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The Changing Landscape of Joint Custody

By Lee Rosenberg, Editor-in-Chief

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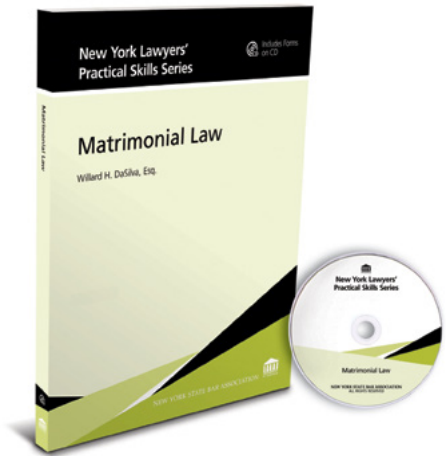

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Revisiting Custodial Norms: The Changing Landscape of Joint Custody

By Lee Rosenberg, Editor-in-Chief

There has been a debate in recent years whether or not there should be a presumption of joint custody. Many states already start with joint custody as the default, with the ability to argue against the presumption. New York has been historically resistant to this concept, although legislation has been proposed and languished. Some recent cases, however, have explored joint custody even after the matter was contested at trial, so that the idea may be one that is now ready for consideration.

Best Interests and Gender Neutrality

The law of custody in New York is "gender-neutral" by statute. As was held in *Linda R. v. Richard E.*,[1]

> In enacting the "best interests of the child" test, the Legislature expressly rejected the idea that either fatherhood or motherhood alone carries with it a superior right to custody (see, Domestic Relations Law §§ 70, 81, 240). The statutory declaration that there is "no prima facie right to the custody of the child" (Domestic Relations Law §§ 70, 240) rejects the notion that there is an inherent custodial preference for either parent (Matter of Fountain v. Fountain, 83 A.D.2d 694, 442 N.Y.S.2d 604, affd. 55 N.Y.2d 838, 447 N.Y.S.2d 703, 432 N.E.2d 596; Alan G. v. Joan G., 104 A.D.2d 147, 152, 482 N.Y.S.2d 272; People ex rel. Moody v. Moody, 36 A.D.2d 627, 319 N.Y.S.2d 136), while at the same time advancing equal protection concepts, and reducing invidious gender classifications and stereotyping of either sex. While the role of gender in making custody determinations has had a lengthy social and legal history, it finds no place in our current law. (Footnotes omitted).

Most family law attorneys I think would agree that notwithstanding the long-gone abandonment of the "tender-years doctrine," mothers still maintain an advantage on issues of custody. Most judges would officially opine that there is no bias in this regard, but practice would dictate otherwise. There may be valid statistical reasons for this advantage such as a greater prevalence of stay-at-home mothers vis-a-vis fathers. Nonetheless, while it would seem rare to have a father with a substance abuse or mental health history have a legitimate chance at custody, a mother with similar background seems to still have a foot in the door.[2] While this remains antithetical to the gender neutral concept of custody, it is a reality. That being said, a father's ability to obtain custody gets better and better in the modern age due to changes in parenting: a substantial increase in the involvement of fathers in the day-to-day lives of their children, and the commonality of having two working parents requiring a more pervasive sharing of parental responsibility. Interestingly, the gender-neural language in 1990's *Linda R., id.*, was used to avoid prejudice *to the mother's custody claim* because she was working:

> We stress that custody determinations must be born of gender-neutral precepts in both result and expression. We know that for a variety of reasons, mothers as well as fathers of even young children are, or must be, gainfully employed. That being so, the custody-seeking mother who works outside the home should not be penalized for her employment, any more than should the father. To do so would often confront one parent—in this case the mother—with a Hobson's choice between livelihood and parenthood, while exacting a lesser standard on the other parent—in this case the father. If a mother is held to a more rigorous standard, the legislative presumption of gender neutral custody determination, and with it, the "best interest of the child" test, is upset. In short, the wife, who is employed, should not thereby suffer in her chances

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> for custody any more than should the husband, lest the wife feel compelled to give up her source of income and risk not only financial woe, but a court's finding that her former husband's stronger economic condition is more congenial to the child's best interests. (footnotes omitted).

