_____	$ _____
_____	$ _____
_____	$ _____
Total Household Income	$ _____

Explain on separate sheet of paper if you or any of the above listed individuals were not required to file Federal income tax returns for the most recent 3 years, or if other explanation of income, employment, or evidence is necessary.

D. Determination of Eligibility Based on Income

1. ☐ I am subject to the 125 percent of poverty line requirement for sponsors.
   ☐ I am subject to the 100 percent of poverty line requirement for sponsors on active duty in the U.S. Armed Forces sponsoring their spouse or child.
2. Sponsor's total household size, from Part 4.B., line 5 _____.
3. Minimum income requirement from the Poverty Guidelines chart for the year of _____ *(year)* is $ _____ for this household size.

If you are currently employed and your household income for your household size is equal to or greater than the applicable poverty line requirement (from line D.3.), you do not need to list assets (Parts 4.E. and 5) or have a joint sponsor (Part 6) unless you are requested to do so by a Consular or Immigration Officer. You may skip to Part 7, Use of the Affidavit of Support to Overcome Public Charge Ground of Admissibility. **Otherwise, you should continue with Part 4.E.**

Part 4. Eligibility to Sponsor *(Continued)*

E. Sponsor's Assets and Liabilities

Your assets and those of your qualifying household members and dependents may be used to demonstrate ability to maintain an income at or above 125 percent (or 100 percent, if applicable) of the poverty line *if* they are available for the support of the sponsored immigrant(s) and can readily be converted into cash within 1 year. The household member, other than the immigrant(s) you are sponsoring, must complete and sign Form I-864A, Contract Between Sponsor and Household Member. List the cash value of each asset *after* any debts or liens are subtracted. Supporting evidence must be attached to establish location, ownership, date of acquisition, and value of each asset listed, including any liens and liabilities related to each asset listed. See "Evidence of Assets" in Instructions.

Type of Asset	**Cash Value of Assets** *(Subtract any debts)*
Savings deposits	$
Stocks, bonds, certificates of deposit	$
Life insurance cash value	$
Real estate	$
Other *(specify)*	$
Total Cash Value of Assets	$ _____

Part 5. Immigrant's Assets and Offsetting Liabilities

The sponsored immigrant's assets may also be used in support of your ability to maintain income at or above 125 percent of the poverty line *if* the assets are or will be available in the United States for the support of the sponsored immigrant(s) and can readily be converted into cash within 1 year.

The sponsored immigrant should provide information on his or her assets in a format similar to part 4.E. above. Supporting evidence must be attached to establish location, ownership, and value of each asset listed, including any liens and liabilities for each asset listed. See "Evidence of Assets" in Instructions.

Part 6. Joint Sponsors

If household income and assets do not meet the appropriate poverty line for your household size, a joint sponsor is required. There may be more than one joint sponsor, but each joint sponsor must individually meet the 125 percent of poverty line requirement based on his or her household income and/or assets, including any assets of the sponsored immigrant. By submitting a separate Affidavit of Support under Section 213A of the Act (Form I-864), a joint sponsor accepts joint responsibility with the petitioner for the sponsored immigrant(s) until they become U.S. citizens, can be credited with 40 quarters of work, leave the United States permanently, or die.

Part 7. Use of the Affidavit of Support to Overcome Public Charge Ground of Inadmissibility

Section 212(a)(4)(C) of the Immigration and Nationality Act provides that an alien seeking permanent residence as an immediate relative (including an orphan), as a family-sponsored immigrant, or as an alien who will accompany or follow to join another alien is considered to be likely to become a public charge and is inadmissible to the United States unless a sponsor submits a legally enforceable affidavit of support on behalf of the alien. Section 212(a)(4)(D) imposes the same requirement on an employment-based immigrant, and those aliens who accompany or follow to join the employment- based immigrant, if the employment-based immigrant will be employed by a relative, or by a firm in which a relative owns a significant interest. Separate affidavits of support are required for family members at the time they immigrate if they are not included on this affidavit of support or do not apply for an immigrant visa or adjustment of status within 6 months of the date this affidavit of support is originally signed. The sponsor must provide the sponsored immigrant(s) whatever support is necessary to maintain them at an income that is at least 125 percent of the Federal poverty guidelines.

I submit this affidavit of support in consideration of the sponsored immigrant(s) not being found inadmissible to the United States under section 212(a)(4)(C) (or 212(a)(4)(D) for an employment-based immigrant) and to enable the sponsored immigrant(s) to overcome this ground of inadmissibility. I agree to provide the sponsored immigrant(s) whatever support is necessary to maintain the sponsored immigrant(s) at an income that is at least 125 percent of the Federal poverty guidelines. I understand that my obligation will continue until my death or the sponsored immigrant(s) have become U.S. citizens, can be credited with 40 quarters of work, depart the United States permanently, or die.

Part 7. Use of the Affidavit of Support to Overcome Public Charge Grounds ***(Continued)***

Notice of Change of Address.

Sponsors are required to provide written notice of any change of address within 30 days of the change in address until the sponsored immigrant(s) have become U.S. citizens, can be credited with 40 quarters of work, depart the United States permanently, or die. To comply with this requirement, the sponsor must complete INS Form I-865. Failure to give this notice may subject the sponsor to the civil penalty established under section 213A(d)(2) which ranges from $250 to $2,000, unless the failure to report occurred with the knowledge that the sponsored immigrant(s) had received means-tested public benefits, in which case the penalty ranges from $2,000 to $5,000.

If my address changes for any reason before my obligations under this affidavit of support terminate, I will complete and file INS Form I-865, Sponsor's Notice of Change of Address, within 30 days of the change of address. I understand that failure to give this notice may subject me to civil penalties.

Means-tested Public Benefit Prohibitions and Exceptions.

Under section 403(a) of Public Law 104-193 (Welfare Reform Act), aliens lawfully admitted for permanent residence in the United States, with certain exceptions, are ineligible for most Federally-funded means-tested public benefits during their first 5 years in the United States. This provision does not apply to public benefits specified in section 403(c) of the Welfare Reform Act or to State public benefits, including emergency Medicaid; short-term, non-cash emergency relief; services provided under the National School Lunch and Child Nutrition Acts; immunizations and testing and treatment for communicable diseases; student assistance under the Higher Education Act and the Public Health Service Act; certain forms of foster-care or adoption assistance under the Social Security Act; Head Start programs; means-tested programs under the Elementary and Secondary Education Act; and Job Training Partnership Act programs.

Consideration of Sponsor's Income in Determining Eligibility for Benefits.

If a permanent resident alien is no longer statutorily barred from a Federally-funded means-tested public benefit program and applies for such a benefit, the income and resources of the sponsor and the sponsor's spouse will be considered (or deemed) to be the income and resources of the sponsored immigrant in determining the immigrant's eligibility for Federal means-tested public benefits. Any State or local government may also choose to consider (or deem) the income and resources of the sponsor and the sponsor's spouse to be the income and resources of the immigrant for the purposes of determining eligibility for their means-tested public benefits. The attribution of the income and resources of the sponsor and the sponsor's spouse to the immigrant will continue until the immigrant becomes a U.S. citizen or has worked or can be credited with 40 qualifying quarters of work, provided that the immigrant or the worker crediting the quarters to the immigrant has not received any Federal means-tested public benefit during any creditable quarter for any period after December 31, 1996.

I understand that, under section 213A of the Immigration and Nationality Act (the Act), as amended, this affidavit of support constitutes a contract between me and the U.S. Government. This contract is designed to protect the United States Government, and State and local government agencies or private entities that provide means-tested public benefits, from having to pay benefits to or on behalf of the sponsored immigrant(s), for as long as I am obligated to support them under this affidavit of support. I understand that the sponsored immigrants, or any Federal, State, local, or private entity that pays any means-tested benefit to or on behalf of the sponsored immigrant(s), are entitled to sue me if I fail to meet my obligations under this affidavit of support, as defined by section 213A and INS regulations.

Civil Action to Enforce.

