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"Skin in the Game" and *Caveat Avvocati*: Monitoring the Level Playing Field on Counsel Fee Awards

By Lee Rosenberg, Editor-in-Chief

In the pendente lite and subsequent trial decision in *Sykes v. Sykes*,[1,2] New York County Supreme Court Justice Matthew F. Cooper deftly limited a less monied spouse's ability to perpetuate litigation with an unfettered blank check for counsel fees. In his use of the phrase "skin in the game"[3] to indicate the need of the less monied spouse (and, in effect, their attorneys) to have a financial risk in the litigation and its outcome, Justice Cooper has raised an issue which has now been cited in two other cases to date—one, *Westreich v. Westreich*[4] involving another pair of wealthy litigants (as in *Sykes*), the second case, *Antizzo v. Cannizzaro*[5] being on the opposite end of the spectrum. What then are the ramifications of "skin in the game" to the average middle class and less well-off litigants? And what of the attorneys and their "less monied" clients whose expectation of payment from the monied spouse is compromised?

The "even playing field" demanded by such seminal counsel fee cases as *Frankel v. Frankel*,[6] *O'Shea v. O'Shea*,[7] and *Prichep v. Prichep*,[8] and then codified by the amendments to DRL §§ 237 and 238 with a presumptive award of counsel fees to the "less monied" spouse, has never required a court to direct the dollar-for-dollar payment of all fees requested or incurred by that less monied spouse. Where the parties are wealthy, the "less monied" spouse may still have access to substantial funds so that his or her ability to retain experienced attorneys of substantial repute remains intact. The challenge has most often been in the case of less well-off litigants where fee awards—particularly in pendente lite situations where the imminent need is great—have been paltry in comparison to that need, or worse—deferred to the trial court. The latter practice was specifically decried in *Prichep.*

In the *Sykes* trial decision,[9] Justice Cooper reiterated the reasoning behind his pendente lite order,

> When, in October 2013, I rendered my decision on interim counsel fees, I expressed my concern that defendant, who was having every cent of her fees paid for by

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> plaintiff from his separate property, had insufficient incentive to limit the scope and cost of the litigation. I also was concerned that although both sides agreed that defendant would receive at least $10,000,000 [*24] in equitable distribution and had been receiving $75,000 a month in temporary support, she was being treated as if she was penniless when it came to contributing to her own litigation expenses simply because plaintiff was considered to be the monied spouse.
>
> In an attempt to rectify what I saw to be an unfair and problematic situation, I employed a term that I had often heard from members of the matrimonial bar, including the attorneys involved in this case. The term, which at this point I fear may very well end up being inscribed on my gravestone, is "skin in the game." With the goal of having both parties proceed with a financial stake in the litigation, I required defendant to use a portion of her wealth in the form of her equitable distribution award to fund her litigation from May 2013 onward. As a result, I ordered the disbursement to each side of the $1,000,000 from the marital accounts.
>
> I would like to think that what I decided in the interim fee decision had a beneficial effect on the course and scope of the litigation. Although it did not prompt a full settlement of the matter, it did narrow the issues when the parties agreed on the value of GS Gamma and to other valuations and divisions of marital property. Even more importantly, the trial concluded sooner than expected, with the large witness lists pared down to the essentials. This was not only a major victory for judicial economy, but it undoubtedly prevented already astronomical counsel fees from becoming even more so.

Ultimately at trial, Justice Cooper awarded $400,000 in fees to the wife in addition to the approximately $750,000 which the husband had already paid before the equal $1,000,000 distribution from the marital account was made. The result was that the wife was responsible for $600,000 of the $1,000,000 in fees that she previously paid counsel. She would also be responsible for the additional $200,000 she claimed was still owing to her attorneys and any additional sums which might come due.

With "skin in the game"during the course of the matter, Justice Cooper managed a complicated litigation while still not running contrary to the less recognized portion of *Prichep,* which allows the court to "consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation." In the pendente lite decision,[10] Justice Cooper points out,

> It bears repeating that even with the statutory presumption in favor of awarding counsel fees, the determination of an application is still a matter within the sound discretion of the trial court. (See *Lennox v. Weberman*, 109 AD3d 703 [1st Dept 2013]; *Patete,* 109 AD3d at 599.) It is not a mechanical operation whereby one side can be made to pay all of the other side's legal fees simply by virtue of having greater income, or even by having a greater overall net worth. There are other considerations that must come into play. Among the factors that need to be considered are "the equities…of each particular case."

The court in *Sykes* made its determination not to permit the wife to control the litigation based upon the facts before it.

> As it stands now, it is solely the husband who suffers any financial consequences as a result of the litigation going forward; the longer the case goes on, the more days of trial there are, the more the husband spends. Consequently, he has every incentive to curtail the litigation to the extent possible, even if that means accepting a settlement{**41 Misc.3d at 1069} that falls short of what he wants. The wife, on the other hand, without any "skin in the game," does not have the same incentive insofar as her litigation costs are being paid for completely by her adversary. Because that adversary is her soon-to-be ex-husband, and because the case is a divorce where feelings of animosity, betrayal and abandonment constantly lurk just below the surface, one can easily understand how the wife, perhaps against her better instincts, might find that it serves her interests on a number of levels to make the husband continue to expend copious funds on her behalf. Rather than giving the parties equal footing on a level playing field, the present arrangement "gives one of them a distinct advantage over the other." (Silverman, 304 AD2d at 48.) Ironically, given that the husband is the party who now has the "heavier wallet," it is the wife who has the "distinct advantage" because of her unfettered access to that wallet.

The question becomes, however: should the court apply "skin in the game" where there has been no conduct

on the part of the less monied spouse which would even remotely serve as a basis to anticipate obstreperous or obfuscatory conduct. That is an issue which would later arise in the *Antizzo* case out of Westchester County[11] where the parties' financial straits appears to be the polar opposite of the parties' good fortune in *Sykes* and in *Westreich v. Westreich* from Nassau County.[12,13]

In *Westreich*, decided on August 1, 2014, the wife sought to have the husband pay $2,075,800 in pendente lite fees—$850,000 in legal fees; $300,000 for the wife's forensic accountants; $115,000 for real estate appraisers utilized by the wife and an order directing the husband to reimburse the wife for counsel fees already paid at the time of her application ($651,000), and expert fees already paid ($174,800 for accountants and $35,000 for real estate appraisers). Justice Jeffrey A. Goodstein, citing to *Sykes'* "skin in the game" philosophy similarly notes that "an award of interim counsel fees ensures that the nonmonied spouse will be able to litigate the action, and do so on equal footing with the monied spouse." (See *Prichep v. Prichep*, 52 AD3d 61 [2d Dept. 2008]). "Where there is no serious dispute that one of the party's financial resources far exceed those of the other party, the latter should not be expected to exhaust all of the finite resources available to him or her in order to pay his or her attorney(s). (See *Prichep v. Prichep, supra*.)." The court, though, continues,

> However, the statutory "presumption" of interim counsel fees has been criticized for allowing the nonmonied spouses to gain an unfair advantage over supposedly "monied" spouses. While "[a wife] should not have to deplete her assets in order to have legal representation comparable to that of [her husband]" (Lennox v. Weberman, 109 AD3d 703 [1st Dept. 2013]), *the Court must avoid awards of interim counsel fees that could result in nonmonied spouses having every incentive to engage in costly litigation, regardless of necessity, because they are shielded from responsibility for the substantial majority of litigation expenses*. (See Sykes v. Sykes, 973 NYS2d 908 [Sup. Ct. NY Co. 2013]). In the instant proceeding, it is undisputed that the Husband is the monied spouse. Counsel for both parties are among the elite in their field. However, the situation here seems *not to be that the Wife needs an award to be on an equal footing with the Husband* (emphasis added).

As in *Sykes*, Mrs. Westreich had assets at her disposal as well as a support award in place by virtue of the same pendente lite order addressing fees. The court awarded the wife $250,000 in interim counsel fees, $50,000 in forensic accounting fees, and $40,000 in real estate appraiser fees, further holding:

> All payments of counsel fees and other expert fees shall be subject to reallocation at the conclusion of the trial. As the Wife continues to utilize portions of the over $2 million dollars she removed from the 237 Park Account, the Court is confident that at the conclusion of the trial, any reallocation awarded will be paid, if need be, and if warranted, through an additional distribution from the Husband's share of the parties' assets. This award of counsel and expert fees is without prejudice to future requests for additional fees from the Wife.

Given that Mrs. Westreich had taken $2,000,000 and had an additional $1,000,000 which she had transferred into her individual name prior to commencement in order to fund the litigation, the court accordingly balanced the equities to arrive at the awards given.[14] As will be later seen, other factors also come into play with regard to the billing in both *Westreich* and *Sykes*.

Converse to the wealth in the two cases discussed, the parties in *Antizzo v. Cannizzaro,* decided on March 28, 2014 by Justice Charles D. Wood, were far less fortunate. The court begins its decision quoting the heavy metal lyrics of "Adrenaline Mob" as a precursor of the court's view on the parties' deficit based lifestyle:

> You better listen up
>
> What I say
>
> You went and lived it up
>
> Now ya pay. You're gonna bite the bullet feel the bat
>
> Be begging for a heart attack.
>
> You borrowed now you can't repay
>
> Collection on your judgment day.

The parties in *Antizzo,* in a seven-year marriage at the time of trial, had two young children, one of whom had Down's Syndrome. The husband earned $85,500 and the wife did not work outside the home for several years. The wife's request for counsel fees was referred to hearing after the parties could not stipulate at the conclusion of trial.[15] The wife's fees totaled over $57,500 of which she already paid $12,350 to her counsel, leaving a balance of over $45,000. The husband's counsel fees, which included the divorce action, the short sale of the marital home, defending suits brought by American Express and foreclosure proceedings, totaled over $79,834, of which $7,500 had been paid, thus leaving over $72,000 due and owing.[16] Only the attorneys testified at the counsel fee hearing and appropriate proofs were submitted.

Justice Wood opined on the nature of matrimonial litigation:

> Matrimonial litigation in New York is expensive. It has been repeatedly recognized that in a fiercely contested case, the costs of the litigation can consume the marital

estate of even an affluent couple" (*Charpie v. Charpie*, 271 AD2d 169, 170171 [2d Dept 2000]). "An award of an attorney's fee is designed to redress the economic disparity between the spouses, it is not intended to address a party's decision to proceed to trial rather than agree to a settlement" (*Comstock v. Comstock*, 1 AD3d 307, 308 [2d Dept 2003], citing *O'Shea v. O'Shea*, 93 NY2d 187 [1999]). However, in determining whether and how much a court should award in attorney's fees, DRL 237(a) makes it clear that the court must take into account "the circumstances of the case and of the respective parties." *Here, as in most matrimonial cases, the parties themselves are in the best position to establish what limits must be self-imposed when incurring attorney's fees. Why? Because it is their life. Parties live together. They budget. They spend. They observe. Generally speaking, they know or should know what the basic overall financial picture of their marriage is—based upon firsthand knowledge, and based upon the Statement(s) of Net Worth and documents provided through discovery* (emphasis added).

