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Notes and Comments

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A Preemptive Strike to Obtain Electronic Evidence Is Essential to Preserve Financial Proof in Divorce Litigation

The granting by the courts of liberal discovery of electronic evidence in matrimonial litigation has certainly not kept pace with the sophisticated technology devices that have been developed to make it difficult or impossible to obtain information stored on computer hard drives. In order to prevent erasures or destruction of hard drives that contain essential financial information, it is absolutely essential that the court grant not only *ex parte* restraining orders but also permit the sheriff's office to take control of computers used both in the home or in businesses in order to clone the hard drive. It is only when such preemptive action is requested and granted that data destruction can be obviated.

Once an order to show cause is served on an adverse party, you can rest assured that he or she will take whatever means available either to alter or obliterate any incriminating evidence that may be contained on a computer's hard drive or to physically destroy it.

In order to induce the court to grant such a drastic remedy, it is important that you lay a comprehensive foundation and obtain the services of a forensic computer expert to submit a supporting affidavit detailing the work that must be done, the time necessary to complete such tasks, and the assurance that the adverse parties' business will not be disturbed during the cloning process. In this regard, it is most important to convince the court that no prejudice or damage will be sustained by the adverse party and that the hard drive will remain intact. The court must reach the conclusion that the procedure is merely remedial in nature and will do nothing to destroy, alter, or obliterate any of the data contained on the hard drives.

Consider the following fact pattern in determining what legal strategy to employ to make certain that you preserve the financial data contained on a myriad of electronic devices, which is necessary to protect your client both in a division of marital property and the award of maintenance and child support. The client discloses to you that he or she believes his or her spouse has diverted monies from the family business to foreign corporations, placing the shares in dummies and nominees and then diverting such monies from such corporations to offshore trusts that are beyond the reach of the New York courts. Armed with such information, it is not a leap to judgment to suspect that such spouse will use every method available to destroy any evidence contained on his or her computers once he or she realizes that his or her spouse has enlisted the aid of the court to obtain such

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information. This includes a destruction of the computers themselves.

To merely submit an order to show cause requesting that the computers be cloned without asking for interim relief to protect the integrity of such discovery device would be tantamount to committing a grievous error in the management of your case. That is why it is essential that your order to show cause contain the following decretal paragraphs:

ORDERED, that [Plaintiff] and / or her authorized computer forensic experts shall impound, clone and inspect the computer servers, hard drives, individual workstation PCs, laptops, PDAs, cell phones, smart phones, external hard drives, "thumb" drives, flash drives and other peripheral storage devices, and other items containing digital data, including but not limited to (1) electronic mail, (2) any information in the defendant's business or personal computer or computer equipment, (3) word processing files, calendars and / or schedules, (4) electronic data containing memory and / or storage devices on standalone microcomputer and / or network workstations, and (5) electronic data contained on network servers, minicomputers and mainframe computers in directories or subdirectories, located at [defendant's] residence, business location, and any other locations where it is known that [defendant] or [business] conduct business in New York and may have computers, data storage or computer equipment; and it is further

ORDERED, that [plaintiff] and / or her authorized computer forensic experts gain access into [defendant's] residence located at [address], [business] location at [address] and any of [business'] other New York locations where computers, data storage or computer equipment may be found; and it is further

ORDERED, that deputy sheriffs of the [_____] County Sheriff's Department shall accompany [plaintiff] and / or her computer forensic experts and take whatever steps are necessary, including but not limited to breaking down, breaking open, searching for, and / or removing any obstacles that may impede such entrance, to ensure that this order of the court is complied with; and it is further

ORDERED, that the [_____] County Sheriff's Department shall be held harmless from any and all liability occasioned from obtaining control of the defendant's computers or computer equipment and access into [defendant's] residence, [business'] location, and any of [business'] other New York locations where computers or computer equipment may be found; and it is further

ORDERED, that the defendant immediately cease the rotation, alteration and / or destruction of electronic media located at [defendant's] residence, offsite locations, Internet and Web-based storage locations or any of [business'] locations that may result in an inability to recover (1) electronic mail, (2) any information in the defendant's business or personal computer or computer equipment, (3) word processing files, calendars and / or schedules, (4) electronic data containing memory and / or storage devices on standalone microcomputer and / or network workstations, and (5) electronic data contained on network servers, minicomputers and mainframe computers in directories or subdirectories regarding _____, the defendant's involvement with _____, persons dealing with _____, or any other business interest of the defendant or [business] in _____, or any persons or company communicated with regarding all of such entities.

Before drafting the clauses as suggested in this column, it is most important to consult with the local sheriff's office to determine exactly what language they wish to appear in the order to show cause, what fees they require, and the extent of the action that they will take in order to obtain and preserve the computer hard drives. Each county will differ, so it is important not to rely on a previous experience in a bordering county.

In order to assure that the sheriff's office will fully comply with the court's direction, it is wise to enlist the services of a private investigator who will work together with your forensic computer expert and the local sheriff's office not only to identify the location of the party's residence and or business but to aid in securing access in order to complete the cloning process.

Once you have carefully drafted your papers and submitted the same to the matrimonial court for signature, it may well be that the interim relief requested with respect to the sheriff obtaining custody of the computers and hard drives may be denied by the court for a variety of reasons. First, the court may refuse to sign the order to show cause without notice to your adversary. It is your job to convince the court that special circumstances exist that warrant no notice be given. This is permitted under 22 N.Y.C.R.R. § 202.7 as amended. To give notice or simply to serve the papers without an interim stay would be foolhardy. Once the adverse party has obtained a copy of the order to show cause without such relief, you can be certain that computers will disappear or be destroyed, or that one or more "input errors" will occur to cause the computers to crash. Moreover, as suggested above, there are computer programs that can permanently erase all information from a hard drive and make it totally irretrievable even by a forensic expert. Most computer users are unaware that all deleted files can be detected and recaptured, unless they were deleted by a software program. As such, a computer owner is usually lulled into a false sense of security, believing that the information they deleted can never be recovered!

Now you ask what can be done in such a situation where the court strikes out your *ex parte* relief or fails to dispense with the appearance of the adverse attorney.

Your remedy, of course, would be to bring on a proceeding pursuant to CPLR 5704 for the full court of the Appellate Division to reinstate all stricken provisions and grant such relief without notice to the adverse party. The application cannot be made before a single judge for the Appellate Division. It is not permissible to do so, because a panel must hear the request. When this application is drafted, it gives you a further opportunity to convince the appellate court by affidavit of the extreme need to conceal from the other side the nature of the *ex parte* relief and the necessity to impound and clone the delineated information contained on the computers. The law has provision to dispense with notice when applying for an order to show cause in both the supreme and appellate courts where to do so would render the proceeding nugatory.

With a proper foundation, the appellate courts will readily grant such relief, dispense with an adverse party's appearance, and reinstate deleted provisions of the order to show cause, thereby enabling you to preserve the evidence that is essential to successfully litigating your case.

Without utilizing these procedures, there is no way that you can be certain that you will be able to succeed in the litigation. Not applying to the Appellate Division to reinstate the stricken provisions would be a mistake.

If after you have made your application to the Supreme Court and the Appellate Division, and all the relief has still been denied, you will have discharged your professional obligation and cannot be criticized later. That is why it is so very important that your papers be complete, comprehensive, and detailed sufficiently for the court to grant the relief you seek.

Even with such failure, other remedies are still available. If the computer information is altered or destroyed, consider bringing on a cause of action for spoliation of evidence. Moreover, CPLR 3126 imposes civil sanctions against a party from adducing any evidence concerning the spoliated property or information and will allow the court to draw an unfavorable inference against the spoliator. Yet, there is more. When the court determines that the conduct of the defendant is serious and deliberate, it has the discretion to default the spoliating party and award judgment to the other. In a matrimonial action, it may well mean that a marital asset could be valued solely upon the innocent's party's speculations or conjectures as to value. It may also mean that a court could award 100% of the value of such asset to the innocent spouse.

Certainly, in the next case that you are retained, you should utilize these remedies. The rewards may be beyond your expectations.

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Being a Detective: Uncovering Hidden Assets

By Robert Goldstein

Introduction

The goal of this article is to educate the matrimonial attorney about the various ways that assets can be hidden and to present a list of those assets that are most likely to go undetected or be forgotten. For those who are convinced that undiscovered assets exist in their financial picture (whether intentionally hidden or not), we present a number of different tactics for finding hidden assets. We emphasize that one low-cost way to begin is to look at the U.S. Individual Income Tax Return Form 1040 and the attached schedules to reveal any documentation supporting the existence of hidden assets.

Assets may be inadvertently hidden, in that the owner is unaware of their existence. Examples are antiques in the attic, often thought of as junk; jewelry and other items stored but long-forgotten in a safety deposit box; or even inactive bank accounts that may have been turned over to the state.

All too often, though, assets are intentionally hidden. This kind of unethical action may be undertaken to avoid or lower tax payments by reducing one's apparent value; to undervalue a company that is going through a transition; or even for personal reasons, such as an impending divorce. In each of these circumstances, there is a malicious intent to mislead someone as to the actual amount of a person's wealth or a company's net worth. There are various methods to uncovering hidden assets, and we will explore some of the cost-efficient ways that you can help detect them before engaging a private investigator.

What Does an Asset Look Like?

It is important to remember that assets can be much more than cash or securities. Instead of focusing on someone's worth based solely on the money in the bank, the value of brokerage accounts, or the value of the business, consider the other valuable assets that may not be so obvious.

Hidden assets—or undervalued assets—may be in the form of:

- Antiques
- Artwork
- Jewelry
- Hobbies (such as coin, stamp, or baseball card collections)
- Traveler's checks
- Frequent flyer miles
- Patents, trademarks, and copyrights owned

How Are Assets Hidden?

Assets like those listed above may be somewhat easy to hide and take less effort to deceive the unsuspecting. However, there are other, more sophisticated ways of hiding assets, for example:

- Having a tax refund addressed to one spouse and cashing it without the other knowing
- Conspiring with an employer to delay or disguise a bonus or raise so it will go undetected
- Using sham transactions, such as claiming to repay a bogus debt to a friend or family member
- Establishing a custodial account in the name of a child, using the child's Social Security number
- Falsifying tax returns to keep from reporting undisclosed income
- Opening an undisclosed retirement account
- Secretly purchasing a timeshare or other rental property

It is disheartening but realistic to expect that some of these types of strategies are commonplace. For various reasons, one party benefits from hiding the true worth of valuable assets that are an integral part of a relationship, whether it be a marriage, a business partnership, or some other joint venture.

What Can You Do?

When faced with an adversarial situation where the incentive to hide or understate assets is present, a search for hidden assets can include:

- Reviewing county records regarding undisclosed real estate
- Reviewing credit card statements to discover money hidden by an overpayment
- Checking all bank and stock records for cashed-in stocks or bonds, or withdrawals
- Checking with motor vehicles registry for cars purchased
- Working with a forensic accountant to review all financial records, especially working with your own

CPA to verify Form 1040 in an effort to seek out hidden assets

- Working with a forensic accountant to properly value a closely held business
- Reviewing all checks written by a spouse or other family member
- Reviewing the backs of checks to determine where funds are deposited and checks written to cash

Start with the Income Tax Return

The first place to look is Form 1040, because it is the best place to begin for identifying clues regarding hidden assets. Because a correctly filed tax return describes the sources of all income, whether interest from a bank account, gain (or loss) on the sale of property, rental income and the like, this document should be investigated thoroughly first.

It is a good idea to look at every line where assets can be hidden, including the following:

- Income from wages. Look over the attached W-2 forms to see how many businesses are represented, what salaries were earned, and if there are any deferred compensation plans such as 401K or other fringe benefits being reported. Look to see if the box is checked on the W-2 that indicates whether the employee made any contributions to a retirement plan. In order to determine employee contributions to a 401K plan, subtract the total wages from the Social Security wages. However, note that any employer matching contributions to a 401K will not be included in this figure. Therefore, one must make an independent inquiry of the employer to determine if the company provided matching contributions. Also, note that Form W-2 will not provide information regarding 100% employer-sponsored retirement plans such as a profit-sharing plan.
- Interest income. Be sure to look at both federal and state income tax returns, because tax-exempt income reported on the state return may not be included on the federal return. Dividend income exceeding $400 requires the filing of a supplemental Schedule B identifying the source of reported dividends, which should also be examined.
- Retirement plan distributions. Funds from a deferred-compensation plan or an IRA account can be traced back to their commencement dates. The existence of a retirement payment on page 1 of the income tax return more than likely is just the required distribution includable in income from a much larger asset. Individuals who are over 70½ must take approximately one-half of the balance in their IRA accounts; so to estimate the asset size multiply the distribution income reported by 22.
- Carry-forward loss or other credits. Inquiries should be made as to the origin of the credit being carried.
- Taxable refunds. This entry would indicate that one party has overwithheld taxes the previous year. Because overwithholding is occasionally used as a "forced" savings plan, it would be significant to know the whereabouts of the overpayment on income. Did the payor receive a refund, or was it applied to the following year's taxes? Note that there will be no indication of the year in which the refund is received on that year's tax return. Rather, one needs to review the prior year's tax returns to determine if such a refund was to be received.
- Stock options. There are two kinds of stock options: qualified and nonqualified. The benefit from the exercising of qualified stock options must be reported as part of the alternative minimum tax calculation. Alternate Minimum Tax—Individuals Form 6251 should be reviewed for this purpose. Nonqualified stock options are taxable as compensation and are therefore included in the W-2 totals. However, it is not independently notated anywhere on the W-2 itself. An analysis of the components of total compensation would reveal the exercising of the options. For both types of options, the investigation in the current year may indicate the existence of other options received in previous years.

Don't Forget the Attached Schedules!

In addition to the line items listed above, as well as other categories included on Form 1040, the attached schedules should be analyzed for the information they hide.

Schedule A, for instance, lists the itemized deductions from income. These should be confirmed, including state and local income tax, real estate and property tax, interest paid, mortgage interest, and investment interest. Especially important are the items in miscellaneous deductions, which can include the revelation of a safe deposit box rental, where cash, jewelry or other high-priced items may be concealed.

Schedule B is filed in regard to interest and divided income, and, again, a thorough reading may disclose investments, particularly foreign accounts and foreign trusts that may otherwise be overlooked. Because Schedule B requires the names of mutual funds, banks, and other sources of dividends and interest, it can be rich in information for further investigation.

Schedule C is the place where profit or loss from business is reported. The existence of a Schedule C may

indicate the existence of another business venture along with the primary business. In addition, the personal expenses that are paid by the business must be considered as "add-backs" for determining the owner's true income.