If the immigrant on whose behalf this affidavit of support is executed receives any Federal, State, or local means-tested public benefit before this obligation terminates, the Federal, State, or local agency or private entity may request reimbursement from the sponsor who signed this affidavit. If the sponsor fails to honor the request for reimbursement, the agency may sue the sponsor in any U.S. District Court or any State court with jurisdiction of civil actions for breach of contract. INS will provide names, addresses, and Social Security account numbers of sponsors to benefit-providing agencies for this purpose. Sponsors may also be liable for paying the costs of collection, including legal fees.

Part 7. Use of the Affidavit of Support to Overcome Public Charge Grounds *(Continued)*

I acknowledge that section 213A(a)(1)(B) of the Act grants the sponsored immigrant(s) and any Federal, State, local, or private agency that pays any means-tested public benefit to or on behalf of the sponsored immigrant(s) standing to sue me for failing to meet my obligations under this affidavit of support. I agree to submit to the personal jurisdiction of any court of the United States or of any State, territory, or possession of the United States if the court has subject matter jurisdiction of a civil lawsuit to enforce this affidavit of support. I agree that no lawsuit to enforce this affidavit of support shall be barred by any statute of limitations that might otherwise apply, so long as the plaintiff initiates the civil lawsuit no later than ten (10) years after the date on which a sponsored immigrant last received any means-tested public benefits.

Collection of Judgment.

I acknowledge that a plaintiff may seek specific performance of my support obligation. Furthermore, any money judgment against me based on this affidavit of support may be collected through the use of a judgment lien under 28 U.S.C 3201, a writ of execution under 28 U.S.C 3203, a judicial installment payment order under 28 U.S.C 3204, garnishment under 28 U.S.C 3205, or through the use of any corresponding remedy under State law. I may also be held liable for costs of collection, including attorney fees.

Concluding Provisions.

I, _____, certify under penalty of perjury under the laws of the United States that:

(a) I know the contents of this affidavit of support signed by me;

(b) All the statements in this affidavit of support are true and correct,

(c) I make this affidavit of support for the consideration stated in Part 7, freely, and without any mental reservation or purpose of evasion;

(d) Income tax returns submitted in support of this affidavit are true copies of the returns filed with the Internal Revenue Service; and

(e) Any other evidence submitted is true and correct.

_____ _____

(Sponsor's Signature) *(Date)*

Subscribed and sworn to (or affirmed) before me this

_____ day of _____, _____

(Month) *(Year)*

at _____.

My commission expires on _____.

_____

(Signature of Notary Public or Officer Administering Oath)

_____

(Title)

Part 8. If someone other than the sponsor prepared this affidavit of support, that person must complete the following:

I certify under penalty of perjury under the laws of the United States that I prepared this affidavit of support at the sponsor's request, and that this affidavit of support is based on all information of which I have knowledge.

Signature	Print Your Name	Date	Daytime Telephone Number

Firm Name and Address

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Selected Case

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

(Vol.) Fam. Law Rev. (page), (date, e.g., Fall 2006) 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.

Renee C. v. Vincent C., Jr., Supreme Court, New York County (Drager, Laura E., August 7, 2006)

Decision and Order After Trial

In this matrimonial action, the parties previously agreed to joint legal custody with residential custody of the children of the marriage to plaintiff (the "Wife"). In addition, on July 5, 2005, the wife was granted the divorce on the grounds of abandonment without opposition by the defendant (the "Husband"). Remaining in issue are distribution of the property of the marriage, maintenance, child support and attorney fees. A trial was conducted on July 5, 7, 11, 12; September 8, 19, and 20, 2005. The parties were given the opportunity to submit post-trial briefs, including a written submission with respect to the issue of attorney fees (as agreed by the parties) by November 18, 2005 and reply briefs were submitted on December 7, 2005.

The parties married on April 24, 1987. They separated in April of 2002. The husband commenced a divorce action in Nassau County in March of 2002, which he discontinued in April of 2003. The wife commenced this New York county action on March 13, 2003.

The parties are each 45 years old. They have two daughters, ages 16 and 12. The parties always lived on Long Island and the marital residence is located in Massapequa, New York (the "Marital Residence"). The children attend public school. After the separation, the husband moved to Manhattan, while the wife and children continued to reside in the marital residence.

Both parties graduated from high school. Neither attended college. They each found jobs with Wall Street firms, where they met. The wife worked as a phone clerk taking buy and sell orders from clients. She worked for the first three years of the marriage, until she gave birth to the parties' first child in 1990. Since then, she has stayed at home to care for the children and household. Recently, she made some inquiries to become a fitness trainer.

The husband worked initially as a clerk, and then as a floor broker. He became a floor broker prior to the marriage. In 1991 he began to work for a member firm of the New York Stock Exchange (the "NYSE") known as Lombardi Aprilante, which later became Lombardi & Company (the "Company"), his present employer. This company, through its owner Bruce Lombardi, owns two seats on the NYSE and leases three other seats, enabling the company to have a total of five members on the floor of the NYSE. The company is a floor broker firm that executes securities transactions on the floor of the NYSE for retail brokerage firms and other institutional clients. During the course of the marriage, the husband became a member of the New York Stock Exchange and acquired his Series 7, 12 and 63 licenses. The various licenses are required by the NYSE for an individual to perform certain functions. The series 7 license is required of individuals who accept orders from non-member customers.[1] The series 63 license (the Blue Sky license) enables an individual to solicit orders for any type of security in a particular state. The series 12 license enabled the husband to become the branch manager of his company. To obtain these licenses, the husband studied approximately five hours for each test. He did not attend any classes; rather, he studied from books at home.

The husband was one of the floor brokers of the company. However, he testified that he now works as the supervisor of the company, reporting directly to its owner. Although the company is still owned 100% by Bruce Lombardi and there was no evidence that the husband enjoys any ownership interest in the business, the evidence revealed that, to a large extent, the husband runs the company. He has unfettered discretion to write checks for the company and to determine each broker's pay, including his own. His supervision extends over the work of the adult children of Bruce Lombardi who are employed by the company. The husband also approves his own expense reimbursements. He claims that, unlike in the past, as a result of his supervisory functions, he has little involvement in the trading transactions of the company's clients.

During the marriage, the parties enjoyed a very comfortable lifestyle. They acquired significant savings and, with the exception of the mortgage on the marital residence, no debt. They frequently dined out, regularly purchased luxury cars, entertained others, and enjoyed vacations several times a year.

The husband achieved a high income during the marriage reflected as follows:

Year	Base Wages	Bonus	Total
1999	$187,000.00	$524,745.36	$711,745.36
2000	$187,000.00	$1,114,134.12	$1,301,134.12
2001	$240,000.00	$774,500.00	$1,014,500.00
2002	$240,000.00	$820,000.00	$1,060,000.00

Subsequent to the commencement of this action, the husband claimed his income dropped in 2003 to only $420,000, consisting of a base salary of $240,000 and a bonus of only $180,000.

He claims that his income decreased again in 2004 to a total of only $265,000.

Notwithstanding this decrease in income, the husband purchased a condominium (the "Massapequa Park Condominium") in October 2003. In August 2004 he purchased a time share with his girlfriend and enjoyed a vacation with her in Mexico in April 2005. He was able to meet the expenses for the marital residence, the new condominium and his living expenses in Manhattan without accumulating any debt.

The Marital Assets and Valuations

From the evidence presented, the court determines the following assets constitute marital property:

The parties agree that the marital residence is marital property. Its appraised value is $750,000. Subtracting the outstanding mortgage of $156,000, the net value of this asset is $594,000. The parties also agree, as indicated in their updated net worth statements, that the furnishings in the marital residence are marital property valued at $100,000.[2]

During the marriage, the husband loaned $250,000 to the company, evidenced by a promissory note dated April 1, 2001 (Ex. F). The note paid interest at 10% per annum on or before the anniversary date on the note. The husband testified that he received $25,000 each year as interest and that this amount was reported on his tax return. The note was redeemed by the husband in 2005. The court finds that the proceeds of the loan in the amount of $250,000 returned in 2005 to the husband constitutes marital property. The court excludes the interest income received from consideration as marital property. There is no evidence to contradict the husband's assertion that this interest income was expended for normal living expenses.

During the marriage, the parties opened a joint Fidelity Account, #...851. The account was opened on January 6, 2000 with a deposit of $225,000. Deposits and withdrawals were made against this account. As of May 31, 2003, the value of this account was $112.40. (Ex. 30). This amount is marital property.