The court, still considering the equities, the trial award, the husband's greater income and earning potential, but greater debt, and "skin in the game," awarded the wife only $3,500 in counsel fees.

> ...the court must also consider the overall financial picture of the parties. Counsel for the husband accurately points out that from the financial perspective of the parties and counsel, "This case was a loser all around." The parties are, and were at all times of limited means and minimal assets. In this case, counsel for both sides ably and professionally represented their clients, and earned their fees for their professional services. Could they have worked harder to avoid a trial? Perhaps. *But ultimately, it is a litigant's responsibility to be aware of and recognize when the fees are growing beyond what the case merits or a level that they can reasonably afford. That recognition came entirely too late to these litigants, as they each amassed attorneys' fees far in excess of what their marital assets and lifestyle were, and what reasonable expectations should have warranted.[FN1] Neither of them have a cash business or a huge trust fund. While they rarely agree, they jointly made the decision to squander the assets they had on attorneys and to go into significant debt. It is only appropriate that each of them have a "skin in the game" and share the cost of this litigation (See Sykes v. Sykes,* 41 Misc.3d 1061 [New York Co. 2013]). (emphasis added).

So, in *Antizzo*, it is the parties' inability or unwillingness to settle while in a relatively precarious financial state, and not a wealth of assets or objective bad behavior, which has triggered the use of "skin in the game" to limit the wife to an award of $3,500 in counsel fees. Simultaneously, her attorney is also on the losing end despite the court's finding that "counsel for both sides ably and professionally represented their clients, and earned their fees for their professional services."

It would seem that this application of "skin in the game" has then placed the mandate of a level playing field at the edge of an unintended precipice, falling to the rocky seas below, and with the body of counsel ready to be dredged from the depths. It is a dangerous path to follow. Less-monied litigants of more limited means who have done no wrong will not have the intended benefit of DRL § 237 nor of *Prichep* and *Frankel*. Nowhere in *Sykes* in its use of "skin in the game" does it offer that phrase as a penalty for legitimately prosecuting one's right to proceed, defend, or be heard at trial. In both *Sykes* and *Westreich*, the court cautioned against the non-monied spouse's demonstrated ability to misuse the award, particularly where they have additional funds at their disposal. That circumstance does not appear to have existed in *Antizzo*. Further, in *Sykes* and *Westreich*, "skin in the game" was applied pendente lite. In *Antizzo*, the game was over, so presumptively the wife had her skin in it throughout the litigation since counsel fees were determined post-trial.

The amendments to DRL § 237 following the level playing field cases was designed to allow the less-monied spouse to be able to hire competent and experienced counsel. In *Antizzo*, experienced counsel is now most likely out of luck in being compensated for doing an able and professional job and earning the fees charged. What message is then sent in this regard and how quickly must counsel place him or herself at odds with the client when the bill is not paid and no field-leveling fee award is in sight? Should experienced counsel not take the case in the first place? Should counsel make a mid-stream application to withdraw as counsel for non-payment, leaving the court with another self represented litigant instead of remaining in a state of servitude? A conflict is most certainly created with the client as it is unfair to require counsel to proceed without the ability to be paid for their professional services. A further conflict is also ripe for exploration, albeit in a different vein, in both *Sykes* and *Westreich*.

In *Sykes*—even where the husband was previously found in violation of the "automatic orders"[17] restrictions against transfer of assets including his use of $3,795,000 in liquid marital funds to purchase a house in Connecticut—the court critiqued the billing practices of the wife's attorneys in terms of hours spent, hourly rates, and multiple attorneys simultaneously handling similar aspects of the

matters. A similar critique of different counsel is also made part of the Nassau County decision in the *Westreich* case.[18]

In high-net-worth cases where a litigant hires well-known and elite counsel and signs a retainer agreement replete with Matrimonial Rules[19] compliant provisions, the application of "skin in the game" (which reduces the less monied spouse's ability to obtain as much in counsel fees from the other as was billed for and requested) should also be a warning to counsel. That warning, though, is not limited to elite counsel, but applies as well to all. The court's critique of billing practices, although presumably authorized by the client, affects counsel's ability to recover the unpaid fees from their own client. As we all know, even warring spouses battling to near death on every issue can usually find common ground on how to avoid paying their own attorneys.

As legal fees must be deemed reasonable by the court and "not excessive"[20] lawyers must, of course, be circumspect in their billing practices even where the client has explicitly agreed to those practices. Otherwise, the client (and the adverse spouse) might not be charged with payment of those fees, just as non-substantial compliance with the Matrimonial Rules will also preclude such recovery. Counsel accordingly must be prepared to address the now complaining client who asked for every stone to be lifted and all stops pulled against his or her spouse, but who has now been told by the court that the billing practices are excessive, he or she is charged with "skin in the game," and his or her spouse's obligation to pay same will be limited as a result.

"Skin in the game," when appropriately used, provides a valuable check against litigation abuses by the less monied spouse. Its application does, however, have a number of other consequences for litigants and also for counsel—caveat avvocati.

Endnotes

1. 41 Misc.3d 1061 (Sup Court NY County 2013).
2. 43 Misc.3d 1220(A) (Sup Court NY County 2014).
3. *See* William Safire, *On Language,* "Skin in the Game," New York Times (September 17, 2006).
4. 44 Misc.3d 1217(A).
5. 43 Misc.3d 1204(A).
6. 2 N.Y.3d 601 (2004).
7. 93 N.Y.2d 187 (1999).
8. 52 A.D.3d 61 (2nd Dept 2008).
9. Endnote 2.
10. Endnote 1.
11. Endnote 5.
12. Endnote 4.
13. As an example of the parties' wealth and lifestyle in *Westreich*, the court offered the following: "It is safe to describe the parties' lifestyle, as one of extreme excess. Prior to purchasing their home in the Hamptons, they rented a home each summer costing approximately $100,000 dollars, until they purchased a home in 2008 for $4.262 million dollars, plus expending an additional $500,000 dollars in improvements. While in the Hamptons, they employed the same housekeepers as they had at the Old Westbury residence [FN7] . The Wife explains that they had fresh flowers delivered to all of their homes, rental and owned, from local florists costing approximately $500.00 per week; they catered parties up to $20,000 each; birthday parties costing approximately $3,000; they spent $30,000 a month while in the Hamptons for entertaining, gifting and food supplies; dinners with family and friends were always paid by the parties costing [*4] approximately $1,500 per dinner; dinners at home were catered at a cost of $2,000 per month; the Children took private tennis lessons costing approximately $10,000 over the course of 4 years; they took extravagant vacations all across the world where they utilized limousines and $3,000 a night hotel rooms; they had a NetJets contract costing over $500,000 a year just to maintain the contract, and an additional $2,500 $5,000 per hour when utilizing the service; the parties always flew by private jet and traveled extensively with friends and family; Husband played golf at only the most exclusive golf resorts and clubs, many of which they are members [FN8] [FN9], and always paid for their guests; the parties made various charitable donations in the amounts of $150,000 to Long Island Jewish Medical Center, $75,000 for Women's Health and $25,000 to Mt. Sinai Hospital, to name a few; they attended Prince Charles' 60th birthday party at Buckingham Palace; spent over $100,000 a month for clothing, and holiday vacations costing $40,000–$45,000 each. There was no limitation to the parties' spending."
14. Mr. Westreich is also accused of engaging in suspect behavior. In addition to pendente lite relief, the court's order also addresses applications for contempt, restraining orders, and receivership.
15. After trial, the court "equitably" divided the assets and support was ordered for the wife and children to be paid by the husband.
16. It is not clear how the "non-matrimonial action"-related fees were addressed.
17. DRL § 236(B)(2)(b) and 22 NYCRR § 202.16a.
18. Billing was also critiqued in another Nassau County case, *MI. S v. MA. S.*, NYLJ 1202646902432, at *1 (Sup Court Nassau County, decided February 14, 2014, Bennett, J.).
19. 22 NYCRR Part 1400, et seq.
20. Rules of Professional Conduct, Rule 1.5, *Fees and Division of Fees.*

Lee Rosenberg, Editor-in-Chief, is a Fellow of the American Academy of Matrimonial Attorneys, a past-Chair of the Nassau County Bar Association Matrimonial Law Committee, and a partner at Saltzman Chetkof & Rosenberg LLP, in Garden City. His email address is lrosenberg@scrllp.com.

Marital Agreements After *Petrakis* and *Petracca*

By Glenn S. Koopersmith

Although both *Petracca v. Petracca*,[1] and *Cioffi-Petrakis v. Petrakis*[2] have been cited for fundamental principles regarding contractual construction and fiduciary obligations, only a few cases (none on the appellate level) have applied these principles to comparable factual situations. While the subsequent cases are too few in number to establish a clear trend, they do seem to indicate an increased judicial willingness to intervene by rescinding all, or part, of a marital agreement if the ultimate impact of the agreement appears unfair or inequitable. It is unclear whether this trend will continue in the future or whether these principles will be adopted outside the Second Department.[3]

Petracca v. Petracca

In *Petracca*, the parties entered into a postnuptial contract approximately three months after the marriage. The wife waived any claim to the husband's business interests (including future appreciation) and the marital residence (to which the wife had made no financial contribution); both parties waived their rights of inheritance. The wife claimed that she had been pressured into signing the agreement because of the husband's threat to terminate the marriage and decline to have children with her.

Following a hearing, the Supreme Court found that the agreement was executed validly and the wife had failed to meet "her heavy burden of establishing by proof so clear and convincing as to amount to a moral certainty that the agreement was not properly executed." While the agreement provided that each party had been "advised by counsel of his or her own choosing," the Court credited the wife's testimony that she had not been represented by counsel. The Court invalidated the agreement, finding that it was "patently unconscionable and not fair and reasonable at the time of its execution," largely because the wife waived any interest in the multimillion dollar marital residence and her right to inherit from the husband.

On appeal, the Second Department affirmed the order invalidating the agreement. It noted that the husband's assets were "undervalued by at least $11 million" and relied upon the "vast disparity" in the parties' net worth and earnings and the wife's waiver of any claim to the marital residence and all inheritance rights, in concluding that since the "terms of the agreement were manifestly unfair to the plaintiff and were unfair when the agreement was executed, they give rise to an inference of overreaching."

The Appellate Division's finding that the agreement was "manifestly unfair...when [it] was executed" because of the wife's waiver of any claim to the marital residence and her rights of inheritance is seemingly inconsistent with the many cases in which the Second Department has refused to invalidate agreements which are improvident or one-sided.[4]

Cioffi-Petrakis v. Petrakis

In *Petrakis*, in which the wife signed a prenuptial agreement against her attorney's advice, the agreement contained a series of specific disclaimers which provided, *inter alia*, that: (1) the "entire understanding" of the parties was set forth in the agreement; (2) there were no oral representations other than those set forth in the agreement; (3) "the agreement and its provisions merge any prior agreement"; and (4) neither party was relying upon any promises which were not set forth in the agreement. If upheld, the agreement's equitable distribution provision limited the wife to no more than $25,000 for each year of the marriage and a 1/3 interest in one of the husband's businesses.