Schedule D is filed to report capital gains and losses, and it is a starting point for tracing the proceeds from the sale of property or the sale of fund shares, individual stock, or other assets.

Schedule E reports supplemental income and loss, and it includes income from rental properties and also income from partnerships, S corporations, and estates and trusts. Obviously this is one area where the existence of unrevealed partnerships or property can be discovered and traced.

Although this process can be tedious, by combing through the 1040, paying careful attention to key elements, and reviewing the schedules as well, there will be a good chance that hidden assets may come to light. Personal financial statements and loan applications are also documents that can enhance the discovery process for two reasons: first is that they comprise the crucial elements that represent all of the individual's assets; second, these documents are prepared in compliance with strict standards for truthfulness and are sworn statements. For these reasons, personal financial statements and loan applications can provide a true picture of the full estimate of a person's financial worth. However, notwithstanding the above, an appropriate amount of skepticism must always be maintained that the documents are deliberately less than complete.

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Arena Parenting: An Effective Solution for Parents Living Together During the Separation and Divorce Process

By Roger Pierangelo and George Giuliani

The process of separation and divorce is filled with a myriad of complications, unnatural arrangements, fears, frustrations, anxieties, and resentments. The problem with all of these feelings floating around is that they are like a match in a gunpowder factory. Children exposed to these feelings and the resulting behaviors on the parts of their parents are often confused, frightened, anxious, and fearful. Nowhere is this potential volatility more apparent than in the case of two parents in the midst of a very bad divorce forced to live in the same house. Our experience has shown that during this period, some of the most dangerous and damaging situations occur because the parents are placed there without practical boundaries or guidelines. Constant fighting for control; getting the children to try to side with each parent; confrontations in front of the children; and sometimes, in more serious cases, hitting and abuse, underscore this very unnatural "living arrangement."

As a result, a new "living arrangement" should be instituted by the courts with very clear guidelines, boundaries and a monitoring system to protect the health, welfare, and safety of the children. We call this system *Arena Parenting*, a process that establishes a set arena time for both parents where the health, welfare, and safety needs of the children are taken care of by one parent without the intrusion of the other. The arena control is followed and monitored by a Civility Coach. (For a complete description of a Civility Coach, see Pierangelo and Giuliani, Spring 2007, article in the *Family Law Review*.) For as long as the health, welfare, and safety needs of the children are followed, each parent will have his and her protected arena time. This dramatically reduces control issues, the use of children to vent displaced anger, and drama in front of the children. Issues that transcend both arenas are discussed, and ways of resolving issues in a civil manner are taught and closely monitored. In other words, Arena Parenting is a closely monitored, in-house visitation arrangement.

All too often when in the process of a separation and divorce, parents may be told by their attorneys to stay put and not leave the house either to strengthen their legal positions and assist in negotiations or because they are unable to afford separate housing arrangements. However, they are left in this position with no guidance, support, or arena to vent their frustrations and learn how to cope with this very stressful arrangement. Arena Parenting is a very viable and successful measure in reducing the tension for everyone involved.

Steps in Arena Parenting

1. The first step in Arena Parenting is for the court to mandate that the parties engage in Civility Coaching for the purposes of monitoring Arena Parenting. Without the courts' mandate, the process may not be taken as seriously as it needs to be by the parties involved.

2. The next step is for the Civility Coach to develop an Arena Parenting schedule either with both parents (if possible), or on his or her own. The Civility Coach will have to take several factors into consideration, such as work schedules, driving and transportation options, ages of the children, and extracurricular activities. Arena Parenting is based on common sense and logic, not always equality as one may see in some divorce visitation agreements. However, adding common sense and logic to a chaotic situation may anchor the individuals involved who already feel so out of control.

3. The Civility Coach will then meet with the children to discuss the direction and concept of Arena Parenting, which in our experience, calms the children down because all they see may be out-of-control "lifeguards."

4. It is very important that the Civility Coach clearly outline and define what is meant by the "health, welfare, and safety" of the children. Examples include but are not limited to:

Health Responsibilities

a. Administering medications

b. Keeping doctors' appointments

c. Informing the other parent of the outcome of regular checkups

d. Keeping the house free of allergens if a child has allergies

e. Keeping dental appointments

f. Making sure they maintain hygiene responsibilities

Welfare Responsibilities

a. Maintaining a clean house

b. Having clean clothes and linens for the children

c. Taking the children to school on time

d. If applicable, picking up the children after school on time

e. Attending school meetings and teacher conferences, if feasible

f. Making sure homework is finished every night

Safety Responsibilities

a. Driving within the speed limits

b. Making sure the children always use car seats or wear seat belts

c. No drug involvement

d. No drinking and driving

e. No leaving children under the age of 12 home alone

f. No smoking around children or in the car with children

5. The Civility Coach will then identify the specific days and times that each parent will be in charge of the health, welfare, and safety of the children. This responsibility will involve school-related activities; i.e., homework, studying, extracurricular activities, preventive health care appointments, cooking and feeding, bedtime activities, and any other activities defined in the children's lives. Depending on the schedule, one parent may become involved in certain activities needed by the child that infringe on the parent's "quality time." We call this concept "luck of the draw," which basically means that being a parent involves many responsibilities aside from fun activities.

6. The Civility Coach will teach parents to use this activity time to foster the bond with their children, and these responsibilities will need to be learned as each parent approaches single-parenting responsibilities. In some ways, Arena Parenting is a learning experience for both parents, which should facilitate their transition into becoming single parents. The goal for each parent is to ensure that the needs of the children are met.

7. When it is the Arena day, or one parent's time, the other parent must leave the area but not necessarily the house. Decisions that need to be made will be made by the parent in charge, as long as they are decisions that do not cross over Arena boundaries; i.e., major school decisions or therapeutic, religious, or medical decisions other than normal prevention. In the case of regular checkups that may fall on one parent's Arena day, it is that parent's responsibility to notify the other parent of the outcome as soon as he or she first sees the other parent or within 24 hours by email.

8. The children are told whom they need to go to for anything on that specific day to have their needs met. They are provided with a very clear schedule, and any questions they may have are answered. It is also crucial that a parent refer the children to the Arena parent when they come to him or her for a decision. This stops children from playing one parent against the other and stabilizes their routine.

9. If the Arena Parenting schedule requires that one parent supervise an entire weekend, then he or she must make all arrangements that may require supervision, babysitting, transportation, and availability by phone.

10. With Arena Parenting, discipline can occur only on the Arena time of the parent who set the punishment. He or she cannot have the child serve the discipline on the other parent's Arena time. This avoids using the child s a weapon against the other parent's time.

11. A major rule of Arena Parenting is that one parent can never ask the other parent for information or some item that the parent can get himself or herself. For instance, asking the parent for the date of the teacher conference is something that either parent can get on his or her own. The rule is to stop game playing where one parent uses this type of questioning to portray the other parent as uncooperative.

12. No scheduling of appointments or activities can be made on the other parent's Arena day without his or her input or agreement, unless it is something that is not determined by the parent, such as a school or religious activity. For instance, if one parent wants to sign up his or her daughter for ballet lessons, the lessons must be held during his or her Arena time unless agreed on by the other parent. If it is kept to his or her Arena Parenting schedule, then communication of information, not communication for permission, is expected.

13. No parent is allowed to interfere in the discipline of the other parent unless he or she deems it to be a health, welfare, or safety issue. In that case, a call to the Civility Coach is expected.

14. In Arena Parenting, a parent's private life is private, and there are no questions allowed. Both parents have chosen to divorce and will need to get on with their lives.

15. Vacation and holiday schedules are also part of the Arena Parenting schedule but are known by both parties to be temporary Arena schedules until the divorce agreement is finalized. Here, logic, common sense, and fairness are the concepts that oversee the holiday scheduling.

16. Each parent is guided in understanding that normal conversations with a child may take place, but no decisions or undercutting of the other parent's Arena supervision can take place. This is monitored very closely by the Civility Coach.

17. All money transactions, allowances, and payments are monitored as per the court directives.

18. Either parent can request a change of Arena day; however, if the other parent says that it is not possible, the conversation is over. This is a crucial part of Arena Parenting, because so many arguments in the regular situation occur due to pressure, unresponsiveness, not getting one's way, badgering, or bullying. All of these behaviors are monitored, and a zero-tolerance policy is enforced by the Civility Coach.

19. The Civility Coach is available to all the parties when not in session, either by phone or email. This option is like having money in the bank. You may not need it, but it's nice to know it's there.

20. Until civility is attained by both parties, communication by email with a copy to the Civility Coach is required. In this way, the Civility Coach can see how each parent is approaching the other to avoid threats, verbal sarcasm, or bullying. However, the hope is to move toward civil conversation.

21. It is up to the Civility Coach to monitor any court order, prior agreements, or *pendente lite*. In this way, rules will be followed and chaos avoided. The presence of the Civility Coach coupled with the court's mandate has, in our experience, dramatically reduced the tension in situations where Arena Parenting was enforced.

22. The children will welcome the boundaries and monitoring set by the Civility Coach because it stops them from becoming part of the battle. In Arena Parenting, the Civility Coach counsels the children on the skills involved in remaining neutral and not allowing themselves to be drawn into unhealthy situations. The Civility Coach will have to monitor very young children more closely, because they may not be able to clearly label or communicate what is actually going on in the house.

23. In Arena Parenting, the parent who is not in charge has no say in the parenting style of the other parent as long as the health, welfare, and safety of the children is appropriate. It will be up to the Civility Coach to determine whether a parenting style is creating tension for the children or is not providing a healthy structure. If this is so, the Civility Coach will counsel and offer skills and options for improving parenting skills.

Conclusion

Arena Parenting is a process that allows for a more civil atmosphere for parents and children living in the same house during the separation and divorce process. It is imperative that the courts mandate this process as quickly as possible to calm the dangerous and damaging behaviors that arise from this stressful situation. Arena Parenting can provide more consistency, logic, common sense, and predictability to a very tense environment.

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Your Passport: A Privilege for Those Who Pay Child Support

By Catharine M. Venzon and William Z. Reich

Deadbeats who owe court-ordered child support have another incentive to pay their arrears. Effective October 1, 2006, Federal law prohibits the issuance or renewal of a U.S. passport to anyone whose child support is in arrears of $2,500 or more and allows the government to revoke or limit previously issued passports to such individuals.

Many states already have their own penalties for deadbeats who owe child support. These penalties include loss of professional licenses, wage garnishment, court-ordered judgments and liens. See N.Y. FCA §§ 454 et al.; N.Y. CPLR 5242. But Federal law now provides yet another incentive.

22 C.F.R. 51.70(a)(8) states that "[a] passport, except for direct return to the United States, shall not be issued in any case in which the Secretary of State determines or is informed by competent authority that the applicant has been certified by the Secretary of Health and Human Services . . . to be in arrears of child support in an amount exceeding $2,500.00." 42 U.S.C. § 652(k)(2) further states that the Secretary of State "may revoke, restrict, or limit a passport issued previously to such individual."

The Department of State Passport Services has interpreted this to mean that anyone whose child support is in arrears in excess of $2,500 is ineligible to receive a U.S. passport. Furthermore, Passport Services will not issue a passport to such a person until the Department of Health and Human Services (HHS) certifies that arrears have been paid or that acceptable payment arrangements have been made.

The purposes of the provision are to ensure that individuals stay current on child support obligations and to aid in enforcing payment of those who fall into arrears within the United States, where additional administrative and judicial remedies are available. The October 2006 Federal law modifies a previously enacted 1998 statute by reducing the required amount of arrearages owed from $5,000 to $2,500.

This provision has had a profound effect on obtaining past due child support from parents in arrears. From the inception of the provision in 1998 to 2006, approximately $22 million in child support was collected. In 2006, an approximate $24 million in child support was collected through the passport denial provision. This amount is expected to double in 2007 and 2008, when the new passport and travel requirements go into effect.[1]

The concern over this provision's infringement on the right to travel was addressed in the Ninth Circuit case *Eunique v. Powell*, 281 F.3d 940 (9th Cir. 2002). The court held that there is an important governmental interest in making sure that those who do not pay their child support obligations remain within the country where they can be reached by process. The court reasoned that the failure to pay child support has both an economic and moral effect on the country, so there is a sufficient connection between nonpayment of child support and the government's interference with an individual's right to travel.

How It Works

42 U.S.C. § 654 requires that each state establish and maintain a statewide child support enforcement agency for the purpose of obtaining, collecting, and enforcing child support orders. In New York State, child support services are provided by the New York State Division of Child Support Enforcement (CSE) and Support Collection Units (SCU) in county and in New York City offices.[2] Any court order of arrears or child support order referred to an SCU is monitored and enforced by the CSE.

Upon notice to an individual in arrears, the enforcement agency may take several administrative actions to recover child support. These administrative actions include mandatory notification to HHS once an individual is in arrears of $2,500 or more. An electronic list of these individuals is compiled by HHS and forwarded to the U.S. Secretary of State for action. This action includes the *mandated* denial of any application for a new or renewal passport and the *discretionary* action of revoking, restricting, or limiting a previously issued passport.

Currently, passport applications ask applicants to "self-identify" as being in arrears on their child support payments. However, the Department of State Passport Services (Passport Services) will also screen each application against HHS's electronic list of individuals in arrears. If an applicant is listed on this electronic list, the individual will be sent a passport denial Pre-Offset Notice by Passport Services. Passport Services will then hold the application for 90 days pending the removal of the individual's name from HHS's electronic list. If the name is removed before the end of the 90-day hold period, then Passport Services will process the application. If not, the application will be denied.

Passport Services strongly recommends that any individuals believing they are in arrears of their child support should contact their state's child support enforcement agency before applying for a passport.[3] Contact information for each state child support enforcement office can be

found at http://www.acf.hhs.gov/programs/cse/extinf.html.

Once arrears have been paid or acceptable payment arrangements have been made, the state agency will certify to HHS that arrears have been satisfied. HHS will then remove the individual's name from its electronic list and will notify Passport Services of the removal. The estimated time between payment to the state agency and Passport Services notification by HHS is two to three weeks.[4]

It is suggested that if you owe arrears over $2,500, you should wait three weeks after making payment arrangements with the state agency before submitting a passport application. Passport Services has no information regarding any individual's amount of arrears or how to make payment arrangements. They also have no control over HHS's electronic list. Therefore, all questions or concerns should be directed to the proper state agency rather than Passport Services.

Potential Problems

There are issues with the breadth of this program's impact. First, for the provision to be applicable to an individual, a state agency has to have control over that individual's obligation to pay child support. In most states, including New York, that requires an order of child support be on file with, and have collection go through, a local or state child support collections unit. Only when a court decides that there are arrears due or that future child support payments must be made through a collections agency can the state have any control over arrears and make a report to HHS. Therefore, this provision will affect only individuals who have had previous court intervention in their child support matter and who are utilizing support collections services.