On March 20, 2002, the husband opened an individual Fidelity Account, #...519. As of May 31, 2003, the value of this account was $628,0852.54. (Ex. 30). The evidence revealed that this account was funded with martial property derived, primarily from the joint Fidelity Account, #...851 (the husband deposited checks into this individual account from the joint account in the total amount of $621,089.08). To the extent any additional funds were deposited, funds were also marital. Thus, the funds in this account constitute marital property. The husband then used funds from this account to purchase the Massapequa Park condominium. There is no mortgage on that property. The purchase price of the Massapequa Park condominium was $460,000 (the parties agree that this is the value of this asset). Although obtained after the commencement date of this action, the court is satisfied from the evidence presented during trial that the husband used marital funds to purchase this asset. Thus, the value of the Massapequa Park condominium is marital property and is valued at $460,000. In addition, the money remaining in the husband's Fidelity Account, #...519 in the amount of $165,708.59 (derived from the husband's net worth statement) constitutes marital property.[3]

The husband's net worth statement revealed he had funds in two Fleet checking accounts (# ...1055 and # ...9608) totaling $48,323.43. These funds are marital and subject to distribution.[4]

UTMA accounts exist in the name of each daughter: the account for the older daughter holds $2,748.66 and the account for the younger daughter holds $1,976.66 (Ex. 30). These funds are marital property.

The wife has a Charles Schwab IRA Rollover account, #...108 with an account value of $125,081.74 as of May 31, 2005 (Ex. 31). Although they disagree as to the value of this account, both parties agree that this fund is marital property. The court accepts the value, set forth above, derived from the account statement closest to the trial date for this passive asset.

During the marriage, the husband opened a traditional Fidelity IRA account. The parties agree that this account is valued at $286,357 and is marital property.

During the marriage the husband acquired a Fidelity Profit Sharing Account, #... 375. Both parties agree that this fund contains marital property. The husband failed to offer any evidence to suggest that this is an active asset. The value of this fund as of May 31, 2004 was $253,863.90 (Ex. 30) as determined by the court appointed neutral appraiser. Accordingly, the court determines this is the value subject to distribution

The husband has two life insurance policies. The parties agree that the cash surrender value of these policies is marital property. The evidence offered at trial revealed that the cash surrender value for the Guardian Life Insurance policy is $35,901.37 (Ex. 41) and for the Northwestern Life Insurance is $39,889.79 (Ex. 42). The court determines that these are the values subject to distribution.

The wife argues that the enhanced earning capacity of the husband's career is subject to valuation and distribution. *O'Brien v. O'Brien,* 66 NY2d 576 (1985); *Hougie v. Hougie,* 261 AD2d 161 (1st Dept. 1999). She notes that the husband acquired several licenses and became a member of the NYSE during his career, without which he would not have been able to perform his job. Her role as a housewife and her care of the children constituted her contribution to the attainment of this earning capacity. She contends, in reliance on the testimony of the neutral forensic accountant, that the value of the husband's enhanced earning capacity is $826,000.

The husband counters that the exams he took during the marriage did not result in licenses comparable to an MBA degree or the licenses acquired by a doctor or lawyer after years of study. The series 7, 12 and 63 licenses he acquired required a minimal amount of home study. Moreover, the licenses he obtained resulted merely in his ability to perform the ministerial functions required by exchange markets. He contends that his increased earnings are the result of a natural career progression derived from his own innate abilities.

In addition, the husband argues that it is impossible to place a value on any enhanced earning capacity derived from his career in light of the changes occurring in the operation of stock exchanges. He contends that as a result of technological advances and other market forces, the role of the floor trader is becoming obsolete or greatly reduced. He believes he will never again enjoy the earnings he received prior to 2003.

From all of the evidence presented, the court concludes that there is no enhanced earning capacity asset derived from the husband's career subject to distribution. Moreover, even if the court were to find that an enhanced earning capacity existed, the evidence failed to reveal an accurate valuation of that asset.[5]

As the forensic accountant noted, the determination of the value of an enhanced earning capacity begins with the difference between the enhanced earnings based on the individual's education and training achieved during the marriage (the "topline earnings") as compared to the earnings he would have achieved absent such education and training (the "baseline earnings"). Here, the husband was already a floor broker prior to the marriage. During the marriage he became a member of the NYSE and acquired the Series 7, 12, and 63 licenses. The neutral forensic accountant opined that these attainments enabled him to continue working as a floor broker and become a branch manager, but there is no evidence that the husband's attainment of these licenses or the NYSE membership did anything to increase his ability to perform his job. Indeed, based on the uncontradicted evidence, it appears that most of the knowledge necessary to enable the husband to pass these exams was derived from his work experience (acquired both before and during the marriage), rather than from the minimal amount of studying he did in anticipation of the exams. Moreover, neither the neutral expert's analysis, nor any other evidence, distinguished between the husband's work as a floor manager from his work as a branch manager or supervisor.

Equally troubling is how the neutral forensic accountant arrived at the numbers to be used as the husband's baseline and topline earnings. It appears that the baseline earnings was derived from the trend of the husband's earnings leading up to the date of marriage as well as a statistical analysis of floor brokers' earnings as of the valuation date. The accountant, however, did not provide the source of that statistical analysis. Moreover, the accountant also noted that he considered that non-licensed employees working for the company receive base salaries of $150,000, but did not indicate if these employees do work comparable to the work performed by floor brokers. (Ex. 34, p. 7). It then appears that the amount the neutral forensic accountant attributed to the husband's topline earnings was derived solely from the husband's present base salary. Although some of this increase in salary may be due to the licenses attained by the husband during the marriage, some of this amount would also reasonably be attributed to his years of service (including his work from before the marriage) and the regard in which his boss held him. At a minimum, a comparative statistical analysis of floor broker or branch supervisor salaries in the industry might have confirmed if the topline earnings were in line with other individuals who had obtained similar licenses.

In addition to the difficulty in establishing baseline and topline numbers, the accountant had difficulty in determining the extent to which industry risk should be considered. Ultimately, the witness applied all of the risk factors to the bonus and used only the husband's bonus received in 2003 for calculation purposes. Although the court understands how the accountant reached these conclusions, the results are too speculative to satisfy this court that the resulting number reflects a meaningful valuation. "Courts recognize that valuing an intangible asset may be difficult, but there must be some standards by which a valuation occurs." *J. C. v. S. C.*, 10/31/2003 NYLJ 20, (col. 1).

The court recognizes, however, that the husband is leaving this marriage with an intact career, while the wife will receive no asset derived from the progression of the husband's career. "Fortunately, the court has great latitude to address this issue, in equity, with the division of the existing marital assets and the award of maintenance [DRL §§ 236 (B) (5) (d) (13); 236 (B) (6) (a) (11)]." *J.C. v. S.C., supra.*

Analysis

Marital property must be distributed equitably upon consideration of the circumstances of the case and the

respective parties. DRL § 236 (B) (5) (c). This court has considered each of the factors set forth in DRL § 236 (B) (5) (d) to the extent applicable in reaching its decision. In addition, the court may award maintenance where justice requires, having regard for the standard of living established during the marriage, the lack of sufficient income and property to provide for the reasonable needs of the recipient, and the ability to pay by the other party, as well as the circumstances of the case and the respective parties. DRL § 236 (B) (6) (a). This court has considered each of the factors set forth in DRL §236 (B) (6) (a) to the extent applicable in reaching its findings.

The parties were married for sixteen years (they were separated a year before this action began). They are each in their mid-forties and in good health. DRL §§ 236 (B) (5) (d) (2); 236 (B) (6) (a) (2). They lived a traditional lifestyle. The husband worked outside the home providing for all of the families' financial needs. Although the wife worked outside of the home at the beginning of the marriage, she became a homemaker with the birth of the parties' first child. She bore primary responsibility in maintaining the home life needs and tending to the children. She cleaned the house, did laundry and shopped for food and clothing. She also managed all of the children's daily needs. She also supervised the work done to renovate the marital home, although the husband was also involved in those endeavors.