After a hearing, the wife's cause of action for fraudulent inducement was sustained and the agreement set aside. The Supreme Court found that: the husband was evasive, crediting the wife's testimony; the husband promised to tear up the agreement after they had a child and never intended to comply with this promise (notwithstanding the aforesaid disclaimers); and the wife justifiably relied on his (mis)representation, to her detriment. It did not directly address the longstanding rule of law in the Second Department that "a cause of action alleging fraudulent inducement may not be maintained if specific disclaimer provisions in the contract...disavow reliance upon oral representations."[5]

On appeal, the Second Department affirmed, sustaining the cause of action for fraudulent inducement and the rescission of the agreement. It noted that the wife's claim "rested largely on the credibility of the parties," the hearing court had resolved the credibility issues in the wife's favor and these findings were supported by the record. It, too, made no reference to the merger and oral modification disclaimer provisions of the agreement, notwithstanding that these provisions were fully addressed in the husband's brief. The husband's motion for leave to appeal to the Court of Appeals was denied.[6]

Both the Hearing Court and the Appellate Division relied on "credibility" and parole evidence and declined to address the sufficiency of the disclaimers set forth in the agreement, notwithstanding that similar issues have been litigated extensively in the past.[7]

The Post-*Petracca*-*Petrakis* Decisions

In *C.S. v. L.S.*,[8] in which a hearing was conducted to determine the validity of the parties' prenuptial agreement, the Court noted that the parties had been married for 11 years and had been engaged in an "intimate relationship" for 19 years. It emphasized that the wife, who was finan-

cially dependent of the husband, had sold her furniture and moved out of her apartment in advance of the execution of the agreement. The Court recognized that the wife was desperate to marry and had advised the husband that she would "sign any piece of paper you put in front of me and I won't even read it."

The first paragraph of the Court's decision tells it all:

> Nonetheless if Husband's present motion before the court is granted, upon the parties divorce wife will be left no home, no assets, no bank account and no maintenance.

Without reading anything further (and regardless of the seemingly unjust, coercive circumstances surrounding the execution of the agreement), the fundamental inequity which would have resulted if the agreement had been sustained was sufficient to compel the Court to invalidate the agreement.

The facts in *C.S.* provide a wonderful blueprint for how *not* to proceed in the drafting, negotiation and execution of a prenuptial agreement. Although the agreement was drafted by the husband's business attorney more than a month before it was signed and counsel immediately advised the husband that the wife would need independent counsel, the husband declined to advise the wife of this fact. The wife was not told that she would be required to sign the agreement "until either the night before or the morning of the appointment to sign the agreement."

The wife was never provided with an opportunity to review the agreement before it was signed. It was presented to her two days before the wedding on a "take it or leave it basis." She first met her attorney, an "office suite mate" of her husband's counsel who was selected by the husband's counsel, when she was first handed the agreement to sign. Her attorney advised that the agreement was very one-sided in the husband's favor but made no attempt to renegotiate its terms. The attorney confirmed that during his meeting with the wife she was "sobbing." The execution process took 45 minutes.

The *C.S.* Court cited *Petracca* (quoting *Christian v. Christian*[9]) for the proposition that courts have "thrown their cloak of protection" over marital agreements to ensure that they are free from fraud and duress, and *Petrakis* to establish the fiduciary nature of the relationship between prospective spouses. Citing *Matter of Greiff*,[10] the Court shifted the burden of proof to the husband to disprove "freedom from fraud, deception or undue influence." After reviewing the facts and finding that the agreement would "leave the wife nearly destitute," the Court, in explicit reliance on *Petracca*, set the agreement aside because: (1) the wife was provided with no opportunity to retain independent counsel; (2) she received the agreement on the date of its execution and was afforded "no meaningful opportunity" to reflect on its terms; (3) there was no opportunity to negotiate the terms of the agreement which was presented on a "take it or leave it basis"; (4) her attorney acknowledged that the agreement was inequitable yet made no attempt to renegotiate any of its terms; (5) the "nature and magnitude of the rights she waived, particularly the relinquishment of her property rights in after acquired real and personal property," rendered the agreement manifestly unfair; (6) she waived of all inheritance rights; and (7) there was a "vast disparity" in the parties net worth and earnings.

In *Zinter v. Zinter*,[11] the defendant-husband was the monied spouse; the divorce action was commenced after eight years of marriage. After the husband's attorney prepared a prenuptial agreement, he met jointly with the parties and provided the wife with the name of three experienced matrimonial lawyers. The wife selected one of these attorneys and met with him three times. The agreement was executed more than a month before the wedding. The agreement utilized an expansive definition of separate property and a narrow definition of marital property pursuant to which title controlled the classification and distribution of assets. The amount of maintenance upon divorce was linked directly to the "cumulative gross earnings" of the parties. The Court noted that "the longer the marriage, presumably the greater the amount of cumulative earnings and thus greater the maintenance would be." The husband's business and the appreciated value of that business were to remain his separate property. The agreement contained mutual waivers of the right of election and specified that if the wife predeceased the husband she would receive $250,000 in cash, a marital residence, a car and his retirement plan. Both parties waived any claim to the other's retirement assets acquired both before and after the marriage.

While the *Zinter* Court cited *both Petrakis* and *Petracca* for basic legal principles, ironically it also cited *Christian,* noting that where there has been full disclosure of the relevant facts and their "contextual significance" and there has been an absence of "inequitable conduct," "courts should not intrude so as to redesign the bargain…."

The *Zinter* Court rejected the wife's claim that the husband's failure to state his annual income in the agreement and his alleged undervaluation of the business stated a cause of action for fraud. In reaching this determination, the court noted: (a) the failure to include income in a marital agreement is not "by itself sufficient to vitiate [an] agreement"; (b) the wife never alleged that she would not have signed the agreement if she was aware of the husband's income or the purportedly higher value of his business; and (c) it was clear at the time of the agreement that the "defendant had considerable means while plaintiff did not, and these disparities were indeed disclosed (citation omitted)." The *Zinter* Court also dismissed the wife's claim of duress because her attorney was one of three suggested by the husband's counsel, she met with him three times and the agreement, which was signed more than one month before the wedding, was "not foisted or sprung upon the plaintiff at the last minute."

The court's decision with respect to whether the agreement was "'manifestly unfair' and thus unconscionable" was more nuanced. While the court did not cite *Petracca*

directly in its conclusion, it certainly appears to have been influenced by its principles. The court found that the maintenance provision was neither manifestly unfair nor unconscionable. With respect to the duration of the payment, the court noted that the wife was to receive a five-year payment in an eight-year marriage. The Court's analysis of the amount of the payment emphasized that while the agreement provided the wife with less than she otherwise would have received, the formula entitled her to more maintenance as the marriage matured since the parties cumulative earnings would "presumably" increase over time.

With respect to the property distribution, the agreement provided that marital property included assets that the parties "purchase or otherwise acquire during the marriage that is owned or held by them jointly." Thus, while the contract provided that title was to control the classification of property—it was to remain separate unless "owned or held by them jointly"—the Court found that this provision was "manifestly unfair and unconscionable as applied to the facts of this case." It emphasized that notwithstanding the parties' receipt of approximately $2.7 million in gross marital earnings between 2006 and 2011, the assets in joint accounts totaled approximately $80,000 at the time of the decision. The court was offended by the fact that the husband, as the "sole breadwinner," "had the means and capacity to title accounts as he saw fit and thus to create marital or separate property at his whim." Thus, the court eliminated the phrase "that is owned or held by them jointly" from the agreement. This effectively modified their agreement by establishing that the assets acquired during the marriage would become marital property regardless of how they were titled. The court did not alter the definition of separate property which permitted the husband to retain his business and its appreciated value.

When stripped to its essentials, the *Zinter* Court concluded that notwithstanding that the wife had been adequately represented and there was no duress in the execution of the agreement, the provision that title would control the classification (and ultimately distribution) of assets acquired during the marriage was manifestly unfair. Despite its citation to *Christian*, the *Zinter* Court redesigned the bargain between the parties based on its own subjective assessment of equity and fairness. Thus, as in *Petracca*, the Court relied upon its personal assessment of the terms of the agreement, years after its execution, to conclude that it was manifestly unfair.

In *E.C. v. L.C.*,[12] after 26 years of marriage, the parties executed a postnuptial agreement which the wife had obtained from the Internet. Neither party had counsel and the agreement was signed before a notary at a bank. While the Court in *E.C.* (the same Justice who decided *C.S. v. L.S.*) again cited *Petracca* for the principle that courts have "thrown their cloak of protection" over marital agreements, the court denied the wife's application to set aside the agreement after a hearing was conducted. The Court again cited *Matter of Greiff*, but concluded that there was no basis for shifting the burden of proof to the husband to disprove fraud because there was no evidence that the relationship was unequal or that the wife had executed the agreement under duress. Interestingly, although the *E.C.* court cited *Levine v. Levine*[13] for the proposition that "if the execution of the agreement...be fair, no further inquiry will be made" and found that there was no inequity in the execution since the complaining party—the wife—had procured the agreement, the Court still made a detailed, subjective evaluation of the terms of the agreement, including the property distribution, before concluding that the agreement was neither manifestly unfair nor inequitable. This willingness to subjectively evaluate the "fairness" of an agreement (often many years after it was executed), even where it is clear that the execution process was equitable and there was no duress or undue influence, may ultimately prove to be the legacy of the *Petracca* case.

In *D.R. v. M.R.*,[14] the Court cited both *Petracca* and *Petrakis* in denying the husband's motion to dismiss the wife's cause of action to rescind a divorce settlement agreement. The Court noted that the wife had waived any claim to the marital residence and a vintage 1973 Ford Mustang in exchange for receiving 50% of the husband's Teamster's Fund which she would have received in any event. In denying the motion to dismiss, the Court relied on *Petracca* for the proposition that:

> Pursuant to the terms of the Settlement Agreement, Plaintiff agreed to give up her rights to what appears to be the single largest asset of the marriage, the Marital Residence, as well as her rights in a vintage car, and received, in exchange, Defendant's interest in the Teamsters Fund, which may be less than half the value of Plaintiff's interest in the Marital Residence. *Petracca*, 101 A.D.2d at 698 (wife demonstrated that terms of agreement were manifestly unfair given the nature and magnitude of rights she waived, giving rise to inference of overreaching); *Pennise*, 120 Misc.2d at 788–89; *Christian*, 42 N.Y.2d at 71–72.

Thus, the Court in *D.R.* emphasized the "magnitude" of the asset waived and the perceived inequity rather than whether there was fraud, duress or overreaching in the execution of the agreement.