Secondly, there is very little data on how frequently the Department of State invokes its discretionary powers under the law to revoke, restrict or limit a previously issued passport. U.S. passports are valid for 10 years. State Department policy suggests that an individual actually would have to apply for a passport renewal or other consular service before the Department of State would invoke its discretionary power to revoke. If the Department of State does not utilize this discretionary power, an individual could obtain or renew his or her passport and then let his or her child support obligations fall into arrears for up to 10 years before he or she needs to renew again.

Another problem is the discrepancy in the payment requirements from state to state in order to remove an individual's name from the HHS list. Some states require actual payment (cash or otherwise) of arrears.[5] Others require only that payment arrangements be made, such as through income execution or other gradual payment plans.[6] Furthermore, some states require full payment of all arrears to release the name from the list.[7] Other states require only that the arrearages fall below $2,500.[8] Therefore, a person owing $10,000, in arrears could pay only $8,000 of the arrears and then have his or her name removed.

These discrepancies may allow individuals to manipulate the policy by making payment arrangements they have no intention of fulfilling or paying only as much of their arrearages as is needed to get their passport issued. This may prove problematic if the Department of State is not pursuing revocation of passports for those individuals who have previously been issued passports.

Practical Effect

A similar federal provision for passport denial has been around for several years, with a higher threshold amount of $5,000. However, 22 C.F.R. 51.70(a)(8), with its lowered threshold of $2,500 is of even greater significance given today's concern for national security. In addition to the requirement of a valid passport for any travel overseas, as of January 23, 2007, all persons traveling by air between the United States and Canada, Mexico, Bermuda, and the Caribbean region are required to present a passport or other valid travel document to enter or re-enter the United States.[9]

Expected to begin in the summer of 2008 is the requirement that all U.S. citizens entering the United States by sea or land present either a U.S. passport or other Department of Homeland Security-approved form of identification.[10] While this passport requirement will not apply to U.S. citizens traveling to, or returning directly from, a U.S. territory, virtually any travel out of the country, even a weekend getaway to Canada, will soon require a valid U.S. passport.

Conclusion

Deadbeats have another incentive to pay their child support because now the federal government has stepped in and is working with states to ensure payment of child support. It is expected that any problems will be resolved in favor of the payee and a person's freedom to travel will be restricted if child support is owed.

Endnotes

1. http://www.onlinelawyersource.com/news/child-support passport.html.
2. http://www.newyorkchildsupport.com.
3. http://travel.state.gov/passport/ppi/family/family_863.html.
4. http://travel.state.gov/passport/ppi/family/family_863.html.
5. *See, e.g.* Rhode Island policy at http://www.cse.ri.gov/services/enforcement.php (accessed November 9, 2007).
6. *See, e.g.* Maryland policy at http://www.dhr.state.md.us/csea/whatsnew/pasport2.htm (accessed November 9, 2007); Wisconsin policy at http://dwd.wisconsin.gov/bcs/bulletins/2006/CSB06-16.pdf (accessed November 9, 2007).

7. *See, e.g.* Virginia policy at http://www.dss.virginia.gov/news/2005/pr_dcse_%20passport_11_09_05.pdf (accessed November 9, 2007); Minnesota policy at http://www.childsupport.dhs.state.mn.us/Action/RemedyDescriptions (accessed November 9, 2007).
8. *See, e.g.* North Carolina policy at http://info.dhhs.state.nc.us/olm/manuals/dss/cse/man/CSEcP.pdf (accessed November 9, 2007).
9. http://travel.state.gov/travel/cbpmc/cbpmc_2223.html.
10. http://travel.state.gov/travel/cbpmc/cbpmc_2223.html.

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NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998, can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, New York 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

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 case that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, e.g., Spring 2008) 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.

This decision was edited for publication. *** indicates that material was omitted.

J.D. v. D.K., Supreme Court, Suffolk County, (Marilyn R. Friedenberg, JHO, July 31, 2007)

Attorneys for Plaintiff: Miller, Apfel & Curran, LLC
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This matter was referred to me by the Hon. H. PATRICK LEIS, III, the District Administrative Judge of the Courts of Suffolk County to hear and determine the issues of Grounds and of Equitable Distribution in this matrimonial matter as stipulated and agreed to by the parties and so ordered by the Hon William J. Kent.

The matter came before me for trial on September 15, 18, 20, 25, 2006, October 24, 27, 30, 2006 and November 1, 2006.

Divorce

Plaintiff-husband's testimony proved the jurisdictional and factual elements necessary to support his claim to a divorce on the grounds of constructive abandonment, in that defendant-wife refused to have sexual relations with him for a period of more than one year prior to the commencement of this action. He made repeated requests that their sexual relations continue and defendant-wife refused. There was no physical or psychological reason that he knew of that prevented either party from having such sexual intercourse. Defendant-wife neither admitted or denied the allegations and consented that plaintiff-husband have judgment herein. Therefore plaintiff-husband was granted a divorce on the grounds of abandonment under Section 170(2) of the Domestic Relations Law of the State of New York.

Facts

The parties were married on June 2, 1984. There are no children born of this marriage. This is the second marriage for both.

The plaintiff-husband has three daughters from a prior marriage. Defendant-wife has one daughter from a prior marriage. All the parties' children are emancipated.

Defendant-wife commenced an action for divorce in Suffolk County, New York, on January 3, 2003. She discontinued this action on April 21, 2004 and commenced an action for divorce in Connecticut. Plaintiff-husband filed for divorce in Suffolk County on April 22, 2004. The jurisdiction issue was resolved by the parties agreeing, by stipulation, that the action in Connecticut be discontinued, and the divorce instituted by plaintiff-husband herein continue in Suffolk County, New York.

The stipulation which determined jurisdiction also agreed that the commencement date of the first divorce action by defendant-wife, January 3, 2003, would be utilized for the purpose of determining equitable distribution.

Both plaintiff-husband and defendant-wife testified at the trial. Plaintiff-husband called the following additional witnesses, Diane W., a Vice President, employed by Merrill Lynch, Brian D., Vice President of Benefits in the deferred compensation area, employed by Merrill Lynch, Glen D., Vice President in the Benefits department employed by Merrill Lynch and William H. B., from Lexington Pension Consultants, Inc.

Defendant-wife called the following additional witnesses, Leatrice K., her sister, David B., and Carter T., from Pension Evaluators at Troyan, Inc.

Major Issues

1. What should be the percentage of distribution, if any, of the enhanced earning capacity of defendant-wife's law license?
2. What portion of plaintiff-husband's interest in his Merrill Lynch, FACAAP, Wealth Builder and Growth Award plans are for past or future services?

3. If a portion of said plans is determined to be a marital asset, what portion of the value of said asset, if any, should be distributed to defendant-wife?

4. Should plaintiff-husband's VOCON plan, Deferred Profit Sharing plan, and 1978, 1979 Deferred Compensation plan, be determined to be separate property?

5. What percentage distribution should be made of plaintiff-husband's Retirement Accounts, ESOP, and RAP Accounts and defendant-wife's 401K, from Wilson Elser, her prior employer?

6. What percentage distribution, if any, should be made of plaintiff-husband's Met Life Annuity, and defendant-wife's United Airlines Pension?

7. Does Plaintiff have an interest in the home of defendant in Huntington, New York purchased prior to commencement partially with the proceeds of a Home Equity Loan against the former marital premises in Lattingtown, New York?

8. Is Plaintiff-husband entitled to a separate property credit for the payments he made for the purchase of the first jointly owned home purchased by the parties in Greenwich, Connecticut in 1987 and sold in 1998?

Defendant-Wife's Enhanced Earning Capacity

At the time of the marriage in 1984 defendant-wife was working for United Airline for approximately five years as a passenger service agent, earning approximately $24,000-$25,000 per year. She was a high school graduate and had obtained 24 college credits from Nassau Community College and Adelphi University.

When the parties married defendant-wife moved into plaintiff-husband's residence in Larchmont, New York. The defendant-wife returned to school at the College of New Rochelle. She took one course the first semester, two classes the second semester and then enrolled full-time. In May 1989 she graduated from college and then attended Bridgeport Law school, (later known as Quinnipiac University School of Law), from which she graduated in 1993. Shortly thereafter she obtained her license to practice law in the State of Connecticut while the parties were residing in Greenwich, Connecticut and started to practice law in 1994. In October 1996 she obtained her license to practice law in the State of New York.

During the time that defendant-wife attended school the plaintiff-husband worked full time. As the result of injuries sustained while working for United Airlines the defendant-wife received disability payments of $105 per week from New York State and was unemployed from the time of the marriage until she became an attorney and obtained her first job. She testified to being an unemployed housewife for the year after college and the start of her law school education.

Plaintiff-husband paid for her tuition for New Rochelle College. In addition, the law school payments of $15,000 per year were paid by him, as well as payments for books and supplies. When defendant-wife completed her education she had no outstanding obligations or student loans to either her college or law school. All of these obligations were paid by plaintiff-husband, who had entered the marriage with substantial assets and had a highly paid position with Merrill Lynch.

In addition plaintiff-husband testified that he had encouraged his wife to pursue a career in law and took defendant's daughter from a prior marriage to her activities when defendant-wife was unavailable. He welcomed her fellow students from law school when they came to their home for study sessions and provided them with food and drink during these visits.

The parties have stipulated that the value of the defendant-wife's enhanced earning capacity is $195,000. Plaintiff-husband requests an award of 50% of that value.

Defendant-wife acknowledged that all her educational expenses were paid by plaintiff-husband. However she denied that she was encouraged by her husband and stated that he didn't care whether she attended law school or not. Her testimony was that when she hosted study groups, her husband mainly left them alone.

She claims that acts of physical abuse occurred during the marriage, which she alleges were an active hindrance to her education and attainment of a law license. She contends that there were three incidents in a period of twelve years from 1987 to 1999, and at least several others from 1999 and 2002, and four in 2002 before the parties' separation. She testified to one incident occurring while she was attending law school where she sustained a black eye. The defendant called as her witness a law school associate who testified to having seen the injury and inquired as to whether she wished assistance, which she declined. The plaintiff did not recall any incidence involving his wife having a black eye. Another incident was testified to occurring during the time of her attendance at law school wherein she made allegations of her husband grabbing her arm and twisting it and throwing her to the ground.

None of these incidents required care or treatment or were they reported to the police or any authorities. Her failure to report was caused by her fear of retribution and a Greenwich "police blotter" which is a portion of the local paper and would let everyone become aware of what was happening.

Defendant-wife testified to more incidents occurring in 2002 when the parties were contemplating divorce and the tensions in the household were escalating, one of which ultimately resulted in an Order of Protection.

In the course of this last altercation, in 2002, defendant-wife broke her wrist when plaintiff-husband tried to grab a tape recorder with which she was trying to tape his conversation with her. He took the recorder into the garage and smashed it against the wall and then forced his way back into the house. After each of the incidents defendant-wife took pictures of her alleged bruises. The photographic evidence is inconclusive and indistinct, without substantiating value. Defendant-wife's sister testified to having been informed of the incidents and viewing the bruises.

Defendant-wife argues that the domestic violence claimed to have been inflicted on her during the marriage is relevant to the plaintiff-husband's entitlement to a proportion of her enhanced earnings, and as a result the plaintiff-husband should be entitled to no more than 15% of the stipulated value of her license.

In addition defendant-wife claims that plaintiff-husband's action in placing title of the Greenwich home in her sole name, to defeat creditors, during a pending law suit instituted in 1997 might have jeopardized her license. The law suit was in regard to an investment made by the plaintiff-husband in a restaurant business and she feared that it could have impacted upon her retaining her license or lead to its decrease in value.

Defendant-wife after finding out that she was also named as a defendant in the pending law suit immediately with the consent of plaintiff-husband quit-claimed the property back to joint names. Subsequent to this action the pending law suit was settled before trial so that plaintiff-husband's actions however improvident did not affect defendant-wife's career capabilities or the value of her license.

Conclusion

The court has had the opportunity to observe the demeanor of the defendant and assess her credibility in regard to her recital as to the alleged acts of domestic violence. It finds that she has not established to this court's satisfaction that the recital was anything more than an attempt to establish a rationale to her request that a less than equal division of the value of her enhanced earning capacity be made. During the last year before the parties' separation there is no question that they were not living in loving harmony. Disputes and arguments most probably were prevalent. However none of the testimony by defendant-wife or her witnesses or her photographic evidence satisfied this court that these incidents did occur in the manner and severity testified to by defendant. I find her credibility in regard to this testimony unworthy of belief. See *Biasich v. Biasich* 195 A.D.2d 496, *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658.

Under all of the facts elicited above the court finds that the enhanced earning capacity of the defendant's law license is marital property (See *Litman v. Litman*, 280 A.D.2d 520, 721 N.Y.S.2d 84 (2nd Dept. 2001). The value of that property right has been stipulated to be $195,500.

Non-Retirement Accounts

1. Merrill Lynch account ***

This account was transferred by plaintiff-husband, from his sole name to the joint names of the parties in 2002. Defendant-wife testified that this was done since there was only one joint account in her name and in the event something happened to plaintiff-husband she would have no access to funds.

Plaintiff-husband opened this account on or about 1998. He stated that it contained between $125,000 and $150,000 when he added his wife's name to the account and also admitted that in December 2002 he removed $94,000 from this account.

The value of this account as of August 31, 2006 was $105,121.97. Additional interest income may have increased its value as of the date of this decision.

2. Merrill Lynch account ***

This account was opened in December 2002, with the $94,000 opening deposit from the parties joint "***" account set forth above. This account is in plaintiff-husband's sole name and was utilized by him for depositing his paychecks and dividends.

As of August 31, 2006 the balance was then $29,704.46. Defendant-wife sets forth a claim to one half of the $94,000 transferred by plaintiff-husband into this account or $47,000.

Defendant-wife agrees that the balance in this account should be granted to plaintiff-husband with a credit to her for the $47,000.

3. Merrill Lynch account ***

Plaintiff-husband testified that he opened this account in 1998. It was in his sole name and entitled JD Special Account ***. He stated that the source of the funds in this account was his daughter D's trust account which he did not wish to disburse to her at that time. His daughter was twenty-five years of age at that time. The account statement introduced in evidence as of August 31, 2004 showed a balance in the account of $34,641 which he testified was funded solely from his daughter's trusts.

The statements from his two children's trust accounts show withdrawals of $20,000 which were made subsequent to the commencement of this action. On December 31, 2002 the account was solely in his name and not in trust for the children.