At the time of the marriage, neither party had many assets or income. Fortunately, during the marriage they accumulated significant assets. Each party attained a high school degree, but neither party attended college. The husband's career has progressed to the point that he earns an excellent income. Although there have been fluctuations in his career resulting from changes in his industry, even in the more recent years when he claims his income decreased due to changes in the industry, he still commanded an income in excess of $250,000. Although the husband claims the recent decline in his income results from technological advances and that he will never earn the kinds of bonuses he received from 1999 to 2002, it could also be that the decline in his recent bonuses were merely the result of the downturn in the market for the years 2003 and 2004. Moreover, the evidence revealed that the husband plays a critical role in the determination of the amount of his own bonus and that the years he received no bonus or a very small bonus coincided with the two divorce actions between these parties. Most significant, notwithstanding the husband's claim that his particular niche in the industry is in decline, he has not sought new employment opportunities, nor has he limited his spending or gone into debt. Thus, the court concludes that the husband will have future good earnings.

On the other hand, the wife is unlikely to ever achieve comparable earnings. She has no college degree. She last worked in the market industry almost fifteen years ago and then only as a telephone clerk. Most recently she has worked as a fitness trainer, but would need additional training to further that career. Moreover, with a child in middle school, the wife still has childcare responsibilities that limit the hours she can devote to work or her own education. DRL §§ 236 (B) (5) (d) (1), (8); 236 (B) (6) (a) (4), (5), (6).

The court concludes that each party made direct or indirect contributions to the ability of the parties to accumulate assets and enjoy a good marital standard of living. The husband was the breadwinner while the wife took care of the home and children. The wife's attention to the home and children enabled the husband to devote his attention to the development of his career. Although the husband claims that the wife frivolously expended marital funds, the court finds no evidence that the expenditures were beyond the means of the parties. Other than the three years remaining on the mortgage for the marital residence, the parties have no outstanding debt. Moreover, the husband controlled the parties' finances and was always in a position to limit the spending if he wished to do so. The court finds there were no excessive expenditures. The family's luxury expenditures were enjoyed by both parties. They both regularly dined out, renovated their home, shopped for clothes, purchased new cars and enjoyed vacations. However, the children attended public school, they did not have a nanny and the children did not attend expensive summer programs. The parties did not own a second home. DRL §§ 236 (B) (5) (d) (6), (11); 236 (B) (6) (a) (8), (9).

The court also notes that although one child is approaching college age, the second child is only twelve years old. The children will be best served by allowing the mother, the custodial parent, to remain in the marital residence. Moreover, in light of the fact that the mortgage on that home is almost fully paid, it will be the least expensive place for the wife and children to reside. The court further notes that the father spends relatively little time with the children. DRL § 236 (B) (5) (d) (3); DRL § 236 (B) (6) (a) (6).

Finally, although the court found that there was no enhanced earning capacity asset, the husband will benefit for years to come from the progression of his career that flourished during the marriage. The court finds that, in equity, it is appropriate to take this factor in account in the distribution of the marital assets, as well in awarding maintenance. DRL § 236 (B) (5) (d) (13); 236 (B) (6) (a) (11).

In accordance with these findings, the court distributes the marital assets as follows:

1) The court awards to the wife the marital residence and its furnishings. The court awards to the husband 100% of any remaining payments owed on the mortgage for the marital residence and which shall be fully paid by the end of the term of the mortgage. He shall also be responsible for the real estate taxes until the mortgage is fully paid. The

husband shall be entitled to any tax deductions arising from the mortgage and real estate taxes payments he makes. Once the mortgage is fully paid, and the transfer of title effected, the wife will be responsible for the real estate taxes payments. The parties shall cooperate in completing all paperwork to effectuate the transfer of the title of the marital residence to the wife, free and clear of any mortgage.

2) The court awards to the husband 65% and to the wife 35% of the value of the Massapequa Park condominium. The husband purchased this property for his own use from marital funds without having previously discussed this action with the wife. On the other hand, he claims to have acquired it so that he would have a place near the marital residence to facilitate visitation with the children. In light of the award of the marital residence free and clear to the wife, the court finds it equitable to award a greater portion of this asset to the husband. Accordingly, the husband shall transfer to the wife $161,000 in non-retirement, liquid funds as her share of the value of the Massapequa Park condominium.

3) The value of the remaining assets (with the exception of the UTMA accounts) shall be distributed 50% to the wife and 50% to the husband:

Lombardi & Co. Loan	$250,000.00
Fidelity Account#...851	112.40
Fidelity Account#...519	165,709.59
Fleet checking accounts	48,323.43
Wife's Charles Schwab IRA	125,081.74
Husband's Fidelity IRA	286,357.00
Husband's Fidelity Profit Sharing Account	253,863.90
Husband's life insurance policies cash value	75,791.16
Total	**$1,205,239.22**

The wife will retain the entirety of her Charles Schwab IRA account. The husband shall cause to be transferred to the wife $80,637.63 from his Fidelity IRA account so that each party shall have an equal amount of retirement funds. The husband shall transfer the remaining portion of the wife's share of the assets, $396,900.24 in non-retirement, liquid funds.

4) The UTMA accounts created in each child's name shall continue to be held and shall be used for each child's college education. If a child does not attend college, the funds shall be turned over to the child when she attains her 22nd birthday.

The court recognizes that this distribution provides the wife with significantly more than half of the marital assets. Equitable distribution does not mean equal distribution and there is no requirement that each asset be divided equally between the parties. *Arvantides v. Arvantides,* 64 NY2d 1033 (1985). In the interests of justice, this distribution will help secure the wife's financial future. The husband, with his intact career, will be able to secure his own financial future. *Finkelson v. Finkelson,* 239 AD2d 174 (1st Dept.).

Upon consideration of the factors set forth above, the court finds that an award of maintenance is appropriate. Consideration of the pre-divorce standard of living is essential. *Hartog v. Hartog,* 85 NY2d 36 (1995). A purpose of maintenance is to encourage economic independence. *Ventimiglia v. Ventimiglia,* 307 AD2d 993 (2d Dept. 2003). In this instance, although the court believes the wife can obtain a job, it is unlikely that she will develop a career that will match the husband's earnings. However, the court notes, as set forth above, that the wife will receive a substantial portion of the marital assets, including the marital residence without any mortgage obligation, and over $550,000 in available cash (excluding the retirement accounts available to the wife). Not only must the court consider the distribution of the marital assets in determining an appropriate maintenance award [DRL § 236 (B) (6) (a) (1)), but the distribution here will go a long way to assure that the wife is able to maintain the marital standard of living. Moreover, the court notes that the parties' two children are fast approaching college age, and that the husband will be largely responsible for this cost (see below). Finally, in reaching its determination, the court has considered the wife's expenses as she sets forth in her net worth statement (Ex. 36), the fact that the husband has provided support to the wife since the parties' separation in 2002 (either voluntarily or by court order), as well as all of the other evidence in this case.

Taking all of these factor into account, the court awards to the wife maintenance as follows:

Until such time as all of the liquid non-retirement and retirement fund assets are fully transferred to the wife, the husband shall pay to the wife $10,000 a month as undesignated maintenance and child support, non-taxable to the wife. In addition, the husband shall pay the mortgage and real estate taxes for the marital residence, reasonable landscaping costs and homeowner's insurance.[6]

Effective the first day of the month after the transfer of the liquid non-retirement and retirement assets to the wife, the husband shall pay to the wife as maintenance $5,000 per month, and this amount shall be paid on the first day of each month for a five year period. On the first day of the month at the end of that five year period, the husband shall pay to the wife as maintenance $4,000 per month and this amount shall be paid on the first day of each month for a four year period. On the first day of the month at the end of that four year period, the husband shall pay to the wife as maintenance $3,000 per month

and this amount shall be paid on the first day of each month for a two year period.

The husband shall cooperate with the wife to enable her to obtain COBRA medical insurance coverage through his policy. The wife shall be responsible for the cost of this coverage.

This maintenance award is taxable to the wife and shall terminate in accordance with the statutory provisions set forth in DRL § 236 (B) (6) (c) or at the end of the eleven year period as set forth above.