The Lessons of *Petracca-Petrakis* and Their Progeny

1. **Be generous, or at a minium, fair**. In each case where the Court set aside an agreement (or a portion of an agreement) and substituted its judgment for that of the parties, the non-monied spouse would have received a minimal amount of assets and/or maintenance if the respective agreements had been sustained. The longer the marriage, the more likely it is that a court will be tempted to intervene to ensure that the non-monied spouse receives equitable treatment. Nothing is more likely to cause a Court to invalidate an agreement than a provision

which precludes a spouse from sharing in the vast majority of the assets accumulated during a long-term marriage.

2. **Avoid agreements where title will control the classification and distribution of assets**. These provisions, which generally vest the monied spouse with discretion to avoid the creation of marital assets, are more likely to induce judicial intervention. An agreement in which there are no marital assets or one spouse has the ability to thwart the acquisition of marital assets is more likely to be invalidated. The court's decision to modify the agreement in *Zinter* was expressly based on this provision. The *Petracca* agreement contained a comparable provision which resulted in the wife's waiver of any interest in the marital residence, the husband's estate upon death and his business (including appreciation during the marriage). Since there were minimal assets in the parties' joint names after 15 years of marriage, it appears that the Court felt constrained to protect the wife by setting the agreement aside.

3. **Use a sliding scale-formula to divide marital assets and provide for maintenance.** As evidenced by the *Zinter* Court's decision to uphold the maintenance provision, courts look favorably upon agreements which provide an increased benefit as the marriage endures. While there is ample support for preserving the separate nature of a party's assets (including the appreciated value of those assets during the marriage), an agreement which provides for the non-monied spouse to receive an increased share of marital assets as the marriage matures is more likely to be upheld. In both *Petracca* and *Petrakis*, the substantial nature of the respective husband's separate assets, juxtaposed against the minimal amount of assets which their wives would have received if the agreements had been upheld, surely contributed to the invalidation of both agreements.

4. **Independent counsel is essential**. While the absence of counsel will not automatically invalidate an agreement,[15] it is among the most critical factors that a court will consider in determining the validity of such agreements. An agreement must specifically identify the attorney for the non-monied spouse—it is not sufficient for it to provide that the non-monied spouse has had the opportunity to consult with an unidentified attorney. Although the *Petracca* agreement explicitly provided that the wife had consulted with her own independent attorney, both the Hearing Court and the Appellate Division credited her testimony that she never consulted with counsel. This would not have happened if the attorney had been identified in the agreement. In addition, the attorney for the monied spouse should *never* recommend counsel for the other spouse. Even where multiple attorneys are suggested (as in *Zinter*), the recommendation by opposing counsel may appear collusive and can be used as a component of an overall strategy to invalidate an agreement.

5. **Ensure that the non-monied spouse (and his or her attorney) is provided with a copy of the agreement substantially in advance of its execution and that the agreement is signed well in advance of the wedding**. The execution of the agreement should appear to be a considered, voluntary determination.

6. **If you are representing the monied spouse, engage in negotiations with opposing counsel as to the proposed terms**. Avoid the "take it or leave it" approach discussed by the Court in *C.S. v. L.S.* The monied spouse's willingness to be flexible with respect to some of the terms creates the impression that the agreement is more equitable, thereby making it more difficult to attack at a later date.

7. **Carefully consider mutual estate waivers, the waiver of the right to election and mutual waivers of post-marital retirement assets**. While such waivers have been commonplace, especially for second or third marriages where there are prior issue, the focus upon such waivers in *Petracca* and *C.S. v. L.S.* may be significant, indicating a greater likelihood of judicial intervention if a spouse has waived the statutory right of election and there are mutual estate waivers. While such waivers are not troubling in the early years of a marriage, the longer the marriage endures, the more disturbing they become. This perceived inequity may be remedied by a provision requiring the monied spouse to maintain a life insurance policy (which may provide for a increased death benefit over time) or the inclusion of a "sunset provision," pursuant to which the waiver becomes invalid on a specified date.

8. **Be as specific as possible with respect to the various disclaimers set forth in the agreement**. Disclaimers are essential to thwart a possible cause of action for fraudulent inducement. In addition to the standard broad general disclaimers (i.e., no oral representations other than those set forth in the agreement, the agreement sets forth the "entire understanding" of the parties, the provisions merge all prior agreements and neither party was relying upon promises which were not set forth in the agreement), it is preferable to include other specific factors which cannot be used as a basis for claiming fraudulent inducement (i.e., this agreement will not be invalidated by the birth of any children, employment or unemployment of any party, level of income of either party, acquisition of any asset, etc). If the *Petrakis* agreement had specified that it was not subject to invalidation by the birth of any children, the result would likely have been different.

9. **Identify all assets and do *not* undervalue them**. There is a temptation on the part of many monied spouses to either hide or undervalue their assets. This is a mistake. It is essential to identify every as-

set. The purported undervaluation of the business in *Petracca* was a factor in the Appellate Division's decision to affirm the rescission of the agreement. This is an especially difficult area to navigate because formal asset valuations rarely occur prior to the execution of a prenuptial or early marriage postnuptial agreement. Since it is common to estimate value in these circumstances, especially with respect to business assets, it seems wiser to estimate high rather than low. It is also useful to include a provision recognizing that there have been no formal valuations, the amounts listed are just estimates and any inaccuracy in the listed values will not impact the validity of the agreement.

10. **Consider suggesting that the court may uphold the property distribution while holding a hearing on the unconscionability of maintenance**. Under appropriate circumstances, the courts have directed a hearing on the alleged unconscionability of maintenance, while sustaining the property distribution provisions of a marital agreement.[16] Where both the property distribution and maintenance provisions are being challenged and the property distribution provision is more valuable, it may be beneficial to remind the court that it may uphold the property distribution, while directing a hearing to determine whether the maintenance provision is unconscionable upon the entry of judgment.

Endnotes

1. 101 AD3d 695 (2nd Dept., 2012).
2. 103 AD3d 766 (2nd Dept., 2013).
3. In *Barocas v. Barocas*, 94 AD3d 551 (1st Dept., 2012) decided shortly before *Petracca* and *Petrakis* in which the Court sustained the validity of a prenuptial agreement pursuant to which the wife received $35,550 while the husband retained $4.6 million. This would appear to indicate that the First Department is less likely to adopt a more subjective standard.
4. *See, e.g.*, *Label v. Label*, 70 AD3d 898, 899 (2nd Dept., 2010); *Rauso v. Rauso*, 73 AD3d 888 (2nd Dept. 2010); *Schultz v. Schultz*, 58 AD3d 616 (2nd Dept., 2009).
5. *Tarantul v. Cherkassky*, 84 AD3d 933 (2nd Dept., 2011); *Laxer v. Edelman*, 75 AD3d 584 (2nd Dept., 2010).
6. *Cioffi-Petrakis v. Petrakis*, 21 NY3d 860 (2013).
7. Courts have evaluated whether a disclaimer or merger clause is sufficiently "specific," based on "the very matter" at issue so as to preclude the introduction of parol evidence [See *Danann Realty Corp. v. Harris*, 5 NY2d 317 (1959); *Citibank, N.A. v. Plapinger*, 66 NY2d 90 (1985)] or contradict the written contract "in a meaningful fashion," so as to negate any claim of reliance. *Dutcher v. Shaver*, 40 AD3d 1192 (3rd Dept., 2007); *Bango v. Naughton*, 184 AD2d 961 (3rd Dept., 1992); *Republic Investors, Inc. v. O'Keefe*, 227 AD2d 541 (2nd Dept., 1996).
8. 41 Misc.3d 1209(A) (Sup. Ct,. Nassau Co., 2013).
9. 42 NY2d 63 (1977).
10. 92 NY2d 341 (1998).
11. 42 Misc.3d 1233(A) (Sup. Ct., Saratoga Co., 2014).
12. 41 Misc.3d 1050 (Sup. Ct., Nassau Co., 2013).
13. 56 NY2d 42, 47 (1982).
14. 41 Misc.3d 1208(A) (Sup. Ct., Westchester Co., 2013).
15. *See, e.g., Brennan-Duffy v. Duffy*, 22 AD3d 699 (2nd Dept., 2005); *Brennan v. Brennan*, 305 AD2d 524 (2nd Dept., 2003).
16. *See, e.g., Barocas v. Barocas*, *supra*; *Santini v. Robinson*, 68 AD3d 745 (2nd Dept., 2009).

Glenn S. Koopersmith maintains offices in Garden City, New York. He is an editor of this publication and concentrates his practice exclusively in matrimonial and family law appellate matters where he has been appellate counsel of record in numerous well-known cases, including the *Petracca* case discussed in this article. He is a Fellow of the American Academy of Matrimonial Lawyers and one of the founding Barristers of the New York Family Law American Inn of Court. He may be reached at glennkoop@optonline.net.

Timing Is Everything: New York CPLR 213 and Defense of Enforcement Actions under *Bielecki v. Bielecki*

By Raymond S. Dietrich

The well accepted adage "timing is everything" reaches far and wide across a multitude of human endeavors. Now, that pearl of wisdom can be applied to defense of a post-decree Qualified Domestic Relations Order ("QDRO") or similar assignment order, provided you know what it is and you plead it. This is the lesson of the Fourth Department decision in *Bielecki v. Bielecki.*[1]

In that case, after Mr. Bielecki missed nineteen (19) years of pension payments, the former Mrs. Bielecki sought entry of a QDRO, albeit untimely. The former husband through counsel, however, pled CPLR 213 as a defense. Specifically, CPLR 213 subjects some matrimonial enforcement actions to the statute's six-year statute of limitations. Failure to comply with the rule may bar a plaintiff's action partially or in toto. Ironically, an attorney may use CPLR 213 as a defense in a malpractice claim, based on fraud, for failing to comply with the same rule in the underlying matrimonial action.

In *Bielecki*, the appellate court, relying on CPLR 213, limited the former wife's claim to six (6) years of back pension payments out of the nineteen (19)-year total.

Facts and Procedural History

The court entered the judgment of divorce in 1985 which provided her a share of the former husband's pension "when said defendant starts to obtain his pension." A QDRO was not entered with the judgment of divorce. The former husband began receiving his pension payments in March 1991, unbeknownst to the former wife. The former wife obtained a QDRO in 2005 and began receiving her share, and motioned the court for past payments from 1991 to the 2005. The Supreme Court granted her motion in its entirety. The Appellate Court reversed and limited the arrearage payments to six (6) years pursuant to CPLR 213.