I find that no evidence has been provided other than plaintiff-husband's statement, that the funds came from the daughter's trust funds prior to the commencement of this action. It was defendant-wife's contention that the

money came from the parties' "***" account which were marital funds.

The value of this account as of January 3, 2003 was $16,923. Defendant-wife claims entitlement to one-half of these funds. In addition she requests pre-judgment interest at the statutory rate from September 12, 2005.

4. Merrill Lynch account ***

This account was opened in 1993. It was a joint account utilized to pay the parties' bills and was funded by the earnings of the parties. As of August 31, 2006 the balance was $7,791. Defendant-wife requests that this account be liquidated and the parties each receive one-half of the funds in the account. In addition she requests prejudgment interest. The issue of prejudgment interest in regard to all of defendant-wife's requests will be addressed below.

5. Merrill Lynch, account ***

This account was opened subsequent to the commencement of this action. It has been stipulated that it is plaintiff-husband's separate property. As of trial it had a value of $537,546.

Plaintiff-Husband's, FCAAP, Wealth Builder and Growth Award Option Plans

Plaintiff-husband called as a witness to testify on his behalf Diane W., who has been Vice President of the Global Client Business Plan at Merrill Lynch for the last ten years. She testified first about the plaintiff-husband's, Financial Advisor Capital Accumulation Award Plan. (Hereafter designated as the FCAAP plan.)

Her testimony was that the award was an incentive compensation plan awarding shares of stock to retain and reward their key financial advisors. There are two plans with two separate vesting schedules. One has a ten year vesting period and the other has an eighth year period.

In addition the plan contains forfeiture features for misconduct, competition or resignation. If plaintiff-husband were to go to work for a competitor he can be disqualified from receiving the balance of the remaining awards.

She testified that the award each year is based on services performed by the plaintiff for that year, though he would have to wait until the appropriate vesting period to receive payment for those stock shares.

In regard to the Wealth Builder Plan her testimony was that the plan provides incentive compensation for highly compensated financial advisors who were large producers for the firm, to provide income for them upon their retirement. There is a vesting requirement based on retirement, which is paid in two installments. The first would be the January following the effective date of retirement and the second the January of the following year. There is also a non-compete provision which would allow Merrill Lynch to withhold payment of the balance not paid if the former employee takes employment with a competitor.

The Growth Award Plan is a new fund created in 2002; it was designed as an additional incentive compensation for financial advisors to build a strong sales force. This plan has a forfeiture feature as well, similar to the FCAAP and Wealth Builder Plan.

Plaintiff-husband testified that he began participation in the FCAAP plan in 1987. He designated the plan as a retention plan. Plaintiff-husband's entry into the Growth Award Plan was in 2002. This plan has a four year vesting period and the first available funds for distribution would occur in January 2007. The plaintiff-husband started participation in the Merrill Lynch Wealth Builder plan in 1994. The source of the funds for this account was solely Merrill Lynch, and is in addition to his regular compensation.

Ms. W. also testified that, "the award each year is based on services performed by the plaintiff for that year which he would then have to wait through the vesting period before receiving the stock shares." A document reflecting the shares owned in the plaintiff-husband's account on particular dates and the vesting schedule were placed in evidence. Ms. W. testified that the values listed for the years 1993 through 2001 as of December 31, 2002 totaled $335,343.42.

Defendant-wife requests not only a distribution on awards to be realized in the future but a distributive award of actual shares received by plaintiff between January 2002 and January 2007.

Conclusion

As stated in the case of *DeJesus v. DeJesus*, 40 N.Y.2d 643, 665 N.Y.S.2d 36 (1997) the court held "To the extent that a stock option is compensation for past services rendered by the employee during the marriage and up until the time of the grant, it is marital property, and to the extent that a stock plan is granted as incentive for future services it is not earned until the services are performed. Even then however the incentive stock plan can still be marital property if it is in existence between the time of the grant and the time that the plan vests."

In addition the court pointed out that: "The Trial Judge thus must first determine based on competent evidence, whether and to what extent the stock plans were granted as compensation for the employee's past services or as incentive for the employee's future services. We recognize, as have other courts, that any list of pertinent considerations could only be illustrative and not exhaustive (*see, e.g. in re Marriage of Miller*, 915 P. 2d 1314, 1319, n.9, supra). However relevant factors would include

whether the stock plans are offered as a bonus or as an alternative to fixed salary, whether the value or quantity of the employee's share is tied to future performance and whether the plan is being used to attract personnel from other companies."

In order the make a determination as to whether the plans set forth above have a marital property component the court has considered the wording of the plan, the testimony of the titled spouse and the testimony of the Employer Representatives. It finds that though these plans are called incentive plans they are very much part of the compensation package which is given to the employee when he enters their employment. This additional compensation is based solely on the employee's performance and income production and is determined on a yearly basis and the employer placed stock in an account in his name, the value of which is paid to him the year following its vesting. The quantity of the employee's shares are fixed as of the year that they are earned and are not tied to future performance. Its vesting however is suspended for various years dependent of the terms of the plan itself and it also contains a non-compete provision.

The Plan document that was admitted into evidence on Page 4, para. 3a.) states "an award will generally be stated as an amount equal to a percentage of achievement against established goals during a performance period." There was no testimony that this manner of fixing the additional compensation earned was not adhered to and the valuation schedule placed in evidence shows the value of the stocks presently in plaintiff's account on a yearly basis.

The court finds that these awards represent compensation for past services and to the extent that those services were performed during the marriage this court finds that they are marital assets.

To the extent that they are fully vested and paid over to defendant during the years 2001 and 2002 and not accounted for, and for the options vested in the years during the pendency of this action 2003-2007, they are subject to equitable distribution forthwith. To the extent that they represent a contingent interest until vesting, a coverture fraction shall be utilized to determine defendant's interest therein and determined in the implementation of this decision set forth below. The presence of several contingencies before vesting may operate to reduce the fact finder's estimate of the present value of the asset. Alternatively, where the asset's present value cannot be determined at the time of the divorce, the Court may, in the exercise of its discretion, devise an Order that allocates a portion of each future payment to the non-titled spouse. (*Majauskas v. Majauskas*, 61 N.Y.2d 481, 474 N.Y.S.2d 699.)

The only requirement of the plaintiff-husband is that he not be fired for cause during the vesting period and that he not compete for a period of time if he leaves the company. The plaintiff has been employed at Merrill Lynch for 38 years and would be entitled to retire within the next seven months when he reaches 65 years of age.

As stated by the Court of Appeals in *Deluca v. Deluca*, 97 N.Y. 2d 139, 144 (2001), "Whether the VSF benefits at issue here constitute marital property cannot be determined by the Administrative Code provisions relied upon by the Appellate Division. Rather, that question must be answered by relevant provisions of the Domestic Relations Law. If the benefit is a thing of value and was earned in whole or in part during the marriage, it may be considered marital property subject to equitable distribution."

As further pointed out, "Thus under the broad interpretation given marital property, formalized concepts such as 'vesting' and 'maturity' are not determinative. Indeed, we have held that compensation received after dissolution of the marriage for services rendered during the marriage is marital property. (See, *Olivo v. Olivo*, 82 N.Y. 2d 202, 604 N.Y.S.2d 23, 624 N.E.2d 151.)"

Plaintiff's VOCON Plan, Deferred Profit Sharing Plan and 1978, 1979 Deferred Compensation Plans

The plaintiff-husband claims his VOCON plan, Deferred Profit Sharing plan and 1978, 1979 Deferred Compensation plans are separate property.

The Domestic Relations Law Sec. 236(B)(1)(c) defines property as "all property acquired by either or both spouses during the marriage and before the commencement of a matrimonial action, regardless of the form in which it is held." (See *Seidman v. Seidman*, 226 A.D.2d 1011, 1012 (1996) Separate property is defined as "property acquired before marriage or property acquired by bequest, devise or descent, or gift from a party other than the spouse." See Sec. DRL 236(B)(1)(d)(1). The term "marital property" by case law is to be broadly construed while the phrase "separate property" is to be narrowly construed and the law favors the inclusion of property within the marital estate.

However, plaintiff contends that he has met the burden of proof that the above listed accounts are separate property.

VOCON Plan and Deferred Profit Sharing Plan

Plaintiff testified in regard to his VOCON account that the first account was a pre 1987 Deferred Profit Sharing account. The funds in this account were his after tax contributions that employees were entitled to make if they wished. Further testimony elicited that he made contributions totaling $45,000 into this account and the last contribution to the plan was made in 1978, six years prior to this marriage.

Glen D., a Vice President at Merrill Lynch in the Employee Benefit Department testified that both the VOCON

and Deferred Profit Sharing Plan pre-dated 1984. These plans allowed voluntary contributions, the VOCON plan was for after tax contributions and the Deferred Profit Plan was pre-tax contribution.

The last contribution to the VOCON plan was 1978. The value of the plan as of June 30, 2006 was $215,488.

Plaintiff began contributing to the Deferred Profit Sharing Plan in 1972 twelve years prior to the marriage. Mr. D., when asked about the last contribution to the plan replied it was in 1976. He also testified that the decision as to where the money was to be invested, in either stocks, bonds or mutual funds, was plaintiff-husband's. Plaintiff-husband was given a "lump of money" that he was allowed to invest among different investment options. The plan that existed in 1976 was a different plan than the Deferred Profit Sharing Plan that exists today, which limits his ability to choose where the money can be invested. The 2006 balance in the Deferred Profit Sharing Plan was $72,179. Plaintiff-husband testified that the balance consists of pre-1976 contributions and appreciation of the account since that date.

Deferred Compensation Plan

Plaintiff-husband also participated in a 1978 and 1979 deferred compensation plan. Plaintiff husband made a one time contribution, to each of these plans, in each year. The combined value of the funds as of April 1, 2006 was $321,241.13. Plaintiff further testified that he did not actively mange those accounts.

Brian D., a Vice President of Benefits at Merrill Lynch, confirmed that the one time investment was from plaintiff's income. At the court's instructions he submitted a letter that stated that "Mr. J.D. has never actively traded in his 1978 and 1979 Pre-1993 Deferred Compensation Plans. The deferred compensations plans prior to 1994 had no investment options and operated more like savings accounts. Every year, the balance in the account would be appreciated by a rate equal to the average Broker Call Loan Rate for that year. From 1997 to 2002, this rate was anywhere from 4.97% to 8.62%."

Plaintiff-husband's contention is that the appreciation in value of all of the above plans was passive in nature and that there was no direct or indirect contribution by defendant-wife.

Conclusion

The court concludes that all of the above funds were separate property having been originally obtained prior to the marriage. In regard to the value of these plans as of the date of the marriage plaintiff-husband is entitled to an absolute credit.

In regard to the appreciation in value of these interests the court must make a twofold determination:

1. Was the appreciation in the value of these plans the result of the efforts of the titled spouse or merely passive in nature?

2. Was the appreciation in value of these plans the result of the direct or indirect contribution of the non-tilted spouse?

In determining whether the plaintiff-husband was influential in determining the method and direction of these investments the court has considered the following.

Plaintiff has been a Vice President in the Private Client Division of Merrill Lynch since 1980. In his position, he testified to having to keep up with market factors, influences and trends, interact with other similarly involved associates in updating available information and recommendations throughout the years of his employment. His testimony was that he used all of these resources to monitor and choose the investment portfolio that he was entitled to utilize throughout his employment as long as the right to do so existed.

The testimony of both of the Vice Presidents of Merrill Lynch was that plaintiff could avail himself of approximately 12 different investment options for two of the plans set forth above, the VOCON and Deferred profit sharing plan, until 2002 when the restriction was made that the funds could only be placed in the 401K plan of Merrill Lynch.

In the case of *Price v. Price*, 69 N.Y.2d 8, 511 N.Y.S.2d 219, the holding was clear that the appreciation of separate property had to have a component of the efforts of the titled spouse to the growth of the asset to allow the non-titled spouse an interest in the asset. The mere passive appreciation of a bank account, or work of art, or investment portfolio handled solely by a financial advisor, without input from the titled spouse, and subject only to increase or decrease as determined by market factors would clearly preclude the determination that the increase in value was a marital asset.

Despite plaintiff-husband's testimony that he did not manage these accounts and his contention that defendant-wife has not submitted actual proof that he did, the court finds that it is inconceivable that he would have left these decisions to others when the opportunity to choose and monitor his own investments was given to him, and when recommendations on investment opportunities to his private clients was the nature of his employment. Indeed the increase in the value of his portfolio of investments is evidence of his acuity and expertise.

Defendant-wife made every effort to obtain information as to what direction and input were given by plaintiff-husband into the investment of the funds in these plans and that this information was available to plaintiff-husband but never furnished. The testimony of the Vice President in charge of Benefits was that this information could have been obtained for at least the last ten years.

The court finds that after having observed the demeanor of plaintiff during his testimony in regard to the financial aspects of this litigation and gauged his credibility and the extent to which he went to hinder the full disclosure of his financial circumstances, that his testimony that he did not manage these investments, which was one of the opportunities afforded him by his employment is not worthy of belief. See *Blasich v. Blasich, supra, Eschbach v. Eschbach, supra.*

In determining whether the appreciation of separate property was a marital asset the court must consider any "equitable claim to, interest in, or direct or indirect contribution made to the acquisition or such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career and career potential of the other party." DRL Sec 236(B)(5)(d)(6). See *Price v. Price*, 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684; *Majauskas v. Majauskas*, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15.

In regard to the VOCON and Deferred profit sharing plans the court finds that the appreciation in value of this asset from the time of the marriage and the commencement date of this action, January 2003, is marital property. The court finds that there were direct efforts on the part of plaintiff-husband which effected the appreciation of these assets, and an indirect contribution on the part of the defendant-wife as spouse, homemaker in this marriage of long duration.

In regard to the Deferred Compensation Plan, it is clearly separate property since as shown by the testimony and evidence, its increase in value is purely passive in nature, and no additional contributions were made to the plan during the marriage.

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Plaintiff-Husband's Request for a Separate Property Credit for the Purchase of 17 Rustic River Road, Greenwich, Connecticut

Plaintiff-husband testified that he utilized funds in the amount of $65,000 from his Merrill Lynch account for the contract payment for the purchase of 17 Rustic View Road, Greenwich, Connecticut, in August 1987 and in addition he paid from a pre-marital Merrill Lynch account the sum of $70,500 towards the purchase price. He further claims that defendant-wife bolstered his claim in that she admitted that the accounts liquidated for the purchase were in plaintiff's sole name.