Child Support

In determining an award of child support, a court shall be guided by the provisions of the Child Support Standards Act. DRL § 240 (1-b). In the first step of the analysis, the court must determine the income of each parent. It is undisputed that the husband's income for 2004 (the most recent year for which income information was available) was $265,000. The wife argues that the court should consider the husband's past earnings in determining child support, arguing that the husband's earnings in 2004 do not accurately reflect the husband's earning capacity. She contends that income may be imputed based upon the husband's evasive testimony and the past marital lifestyle. Although the court recognizes that the husband may earn greater bonuses in future years, the court is also cognizant of the testimony of the neutral forensic accountant who noted that changes in the industry create significant risk factors in evaluating the husband's future earning capacity. Accordingly, the court finds it appropriate to find the husband's income to be $265,000 for child support purposes. From this income, the court must deduct FICA actually paid ($9292.30). DRL §§ 240 (1-b)(b)(vii) (H). In addition, the court must deduct maintenance ordered to be paid from the husband's income (totaling $60,000). DRL § 240 (1-b)(b)(vii)(C). Thus, the husband's income available for consideration for child support is $195,707.70.

With respect to the wife, the court finds it appropriate to impute some income to her, but a very limited amount. The wife claims she is able to work part time as a physical trainer. Her limited education most likely precludes her from obtaining anything other than a clerical job. Moreover, she continues to have childcare obligations. Accordingly, the court imputes to the wife $15,000 of income she will be able to earn. She will also receive $60,000 in maintenance. Thus her income for child support consideration is $75,000.[7]

The combined parental income is, therefore, $270,707.70. Accordingly, the husband's pro rata share of child support is 72% and the wife's pro rata share of child support is 28%. On the first $80,000 of combined income, applying child support percentage of 25% [DRL § 240 (1-b) (b)(3)(ii)], the husband's annual obligation would be $14,400 for basic child support.

However, since the combined parental income exceeds $80,000, the court must decide whether to make an award based on the additional income and, if so, whether to apply the statutory formula and/or rely on the factors set forth in DRL § 240 (1-b)(f*). See,* A.D. Scheinkman, McKinneys; DRL § 240 (1-b)(c)(3). Where the court awards support above $80,000, irrespective of the statutory method used, the court must articulate a rationale for its determination. *Matter of Cassano v. Cassano,* 85 N.Y.2d 649 (1995); *Anonymous v. Anonymous*,12/8/99 NYLJ 27, (co.6) *aff d.*,286 A.D.2d 585 (1st Dep't. 2001).

This court finds that an award based on income above $80,000 is appropriate. The children have enjoyed a comfortable lifestyle. *Kosovsky v. Zahl,* 272 A.D. 2d 59 (1st Dep't. 2000). Moreover, although the court finds the husband's argument that he may not achieve the same types of bonuses he earned in 1999 through 2002 somewhat compelling, the court finds it reasonable to believe that the husband will receive greater bonuses than he has received during the pendency of this divorce action. Moreover, as previously noted, the husband maintains significant control over the amount of bonus he will receive. Most important, the children should have the opportunity to enjoy the same lifestyle as available to the husband.

Accordingly, the court finds it appropriate to use the full amount of the combined parental income, $270,707.70, in determining the husband's basic child support obligation. Thus, the husband's basic monthly child support obligation is $4,060.60. In light of the husband's income, and the relative financial circumstances of the parties, the court finds this amount neither unjust nor inappropriate. DRL § 240 (1-b) (f). This award shall become effective upon the transfer of the liquid non-retirement and retirement assets as set forth above. Until that occurs, the combined award of maintenance and child support, previously forth shall remain in effect.

Upon the emancipation of the eldest child, as that term is defined pursuant to DRL § 240(1-b) (b) (2), the husband's basic child support obligation shall decrease to an amount based on his then current income, but no less than $2,761.22 per month (based on the appropriate percentages for one child of the present total combined parental income). The court determines that no adjustment shall be made in the basic child support obligation based on the reduction of the wife's maintenance by this point in time in light of the husband's college cost obligations.

Virtually no evidence was presented with respect to the children's college ambitions or the parents' expectations regarding higher education for the children. Neither parent attended college. However, there was no evidence

presented that either parent expected that the children would not attend college. Moreover, there is no evidence to suggest that either child suffers from an infirmity that would preclude her from attending college. Thus, the court concludes it is anticipated that the children will attend college. Given the children's ages, it is appropriate for the court to address college expenses. The court orders that the husband shall pay 100% of the costs for each child to attend four years of college, up to the cost of the child attending a SUNY college, including tuition, room and board (if the child attends a residential school), fees, computer, books and school supplies, and no more than three round trip tickets for each child by whatever transportation is appropriate between home and school. If either child attends a private college or university, the husband shall be responsible for 72% and the wife for 28% of the additional tuition cost above the SUNY cost (the husband shall remain 100% responsible for all other costs as set forth above). The wife will have received a significant portion of the assets of this marriage. Although she will need to rely on those assets for her own support in the future, she will be able to afford some contribution to the education needs of the children. The husband shall have the right to use the funds held in the children's UTMA accounts towards his college cost obligations. The parties shall fully cooperate in completing any scholarship or loan applications to help meet these costs.

The husband shall pay 100% of the cost of each child's college application fees, SAT preparation courses, college admission test fees, and costs to visit college campuses. Each parent shall pay his or her own expenses to visit college campuses with each child if either parent elects to accompany the child.

In light of the husband's substantial college financial responsibilities, and the decreased costs to the wife, if a child attends a residential college, the husband's basic child support obligation shall be reduced by $750 per month. This reduction will occur as each child attends college.

The husband shall pay 100% of the children's medical insurance costs. The husband shall pay 72% and the wife shall pay 28% of the children's unreimbursed medical expenses (including medical, dental, ophthalmology, and mental health counseling). The wife shall forward to the husband all medical bills she receives for the care of either child within 15 days of the receipt of the bill. If the bill has been paid by the wife, the husband shall immediately reimburse her his 72% obligation of the bill. The husband shall submit the bill to his insurance company for reimbursement, if appropriate. He shall provide the wife with a copy of the submitted insurance company claim form. He shall provide to the wife her proportionate share of any reimbursement within 15 days of his receipt of same and shall provide her with a copy of the explanation form with respect to reimbursements received or rejected. All effort shall be made to use participating providers under the husband's plan.'

Upon the full transfer of the assets as set forth above, the husband shall pay 72% and the wife shall pay 28% of any extra-curricular activity, tutors (apart from college test preparation costs) or summer activity costs of the children. Until said transfer of assets is effected, the husband shall pay 100% of these costs.

The wife shall be entitled to claim each child as a dependent for tax purposes.

The husband shall maintain a life insurance policy with a death benefit in the amount of $1,000,000, for the benefit of the children and the wife until the eldest child is emancipated. The husband shall then be entitled to reduce the death benefit to $500,000 until payment of all obligations pursuant to this decision and order have been made.

Attorney Fees

The wife seeks attorney fees in the amount of $113,660.00 and an additional amount of $1,413.26 in costs and expenses. Counsel for the wife acknowledges having received from the husband $30,000 in *pendente lite* fees. Thus, the outstanding balance is $85,073.06. The husband's counsel argues that no additional award is warranted. He notes that the husband paid his counsel a total of $86,447.90. He contends that part of the difference in fees resulted from the wife's costly and wasteful exploration of whether the husband had an ownership interest in the company. The husband notes that he bore full responsibility for the neutral expert fees in addition to his own attorney fees and the *pendente lite* fees paid to the wife's counsel and that, as of the date of submission, still owed his attorneys some fees.