Analysis

CPLR 213 can be used to limit or defeat an enforcement action in family court. The rule time-bars certain actions not commenced within six (6) years from when the cause of action accrues. Specifically, and for purposes of this casenote, the rule applies to contract actions, actions where there is no specific time limitation imposed by law, mistake, and fraud.[2]

CPLR 213

> § 213. Actions to be commenced within six years: *where not otherwise provided for*; on *contract*; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on mistake; by corporation against director, officer or stockholder; based on fraud

The following actions *must be commenced within six years*:

1. an action for which no limitation is specifically prescribed by law;
2. an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law;
3. an action upon a sealed instrument;
4. an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;
5. an action by the state based upon the spoliation or other misappropriation of public property; the time within which the action must be commenced shall be computed from discovery by the state of the facts relied upon;
6. an action based upon mistake;
7. an action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith;
8. an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it. (emphasis added)

Operation of Law

At divorce, a former spouse loses his or her retirement benefits, in connection with the marriage, by operation of law.[3] Therefore, the two most important issues when preparing for entry of a QDRO are timing and notice. Proper timing ensures that benefits are secured at divorce. Notice refers to placing the client and plan administrator on notice of a pending QDRO and its importance. Rather than incorporating the QDRO into the divorce decree, most attorneys advise their client's to obtain a QDRO after the case has concluded. That is dangerous advice.

There are only two (2) exceptions to the operation of law rule: the "plan documents" rule and the "vesting exception." The plan documents rule refers to a participant's designation of a beneficiary. The United States Supreme Court has recently bolstered the plan documents rule by allowing the rule to even trump a waiver of benefits.[4] The vesting of survivor benefits is the second exception to the operation of law rule. Under the exception, once benefits vest in a current spouse, a subsequent divorce cannot take them away.[5] CPLR 213 now adds an additional hurdle for the plaintiff.

Contract or Judgment of Divorce

A property settlement agreement or order of the court will trigger CPLR 213. It is of no consequence if the agreement is incorporated and or merged or not into the judgment of divorce since either circumstance will invoke section (1) or (2) of the rule. If, however, the support arrearage is reduced to a money judgment, then a 20-year statute of limitation period applies.[6] Likewise under ERISA, there is also no time limitation to enter a QDRO. The problem is, however, that benefits are at *risk* until the plan administrator accepts a QDRO, subject to the stated exceptions. That means under federal law, a court may not time bar your action, but you may risk losing your claim.

Distributive Award

In *Bielecki*, the participant was in "pay status" when the former wife commenced her action. In New York, "pay status" is synonymous with a "distributive award," meaning that the participant has elected his option under the plan and has begun receiving his monthly benefit.

Importantly, the *Bielecki* Court makes no distinction between a motion to enforce a right and a distributive award, although it does cite *Bayen v. Bayen*.[7] In *Bayen*, the Court distinguishes between a distributive award, which is governed by the six (6)-year statute of limitations, and a motion to enforce the terms of a settlement agreement, which are not. Therefore, a non- distributive award will likely fall outside the restraint of CPLR 213.

Malpractice and the Discovery Rule

Ironically, an attorney may use CPLR 213 as a defense in a malpractice claim for failing to comply with the same rule in the underlying matrimonial action, if the action is based on fraud. Under paragraph (8) of the rule, the cause of action must be commenced within six (6) years of the when the cause of action accrues or within (2) years from its discovery, whichever period is greater. If the claim is not based on fraud, then a shorter three (3) year statute of limitation period applies under CPLR 214 for a legal malpractice claim.

A malpractice claim against a matrimonial attorney usually sounds in contract. Importantly in New York, the statute of limitations period begins to run *when the cause of action accrues*, not when the damage it is *discovered*.[8] That can be a daunting task for a plaintiff since oftentimes the damage is not readily recognizable, and pension issues are often mishandled by matrimonial attorneys.[9]

Conclusion

Under CPLR 213, a plaintiff risks losing an enforcement claim, against a distributive award, if the action is not commenced within the six (6) year statute of limitation period, save fraud and money judgments for support. This rule of civil procedure provides yet another incentive for matrimonial attorneys to file their QDROs, and similar assignment orders, with the judgment of divorce, not after, lest their actions be time barred.

Endnotes

1. 964 N.Y.S.2d 832 (4th Dep't 2013).
2. Additional actions covered by the rule are inapplicable in most matrimonial cases.
3. *See* ERISA § 206.
4. *See Kennedy v. Plan Adm'r for Dupont Sav. & Inv. Plan*, 128 S. Ct. 1225 (U.S. 2009).
5. *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153, 155 (4th Cir. 1997) (holding that benefits vest in the current spouse upon election of a Qualified Joint and Survivor Annuity ("QJSA")); *see also Carmona v. Carmona*, 544 F.3d 988 (9th Cir. 2008); for further discussion of the vesting rule see *Carmona* Casenote at http://www.galleonnetwork.com/category/case-law/erisa/.
6. CPLR 211; see also *Tauber v. Lebow*, 493 N.Y.S.2d 1008, 1010 (1st Dep't 1985).
7. *Bayen v. Bayen*, 917 N.Y.S.2d 269 (2nd Dep't 2011); *see also Schnee v. Schnee*, 973 N.Y.S.2d 25 (1st Dep't 2013).
8. *McCoy v. Feinman*, 755 N.Y.S.2d 693 (4th Dep't 2002) (dismissing a QDRO malpractice claim for being untimely).
9. See Dietrich, *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney*, § 3 (2014 ed., Matthew Bender).

Raymond S. Dietrich is admitted in New York, District of Columbia, Arizona, Nevada, Virginia, and Florida. Mr. Dietrich manages a multi-jurisdictional law practice concentrating in the drafting and litigation of Qualified Domestic Relations Orders ("QDROs") and related issues. Mr. Dietrich is the author of *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney* (Copyright © 2014 Matthew Bender). The firm's web site is located at www.galleonnetwork.com. Telephone is 202.540.9107.

A Marriage Proposal

By Donald M. Sukloff

Recently I overheard a conversation between an engaged family law attorney with his bride-to-be:

"When we marry, we will live in the house you acquired on your recent divorce. I will help pay off the mortgage with my pre-marital savings. Of course, in the unlikely event that our marriage is unsuccessful, I will receive a credit of this money.[1] If we use our mutual earnings after the marriage to pay off the mortgage on your house, then I will obtain a credit of half of these marital funds used to pay not only the mortgage but also the taxes, insurance and home equity.[2] Of course, I can't put my present savings into a joint account because, unless I can prove the account was set up for convenience, then I won't receive any credit.[3] Don't worry—in the unlikely event that the amount of my credit exceeds the equity in the property, I will be restricted to that amount only.[4]

"Of course, dear, maybe you should deed the property to me so that we would own it as tenants by the entirety after we're married. Then it becomes marital property and probably would be divided equally in the unlikely event of our split.[5] After all, there is a difference between using separate funds to acquire marital property and using separate funds to improve it.[6] On the other hand, maybe you should sell your house and we can buy a house together. Of course, if I use any of my separate funds in purchasing a house, I would want a credit in the event of a divorce.[7] The good news, however, is that I would not receive any reimbursement for closing costs paid from my separate funds.[8]

"During our marriage we will probably want to enhance your separate property with improvements and major repairs. Even if we can't show the property has been enhanced in value, I would probably be entitled to recover an equitable share of the marital funds used for improvements.[9]

"I mentioned that you could transfer the property to me during our marriage and in that event, if we were to divorce we would divide the equity equally, although there is a possibility that you might be able to get a credit for the value of the property when you transferred it to me.[10] Because the courts have recently shown a reluctance to inquire how married couples spend their money, the courts might not earmark our separate contributions in improving our jointly owned house but would just equitably divide the asset.[11]

"By the way, I have numerous debts that we will pay with our funds after we get married. Of course, you will not want or receive any credit for marital funds used to pay my prior debts.[12] Didn't I tell you that we will be paying off your prior student loans after we are married with our earnings? I would, of course, seek one-half returned to me in the court's discretion.[13] Normally, dear, a credit would not be given. The courts do not want to interfere with how we spend our money.[14]

"Certainly you realize that my former wife and children have to continue to be supported with my maintenance and child support payments from our joint earnings. Naturally, because you love me, you will not receive a credit for the dedication of our funds to these obligations."[15]

I then overheard the attorney's fiancée raising her voice in dumbfounded bewilderment, "You know what?," she exclaimed, "this is too complicated! Let's call the whole thing off."

Endnotes

1. *Jacobi v. Jacobi*, 118 AD3d 1285 (4th Dept., 2014).
2. *Biagiotti v. Biagiotti*, 97 AD3d 941 (3rd Dept., 2012); also *Marlinski v. Marlinski*, 111 AD3d 1268 (4th Dept., 2013).
3. *Krinsky v. Krinsky*, 208 AD2d 599, 600 (2nd Dept., 1994).
4. *Lawson v. Lawson*, 288 AD2d 795 (3rd Dept., 2001); *Rabinovich v. Shevchenko*, 93 AD3d 774, 776 (2nd Dept., 2012); *Carr v. Carr*, 291 AD2d 672 (3rd Dept., 2002).
5. *Campfield v. Campfield*, 95 AD3d 1429 (3rd Dept., 2012).
6. *Campfield v. Campfield*, supra.
7. *Jacobi v. Jacobi*, 118 AD3d 1285 (4th Dept., 2014); but, see *Fields v. Fields*, 15 NY3d 158 (2010).
8. *Suppa v. Suppa*, 112 AD2d 1327 (4th Dept., 2013).
9. *Carr v. Carr*, 291 AD2d 672 (3rd Dept., 2002).
10. See *Alecca v. Alecca*, 111 AD3d 1127 (3rd Dept., 2013).
11. *Mahoney-Buntzman v. Buntzman*, 12 NY3d 415 (2009).
12. *Kessler v. Kessler*, 111 AD3d 895 (2nd Dept., 2013); but see *Dewell v. Dewell*, 288 AD2d 252 (2nd Dept., 2001).
13. *Rabinovich v. Shevchenko*, 93 AD3d 774 (2nd Dept., 2012); *Kim v. Schiller*, 112 AD3d 671, 674 (2nd Dept., 2013).
14. *Mahoney-Buntzman v. Buntzman*, supra.
15. *Mahoney-Buntzman v. Buntzman*, supra.

Donald M. Sukloff is a partner in the firm of Sukloff & Schanz in Binghamton, New York; was valedictorian of his class at Syracuse University School of Law; editor-in-chief of Syracuse Law Review 1950-1951; former Judge Advocate in the military during the Korean War; member of and former vice-president and Board of Managers member of American Academy of Matrimonial Lawyers; member of Family Law Section of New York State Bar Association; listed in Best Lawyers of America; author of numerous articles and a lecturer in family law.

Does Client-Directed Representation of Children Make Good Sense Based on Neuroscience and Child Psychology?

By William H. Kaplan, MD

The evolution from "substituted judgment" to "client directed representation" of children is not consistent with recent developments in neuroscience and current views of child development. Substituted judgment refers to a situation where an attorney may advocate in a manner that is contrary to a child's articulated preferences. Client-directed representation refers to a situation where the child's preference sets the objectives of the attorney's representation. This article is a cautionary tale rather than a dogmatic position that one form of legal representation is always preferable to the other. However, recent neuroscience findings raise serious questions about the ability of children and adolescents to fully participate in the legal process involving a custody matter by advocating for a position which the child considers in his or her best interest.