Plaintiff-husband had previously testified in his deposition on March 2, 2004 that the money to purchase the Greenwich house came in part from the proceeds of the sale of the Larchmont house. It was determined that the Larchmont house was not sold until after the purchase of the Greenwich house, which was finally acknowledged by plaintiff-husband. At trial his contention was that the money came from the sale of stocks and bonds. At this juncture for the first time he testified that he had located his 1987 Federal Income Tax return which showed the sale of stocks. The majority of the acquisitions were short term and within the same year as their sale. It did however support the contention of defendant-wife that his income from employment for that year was $232,732 that could have been utilized for the down payments.

In addition, the title to the Greenwich house in August 1987, in plaintiff-husband's sole name, was then transferred to the parties' names as joint tenants with the rights of survivorship. In 1997 he deeded the property solely to the defendant-wife in order to avoid creditors' claims from his restaurant business investment which was liquidated. When defendant-wife became aware of this she insisted that the parties execute a quitclaim deed transferring the residence back to the parties' joint names. It remained so titled until the property was sold in 1998.

Defendant-wife did not testify that she had contributed any funds towards the purchase. It is her contention that no proof was offered that the accounts liquidated to make the payments were not accumulated during the marriage since plaintiff-husband's income tax return for 1987, the only evidence in this regard, failed to show the origin of the stocks, premarital or marital. The return did show however an income of $230,000, which she contends shows the likelihood that the parties could have been able to amass sufficient savings to make the down payment, since plaintiff's income over the three prior years of the marriage up until the time of the purchase were substantial.

Conclusion

The court finds that plaintiff-husband has not sustained his burden in demonstrating that he is entitled to a separate property credit. He has not substantiated his claim by a clear and convincing showing as to where the source of the down payments originated. *Massimi v. Massimi,* 35 A.D.3d 400, 825 N.Y.S.2d 262 (2d Dept. 2006). The absence of evidence tracing the funds used to purchase the property to a separate property source leads the court to determine that the source of the payment was from marital property acquired during the marriage. *Lolli-Ghetti v. Lolli-Ghetti*, 165 A.D.2d 426, 568 N.Y.S.2d 29 (1st Dept. 1981).

In addition this court finds that the transfer of the property to the sole title of the wife, even though the property continued to be marital property, cut off any right to revisit any separate property claim which might have been asserted if this property was still held by them in their joint names. The transfer of the separate property into joint names and then to defendant-wife's sole name is presumed to be intended as an interspousal gift so the separate property component is transmuted into marital property. See *Coffey v. Coffey*, 119 A.D.2d 620, 501 N.Y.S.2d

74 (2nd Dept. 1986). Here the property has been sold and the proceeds of sale have been distributed to other joint assets of the parties and the claim is no longer viable.

Plaintiff's Claim to a One-Half Equity Interest in 71 Abbott Drive, Huntington, New York

Defendant-wife purchased 71 Abbott Drive, Huntington, New York in her sole name, on December 17, 2002. The testimony of defendant was that each of the parties had discussed the need for them to obtain residences near one another after the contemplated sale of the former marital residence, since they were both to have joint custody of their three dogs.

She testified she informed plaintiff-husband that she had found a house she was interested in purchasing and she had gone to see it with her mother and sister. Since she did not have sufficient funds to make the down payment, at her sister's suggestion she took a home equity loan in the amount of $184,000 on the marital residence in Lattingtown. With $175,000 from this loan and her sister's gift of $125,000 she had sufficient funds to allow her to purchase the Abbott Drive property. The cost of the house at the time of closing was $500,000. The remaining purchase price was to be covered by a purchase money mortgage

She took the home equity loan before telling plaintiff-husband but informed him the next day and he did not object. She stated that she told him that she would return the funds from her share of the proceeds of the sale of the Lattingtown residence.

In addition defendant-wife testified that plaintiff-husband assisted her in obtaining the mortgage on the Huntington residence by writing a letter to the bank from which defendant-wife was obtaining the mortgage taking sole responsibility for all expenses related to the Lattingtown house. A letter was placed in evidence showing this agreement. Plaintiff-husband testified that he could not recognize the signature and doesn't recall the document. This court finds this testimony unworthy of belief since there was no complaint as to the validity of the document until the date of trial.

Within three months of the institution of this first action the parties entered into a stipulation, and an order was issued by Justice Kent, the justice assigned to this matter, directing the sale of the marital residence in Lattingtown within 90 days of March 17, 2003. The original proposed contract was not accepted, since there was considerable new interest in the property which led to a sale price of $1,400,000, or approximately $265,000 more than the original proposed price that defendant-wife had refused to accept.

The Lattingtown home was sold during the course of the discontinued action and the outstanding equity line balance of $184,000 was paid at the closing. During the period of time from the purchase of the house on December 17, 2002 and until the sale of the Lattingtown home in November 2003, the home equity loan payments were made solely by defendant-wife.

Plaintiff-husband now claims that when he was told of the proposed purchase of the Huntington house he thought the home was to be for both parties and now sets forth a claim that he share in the equity in the Huntington residence. The stipulated value of the property as of June 30, 2005 was agreed to be $658,000. The outstanding mortgage is $182,509.21. Plaintiff-husband claims a one-half interest in the net equity of $475,490.

Conclusion

The court concludes that to the extent that the proceeds of the home equity loan were utilized to purchase the Huntington residence, that portion was marital property. The distribution of this asset will be set forth below.

Factors

The court must now consider the thirteen factors set forth in DRL Sec. 236 (b)(5)(d) in determining the equitable distribution of the marital property.

1. Income and Property.

At the time of the marriage in 1984 plaintiff-husband had been employed by Merrill Lynch since 1969, a period of fifteen years. He started as a financial consultant trainee. In 1970 he became a financial advisor, and ten years later he became a Vice President. At the date of trial, he was working in the Private Client division in the Stamford, Connecticut office, where he had worked since 1987.

Plaintiff-husband has reported W-2 wages for the year 2005 in the sum of $330,012. A payroll history statement from that year placed in evidence indication that $166,246 of this gross amount was receipt of an award of Merrill Lynch stock shares from the FCAAP plan on which he was required to pay taxes. His income in 2004 was $201,102; in 2003, $116,526 and in 2002, 134,204.

Defendant-wife's income from her present position with the law firm of Potruch & Daab, L.L.C. is $90,000 per year. Her first full year of employment as an attorney in 1995 in Connecticut she earned approximately $32,000, and from 1996 to 1998 she earned $56,000 to $58,000.

In 1999 the parties moved from Connecticut to Lattingtown, Long Island and defendant-wife was unemployed for approximately one year. In 2000 defendant-wife obtained a position, with the firm of Joseph D'Elia in Huntington, New York where she worked until 2006. She earned $90,519 in 2005 from said employment.

Plaintiff-husband has Merrill Lynch Performance Based Award Plans, Merrill Lynch Financial Advisor Capital Accumulation Award Plan (FCAAP), and Wealth

Builder and Growth Award plans which are the subject of this court's determination as to whether they constitute separate or marital property. The parties' retirement accounts consist of two IRA accounts in plaintiff-husband's sole name, a Merrill Lynch ESOP, 401K and RAP account, and defendant's 401K from Wilson Elser.

Pension Plans consist of the plaintiff-husband's Met Life Annuity and defendant-wife's United Airlines Pension. Plaintiff-husband has five Merrill Lynch accounts that are non-retirement accounts.

The parties have sold the former marital residence in Lattingtown, New York and have by stipulation distributed all of the proceeds of the sale. Defendant-wife owns a home in Huntington, New York at present to which plaintiff asserts a claim as a marital asset.

2. Duration of the marriage and the age and health of the parties.

The parties were married on June 2, 1984. The date of the first action for divorce filed by defendant-wife which has been stipulated as the date of commencement herein, was January 3, 2003, at which time they were married approximately 18½ years. The plaintiff husband was 64 years of age at the time of trial and the defendant wife was 53. Neither party has testified to any health problems that would interfere with their ability to be self-supporting.

3. This provision is not applicable in this action. There are no children of this marriage, and all of the children of the parties' first marriages are emancipated.

The former custodial residence has been sold and all of the proceeds of that sale distributed to the parties.

4. The loss of inheritance and pension rights.

One of the major issues in this proceeding is the determination of what pension interest of plaintiff-husband are separate property and what, if any, are marital and subject to distribution which the court has addressed above.

5. There is no request for maintenance herein. Both parties are self-supporting.

6. Direct and indirect contributions.

The facts testified to by defendant-wife as to her direct and indirect contributions to this long term marriage have basically not been contested. The disability payments of $5,000 per year which she received from United Airlines as well as her child support payments in the amount of $6,000 per year were deposited into the parties' joint account from 1984 to 1993. In addition when she obtained employment as an attorney she made increasing monetary contributions towards the parties' expenses.

She testified that in addition to caring for her own child she cared for plaintiff-husband's daughter who moved in with them when she moved into the Larchmont residence in 1984. She would drive the child to the railroad station to visit her mother every other weekend. On alternate weekends plaintiff's two other children would stay with them, as well as being with them for one month in the summer. In addition she maintained the parties' residence and cooked and cleaned for the family.

7. Liquid or non-liquid character of the property.

Each of the assets of the parties have been valued above, where possible, and will be subjected to a QDRO, where applicable if they are not yet in pay status. The stock options, some of which have vested and been paid, but have yet to be distributed or will become vested in the future, have been considered and a portion has been determined which the court finds constitutes marital property.

8. The future financial circumstances of the parties.

The future financial circumstances of both parties seem secure. Plaintiff still maintains his position as Vice President with Merrill Lynch. He has major opportunities for additional options and growth fund investments. Through his acuity and knowledge he has been able to build a sizeable investment portfolio.

Defendant-wife is gainfully employed with a law firm and has advanced her career over the last few years. She will have sufficient interest in pension and options to secure her future as well.

9. The parties do not own any business.

10. The tax consequences to each party have been taken into consideration above with the determination of the value set forth for the assets when capable of determination and by direction for their consideration before distribution of assets that are future benefits to the parties.

11. The court finds no dissipation of assets herein.

12. Transfer of property in contemplation of this action.

The court has analyzed the use of the Home Equity Loan placed on the former marital residence that was eventually sold by the parties. It has found it was made with the intent by the parties that the moneys taken was to permit defendant to make the down payment for her own residence and was to be returned or considered as part of her share of equitable distribution made herein. The court does not find that this was in any way surreptitious or manifests an attempt to transfer assets from the marital estate.

13. There are no other factors that the court finds necessary to address.

Proportion of Distribution

To determine the proper distribution of assets, a court must first characterize each asset as either marital or separate property. The court has made those determinations above. Each asset must be assigned a value which shall be determined in the implementation of the award, wherein the marital property shall be equitably distributed. See *D'Amato v. D'Amato*, 96 A.D.2d 849, 466 N.Y.S.2d 23 (2nd Dept. 1983).

The court has determined the items which are marital property as well as declared that some of the stocks, profit sharing plans, and various savings plans and pension interest have a separate property component, which will have to be determined in order to ascertain the correct division of the assets determined to have been accumulated during the marriage, whether to distribute in kind or to make a distributive award in lieu of or to supplement, facilitate or effectuate distribution. The court has discretion in this regard to allow it to achieve equity between the parties. *Majauskas v. Majauskas, supra*, *Litman v. Litman, supra*; *Biscay v. Biscay*, 108 A.D.2d 773, 485 N.Y.2d 301 (2d Dept. 1985).

Having examined all of the factors set forth above the court determines that due to the length of the marriage and the contributions of both parties directly and indirectly, all of the assets or part thereof which have been determined to be marital; the enhanced earning capacity of defendant-wife's law license; plaintiff-husband's Non-Retirement accounts; his Merrill Lynch performance based award plans; retirement account, IRAs ESOP, 401K and RAP accounts; defendant-wife's 401K account; plaintiff-husband's pension plan with Met Life Annuity, and defendant-wife's United Airline Pension; that portion of the defendant-wife's Huntington home which the court finds to be marital, shall all be divided, "close to if not totally equal." *Perri v. Perri*, 97 A.D.2d 299, 467 N.Y.S.2d 22 (2nd Dept. 1983); *Dawson v. Dawson*, 152 A.D.2d 717, 544 N.Y.S.2d172 (2nd Dept. 1989); *Thomas v. Thomas*, 145 A.D.2d 477, 533 N.Y.S.2d 736 (2nd Dept. 1988).

In regard to plaintiff-husband's VOCON, plan and his Deferred Profit Sharing plan the court has found these were plaintiff-husband's separate property, but that the increase in value of these assets during the marriage were the result of the active management by the titled spouse's monitoring and choosing his investment portfolio, within the wide range of investment opportunities presented by Merrill Lynch until 2002. The court has found that the value of this appreciation is marital.

However, in regard to the distribution of these assets the court does not find that an equal allocation would be equitable. See *Arvantides v. Arvantides*, 64 N.Y.2d 1033, 489 N.Y.S.2d 58 (1985). The court is granted "substantial discretion" in determining the proper distribution of each asset under all of the circumstances. See *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000).

In this case although the court acknowledges that there was an indirect contribution on the part of defendant-wife and has set that forth above, there has been very little showing of direct involvement by her in plaintiff-husband's financial endeavors. Other than her presence on an occasional award trip, given in recognition of the acknowledged ability of the plaintiff-husband as an important and productive financial advisor for his company, no substantial contribution to the appreciation of these assets has been proven. See *Brough v. Brough*, 285 A.D.2d 913, 727 N.Y.S.2d 555 (3rd Dept. 2001).

Under these circumstances the court finds that defendant-wife is entitled to a 25% interest in the marital portion of these plans from the date of the marriage to the date of the commencement of this action.

The court has also determined that the plaintiff-husband's Deferred Compensation plan is separate property in its totality since the increase in value was purely passive in nature based on a set interest factor and not on any efforts or involvement of plaintiff-husband to manage or modify the terms of the plan in any way.

Implementation

The court must now fashion an equitable distribution of the marital assets and determine whether to distribute in kind or to make a distributive award in lieu of, to supplement, facilitate or effectuate distribution. The court has discretion in this regard to allow it to achieve equity between the parties. *Makaiskas v. Majauskas; supra*, *Litman v. Litman, supra; Biscay v. Biscay*, 108 A.D.2d 772, 485 N.Y.2d 301 (2d Dept. 1985).

Former Marital Residence

The court has addressed above the fact that the former marital residence, located in Lattingtown, New York was eventually sold by the parties in November, 2003. After much negotiation and several proposed buyers the property was sold for $1,400,000. The parties have agreed that the net, after payment of mortgage, home equity loan, broker's commission and costs of sale was $704,000. These funds were divided equally between the parties, each of their attorney's placing $352,000 in their respective escrow accounts. $250,000 was distributed by stipulation to each of the parties during the course of this litigation and the additional funds in the account distributed by stipulation on November 1, 2006, the last day of trial, on consent of the parties. Therefore each of the parties has received approximately $352,000 as their distributive award, in regard to this asset.