As this court has previously noted in a case with facts similar to those here,

> The decision to award counsel and expert fees is left to the sound discretion of the court. Indigence is not a requirement. *DeCabrera v. DeCabrera-Rosete,* 70 N.Y.2d 879 (1987). "The issue of counsel fees is controlled by the equities and circumstances of each particular case and the Court must consider the relative merits of the parties and their respective financial positions in determining whether an award is appropriate. (citations omitted)" *Hackett v. Hackett,* 147 A.D.2d 611 (2d Dept. 1989). An award of counsel fees is appropriate where there is a disparity of income and earnings capacity. *Merzon v. Merzon,* 210 A.D.2d 462 (2d Dept. 1994); *Denholz v. Denholz,* 147 A.D.2d 522 (2d

Dept. 1989). A party with limited assets and modest income should not be required to expend a significant portion of her assets to qualify for an award of attorney fees. *Melnitzky v. Melnitzky,* 284 A.D.2d 240 (1st Dept. 2001); *Atweh v. Hashem,* 284 A.D.2d 216 (1st Dept. 2001); *Denholz, supra.*

(A)n award of attorney fees should be "reasonable in light of the skill, experience and background of . . . counsel, the nature of the services rendered, the difficulty and complexity of the issues of fact and law involved in the case, as well as the time actually spent on [the case]." *(Silver v. Silver,* 63 AD2d 1017, 1018). *Willis v. Willis,* 149 A.D.2d 584 (2d Dept 1989); *Krigsman v. Krigsman,* 6/14/99 NYLJ 34, (col. 6); New York State Professional Disciplinary Rules, Code of Professional Responsibility, §§ 1200.11(b)(1)-(8). *J. C. v. S.C., supra.*

The court is satisfied that an additional award of attorney fees is warranted. This case required seven trial days and submission of briefs. The court is satisfied that the wife's exploration of the husband's possible ownership interest in the company was appropriate in light of the husband's extraordinary supervisory responsibilities in the running of that business. The court is also aware that the wife had to obtain many documents that should have been under the husband's control because the husband failed to provide them. To require the wife to have to pay the fees owed to her counsel would defeat the purpose of providing her sufficient assets from which she will ultimately have to support herself. Moreover, the court finds that the fees sought are not unreasonable or disproportionate to the effort needed to prepare for and ultimately try this case. Accordingly, the husband shall pay to plaintiff's counsel an additional $57,000 for attorney fees and costs, $30,000 of said amount to be paid 30 days from the date of this decision and order and the remainder to be paid in 90 days from the date of this decision and order.

Accordingly, it is hereby

ORDERED, that the wife is awarded the marital residence and its furnishings. The husband shall pay 100% of the remaining money owed on the mortgage for the marital residence and shall fully pay off the mortgage by the end of its term. The husband shall also be responsible for the real estate taxes owed on the marital residence until the mortgage is fully paid. The husband shall be entitled to any tax deductions arising from the mortgage payments and real estate taxes he makes. Once the mortgage is fully paid, and the transfer of title effected, the wife shall be responsible for payments due for real estate taxes on the marital residence. The parties shall cooperate in completing all paperwork to effectuate the transfer of the title of the marital residence to the wife, free and clear of any mortgage; and it is further

ORDERED, that the husband shall transfer to the wife $557,900.24 in non-retirement liquid funds and $80,637.63 from his Fidelity IRA account to the wife; and it is further

ORDERED, that the husband shall be entitled to use the children's UTMA accounts towards his obligation to pay for college for the children, except that if either child does not attend college, the child shall receive the proceeds of her account on her 22nd birthday; and it is further

ORDERED, that until such time as all of the liquid non-retirement and retirement assets are fully transferred, the husband shall pay to the wife $10,000 per month as undesignated maintenance and child support, non-taxable to the wife, the mortgage and real estate taxes for the marital residence, as well as reasonable landscaping costs and the homeowner's insurance for the marital residence.

ORDERED, that effective the first day of the month after the transfer of the liquid non-retirement and retirement assets, the husband shall pay to the wife as maintenance $5,000 per month, and this amount shall be paid on the first day of each month for a five year period. On the first day of the month at the end of that five year period, the husband shall pay to the wife as maintenance $4,000 per month and this amount shall be paid on the first day of each month for a four year period. On the first day of the month at the end of that four year period, the husband shall pay to the wife as maintenance $3,000 per month and this amount shall be paid on the first day of each month for a two year period. This award is taxable to the wife and shall terminate in accordance with the statutory provisions set forth in DRL § 236 (B) (6) (c) or at the end of the eleven year period as set forth above; and it is further

ORDERED, that the husband shall cooperate with the wife to enable her to obtain COBRA medical insurance coverage through his policy. The wife shall be responsible for the cost of this coverage; and it is further

ORDERED, that commencing the month after the transfer of the liquid non-retirement and retirement assets, the husband shall pay child support in the amount of $4060.60, said payment to be made on the 15th day of each month. Upon the emancipation of the eldest child, as that term is defined pursuant to DRL § 240 (1-b) (b) (2), the husband's basic child support obligation shall decrease to an amount based on his then current income, but no less than $2,761.22 per month. If a child attends a residential college, the husband's basic child support obligation shall be reduced by $750 per month. This reduction will occur as each child attends a residential college; and it is further

ORDERED, that the husband shall pay 100% of the costs for each child to attend four years of college, up to the cost of the child attending a SUNY college, including tuition, room and board (if the child attends a residential school), fees, computer, books and school supplies, and no more than three round trip tickets for each child by whatever transportation is appropriate between home and school. If either child attends a private college or university, the husband shall be responsible for 72% and the wife for 28% of the additional cost of tuition above the SUNY tuition cost (the husband shall remain responsible for 100% of all other costs as set forth above). The husband shall have the right to use the funds held in the children's UTMA accounts towards his college cost obligations. The parties shall fully cooperate in completing any scholarship or loan applications to help meet these costs; and it is further

ORDERED, that the husband shall pay 100% of the cost of each child's college application fees, SAT preparation courses, college admission test fees, and costs to visit college campuses. Each parent shall pay his or her own expenses to visit college campuses with each child if either parent elects to accompany the child; and it is further

ORDERED, that the husband shall pay 100% of the children's medical insurance costs. The husband shall pay 72% and the wife shall pay 28% of the children's unreimbursed medical expenses (including medical, dental, ophthalmology, and mental health counseling). The wife shall forward to the husband all medical bills she receives for the care of either child within 15 days of the receipt of the bill. If the bill has been paid by the wife, the husband shall immediately reimburse her his 72% obligation of the bill. The husband shall submit the bill to his insurance company for reimbursement, if appropriate. He shall provide the wife with a copy of the submitted insurance company claim form. He shall provide to the wife her proportionate share of any reimbursement within 15 days of his receipt of same and shall provide her with a copy of the explanation form with respect to reimbursements received or rejected, All effort shall be made to use participating providers under the husband's plan; and it is further

ORDERED, that upon the full transfer of the liquid non-retirement and retirement assets, the husband shall pay 72% and the wife shall pay 28% of any extra-curricular activity, tutors (apart from college test preparation costs) or summer activity costs of the children. Until said transfer is effected, the husband shall pay 100% of these costs; and it is further

ORDERED, that the wife shall be entitled to claim each child as a dependent for income tax purposes; and it is further

ORDERED, that the husband shall maintain a life insurance policy with a death benefit in the amount of $1,000,000, for the benefit of the children and the wife until the eldest child is emancipated. The husband shall then be entitled to reduce the death benefit to $500,000 until full payment of all support obligations pursuant to this decision and order; and it is further

ORDERED, that the husband shall pay to the wife's counsel an additional $57,000 for attorney fees and costs, $30,000 of said amount to be paid within 30 days from the date of this decision and order and the remainder to be paid within 90 days from the date of this decision and order without further notice.

This opinion constitutes the decision and order of the court.