In family law matters such as divorce, custody, or parenting disputes, courts often appoint an attorney to represent the child or children. Attorneys for children are appointed "for children who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court."[1] This attorney, according to the *Model Rules of Professional Conduct*, "shall abide by (the) client's decision concerning the objectives of representation."[2] The recent trend among family courts and legislatures is to enforce a model where children are treated as adults when it comes to representation by an attorney. Advocates for children argue that the child must have a voice during such family law disputes.

In Section 7.2 of the Rules of the Chief Judge, effective October 17, 2007, it states that in matters such as a child custody proceeding, "the attorney for the child must zealously advocate the child's position."[3] The Rule further states that: "If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interest."[4] According to Section 7.2 the attorney for the child must act as an advocate for the child and not as a guardian *ad litem* or a "Best Interests Attorney."[5]

The client-directed model assumes that the child is able to consult with and direct an attorney. This model was created based on the assumption that children, even as young as seven, can think rationally. The child's attorney has the responsibility to create the conditions for and promote the use of client-directed representation. Again, it is important to emphasize that these assumptions about the appropriateness of a child's participation in the legal process focus primarily on cognitive standards of rationality.

These directives for how the child's attorney should proceed do not sufficiently reflect our current understanding of child-adolescent development based on recent neuroscience.[6]

Client-directed representation focuses largely on the cognitive capacity of the child with little regard for his or her emotional life. This is an important omission in that there can be no full understanding of child development without incorporating both the emotional and cognitive status of the child.

For young children, their emotional life centers on a drive to preserve unconditional love and security. The child's most fundamental fears are loss of love and fear of abandonment. This is the driving force for major decisions made by the child. In an issue such as custody, which is both complex and abstract, the child's form of thinking become a major impediment to participating in the process. Children think concretely and egocentrically.[7] They will assume a causal link when none exists. As an example of egocentric and concrete thinking, a five-year-old child may believe that having wet the bed the night before he learned from his parents about a planned divorce is the causal event for what he perceives to be a catastrophe in his or her life.

From a child's emotional development, there is a compelling argument to be made that children should not directly participate in the divorce process even though the child may meet a cognitive standard which qualifies for his participation in client-directed representation.

In *Surviving the Breakup, How Children and Parents Cope with Divorce* by Judith Wallerstein and Joan Berlin Kelly, it is noted how children feel "pulled by love and loyalty in both directions" as parents often openly "competed for the child's love and allegiance." Even when this does not occur in reality, children often feel the pull of divided loyalties. School-age children conceptualize the divorce as a struggle in which the child feels each parent demands primary loyalty. For children, the divorce is a heightened time of rejection, loss, loneliness and vulnerability.[8]

Given children's perceptions, the legal system risks exacerbating these fears and worries by empowering them to get in the middle of the fray. This puts children and adolescents at increased risk for acting out and high risk behaviors, alienation, and depression or other forms of psychopathology, all of which can be risk factors by the time of adolescence without the added stress of divorce.

This is why, from the child's emotional development, it is essential to reassure the children that it is not their responsibility to choose one parent over the other in a custody dispute even though cognitively such children may meet a legal standard for client-directed representation.

Because children seek to please and retain the love of a parent, the child is wired emotionally to often favor the primary caregiver even in the absence of efforts at parent alienation. The child, on his own, can easily embellish reality in the cause of preserving his most cherished bond in order to maintain a sense of love and security. This feature of child development should give pause when one parent is accused of alienating the child from the other parent.

Children are driven emotionally to seek unconditional love. Their greatest fear is loss of that love from the parent with whom the child has been bonded since infancy, driven by the release of the hormone oxytocin, which facilitates the mother-infant bond and plays a critical role in social recognition, empathy and a sense of trust and calmness.[9] Thus, children are wired to seek and favor the primary caregiver even in the absence of any effort by one parent to alienate the child from the other.

Adolescents are less concerned than younger children about a fear of loss of love or hurting the feelings of a parent. The adolescent, who is already pulling away from the parental orbit, may feel alienated from one or both parents as part of the adolescent developmental task of establishing his or her own identity. This is a normal developmental phase of adolescence, as articulated by Erikson,[10] in the service of consolidating an identity independent of the parents.

The reason for caution in client-directed representation with an adolescent is not the issue of diminished capacity, but the adolescent's unique way of thinking, which can seem disarmingly similar to adult thinking as the adolescent looks and sounds more like the grown-up. But, as with the Emperor's Clothes, what you think you see may not be what is there.

Jan Hoffman writes in her *New York Times* article from October 14, 2014, "Teenagers, studies show, are not developmentally ready to make critical decisions that have longterm impacts. Adolescents are more oriented to the present, so they are less likely than adults to be thinking about the future consequences of what they are saying."[11]

Among the characteristics of teenagers which should give pause for the child's attorney providing client-directed representation are the adolescent's propensity for poor impulse control and risk taking. Death statistics for adolescents from the National Vital Statistics System from 2005 highlight how risk taking and poor judgment affect teenagers ages 15 to 19.[12] The three leading causes of death are as follows: unintentional injury 48.3%; homicide 15.1%; and suicide 11.8%.[13]

Recent imaging studies with the MRI and fMRI provide a detailed understanding of how different the adolescent brain is from that of adults. The prefrontal cortex, which plays a major role in personality formation, decision making, planning for the future, inhibition of impulsive behaviors, empathy and a coordination of thought with behavior, undergoes a dramatic change in adolescents.[14] This evolution in the prefrontal cortex continues through the age of 24. This revelation helps explain why a car rental company such as Hertz may not rent a car to a young adult up to the age of 25 because of the poor actuarial profile of this age group.[15]

While courts and attorneys often assume that by the age of 14 most adolescents can be relied upon to participate actively in a custody matter, it is sobering to recognize that adolescence is a period of destabilization with major changes in the brain.[16] While the onset of adolescence is clearly demarcated by puberty, adolescence has been called the longest decade[17] because it ends when the adolescent assumes adult-like responsibilities and privileges such as driving, voting, drinking alcohol, marriage and educational milestones.

The major reorganization in the prefrontal cortex of the brain is called synaptic pruning. The synapse is the chemical connection that sends signals between nerve cells in the brain. During adolescence there is a major reduction in the overall number of nerve cells and synapses, which leaves behind more efficient synaptic configurations. This reorganization contributes ultimately to adult-like thinking which is better equipped to plan for the future.[18]

While the prefrontal cortex, which is called the braking system to control impulsive behavior and reckless decision making, is slowly evolving during adolescence, the limbic system in adolescence is in hyper-drive. The limbic system is responsible for our emotional life. It rewards fun and is associated with risk taking. It is hypersensitive in adolescence without the braking component of the prefrontal cortex. This imbalance between the prefrontal cortex and limbic system provides an understanding of how different adolescent thinking is from that of adults.[19]

The neurotransmitter that drives the reward system in the limbic area of the brain is dopamine. Adolescents can overcome a sense of boredom by engaging in stimulating and novel activities associated with thrill seeking. Such activities increase the levels of dopamine. The increased drive for pleasure raises the risk of impulsiveness and addiction. All addictive behaviors and substances involve release of dopamine.[20]

Daniel J. Siegel, MD, writes that in adolescence there is a failure to engage in "gist thinking" which allows for the ability to make more prudent decisions. The adolescent is more tempted by the concept of Russian roulette which favors the excitement from a potential benefit of an action while downplaying negative consequences such as driving a car at a high speed while intoxicated.[21] This type of adolescent thinking can result in flawed reasoning in a custody dispute. It explains why a teenager might favor a parent who is seen as providing fun and excitement over a parent who provides structure, discipline and conse-

quences, which in the long term would help the adolescent mature and function as an independent adult.

From a neuroscience and child development perspective, there are compelling arguments to reconsider the child-directed representation, which now subordinates the substituted judgment role of the child's attorney. Caution is indicated even when a child or adolescent clearly meets the cognitive standard established by the Rules of the Chief Judge. Such caution should be applied especially in cases where parent alienation is of concern.[22]

The recent advances in neuroscience and developmental psychology of adolescents have influenced United States Supreme Court decisions including *Roper v. Simmons*[23] and *Miller v. Alabama*,[24] as evidenced by the majority opinions of Justices Anthony Kennedy and Elena Kagan.

In *Roper v. Simmons*, Justice Kennedy, writing the majority opinion, held that the capital punishment is unconstitutional for a crime committed by a person under the age of 18. Justice Kennedy made several important observations about the difference between juveniles under age 18 and adults. He stated that based on scientific and sociological research, juveniles lack maturity and have an "underdeveloped sense of responsibility" when compared to adults.[25] Justice Kennedy further stated that "adolescents are overrepresented statistically in virtually every category of reckless behavior"; juveniles are more vulnerable to negative influences and peer pressure, and lack the freedom to escape criminogenic settings.[26]

In *Miller v. Alabama*, the Supreme Court ruled that a mandatory sentence of life without parole cannot be given to juveniles lest it violate the Eighth Amendment's prohibition on cruel and unusual punishment.[27] In the majority opinion, Justice Kagan wrote that juveniles are immature, impetuous and fail to appreciate risks and consequences.[28] An adolescent lacks the ability to extricate himself from a brutal or dysfunctional home.[29]

These recent Supreme Court decisions, which indicate radical shifts in judicial thinking about adolescent cognitive capacity, judgment, and maturity should give pause in reflecting upon whether the client-directed representation conforms to current neuroscience about children and adolescence.

Conclusion

In most cases, it is important to spare children from client-directed involvement because they remain emotionally vulnerable even when meeting the necessary cognitive standard as defined by the Section 7.2 Rules of the Chief Judge.

Such a message will be perceived by the child with tremendous relief because it allows the child to resume his or her age appropriate role without the burden of pretending to be a pseudomature participant in a custody battle. For the child, this represents only a reaffirmation of what parents have been doing in every other major domain of his or her life including education, recreation, medical care and religious training.

For the most intractable cases of parental alienation in which therapeutic interventions often fail, it is worth considering whether drawing the child into the legal process through client-directed representation contributes to the alienation from a parent. By contrast, substituted judgment often can reduce the incentive for the child to become empowered in embellishing the alienation of a targeted parent.

Even where the child has the cognitive capacity to give an opinion, for his or her psychological well-being it is still important to communicate the following:

For the children, they should know that they are caught in the middle of a mess created by adults and this mess is going to be fixed by adults, including their parents, their own attorney, and the judge, in their best interest.

For adolescents, it is important to consider that they think differently from adults in spite of many cognitive and physical characteristics which are strikingly similar. Their prefrontal cortex, the center of the brain for decision making, empathy, planning for the future and inhibition of inappropriate behavior, is only in the early stages of a major reorganization, which is necessary for adult-like problem solving. The evolving pre-frontal cortex is not yet fully able to control the pleasure-seeking limbic system.