Defendant-Wife's Enhanced Earning Capacity

The court has determined that plaintiff-husband is entitled to 50% of the enhanced earning capacity of the defendant wife's earning capacity. The parties have

stipulated that the value is $195,500. Therefore plaintiff's distributive share of this asset is $97,750.

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Plaintiff-Husband's "FCAAP" Plan

The court has previously held that the assets in this plan, Merrill Lynch stock, are marital property. At the time of commencement of the action 2,380 shares had vested in 2001 and 2002; they are all marital property and 100% of the shares are subject to equitable distribution.

The marital component of options vesting after the date of commencement of the trial is determined by applying a fraction, the numerator of which is the time from the date of the grant until the date of commencement, and the denominator is the time from the date of the grant until the option vests. This will be a fraction of 9/10ths for 2–3, and the numerator will decrease by 1 each year, until 2010, after which no part of the vesting options will be marital property.

For the year 2003, the testimony at the trial shows that the options maturing during this year were cashed in, and the records of Merrill Lynch show a value at the time of payout of $61,389. Of this amount 90%, or $55,262 is marital property.

For the years 2004 and 2005, 4456 shares vested, and after applying the fraction described above, will be marital property to the extent of 8/10ths and 7/10ths respectively. All of the shares vested up to the date of trial are passive assets, as the plaintiff-husband did not control them, and did not exercise any special skill in their management. Defendant-wife is, therefore, entitled to all subsequent increase in value.

Shares vesting after the start of trial, September 15, 2006, had not been received by plaintiff-husband, so they will be valued at the time of trial, $87,275, the appropriate fraction applied, and the cash value so determined will be marital property, when, as and if the shares are actually received by plaintiff.

All of the foregoing shares and cash must be tax impacted at the rate of tax paid by taxpayer for each year. The following table summarizes the distribution of the FCAAP fund:

Shares Vested as of the Commencement of Trial
(Options granted from 1991 to 1995)

Year Vested	No. Shares or $Value Vested	Applicable Fraction	Amount	Tax Impact	Marital Property Amount
2001	1,000	10/10	1,000	27.81%	722 shares
2002	1,380	10/10	1,380	24.09%	1,048 shares
2003	$61,389	9/10	$55,262	33.50%	$36,749
2004	2,784	8/10	2,227	38.87%	1,361 shares
2005	1,672	7/10	1,170	38.87%	715 shares
Total shares					3,846
Total cash					$36,749

Shares Not Vested as of the Commencement of Trial
(Options granted from 1996 to 2004)

Year	No. of Shares	Applicable Fraction	Amount
2006	980	6/10	588
2007	692	5/10	346
2008	556	4/10	222
2009	562	3/10	169
2010	409	2/10	82
2011	188	1/10	19
Total shares			1,426

(These shares are marital property, when, as, and if received, and are to be tax impacted at plaintiff-husband's tax rate for the respective years)

The court is awarding defendant-wife 50% of the dollar amount and number of shares shown as marital property. The monetary award, one-half of $36,749 or $18,374 shall be paid to her in accordance with the distributive award below. The plaintiff-husband shall transfer to her 50% of the vested shares determined to be marital property, or 1,943 shares. A QDRO shall be served upon Merrill Lynch advising them of the number of non-vested shares due to defendant-wife each year, which will be in accordance with the schedule above.

The plaintiff-husband shall make the defendant-wife the beneficiary of his interest in the FCAAP plan to the extent of the distributive awards made to her herein. The amount of this interest shall decrease each year by the distribution to her of the shares of stock set forth above. Upon the receipt by her of the entire award granted to her by this decision and order, she shall cease to be beneficiary of any interest in this plan.

If plaintiff-husband shall retire, or die before the receipt by defendant-wife of her entire interest in the FCAAP plan granted by this decision and order, and the awards granted herein which have been determined to be her distributive interest become vested, she, as a beneficiary of the plan shall be entitled to receive her remaining interest therein from any distribution that is due and owing to plaintiff-husband or his estate.

Merrill Lynch Growth Award Plan

Plaintiff-husband became a participant in this plan in 2002. As stated above, the court finds that it is a performance based fund, and therefore the principal and interest income earned during the marriage is marital property. The only award made during the marriage was in 2002 for $7,285. This plan has a four year vesting provision and vested in 2006, although at the time of trial the award had not yet been issued.

This amount of $7,285 should have been paid to plaintiff-husband in February, 2007 according to the testimony of Ms. W. The interest accumulated on this award over the four years until the date of trial has been shown to be $1,810 which the court shall add to the value of the asset, making the total due and owing $9,095, tax impacted at the agreed rate of 38%, which leaves a balance of $5,639.

Defendant-wife shall be entitled to a net distributive award in regard to plaintiff-husband's Growth Award Plan of 50%, or $2,819.

The plan provisions provide that plaintiff-husband is permitted to defer receipt of his account balance. If plaintiff-husband has received the payment due him of $9,095 in 2007, or if the plan permits withdrawal by him, plaintiff-husband shall withdraw the sum of $2,819 (already tax impacted) and pay such sum to defendant-wife, as a distributive award. If the plan does not permit such withdrawal and plaintiff-husband has not received the amount due him in 2007, the court directs that defendant-wife shall have the right to a QDRO, which will include any further accumulated interest, directing payment to her of the above amount.

If the plan permits, plaintiff-husband shall make the defendant-wife the beneficiary of his interest in the Growth Award Plan under the same conditions as set forth for the FCAAP plan set forth above.

Merrill Lynch Wealth Builder Account Plan

This account commenced in 1994 and its value as of December 31, 2002 was $50,395.80, representing awards for the years 1994 through 1999. The plan vests, according to the plan document, when plaintiff-husband becomes eligible to retire, which would be 55 if he had 10 years of service, which condition has been met.

Defendant-wife shall be obligated to pay 50% of the tax obligation, agreed to be 38%, before calculation of the net amount of any distributive award herein.

Since there is no indication that plaintiff-husband is going to retire from Merrill Lynch at the present time, defendant-wife is entitled to receive a distributive award of 50% of the value as of the date of commencement, $53, 983.67, tax impacted at a rate of 38% or the sum of $16,735, as a distributive award since it will not be paid until plaintiff-husband retires.

Plaintiff's VOCON Plan, Deferred Profit Sharing Plan and 1978, 1979 Deferred Compensation Plans

VOCON Plan

The court has determined that this plan is separate property which has increased in value by the direct contribution of plaintiff-husband's management and direction, taking advantage of the options offered by his employment throughout the marriage and the indirect contributions of the defendant-wife as set forth above.

Defendant-wife has had limited involvement with this fund, and her testimony suggests that as far as plaintiff-husband's business endeavors went she was not an interested or active participant, since she was involved in her own advancement in achieving her career goals and then in her career itself throughout most of the marriage.

The defendant-wife has, however, shown that out of the approximately $45,000 separate property investment originally made prior to the marriage, plaintiff-husband took out $39,000 in November 1981, as shown by a Merrill Lynch statement, to diversify his holding. This would leave only $6,000 of the original investment in the fund.

Plaintiff-husband, although he presented no evidence, stated that the original investment had increased considerably from 1975 to 1982 and a much larger amount remained in the account at the time of the withdrawal,

which increased from 1982-1984 before the marriage as well. His testimony was that the amount in 1981 when he withdrew the $39,000 was "more like $45,000," but no substantiation was offered.

Plaintiff-husband has presented no testimony, other than the above statement as to the value of this asset at the time of the marriage. He has produced no evidence or witnesses to show proof of the value of the separate property component of this account, although constant unanswered discovery demands requested the necessary information.

The appreciated value of this fund is $163,893 as of January 3, 2003, the date of commencement. Defendant-wife shall be entitled to a distributive award, by a QDRO, in the amount of 25% of this asset, less the $6,000 separate property component which has been established was still contained in the fund at the time of the marriage, or a total of $39,468, ($163,873 - $6,000 x 25%). Since the court has determined that this is an active asset she is only entitled to the appreciation in its value to the date of commencement and not the June 2006 date requested by defendant-wife. The $39,468, is tax impacted at 38% or $14,998 leaving a net amount of $24,470.

Merrill Lynch Deferred Profit Sharing Plan

This plan has been valued as of January 3, 2003 at $54.719. The court finds that the determination of the value of the appreciation of this separate property, again as above, starts as of the date of the marriage, when it becomes marital and the marital portion is calculated to end at the date of the commencement of the action.

The only value of the separate property component showing the investments made prior to the marriage is a Merrill Lynch statement with an amount of $1,539 as of April 1973. No other information was produced at trial. This amount shall be deducted from the total value to calculate the appreciation.

The distribution to defendant-wife shall be by a QDRO in the amount of 25% of the appreciation after deducting the 38% tax impact on the income portion, as agreed upon by the parties, or the sum of $8,243 as a distributive award herein.

***

Plaintiff-Husband's and Defendant-Wife's Retirement Accounts

Merrill Lynch IRA Account Number ***

Plaintiff-husband testified that the initial funding for this account in January 1988 came from an ESOP employee stock program. No other contributions have been made to this account. The plaintiff-husband's ESOP plan has been stipulated to be marital property. The court has directed that marital property be distributed equally between the parties; the statement as of August 31, 2006 showed its value at that time was $193,962.83. One-half of its value or $96,982 is to be rolled over into a retirement account as designated by the defendant-wife.

Merrill Lynch IRA Account Number ***

This account is in plaintiff-husband's sole name and was started in March of 2004 with funds from the above account The initial deposit was in the amount of $140,000. No further deposits were made to the account. The account balance as of August 31, 2006 was $167,655.

The court finds that this account constitutes marital property and therefore one-half of its value or $83,828 is to be rolled over into a retirement account as designated by the defendant-wife.

Merrill Lynch ESOP, 401K and RAP Accounts

These accounts were stipulated to be marital property. The account statement for June 30, 2006 set forth the value of the plans at that time to be:

ESOP	$265,858
401K	398,528
RAP	497,519
Total	$1,161,905

It was further stipulated that $95,245 was the value of plaintiff-husband's post-commencement contributions and appreciation thereof. Deducting this amount from the total set forth above leaves the marital portion to be $1,066,661.80.

Defendant wife is entitled to a 50% interest in the above funds in the total amount of $533,330.60 by a QDRO to each of the account plans in proportion to her one-half interest. In addition she shall be entitled to the appreciation of her share of this asset, if any, occurring up to the time of transfer of her interest in this asset. ***The parties shall equally share the reasonable cost of all fees for the preparation of all QDRO's necessary to effectuate the transfer of the assets consisting of the equitable awards made in this decision.***

Defendant-Wife's Wilson Elser, 401-K Plan

At the time of trial this asset was valued at $7,228.95. Plaintiff-husband is entitled to 50% of the value of this plan or $3,6l4.

Pension Plans

Plaintiff-Husband's Met Life Annuity

The court has found that the present cash value for an immediate offset was $228,235.25. One-half of that present value, or $114,167.62, is tax impacted at 38% for a total distributive award of $70,784.

Defendant-Wife's United Airlines Pension

The value of this pension interest was stipulated to be $1,285. Plaintiff-husband is entitled to one-half, or $643.

Huntington House

In regard to the Huntington house, which is in the sole name of the defendant-wife, although the court finds that this is a marital asset, the court however finds that the house is encumbered by a mortgage indebtedness in the amount of $182,509.21, that defendant's sister gave her a gift in the amount of $125,000 toward the purchase price for which she is entitled to a separate property credit, and that the $175,000 of the home equity loan taken by defendant-wife was utilized to purchase the premises. Since plaintiff-husband is claiming an interest in the residence because of the use of the funds from the home equity loan he is entitled to one-half of the additional $9,000 which is $4,500, which defendant-wife also took from the home equity for her own personal expenses, since the loan totaled $184,000.

The Huntington residence is found to be marital property subject to equitable distribution, as it was purchased by defendant-wife prior to the commencement of the parties' first matrimonial action, and marital funds were used to pay a portion of the purchase price. (See Domestic Relations Law Sec. 236 (B)(1)(c), *Massimi v. Massimi,* 35 A.D.3d 400, 825 N.Y.S.2d 262 (2nd Dept. 2006); *Palumbo v. Palumbo,* 10 A.D.3d 680, 782 N.Y.S.2d 106 (2d Dept., *lv. dismissed* 3 N.Y.3d 765, 788 N.Y.S.2d 665 (2004).

However, as discussed above, the credible evidence at trial clearly shows that the property was purchased by defendant-wife with the expectation, shared by both parties, that a divorce action was imminent. The parties' economic partnership essentially ended less than three weeks after such purchase. The court finds that the convincing evidence further shows that plaintiff-husband did not expect to live at the Huntington residence with the defendant-wife and that he did not contribute, directly or indirectly, to the improvement or maintenance of such property. In addition there was no showing that the increase in value of the premises was the result solely of market factors. It was uncontested that the premises were severely damaged by frozen pipes, uninhabited for a period of time, and needed extensive renovation, which were paid for solely by defendant-wife through insurance coverage and her additional expenditure of approximately $135,000, no part of which was paid for by plaintiff-husband.

Plaintiff-husband's claim that he is entitled to a distributive award representing one-half of the value of the Huntington residence at the time of trial, or the value given by the appraiser as of September 2005, in the amount of $628,000, or a sale of said residence and 50% interest in the net proceeds of the sales less only the outstanding mortgage obligation and costs of sale, is rejected. Rather, in view of the particular circumstances of this action, the court determines that the appropriate valuation date for the Huntington residence is January 3, 2003, which is the date the first divorce action was brought and the date which the parties stipulated would be the commencement date for the purposes of equitable distribution in this action. (See *Mesholam v. Mesholam,* 25 A.D.3d 670, 8099 N.Y.S.2d 131 (2d Dept. 2006); *Harned v. Harned,* 185 A.D.2d 226, 585 N.Y.S.2d 780 (2d Dept)). Therefore, plaintiff-husband is entitled to a 50% interest in the $175,000, consisting of the marital portion of the investment for the purchase of the Huntington residence, which is $87,500 as well as the return of $4,500 one-half of the additional $9,000 remainder of the proceeds of the home equity loan received by defendant-wife, or a total of $92,000.

Personal Property

On November 1, 2006 the parties stipulated and agreed to the disposition of their personal property. In addition, in consideration of the different values of their respective automobiles it was agreed that plaintiff-husband was to receive a credit of $1,600.