Endnotes

1. This license requirement went into effect on July 8, 1991.
2. The wife argues that she listed this number on her net worth statement only because it was the number listed by the husband on his net worth statement. She contends that the husband offered no proof as to the value of the furniture and she testified that because the furniture was used, it has a lesser value. However, the court finds that by attesting in her net worth statement that the furnishings are worth $100,000 it is appropriate for the court to rely on this value.
3. The husband argues that the savings accounts controlled by him were depleted to pay the expenses to maintain the wife and children during the pendency of this action. He argues that the court should use the value of these accounts as of the date of trial. The court rejects this argument. Although the husband offered proof that he continued to pay for many of the expenses of the wife and children, he failed to show the source of these funds. Even in his post-trial briefs, he fails to identify from what accounts he derived the funds he used to support his family.
4. The court notes that the wife claims the husband funded these Fleet accounts with funds withdrawn from the parties' joint checking account from which he withdrew approximately $121,000 before commencing the Nassau County divorce action. However, since that action was withdrawn, and the wife did not provide evidence of how that money was used, the court concludes that these additional funds are not subject to distribution.
5. In reaching this decision, the court is not critical of the efforts made by the forensic accountant. Rather, the court finds that notwithstanding his good faith efforts, the resulting valuation is far too speculative to result in a reliable conclusion.
6. In effect, the *pendente lite* ruling continues until the transfer of the liquid assets. The award of maintenance in this case is premised, in part, on the amount of assets received by the wife pursuant to the equitable distribution award. The husband should not benefit from a reduction in support if he does not comply with the remainder of this court's order. The court recognizes, that the transfer of the marital residence may take some period of time. Moreover, the husband remains responsible for the payment of the real estate taxes until the marital residence is fully transferred and for the entirety of mortgage pursuant to the final distribution award. Accordingly, the maintenance and child support awards pursuant to this decision can go into effect even if the marital residence has not been fully transferred, but all other assets have been divided.
7. The court excludes from consideration any income derived from the investment or retirement assets of the parties. Since the liquid assets have been divided equally (except for a portion from the Massapequa Park condominium) between the parties, inclusion of such income would not increase the relative proportion of the parties' child support percentage obligations. Moreover, as will be discussed, some portion of those assets may be necessary to meet college costs.

Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Recent Legislation

Uniform Rule 202.8(h) Is Rescinded and Replaced

CPLR 2219(a) requires that a motion be decided within 60 days after its submission (20 days on provisional remedy motions). However, there was no rule enforcing this time requirement. In my previous column, I reported the new rule, where subdivision (h) was added to N.Y.C.R.R. 202.8 to address the situation, requiring the movant to send the court a letter alerting it that the time limit has passed, with notice to the adversary. As I noted, this rule was not an effective tool to secure timely decisions, and created an awkward burden on the movant.

In less than one year, this rule has been rescinded by the Chief Administrative Judge on July 13, 2006, and replaced with a new Rule 202.8(h), effective October 1, 2006, requiring the supreme courts' administrators to send each justice of the supreme court "a computer-generated notice indicating that 60 days has elapsed and there is no record that the motion has been resolved." (Note that only the supreme court is addressed by the amended rule.)

New 22 N.Y.C.R.R. 144 of the Rules of the Chief Administrator of the Courts: New York State Parent Education and Awareness Program, effective July 24, 2006

While the parent education and awareness program (a.k.a. "PEACE") has been used by the courts and only where litigants voluntarily agreed to attend, it has not been, until now, a legislative mandate. The purpose of the program is to educate parents on how to minimize the stress of family change and protect their children from the negative effects of ongoing parental conflict. The court has discretion to order both parents to attend the program in any action or proceeding in Family or Supreme court that affects the children, including but not limited to divorce, separation, custody and visitation disputes. Only a victim of domestic violence, and for whom safety in traveling to or attending the program, may opt out of the attendance pursuant to Section 144.3(c). Pursuant to Section 144.6(e), the court shall obtain confirmation of compliance with its order directly from the program provider. Pursuant to Section 144.6 (a), any communication made by a party as part of his or her participation in the program is strictly confidential, and may not be used as evidence in any proceeding, and the program may not divulge any information to the attorneys or the court. The list of the certified program providers can be found at www.nycourts.gov/ip/parent-ed.

Court of Appeals Roundup

Same-sex Marriage Licenses in New York Denied by the High Court: Update on *Hernandez v. Robles*, 2006 N.Y. Slip. Op. 5239, 2006 N.Y. LEXIS 1836 (July 6, 2006)

As discussed in my previous column, on February 4, 2005, New York County Supreme Court Justice Doris Ling-Cohan ruled that same-sex couples must be allowed to marry. *Hernandez v. Robles*, 7 Misc2d 459, 794 NYS2d 579 (N.Y. County, 2/4/2005) However, the First Department reversed by a 4-1 majority, 805 NYS2d 354 (1st Dep't 2005), ruling that state law forbidding same-sex marriage is not unconstitutional, and that the state has a legitimate and rational interest in promoting heterosexual marriage.

Lambda Legal filed an appeal to the Court of Appeals, and the high court issued its opinion on July 6, 2006, affirming the decision of the First Department, holding that only the legislature has the ability to change the law to permit same-sex marriage.

The majority recognized that there are at least 300 benefits that married couples receive under New York law, including but not limited to the following: tax advantages, estate and inheritance rights, rights to support from a spouse both during the marriage and upon divorce, the ability to secure health insurance for a spouse, and to make health care decisions for the spouse, etc.

The majority determined that the legislature has a rational basis to limit the benefits of marriage to same-sex couples. The court stated two main reasons, both of which are supposedly to protect the welfare of children, yet both of which appear, in my opinion, bizarre. The court made no mention of protecting children of same-sex couples.

First, the majority found that it is more important to promote stability in same-sex couple relationships because heterosexual couples can have children by accident, and they need to be induced to stay in a long-term committed relationship:

> Heterosexual intercourse has a natural tendency to lead to the birth of children, homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could

> also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.

By contrast, the high court claimed that same-sex couples have more stable relationships than heterosexuals and don't need marriage to promote stability:

> These couples can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse. The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more.

The majority's second reason was stated as follows:

> The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold.

Author's Note: Since when is the law based on intuition? The plaintiffs showed that there is no scientific evidence that children of opposite sex relationships are any better off than children raised by single parents or by same-sex couples. In addition, did the court forget about the rate of divorce in New York? The legal benefits of marriage are not causing couples to marry nor are they preventing couples from divorcing.

Chief Justice Judith S. Kaye strongly dissented, and concluded that "I am confident that future generations will look back on today's decision as an unfortunate misstep."

Justice Kaye opined that the majority's "rational basis" standard was inappropriate, and should have used the high standard of "strict scrutiny" for denying the fundamental right of marriage, as follows:

> The court misapprehends the nature of the liberty interest at stake. An asserted liberty interest is not to be characterized so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to exercise it. . . . Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.

Justice Kaye reminded the court that as late as 1967, 17 states banned interracial marriage until it was declared unconstitutional by the U.S. Supreme Court in *Loving v. Virginia*, 1388 U.S. 1, 875 S. Ct. 1817 (1967), and the same rationale for declaring that statute unconstitutional should apply here.

> Under our Constitution, discriminatory views about proper marriage partners can no more prevent same-sex couples from marrying than they could different-race couples. Nor can "deeply rooted" prejudices uphold the infringement of a fundamental right.

Justice Kaye declared that the record demonstrates hundreds of examples in which committed same-sex couples and their children are deprived of equal benefits under New York law:

> Same-sex families are, among other things, denied equal treatment with respect to intestacy, inheritance, tenancy by the entirety, taxes, insurance, health benefits, medical decision-making, workers' compensation, the right to sue for wrongful death, and spousal privilege. Each of these statutory inequities, as well as the discriminatory exclusion of same-sex couples from the benefits and protections of civil marriage as a whole, violates their constitutional right to equal protection under the law.

Justice Kaye also attacked the majority's use of procreation as the basis for marriage, since not everyone who marries has or can have children, concluding "no one rationally decides to have children because gays and lesbians are excluded from marriage." In addition, she commented that excluding same-sex couples from marriage does not further the interest of the welfare of the children, rather it undermines it because children of same-sex

couples are denied equal protection of the benefits of civil marriage.

Justice Kaye also took issue with the majority's claim that it is up to the legislature to change the law:

> It is uniquely the function of the judicial branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation. The court's duty to protect constitutional rights is an imperative of the separation of powers, not its enemy.

Estoppel of Non-biological Parent

***Matter of Shondel J. v. Mark D.*, 2006 N.Y. Slip. Op. 5238, 2006 N.Y. LEXIS 1837 (July 6, 2006)**

The high court held that a man who has mistakenly represented himself as the child's father is estopped from denying paternity when the child justifiably relied on the man's representation of paternity, to the detriment of the child. In this case, the woman lived in another country and told the man that the child was his. He believed her, and treated the child as his own. Therefore, the court directed the man to pay child support.