It is often a mistake to assume that an adolescent is qualified cognitively and emotionally to participate as a co-equal in the legal process.

Endnotes

1. N.Y. Fam. Ct. Act § 241.
2. MODEL RULES OF PROF'L CONDUCT R. 1.2 (a) (2006).
3. N.Y. CT. RULES OF THE CHIEF JUDGE § 7.2(d) (2007).
4. *Id*.
5. A Best Interests Attorney must advocate for the child's best interests. ABA SECTION OF FAMILY LAW STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILDREN IN CUSTODY CASES § I (2003). A Guardian ad Litem, who may not necessarily be an attorney, is appointed to protect the best interests of the child, not to advocate the child's position. *Id.* § II.
6. When a client lacks the capacity to make "adequately considered decisions in connection with a representation" he or she is considered to have "diminished capacity." MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2006).
7. Jerome Kagan, *The Nature of the Child*, NY Basic Books, 1984.
8. Judith Wallerstein and Joan Berlin Kelly, *Surviving the Breakup, How Children and Parents Cope with Divorce,* Basic Books.
9. Ilanit Gordon et al., *From Attachment to Groups: Tapping Into the Neurobiology of Our Interconnectedness*, Journal of American Academy of Child and Adolescent Psychiatry, Vol. 53, Issue 2, 2014.
10. E.H. Erikson, Identity Youth and Crisis: NY, Norton, 1968.
11. Jan Hoffman, *Too Young to Know Better*, New York Times, October 14, 2014.
12. National Center for Health Statistics Data Brief No. 37, May 2010 U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, Hyattsville, MD 20782.
13. *Id.*

14. T.D. Wager, M.L. Davidson, B.L. Hughes, M.A. Lindquist, & K.N. Ochsner, K.N. (2008), *Prefrontal-subcortical Pathways Mediating Successful Emotion Regulation*, Neuron, 59 (6), 1037-1050.
15. National Center for Health Statistics. Health, United States, 2008, with Chartbook, Hyattsville, MD: 2009, Library of Congress Catalog Number 76-6414.
16. B.J. Casey, R.M. Jones & A.H. Todd, *The Adolescent Brain*, Annals of the New York Academy of Sciences, 2008; 1124-111-126.
17. Laurence Steinberg, *Age of Opportunity: Lessons from the New Science of Adolescence*, Houghton Mifflin, 2014.
18. S.J. Blakemore & S. Choudhury (2006), *Development of the Adolescent Brain: Implications for executive functioning and social cognition,* Journal of Child Psychology and Psychiatry, 47 (3-4), 296-312.
19. Daniel J. Siegel, Brainstorm, *The Power and Purpose of the Teenage Brain*, NY, Penguin 2013.
20. Nora Volkow, et al, *Addiction: Beyond Dopamine Reward Circuitry*, Proc Natl Acad Sci USA Sept 13, 2011; 108)37): 15037-15042. Published online Mar 14, 2010.
21. Daniel Siegel, *The Developing Mind*, Second Edition, NY, The Guilford Press, 2012.
22. *See* Jamie Rosen, *The Child's Attorney and the Alienated Child: Approaches to Resolving the Ethical Dilemma of Diminished Capacity,* 51 Fam. Ct. Rev. 330, 330 (Apr. 2013), for a discussion of the role of the child's attorney in cases of parental alienation, including the determination that a child has "diminished capacity" and the attorney's subsequent decision to substitute judgment.
23. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).
24. *Miller v. Alabama*, 132 S. Ct. 2455, 2457, 183 L. Ed. 2d 407 (2012).
25. *Roper v. Simmons*, 543 U.S. at 569.
26. *Id*.
27. *Miller v. Alabama*, 132 S. Ct. at 2475.
28. *Id*. at 2467-2468.
29. *Id*. at 2468.

William H. Kaplan, MD is a voluntary attending physician in the Division of Child Psychiatry at the Hofstra North Shore-LIJ School of Medicine Division of Child and Adolescent Psychiatry where he is the training coordinator of the Forensic Child Psychiatry Program. Dr. Kaplan is engaged in the private practice of Child, Adult and Forensic Psychiatry, with offices in Great Neck and Manhattan. Dr. Kaplan is certified by the American Board of Psychiatry and Neurology in General Psychiatry, Child Psychiatry and Forensic Psychiatry. Dr. Kaplan helped start and was the Director of The Center for Psychiatric Legal Services at the Schneider Children's Hospital and the Long Island Jewish Medical Center.

Jamie A. Rosen, Esq., Associate at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, in Lake Success, assisted in the research and writing of this article.

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Editor's Note: Since the writing of this article there have been ongoing developments in the areas of same-sex marriage. The 6th Circuit upheld the bans on marriage in Kentucky, Michigan, Ohio, and Tennessee. Marriage bans in Kansas and South Carolina were struck down. Prohibition on same-sex marriage in Mississippi is presently expected to also be stricken. Marriage is also being permitted in Alaska, Arizona, Colorado, Kansas, North Carolina, West Virginia, and Wyoming. Justice Kennedy's interim stay of the Idaho decision was lifted so that same-sex marriage may go forward. St. Louis and other jurisdictions within Missouri also permit same-sex marriage. Thirty-three states now permit same-sex marrriage pending the decision in Mississippi. No doubt there will be more changes by the time this issue is published. More details will be provided in the next issue of the Family Law Review.

Same-Sex Marriage Update

June 2014 marked the one-year anniversary of the landmark Supreme Court decision of *Windsor v. United States*, 133 S. Ct. 2675 (2013), which struck down a core part of the federal Defense of Marriage Act (DOMA) and held that married same-sex couples are eligible for federal benefits, although the justices stopped short of a ruling endorsing a fundamental right for same-sex couples to marry. There is grave legal uncertainty and chaos for same-sex married couples who move to states that don't respect their marriage, while the federal government does. Since *Windsor*, same-sex marriage litigation has exploded in dozens of states.

On October 6, 2014, the U.S. Supreme Court let stand three appeals court rulings allowing same-sex marriage in five states, including Indiana, Oklahoma, Utah, Virginia and Wisconsin. The decision not to take up these cases is seemingly moving the country towards gay marriage rights nationwide.

On October 7, 2014, the United States Court of Appeals for the Ninth Circuit struck down same-sex marriage bans in Nevada and Idaho. However, Justice Kennedy issued a stay of the Idaho order on October 7th, which was surprising given the Supreme Court's decision two days earlier.

The Sixth Circuit is expected to rule soon on the validity of same-sex marriage bans in Kentucky, Michigan, Ohio and Tennessee.

Nineteen other states currently recognize same-sex marriage: Oregon, Pennsylvania, Hawaii, Illinois, New Mexico, New Jersey, California, Rhode Island, Delaware, Minnesota, Washington, Maine, Maryland, New York (as of July 24, 2011 when it passed the Marriage Equality Act) (DRL §§ 210a, 210b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia.

The following countries permit same-sex marriage: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom and Uruguay, and Mexico City, Mexico.

Recent Legislation

As a reminder, as of January 31, 2014, the combined parental income to be used for purposes of the CSSA changed from $136,000 to $141,000 in accordance with Social Services Law § 111i(2)(b), and in consideration of the Consumer Price Index. Agreements should reflect the new amounts. The CSSA chart for unrepresented parties will change to reflect that amount as well. In addition, the threshold amount for temporary maintenance is now $543,000, rather than $524,000. The self-support reserve is now $15,512.

Family Court Act § 451 amended, effective December 22, 2014: Continuing Jurisdiction

FCA 451 was amended to provide that in order to commence a proceeding to modify an existing order of support (on the grounds of a substantial change of circumstances, the passage of three years since the order was entered or last modified, and/or a change in either party's gross income by at least fifteen percent), a petition must be filed.

Civil Practice Law and Rules 5241(a), (b)(1), (c)(1), (d), (f), & (g) and 5242(c)-(g), and Social Services Law § 111-b amended, effective April 27, 2014: Child Support and Income Deduction Orders

CPLR 5241(a) was amended by adding a paragraph 13, which defines an "issuer" as a support collection unit, sheriff, clerk of the court, or the attorney for the creditor. In accordance with this addition, section 5241(b-1), (d) and (f) were amended to replace the word "creditor" with "issuer" in the relevant sentences. In addition, section 5241(c)(1) was amended to specify that the income execution shall be on a form promulgated by the Office of Temporary and Disability Assistance. Subdivision (g) of 5241 was amended to direct the employer or income payor to follow

the directions provided in the income execution with regard to information to be included with each payment remitted.

CPLR 5242(c) was amended to change "wages" to "income" in order to align with the terminology used in 5241(a). Additionally, 5242(d), (e), (f), and (g) were amended to direct the courts to use the form for income withholding promulgated by the Office of Temporary and Disability Assistance for such purpose, and requires that the form complies with the requirements contained in section 666(b) of title 42 of the United States Code, so that it can be characterized as an income withholding order/notice under that statute. Where the income deduction order is for child support or combined child and spousal support orders, the court must serve a copy of the income deduction order on the employer/income payor, the parties, and the state disbursement unit. Lastly, this section requires employers and income payors to follow the instructions provided on the income deduction order, which requires remittances to be paid to and through the state disbursement unit in a child support or combined child and spousal support order, and to the creditor in a spousal support only order.

Section 111-b of the Social Services Law was amended to authorize the Office of Temporary and Disability Assistance or its fiscal agent to act as the federally-mandated "state disbursement unit" for the purpose of collecting and disbursing support received from employers and income payors. This section was further amended to align the disbursement time frame, as required by federal law, from five to two business days of receipt.

Civil Practice Law and Rules 3122-a amended, effective August 11, 2014: Certification of Business Records

CPLR 3122-a was amended by adding a subdivision (d), which provides that certification, duly sworn to in an affidavit and subscribed by the custodian or other qualified witness charged with the responsibility of maintaining records, may be used as to business records produced by *non-parties,* without the necessity of a subpoena, provided the qualified non-party attests to the facts set forth in subdivision (a) of the rule.

Civil Practice Law and Rules 3113(c) amended, effective September 23, 2014: Conduct of the Examination

CPLR 3113(c) was amended to permit a non-party deponent's counsel to be present during examination and cross-examination at a deposition and to participate in the deposition and make objections on the client's behalf in the same manner as counsel for a party.

Cases of Interest

Custody and Visitation

Grandparent visitation granted

Feldman v. Torres, 117 AD3d 1048 (2d Dept. 2014)

The Second Department reversed the decision of the trial court and granted the maternal grandfather visitation with his grandchild, despite the mother's animosity toward her father and her desire that he not have any contact with her child. The court reasoned that the nature and extent of the relationship between the grandfather and the child, coupled with the grandfather's efforts to maintain that relationship, demonstrated the requisite standing for the grandfather to seek visitation. In addition, although the mother objected to the visitation, the court held that the record lacked any sufficient basis for such objection, and that animosity alone is not a sufficient basis.