***

Pre-Judgment Interest

Defendant-wife is requesting pre-judgment interest retroactive to September 12, 2005. This was the trial date that was adjourned for more than one year for failure of plaintiff-husband and his employer to provide what is called critical documentation and information.

Plaintiff-husband's conduct has been described as "stonewalling and harassment." His Net Worth Affidavits have been called incomplete and inaccurate. It is defendant-wife's claim that he was attempting to secrete assets and particularly the extent of his interests in his FCAAP and Growth awards and other marital assets. It was necessary for defendant-wife to engage in costly and extensive litigation with the employer to obtain the requested documentation.

Eventually Justice Kent while denying sanctions found that Merrill Lynch eventually produced the "documents sought" some 5,647 pages, some nine months after the trial was to begin. It is defendant-wife's contention that the conduct of plaintiff-husband, in preventing the trial of the matter for over one year since the Note of Issue was filed, has deprived her of the use of the assets which are liquid in nature and could have been distributed to her over one year ago.

Plaintiff-husband points out that the award of interest should be based on a deprivation of the use of money or its equivalence to make the party whole. He claims that the record is devoid of proof that plaintiff-husband delayed or caused a delay in the trial of this matter.

In addition, he points out the tactic of defendant-wife instituting an action in Suffolk County New York, on January 3, 2003 and voluntarily discontinuing it on April 4, 2004, in order to institute an action in the State of Connecticut, a forum more to her liking. It is plaintiff-hus-

band's claim that it was the defendant-wife who would have wasted fifteen months by her discontinued action, but for plaintiff-husband' s instituting the current action, which caused the discontinuance of the Connecticut proceeding and moved the matter forward.

The court finds that indeed, it was plaintiff-husband's failure to follow through with discovery and respond to the demands of defendant-wife's counsel or to motivate his employer to supply the records that he was well aware were available to them, and as he testified in court, to him as well. As stated by Vice-President D., of Merrill Lynch, both he and the plaintiff-husband had access to computers at Merrill Lynch that would have been able to supply the relevant information. The one year delay was plaintiff-husband's strategy to deter defendant-wife's quest for information necessary for the adequate presentation of her claims.

However, it is also correct that defendant-wife was self-motivated by her actions. If a change of venue would effectuate a more advantageous result in the division, or lack thereof, of the assets of the parties, the loss of the fifteen months of litigation in New York could very well be worth the attempt.

Therefore this court finds that both parties conduct equally protracted the trial of this matter and no pre-trial interest shall be granted herein.

Distributive Award

The court must now bring together the foregoing conclusions, and formulate a distributive award.

Item	Total Amount	Plaintiff Husband	Defendant Wife
Wife's law license	$195,500	$97,750	
Husband's Merrill Lynch A / C ***	105,122		$102,061
Husband's Merrill Lynch A / C *** Separate Property	29,704		
Husband's Merrill Lynch A / C ***	16,923		8,466 + Int.
Husband's Merrill Lynch A / C ***	7,791		3,896 + Int.
Husband's Merrill Lynch A / C *** (Separate Property)	537,546		
Husband's Merrill Lynch FCAAP Plan			
Vested Shares	(shares) (4,098)		(2,049)
Cash	36,749		18,374
Non Vested Shares	(1,426)		½ when received
Husband's Merrill Lynch Wealth Builder A / C	33,740		16,735
Husband's Merrill Lynch Growth Award A / C	5,639		2,819
Husband's Merrill Lynch VOCON Plan	73,421		24,473
Husband's Merrill Lynch Deferred Profit Sharing Plan	32,972		8,243
Husband's Merrill Lynch Deferred Comp. Plan (Separate Property)	321,241		
Husband's Merrill Lynch IRA A / C ***	193,963		96,982 (*)
Husband's Merrill Lynch IRA A / C ***	167,655		83,828 (*)

Item	Total Amount	Plaintiff Husband	Defendant Wife
Husband's Merrill Lynch ESOP, 401K and RAP A/c's (Stipulated Amounts)	1,066,662		533,331(*)
Husband's Met Life Annuity	228,235		
Tax Impacted	141,506		70,753
Wife's Wilson-Elser 401K	7,229	3,614	
Wife's United Air Pension	1,285	643	
Huntington House		92,000	
Pendente Lite Arrears			1,170
Plaintiff-Husband's Loans			25,000
Totals		194,007	996,131
Due to Wife			**281,990**
Due to Husband			194,007
Distributive Award Payable to Wife			**87,983**
QDRO to wife			**533,331(*)**
Transfer to Wife's IRA			96,982 (*)
Transfer to Wife's IRA			83,828 (*)
			714,141
Shares of Stock to be transferred to wife – Vested			**1,923**
Shares of Stock to be transferred to wife – Non Vested			QDRO

The marital portion of the funds in the plaintiff-husband's two Merrill Lynch IRA accounts, *** and *** are directed to be rolled over into accounts established by defendant-wife, within thirty days of this decision and order, in the amounts set forth above.

The vested Merrill Lynch stock in plaintiff-husband's FCAAP plan shall be distributed in accordance with the above schedule. A QDRO shall be put in effect to provide for the transfer of the stock which has not vested, in accordance with the schedule set forth above, when the stock becomes vested.

Defendant-wife has been granted a distributive award of $87,983, not including the distributions of stock interest, either vested or non-vested to which she has been found entitled, ESOP, 401K and RAP plans, and the two IRA accounts. Plaintiff-husband is directed to make payment of this distributive award within 15 days of this amended decision and order. All payments are to be made to defendant-wife attorney, Alexander Potruch, LLC at his office address, 666 Old Country Road, Garden City, New York, 11530.

If payment is not timely made by plaintiff-husband, upon filing of an affirmation of non-compliance by defendant-wife's attorney, the County Clerk of Suffolk County is directed to enter a judgment reflecting the amount then due with interest at the legal rate.

Counsel Fees

The parties and counsel have stipulated and agreed that the application for counsel fees shall be determined by the court upon the submission of both parties' counsel affirmations requesting fees and their affirmation in opposition thereto, without the necessity of trial testimony. *Burke v. Burke*, 118 A.D.2d 102, 500 N.Y.S.2d 398 (3rd Dept. 1986), *Entwistle v. Entwistle*, 92 A.D.2d 879.

The court has reviewed and considered the affirmation of James P. Curran, Esq., of the firm of Miller, Apfel & Curran PLLC on behalf of plaintiff-husband and in opposition to defendant wife's application for fees herein, and the affirmation of Alexander Potruch, Esq., of the firm of Potruch & Daab L.L.C. in opposition to plaintiff-husband's request and in support of defendant wife's application herein.

Plaintiff-husband's counsel is requesting $30,800 for the first action and $129,373 for the second. Defendant-wife's counsel is requesting, $127,403.20, as his fee and $20,648 for the fees, costs and expenses of Marcus & Company, LLP, defendant-wife's expert.

In making awards of counsel fees in matrimonial proceedings the court must consider and weigh the nature of the issues involved, the difficulties of the case and the services performed. *Ahern v. Ahern*, 94 A.D.2d 543, 463 N.Y.S.2d 238 (2nd Dept. 1992). In this matter there has

been a strong difference in the legal opinions of counsel as to the issues of separate property, and / or the appreciation thereof; whether options earned by plaintiff-husband are retension agreements or compensation based on productivity and the current value of the employee's service to the company; transmutation of assets to an equity in solely titled property, claimed separate property credit for down payment and purchase price for the acquisition of the first marital residence; and other intensely litigated issues.

Contrary to plaintiff-husband's counsel contention that many of these issues had no foundation, the court has found that each posed serious complicated and difficult legal considerations that have been addressed herein.

In addition the court has considered the time spent, the nature of the services, the amount of the fee requested, the professional standing of counsel and the relative financial situations of the parties. *DeCabrera v. DeCabrera*, 70 N.Y.2d 879, 524 N.Y.S.2d 876 (1987); *In Re Pott's Estate*, 213 A.D. 59, 209 N.Y.S.2d 655 (4th Dept. 1925).

The court finds that the rates charged by both firms are in keeping with their standing in the legal community.

The time invested in the discovery process was inordinate. Plaintiff's counsel contends that it was overbroad, unnecessary and unproductive. This court finds that this was not correct. The testimony of the three Vice-President's from Merrill Lynch proved the complaint of defendant-wife's counsel that a large part of the information demanded by her in regard to all of plaintiff's profit sharing plans, deferred compensation holding and accounts were but a touch of an internet key away from these experts, as well as from plaintiff-husband but never produced, up to and including to the trial itself. The testimony showed that at least ten years of information were in files of Merrill Lynch contained in their stored computer banks, information that was essential to the court's ability to determine the accuracy of plaintiff-husband's testimony.

The court has taken into consideration the financial circumstances of the parties, their incomes and the distributive award made herein. Each of them have already received over $352,000 as their share of the proceeds of the sale of the former marital residence. Plaintiff's separate property accumulation from income from employment and vested options, since the commencement of this action is substantial. Defendant-wife has been awarded not only a share of the pension interest in plaintiff-husband's retirement accounts and other both jointly held and solely titled assets, but also a portion of the funds and stock received by plaintiff-husband from the vesting of his options during these proceedings.

It is true that if the separate property component and additional option income is considered in the calculation of the comparative incomes of the parties, that plaintiff-husband's income and assets far exceed defendant-wife's, since her share of the option awards will be steadily decreasing. However it is the finding of this court that under the circumstances set forth above, each party shall pay their own counsel fees and there shall be no contribution due from either of them for the fees of the other.

Expert Fees

DRL Section 237(c) specifically authorizes the court in its final judgment to direct the payment of expenses necessary to carry on the action, including appraisal fees, actuary fees and investigative fees. *Ritz v Ritz*, 103 A.D.2d 808, 477 N.Y.S.2d 679 (2d Dept. 1984). In *Ritz* the court pointed out that: "In view of the nature of the marital property involved, the attendant difficulties in determining its value, as evidenced by the wide disparity in the estimates prepared by each party and the respective financial circumstances of the parties, Special Term did not err in awarding pendente lite a definite sum for accounting and appraisal services. (See *Ahern v. Ahern*, 94 A.D.2d 531. 463 N.Y.S.2d 238.)

The complexity of, and indeed, the paucity of the original production of the basic records needed and the difficulty of obtaining available information complicated the job of the expert.

Taking into consideration the relative values of the separate property of the parties and the extensive investigation undertaken for the purpose of attempting to fashion an accurate evaluation for the court, and the evident ease of plaintiff-husband to obtain the same basic information, if desired, it is obvious that plaintiff-husband has been uncooperative and dilatory. He has by his tactics, although he alleged he had no control of the production of the sought after records by his employer, increased the fees engendered for the services rendered.

The plaintiff-husband shall be obligated to pay the sum of $20,648 in connection with the services performed by Marcus & Co. LLP. This amount shall be paid directly to defendant-wife's counsel, Alexander Potruch, LLC., at their office address at 666 Old Country Road, Garden City, New York within thirty days of the decision and orders made herein. Defendant-wife's counsel shall make payment for all outstanding payment due and owing to Marcus & Co. LLP, immediately upon receipt and the remaining funds are to be reimbursed to defendant-wife for the payments she has made for their services.

If payment if not timely made by plaintiff-husband, upon the filing of an affirmation of non-compliance by defendant-wife's attorney, the Clerk of the County of Nassau County is directed to enter a judgment reflecting the amount then due with interest at the legal rate.

This constitutes the decision and order of the court.

Submit Findings of Fact, Conclusions of Law and Judgment of Divorce within sixty days of the date of this decision.

Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Recent Legislation

In my previous column (*Family Law Review*, Summer/Fall 2007), the following recent legislative changes were discussed:

- DRL § 250(2), amended June 18, 2007: Statute of limitation to vacate a prenuptial agreement is tolled during marriage (three years from date of commencement of divorce action)
- CPLR 2214 and 2215, effective July 3, 2007: Timing of service of motions and cross-motions
- CPLR 2303-a, effective January 1, 2008: service of a trial subpoena (permissible upon party's attorney)
- CPLR 2308, effective January 1, 2008: penalty for failure to comply with a judicial subpoena ($150)
- 22 N.Y.C.R.R. § 202.48(c)(2), effective September 1, 2007: Counter-orders and judgments must be marked to indicate changes

The following are additional legislations that affect the matrimonial practitioner.

New Domestic Relations Law § 177, effective October 30, 2007: COBRA notification

New Domestic Relations Law § 177 requires the court, in a divorce action, to ensure that there is a provision for the health care coverage of each individual, or a statement that the individual is aware of the loss of coverage upon divorce. There is a form statement to be signed by each party, which must be contained in "every agreement accepted by the court" as follows:

> I, (spouse), fully understand that upon the entrance of this divorce agreement, I may no longer be allowed to receive health coverage under my former spouse's health insurance plan. I may be entitled to purchase health insurance on my own through a COBRA option, if available, otherwise I may be required to secure my own health insurance.

The statute also requires that prior to rendering a decision in a divorce case, the judge must notify both parties about such potential loss of health insurance and may grant a 30-day continuance to afford an opportunity for the parties to procure their own health insurance.

FCA §§ 446, 656, 842 and 1056, and DRL § 240(3)(f), effective October 1, 2007: Lease termination of domestic violence victims

New Real Property Law § 227-c and amendments to various provisions of law, including FCA §§ 446, 656, 842 and 1056, and DRL § 240(3)(f), provide that a court may issue an order terminating the residential lease of a domestic violence victim for whose benefit any order of protection has been issued.

22 N.Y.C.R.R. § 202.7(f) amended, effective June 11, 2007: Exemption to notice requirement of temporary restraining orders

This amended rule exempts from the temporary restraining order notice requirement any motion or order to show cause requesting an order of protection pursuant to Domestic Relations Law §240, unless otherwise ordered by the court.

CPLR 2001 amended, effective August 2007: Commencement filing mistakes may be corrected

CPLR 2001 provides that any nonprejudicial "mistake, omission, defect or irregularity" may be corrected by amendment or by being disregarded. However, this statute did not cover cases that were characterized as presenting "jurisdictional" defects, including mistakes made at the commencement of the action, often concerning the payment of a filing fee. This would often result in dismissal of the action, and if that occurred when the statute of limitations had expired, the plaintiff could not bring the lawsuit.

The amendment overrules the Court of Appeals' cases that caused such dismissal by extending CPLR 2001 to apply to mistakes in

> the filing of a summons with notice, summons and complaint or petition to commence an action . . . including the failure to purchase or acquire an index number or other mistake in the filing process . . . provided that any applicable fees shall be paid.