Author's Note: Is this a fair result? Does it depend on the age of the child and for how many years the child relied upon the man's representations? Does it depend on whether the man chooses to continue a relationship with the child once he found out that he is not the biological father? Is it in the child's best interest not to be informed of her real father? The moral of the story is, when in doubt, immediately order blood testing to determine paternity before relying upon the mother's representations. See Notes and Comments Column for further analysis.

Other Cases of Interest

Pensions

***Pagliaro v. Pagliaro*, 2006 N.Y. Slip. Op. 5929; 2006 N.Y. App. Div. LEXIS 9586 (2d Dep't, July 25, 2006)**

The parties' separation agreement provided, *inter alia*, that the wife would share in the pension benefits of the husband, a New York City police officer, but did not specifically provide for Variable Supplement Fund benefits nor cost of living adjustments.

The QDRO, as signed, excluded any Variable Supplement Fund benefits from the definition of "retirement allowance" and was silent as to cost of living adjustments (COLAs). The appellate court held that the lower court erred in doing so, because VSF benefits and COLAs are "merely supplements and enhancements to already existing pension benefits," and therefore, the non-employee spouse is entitled to an equitable share of same.

The husband argued that the wife is not entitled to a share of those benefits because the agreement did not specifically provide for such payments, relying upon cases which have held that parties must explicitly provide for an allocation of pre-retirement death benefits in a settlement/separation agreement in order for the non-employee spouse to receive an equitable share of those benefits. The appellate court rejected such argument, and distinguished death benefits from VSF benefits and COLAs, the former being a separate interest independent of the retirement asset, and the latter being merely a supplement to the existing pension asset.

Change in Custody: Parental Alienation

***Shockome v. Shockome*, ___A.D.3d___, 816 N.Y.S.2d 365 (3d Dep't 2006)**

The parties' stipulation was properly modified by the Family Court, granting a change in custody from the mother to the father, and directing that the mother have supervised visitation. The mother's animosity toward the father and her attempts to undermine the children's relationships with him were harmful to the children and rendered her the less fit parent.

***Author's Note*:** The appellate court failed to state any facts to support the conclusion that the mother engaged in parental alienation. The recent trend of the courts is to prevent parental alienation by changing custody to the parent who fosters a positive relationship between the children and the other parent.

Grandparent Visitation

***Matter of E.S. v. P.D.*, 27 A.D.3d 757, 815 N.Y.S.2d 607 (2d Dep't 2006)**

The grandmother lived with the child and his father for approximately five years, after the death of the child's mother. After disputes arose, the father asked the grandmother to leave the home. The father objected to visitation because the grandmother flouted his rules, and exposed the child to an uncle that the father believed to be dangerous. The grandmother was granted visitation after an *in camera* interview with the child and upon the recommendations of the law guardian.

The court determined that New York's grandparent visitation statute, DRL 72, is not facially invalid under the U.S. Supreme Court's holding of *Troxel v. Granville*, 530 U.S. S. Ct. 2054. On the merits of the case, the court found that mere animosity is not enough to deny the grandparent visitation. However, the court modified the order in deference to the father's wishes concerning certain issues, including deleting the clause permitting the grandmother to visit during certain religious holidays; directing that the child's uncle not be present during visitation; and directing that the child not be taken out of the state without the father's permission.

***Author's Note*:** This decision appears to be a good balance between the parent's wishes, the child's best interests, and the grandparent's right to visitation.

Counsel and Expert Fees

***Cooper v. Cooper*, 2006 N.Y. Slip. Op. 6063, 2006 N.Y. App. Div. LEXIS 9782 (2d Dep't, August 1, 2006)**

Suffolk County Supreme Court is not known for generous awards of *pendente lite* counsel and expert fees. However, in this case, Justice Kent granted the wife's motion for an award of interim counsel fees in the sum of $50,000 and interim forensic accountant fees in the sum of $27,745. The Second Department upheld the award "in view of the great financial disparity between the parties and the defendant's dilatory and obstructionist conduct which has unnecessarily protracted the litigation." The court noted that this was an award for services already rendered as opposed to services to be rendered.

***Author's Note*:** In this case, the appellate division failed to set forth any facts regarding the actual respective financial resources of the parties, what asset was being valued by the forensic accountant, or what the defendant did to constitute "dilatory and obstructionist" conduct.

Equitable Distribution

***Pickard v. Pickard*, 2006 N.Y. Slip. Op. 6209; 2006 N.Y. App. Div. LEXIS 9961 (1st Dep't, August 10, 2006)**

The trial court erred in declining to distribute the present value of the husband's minority interest in a New York limited liability company, which owned 11 occupied rent-controlled or rent-stabilized apartments in three buildings in Manhattan, and instead directing that this asset be divided on an "if, as and when" sold basis. The appellate court found that such a future distribution leaves many possible unresolved issues for dispute between the parties over the years, such as the extent to which defendant may claim reimbursement for capital contributions to maintain the apartments until they are sold.

One of the court's reasons for rejecting the expert's conclusion was its observation that the discount rate seemed to have been arbitrarily selected. Under such circumstances, the court had the authority to appoint another expert and direct further proceedings for purposes of a more accurate appraisal. Therefore, the issue was remanded to the trial court for further determination regarding the valuation of the asset.

Judge Andrias issued a dissenting opinion, and found that any valuation of the parties' interest in the real estate partnership would be too speculative, and would result in an unfair distribution in favor of the husband.

Lifetime Maintenance

***Pickard v. Pickard*, 2006 N.Y. Slip. Op. 6209; 2006 N.Y. App. Div. LEXIS 9961 (1st Dep't, August 10, 2006)**

The award of lifetime maintenance to the wife of $3,500 per month was proper in light of the parties' 23-year marriage; the wife's role in raising and educating the two children and being out of the work force throughout the entire marriage; her minimal job skills; and the parties' respective financial positions.

***Author's Note*:** The court failed to state the husband's annual income and the respective ages of the parties. It was also proper to award plaintiff health insurance until she obtains a job with benefits or is eligible for Medicare.

College Expenses

***Schonour v. Hohnson*, 27 A.D.3d 1059; 811 N.Y.S.2d 533 (4th Dep't 2006)**

The parties' stipulation which was incorporated into the judgment of divorce stated that the father "intended to provide for [college costs] to the best of [his] ability" and in accordance with any "judicial[] determination" of his liability for such costs, taking into account "the abilities of the parties to pay and all of the reasonable factors which would bear upon the choice of college and the expense of college." No age limitation was set forth. The father's argument that his obligation to pay for college expenses terminated at age 21 was rejected by the court.

Generally, the court will not obligate a parent to pay for college beyond the child's 21st birthday absent a stipulation to the contrary. Here, the court interpreted the father's obligation to contribute to the undergraduate college expenses of the children for the first four consecutive years of study immediately following graduation from high school since the parties failed to state any particular time limit, and given the children's birth dates, the parties knew at the time of the stipulation that the children would not finish college before their 21st birthday. In addition, any ambiguity in the agreement was construed against the drafter, the father's attorney.

***Attea v. Attea*, ____A.D.3d___, 817, N.Y.S.2d 478 (4th Dep't 2006)**

The father stipulated to pay for his child's college "education comparable to those educations which were paid for by the parties for the older children" without stating any limitation based on a particular age, number of years or semesters, or consecutive course of study. The court construed the stipulation as covering more than four years of college, and beyond the child's 21st birthday, where the child's education was interrupted twice by

academic difficulties and another time by his recovering from serious injuries. In addition, the court considered that the father had paid for one of his older children's additional college classes taken during the summer in its determination.

***Author's Note*:** If the parties did not have a stipulation, the judgment of divorce would automatically cut off child support in the form of college education expenses at age 21. Some children, depending on their ages, even if completing four consecutive years of college directly after high school graduation, do not finish college until after their 21st birthday. The court, in the cases above, took the most liberal construction in the best interests of the children. The practitioner, when drafting college provisions in a stipulation, should be careful to specify any particular time restrictions.

There has been much debate over whether it is fair and/or reasonable to obligate divorcing parents to pay for a child's college education, where no such legal obligation exists for intact couples. The other debate is, since college expenses are considered child support, if a child attends four consecutive years of college, and turns age 21 prior to graduation, is it fair to cut off the child's support so that she/he may not graduate?

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