Mother denied visitation with 14-year-old daughter

Iacono v. Iacono, 117 AD3d 988 (2d Dept. 2014)

The trial court awarded the father sole custody of the children, reduced the mother's visitation with the parties' son, and declined to award the mother any visitation with the parties' 14-year-old daughter, including supervised therapeutic visitation. The appellate division affirmed, hinting only that there was a full evidentiary trial and that the child was mature enough to state her wishes.

Father awarded custody

Soto v. Cruz, 119 AD3d 592 (2d Dept. 2014)

The family court's award of custody to the mother was reversed as lacking a sound and substantial basis in the record. Based on evidence that the mother forced the older daughter to take inappropriate photographs of her, the subject child had excessive absences from school, and the mother delayed enrolling the child in court-ordered therapy for a year, the court determined that the mother was unable to provide necessary parental guidance and place the child's interests before her own. In addition, it was not in the child's best interests to be separated from her older sister, who resided with the father.

Father awarded custody

Reyes v. Gill, 119 AD3d 804 (2d Dept. 2014)

Reversing the decision of the trial court, the Second Department found that an award of sole custody to the father was warranted where the child was excelling in school and the home environment was more suitable than that of the mother. While in the mother's care, the child missed 67 days of school, struggled academically, and was not promoted to the next grade level. In addition, the home environment provided by the mother consisted of a one-bedroom apartment that the child shared with the mother, her boyfriend, and their newborn baby. Conversely, while the child was in the father's care pursuant

to a temporary custody order, the child regularly attended school and improved from well below grade level to above grade level in several subjects. The child has his own bedroom in the father's home and expressed his preference to live with the father.

Change in custody to father where parental alienation found

***Cheney v. Cheney*, 118 AD3d 1358 (4th Dept. 2014)**

Based on evidence that the mother interfered with the father's access to the child by taking the child's cell phone away to prevent the father from communicating with the child, and that the home environment had changed as a result of the mother moving in with her boyfriend and his three children, the court found that the father established the requisite change in circumstances to warrant a modification of the custody arrangement. The daughter had become withdrawn and emotionally volatile because of the above circumstances, and this, coupled with the child's preference to live with the father, were sufficient bases to warrant an award of physical custody to the father.

Shared physical custody

***Miller v. Jantzi*, 118 AD3d 1363 (4th Dept. 2014)**

Where the parties' older son was already enrolled in school and the younger son had not yet reached school age, the trial court properly awarded sole physical custody of the older son to the father to permit him to remain in his current school, and shared physical custody of the younger son to both parties. The court reasoned that, since the younger son was not yet enrolled in school, alternating weekly residency was in his best interests and would provide the two siblings with ample time together.

Split physical custody

***Robert B. v. Linda B.*, 119 AD3d 1006 (3d Dept. 2014)**

Split physical custody of the parties' two daughters was warranted based on the report of the court-appointed forensic psychologist, which concluded that the older daughter, age 17, became alienated from the father due to being "overly enmeshed" with the mother, and a recording of a conversation between the mother and the younger child, age 9, wherein the mother inappropriately discussed the details of changing the father's existing visitation schedule with the child. The court found that the mother did not recognize the importance of the children having a relationship with the father and would not encourage such a relationship if awarded primary physical custody of the younger child. Since the younger child seemed to be more at ease in the presence of the father, and the father was more likely to promote a healthy relationship between the younger child and the mother, the court awarded the father sole legal and primary physical custody of the younger child, with parenting time to the mother. The parties were awarded joint legal custody of the older child, with physical custody to the mother.

Father's visitation reduced where conflict with children's extracurricular activities

***Bugalla v. Calcagno*, 118 AD3d 871 (2d Dept. 2014)**

The trial court properly set aside the terms of the parties' custody agreement based on a sufficient change in circumstances. As a result of the children's busy schedules and extracurricular activities, a reduction in the father's visitation was in the best interests of the children. In addition, although there was evidence that the mother interfered with the father's visitation, the trial court properly denied a change in custody, particularly where the children have lived with the mother all of their lives, and thus a change would not be in the children's best interests.

Maintenance

Termination of employment not deemed retirement for purposes of terminating maintenance

***Calano v. Calano*, 119 AD3d 629 (2d Dept. 2014)**

The parties' stipulation of settlement, which was incorporated, but not merged, into their judgment of divorce required the husband to pay spousal maintenance until the earliest of four events, one being the husband's retirement. In addition, in the provision providing for the division of marital property, the wife was entitled to collect a percentage of the husband's retirement plan and 401(k) plan through his employment at JP Morgan Chase. After losing his job, the husband deferred his collection of *his* portion of the JP Morgan Chase benefits and stopped paying spousal maintenance to the wife. Thereafter, the husband obtained new employment, and the wife moved for, and was granted, maintenance arrears. The husband moved for leave to renew, contending that his termination amounted to retirement, and submitted evidence that the wife was entitled to collect *her* distributive share of the JP Morgan Chase benefits upon his termination. Contrary to the husband's argument, the court held that the maintenance provision was separate from the equitable distribution provision, and thus the wife's eligibility to collect her portion of the JP Morgan Chase benefits was not indicative of retirement and did not properly terminate the husband's maintenance obligation under the parties' stipulation.

Cohabitation clause in agreement

***Vega v. Papaleo*, 119 AD3d 1139 (3d Dept. 2014)**

In an agreement that was incorporated, but not merged, into the parties' judgment of divorce, a terminating event for the husband's maintenance obligation was the wife's remarriage or cohabitation with another individual. Based on the wife's cohabitation with her mother and stepfather, the husband moved to cease his mainte-

nance payments to the wife. Relying on the agreement's failure to define the term "cohabits," the husband argued that the provision should be read to mean any other person that the wife resides with, without the requirement of an existing romantic relationship. The court, noting that the Court of Appeals had previously determined that a "common element" in the various definitions of the term "cohabitation" is that they refer to people living together "in a relationship or manner resembling or suggestive of marriage," denied the husband's motion. *See id.* at 1140 (quoting *Graev v. Graev*, 11 NY3d 262 (2008)).

Pendente lite maintenance, limitation on extreme lifestyle

Westreich v. Westreich, 44 Misc.3d 1217(A) (Sup. Ct. Nassau County 2014)

The parties were married for 12 years, have two unemancipated children, maintained three households, and lived a $2.8 million per year lifestyle. Although the husband continued to pay for all three properties and every expense for the children, totaling $136,000 per month, the wife argued that she needed an additional $97,000 per month in direct spousal and child support to maintain the pre-divorce standard of living. The court ordered the husband to continue paying all of the expenses related to all three homes, all insurance policies for the family, 100% of reasonable physician and pharmacy co-pays incurred by the family, and 100% of the children's summer camp, extracurricular activities, and educational expenses. The court found that the wife was only entitled to $30,000 per month in additional spousal support, explaining:

> This Court finds it difficult to believe that the legislature intended that the status quo for temporary maintenance purposes was for items such as $2,000 a month for household furnishings; $2,000 a month for airfare and $8,000 a month for hotels; $774 a month for massages; $16,000 a month for jewelry; $8,236 for art; $20,000 for a dinner party; $4,166 a month in floral arrangements. It is this Court's belief that the status quo is meant to maintain the comforts of the lifestyle to which one has become accustomed, however, there must be a limit to such comforts. *Id.* at 12.

Imputation of income

Benjamin-Pratt v. Pratt, 44 Misc.3d 1230(A) (Sup. Ct. Monroe County 2014)

At the time of the commencement of the action, the wife, a medical doctor, earned an income of approximately $160,000 per year, and the husband, working part-time with a master's degree in music education, earned an income of $8,000 per year ($17,000 per year at the time of trial). Relying, in part, on the fact that the husband never suggested that his expenses were substantially exceeding his income or that he was failing to pay his bills, the court declined to award him maintenance beyond $1,500 for a period of 40 months ($60,000). In addition, the court found that, since the husband holds an advanced degree and needs little workforce retraining, the husband had the ability to earn significantly more as a teacher and imputed an annual income of $30,000 to him.

Equitable Distribution

No abatement on death of party to divorce action

Cristando v. Lozada, 118 AD3d 846 (2d Dept. 2014)

Where the court had made a final adjudication of divorce before the wife's death, the court's failure to perform the mere ministerial act of entering the final judgment did not cause the divorce action to abate upon the wife's death.

A cause of action for equitable distribution does not abate upon the spouse's death. Therefore, if a party dies in possession of a vested right to equitable distribution, and that right has been asserted in an action during the party's lifetime, then that right survives the party's death and may be asserted by the estate.

No credit for payment of separate property debt with marital funds

Kessler v. Kessler, 118 AD3d 946 (2d Dept. 2014)

The trial court properly exercised its discretion in denying the wife's claim for a $20,000 credit for the use of marital funds to pay down the husband's separate property debt. The court based its decision on, in my opinion, an overly expansive view of *Mahoney-Buntzman v. Buntzman*, 12 NY3d 415 (2009).

Counsel Fees

Cohen v. Cohen, 2014 WL 4452645 (1st Dept. Sept. 11, 2014)

Despite the unnecessary litigation caused by the wife, the appellate division affirmed the trial court's award to the wife of $175,000 in counsel fees. In making this award, the court considered the relative financial circumstances of the parties, including the wife's role as a housewife and mother throughout the marriage, the husband's role as the financial provider of their lavish lifestyle (although the court did not state his income), the wife's award of $22,500 per month in durational maintenance, and the fact that the wife would not be receiving a distributive award.

Cristando v. Lozada, 118 AD3d 846 (2d Dept. 2014)

The order of the trial court, which granted a counsel fee award to the wife of $112,097.98, was modified to $84,073.49, without explanation.

***Carlin v. Carlin*, 120 AD3d 734 (2d Dept. 2014)**

Where the wife was the non-monied spouse and the husband's income exceeded $27 million per year, the Second Department reversed the decision of the trial court and awarded the wife $307,350 in counsel fees and $67,111.19 in expert fees based on the fees she incurred or will imminently incur.

Wendy B. Samuelson is a partner of the boutique matrimonial law firm of Samuelson, Hause & Samuelson, LLP, located in Garden City, New York. She has written literature and lectured for the Continuing Legal Education programs of the New York State Bar Association, the Nassau County Bar Association, and various law and accounting firms. Ms. Samuelson was selected as one of the Ten Leaders in Matrimonial Law of Long Island, was featured as one of the top New York matrimonial attorneys in Super Lawyers, and has an AV rating from Martindale Hubbell.

Ms. Samuelson may be contacted at (516) 2946666 or WSamuelson@SamuelsonHause.net. The firm's website is www.SamuelsonHause.net.

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NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
One Elk Street, Albany, New York 12207-1002

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