Same-Sex Marriage Update

Currently, Massachusetts is the only state in the nation that permits same-sex marriage. There are four states with pending lawsuits seeking same-sex marriage rights: California, Connecticut, Iowa, and Maryland. Civil unions

are available to same-sex couples in Vermont, Connecticut, and New Jersey. Proponents of same-sex marriage rights argue that civil unions are not "separate but equal" rights.

Same-sex Canadian marriage recognized by New York

***Godfrey v. Hevesi*, No. 5896-06, 2007 LEXIS 6589, 238 N.Y.L.J. 55 (Albany County Sup. Ct. Sept. 5, 2007) (McNamara, J.)**

The Comptroller of New York State determined that the retirement system would recognize an employee's same-sex Canadian marriage in the same manner as an opposite-sex New York marriage based on the principle of comity. The taxpayers brought suit. The court affirmed the Comptroller's ruling and reasoned that the only exception to the comity rule is where the state specifically prohibits such an act, such as polygamy or incest. Because New York did not enact a defense-of-marriage act so as to expressly prohibit recognition of same-sex marriages, same-sex Canadian marriages would be afforded comity. The court recognized that the Court of Appeals' *Hernandez v. Robles*, 7 N.Y.3d 338, 821 N.Y.S.2d 770 (2006)[1] did not address the issue of comity.

See also ***Godfrey v. Spano***, 15 Misc. 3d 809, 836 N.Y.S.2d 813 (Westchester County Sup. Ct. 2007),[2] where the Westchester County Executive's Executive Order requiring county agencies to recognize validly contracted out-of-state same-sex marriages to be lawful.

Department of Civil Service recognizes out-of-state same-sex marriages for spousal insurance benefits

Effective May 1, 2007, the New York State Department of Civil Service will respect out-of-state marriages of same-sex couples for the purposes of extending spousal insurance benefits to current and retired state and local government employees. All New York State Health Insurance Program (NYSHIP) Participating Agencies and Employers, including local government agencies and public authorities around the state, must provide benefits to same-sex spouses of employees who were validly married in places like Canada or Massachusetts.

The policy applies to all health benefit plans provided under NYSHIP, including the Empire Plan and HMOs, the New York State Dental and Vision Plans, the M/C Life Insurance Program, and the New York Public Employee and Retiree Long Term Care Program.

This policy came about while the case, ***Funderburke v. NYS Dep't of Civil Serv.***, 13 Misc.3d 284, 822 N.Y.S.2d 393 (Nassau County Sup. Ct. 2006) was on appeal. In that case, a school teacher was denied health insurance benefits to his same-sex spouse despite his Canadian same-sex marriage. That case is now moot.

Other Cases of Interest

Equitable Estoppel: Custody and Support

In my previous column, it was discussed that the stepparent in ***Banks v. White***, 40 A.D.3d 790, 837 N.Y.S.2d 181(2d Dept. 2007) and ***Burgess v. Ash***, 41 A.D.3d 473, 838 N.Y.S.2d 584 (2d Dept. 2007) lacked standing to seek visitation. Likewise, in ***Gulbin v. Moss-Gulbin***, No. 502604, slip op. 9477 at 3, 2007 LEXIS 12204 at *2 (N.Y. App. Div. 3d Dept. Nov. 29, 2007), the trial court erred by awarding joint custody of the mother's biological son to the stepfather, particularly because the mother refused to allow the stepfather to adopt the child and told the child that her husband was not his father. The mother attempted to invoke the doctrine of equitable estoppel, which the court found to be inapplicable.

Sperm donor father equitably estopped from denying paternity

***P.D. v. S.K.*, No. U-2725-07, slip op. 52243U, 2007 LEXIS 7726 (Nassau County Fam. Ct. Nov. 16, 2007) (Greenberg, J.)**

The respondent provided his sperm to the petitioner, who was inseminated by her same-sex partner. At that time, the parties were physicians in the same hospital. The respondent was married but agreed to provide his sperm because the parties agreed that the respondent would have no rights or benefits in raising the child, nor any financial responsibilities. The lesbian couple raised and supported the child for the past 18 years. When the lesbian couple's relationship ended, the County Attorney brought this child support proceeding against the biological father.

The respondent allowed his name to be put on the child's birth certificate as the child's father because he wanted the child to have some biological identity. From the child's birth until he was approximately four years old, the respondent had some contact with the child until the child and the lesbian couple moved to Oregon. The respondent made some financial contributions and sent gifts and cards on birthdays and Christmas. Over the past 15 years, the respondent spoke to the child seven or eight times over the phone and saw him once three years ago for a few hours. The respondent held himself out as the child's father and the child, now 18 years old, claimed that the respondent is the only father he has ever known.

The court determined that the respondent was equitably estopped from denying paternity, and his application for genetic testing was denied.

Author's note: The County Attorney sought child support for the child from the sperm donor, who had little to no contact with the child, rather than the lesbian partner "other parent" who had raised and supported the child for the past 18 years, during the child's entire life. It appears that this case blindly applies the law without

respect to fairness. The lesbian couple agreed with the sperm donor that he would not be responsible for raising or supporting the child, and he relied on such promise when providing his sperm to them; then, 18 years later, to his detriment, he is now forced to support the child. If the nonbiological, same-sex partner formally adopted the child, no action would have been brought against the sperm donor. But, see the case directly below, in which the same-sex partner who is neither the biological nor adoptive parent is not off the hook for financially supporting the child.

Same-sex nonbiological parent may be equitably estopped from denying parentage

H.M. v. E.T., 16 Misc.3d 1136A (Rockland County Fam. Ct. 2007) (Warren, J.)

The petitioner brought a child support proceeding against her same-sex partner, who is neither the biological nor the adoptive parent of the child. Under controlling law, a former same-sex partner who is neither an adoptive nor biological parent of a child has no standing to seek custody or visitation and cannot invoke the doctrine of equitable estoppel. There is little authority on the obligation of a former same-sex partner to support a child who is neither the biological nor adoptive child.

The parties were in a same-sex relationship and decided to conceive and raise a child together. The petitioner was impregnated by artificial insemination performed by her partner. The parties discussed plans on how they would raise and support the child. Shortly after the birth of the child, the relationship ended, and the petitioner and the child moved to Canada. The petitioner sought a declaration of parentage and a support order from the respondent.

Initially, the Family Court dismissed the case, which after objections, was reversed. The court determined that a paternity proceeding could proceed against a same-sex partner if circumstances were established justifying the application of equitable estoppel. The court reasoned that it is unjust and not in the child's best interest for a couple to bring a child into the world only to abandon all financial responsibility for the child, especially where the biological parent submitted to artificial insemination in reliance upon a promise by her same-sex partner to raise and support the child together. Therefore, the case was remanded for an equitable estoppel hearing.

Child Support

Parental alienation as an affirmative defense to the establishment of a support order

F.S-P. v. A.H.R., 17 Misc.3d 390, 844 N.Y.S.2d 644 (Nassau County Fam. Ct. 2007) (Lawrence, J.)

Under Family Court Act § 413 and case law, courts may suspend a noncustodial parent's child support obligation after a finding that the custodial parent has willfully denied or interfered with visitation, also known as "parental alienation." In a case of first impression, however, the court determined that parental alienation may be invoked as an affirmative defense to the establishment of a support order.

Equitable Distribution

Equitable distribution of nonprofit religious organization

C.H. v. R.H., slip op. 27465, 2007 LEXIS 7531 (Nassau County Sup. Ct. Nov. 13, 2007) (Diamond, J.)

In New York, the issue of whether to consider a nonprofit religious corporation as a marital asset for purposes of equitable distribution is one of first impression. The trial granted the wife's motion to value the husband's alleged interest in his church, a nonprofit religious corporation, where the husband claimed he was merely an employee, but the wife claimed that the church was his "personal piggy bank." The valuation was subject to a determination of the trial court that the nonprofit religious corporation is the husband's alter ego under the theory of "reverse piercing" of the corporate veil due to its operational character.

In addition, the wife's motion for the appointment of an expert to determine the earning capacity arising from the husband's master's degree in public health and Ph.D. in ministry, which he obtained during the marriage, was granted.

Enhanced earnings

Midy v. Midy, 846 N.Y.S.2d 220 (2d Dept. 2007)

It was error to award the husband 50% of the wife's enhanced earnings from her master's degree in speech pathology where the husband did not sacrifice any career opportunities during the time the wife was pursuing her degree, although he provided some child care and household assistance. The husband's award was reduced to 25%.

Author's note: There appears to be a trend in the courts limiting the award of the enhanced earnings to 25 to 30%, where the nontitled spouse did not sacrifice any career opportunities. See also ***Ochs v. Ochs***, 40 A.D.3d 1061, 837 N.Y.S.2d 290 (2d Dept. 2007), which was fully discussed in my previous column. It is unfortunate that neither case fully explores the facts, including the length of the marriage.

Separate property credits

Midy v. Midy, 846 N.Y.S.2d 220 (2d Dept. 2007)

It was error to deny the wife a credit for her separate property contribution in excess of $216,000 to pay off the mortgage on the parties' Florida home. The wife received the money as a gift from her family, which was deposited

into the parties' joint account for only a few days before it was used to pay off the mortgage. Therefore, the court determined that the wife deposited the funds into a joint account for convenience purposes only and did not transmute the separate property into marital property.

Wasteful dissipation of marital assets

Xikis v. Xikis, 43 A.D.3d 1040, 841 N.Y.S.2d 692 (2d Dept. 2007)

The trial court erred in failing to determine that the husband's transfer of $200,000 into a charitable account was a dissipation of marital assets in contemplation of divorce. Therefore, the judgment was modified to include an award to the wife of one-half of the amount transferred.

Maintenance

Xikis v. Xikis, 43 A.D.3d 1040, 841 N.Y.S.2d 692 (2d Dept. 2007)

The court below erred by failing to award the wife lifetime maintenance where the parties were married for over 18 years, and the wife was age 60 and was unemployed during most of the marriage and had limited education and skills.

Griggs v. Griggs, 44 A.D.3d 710, 844 N.Y.S.2d 351 (2d Dept. 2007)

The court's award of maintenance to the wife for a period of eight years ($8,000 per month for the first three years and $6,000 per month for the next five years) was reduced to five years. The court held that there was no reason it should take the wife, a graduate of Wharton Business School with extensive experience in banking and finance, more than five years to find employment and return to a salary of at least $70,000 per year. The court reasoned that such a reduction will cause the wife a "greater incentive" to increase her employability, "while at the same time still provide her with sufficient time to become financially independent."

The court properly awarded the wife 35% of the husband's medical practice, although this was a marriage of "long duration." (The case does not state the length of the marriage, ages of the parties, husband's income or the like.)

The award of $150,000 in legal fees to the wife was deleted because she will be receiving a "substantial equitable distribution award" from the husband in addition to five years of maintenance. The court failed to mention the actual amount of the equitable distribution award.

Author's note: It appears that the appellate court punished the wife for misrepresenting her income for the purpose of attempting to obtain a larger support award.

Agreements

Agreement set aside for overreaching

Barchella v. Barchella, 44 A.D.3d 696, 844 N.Y.S.2d 78 (2d Dept. 2007)

The wife moved to set aside the parties' postnuptial agreement pursuant to which she surrendered her interest in "significant assets" in exchange for the husband's agreement to purchase a home for her with a maximum value of $600,000. The agreement was drafted by the husband's attorney. The wife signed the agreement against the advice of her attorney, while she was "undergoing treatment and suffering from the mental and physical effects of complications arising from a surgery." The trial court properly vacated the postnuptial agreement as "manifestly unfair" to the wife because of the husband's overreaching. The court reasoned that "because of the fiduciary relationship that exists between spouses, postnuptial agreements are closely scrutinized by the courts and are more readily set aside on grounds that would be insufficient to nullify an ordinary contract."

Author's note: The appellate court failed to state any facts of this case, including but not limited to the length of the marriage, ages of the parties, respective incomes of the parties, the extent and value of the marital assets, and what type of surgery the wife underwent that caused her to be in such an emotional state that she could not comprehend her rights despite her counsel's advice not to sign the agreement. The decision of the court below is not reported. This trend in the Appellate Division of failing to state the key facts causes problems for the matrimonial practitioner to use the case as precedent.

No room and board credit against basic child support where agreement does not specifically provide for it

Dorecean v. Longueira, 44 A.D.3d 770, 843 N.Y.S.2d 410 (2d Dept. 2007)

The father's payment of educational expenses, including room and board, cannot be credited toward his basic child support where the parties' separation agreement, which was incorporated but not merged into their divorce judgment, set forth the father's obligation to pay child support and educational expenses in separate provisions. The provisions for recalculation of child support did not refer to his separate obligation for educational expenses or provide for an offset or credit.

Author's note: The matrimonial practitioner should be warned that there is no automatic room and board credit against basic child support; rather, the parties' agreement must specifically provide for it.

Enforcement

Appeal dismissed based on fugitive disentitlement doctrine

Wechsler v. Wechsler, 845 N.Y.S.2d 739 (1st Dept. 2007)

Pursuant to a judgment of divorce, the former husband was directed, *inter alia*, to pay the former wife a distributive award of $22,770,623 in periodic installments and monthly maintenance of $46,666.66 until he transferred certain assets to her. When the former husband failed to do so, he was adjudicated in contempt of court, and a warrant was issued for his arrest. The former husband willfully remained outside of New York in order to avoid the jurisdiction and authority of the court to be arrested.

The fugitive disentitlement doctrine permits a court to dismiss an appeal if the party seeking relief is a fugitive while the matter is pending. The doctrine is based on the inherent power of courts to enforce their judgments, and it has long been recognized and applied to those who evade the law while simultaneously seeking its protection.

The doctrine applies in civil cases provided there is a nexus between the appellant's fugitive status and the appellate proceedings. The nexus requirement is satisfied where

> the appellant's absence frustrates enforcement of the civil judgment. The principal rationales for the doctrine include: (1) assuring the enforceability of any decision that may be rendered against the fugitive; (2) imposing a penalty for flouting the judicial process; (3) discouraging flights from justice and promoting the efficient operation of the courts; and (4) avoiding prejudice to the non-fugitive party.

Therefore, the former husband's appeal was dismissed with leave to reinstate the appeal within 20 days on the condition that he post a bond representing the amounts owed in excess of $9 million.

Endnotes

1. *Hernandez v. Robles* was fully discussed in my column in the Spring 2006 issue of the *Family Law Review*.
2. *Godfrey v. Spano* was fully discussed in my column in the Spring 2007 issue of the *Family Law Review*.

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This article is in honor of my mother, a beautiful woman inside and out, in celebration of her 70th birthday.

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar.

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

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