New York, using the "best interests" standard, based upon factors derived from case law, has not codified those factors as some other states have also done, since codification at this point would seem superfluous and unnecessary. Custody, as is set forth in DRL § 70(a) and DRL § 240(1)(a), reflects the best interests standard and the gender-neutrality of custodial rights.

> DRL 70 Habeas corpus for child detained by parent
>
> (a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. *In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.* (emphssis added).
>
> § 240. Custody and child support; orders of protection
>
> 1. (a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, *having regard to the circumstances of the case and of the respective parties and to the best interests of the child...*(emphasis added).

The two seminal custody cases in the State, *Friederwitzer v. Friederwitzer*[3] and *Eschbach v. Eschbach*,[4] both of which involved a modification of custody, remain instructive.

> The only absolute in the law governing custody of children is that there are no absolutes. The Legislature has so declared in directing that custody be determined by the circumstances of the case and of the parties and the best interests of the child, but then adding "In all cases there shall be no prima facie right to the custody of the child in either parent" (*Friederwitzer, supra*).
>
> Any court in considering questions of child custody must make every effort to determine "what is for the best interest of the child, and what will best promote its welfare and happiness." (citations omitted). As we have recently stated, there are no absolutes in making these determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child... (*Eschbach*, *supra*).

Courts consider a number of factors deriving from *Friederwitzer, Eschbach*, and their progeny to determine best interests. As was set forth in *Lliviganay v. Fajardo*,[5]

> In determining a custody arrangement that is in the child's best interests, the court must consider several factors, including "the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent" (Salvatore v. Salvatore, 68 A.D.3d 966, 966, 893 N.Y.S.2d 63 [internal quotation marks omitted]; see Eschbach v. Eschbach, 56 N.Y.2d at 171–173, 451 N.Y.S.2d 658, 436 N.E.2d 1260). The child's expressed preference is an additional factor to be considered, taking into account the child's age, maturity, and any potential influence that may have been exerted on him or her (see Eschbach v. Eschbach, 56 N.Y.2d at 173, 451 N.Y.S.2d 658, 436 N.E.2d 1260; Matter

of Tejada v. Tejada, 126 A.D.3d 985, 986, 6 N.Y.S.3d 122; Bressler v. Bressler, 122 A.D.3d 659, 659, 996 N.Y.S.2d 160). The court is to consider the totality of the circumstances, and the existence of any one factor is not determinative (see Eschbach v. Eschbach, 56 N.Y.2d at 174, 451 N.Y.S.2d 658, 436 N.E.2d 1260; Matter of Bowe v. Bowe, 124 A.D.3d 645, 646, 1 N.Y.S.3d 301; Matter of Bosede v. Agbaje, 121 A.D.3d 675, 676, 993 N.Y.S.2d 377).

Braiman and the Historic Aversion to Joint Custody

In 1978's *Braiman v. Braiman*,[6] the Court of Appeals reversed the Second Department's award of joint custody after the lower court, in a modification proceeding, awarded custody of the parties' sons to the father. Looking back nearly 40 years, the Court's view of joint custody appears initially antiquated in its statement that,

> On the wisdom of joint custody the authorities are divided (see Dodd v. Dodd, 93 Misc.2d 641, —-, 403 N.Y.S.2d 401, —-, Supra, for a collection of authorities and an analysis of competing concerns; Bodenheimer, pp. 1009-1010).

While also acknowledging the benefits of joint custody, the Court re-established the lower court's award to the mother while remanding for further proceedings. The take-away from *Braiman* remains that parents embroiled in an ongoing contentious relationship are not suited for joint custody. *Braiman* continues to be cited for this principle.[7] Its language, however, also sees joint custody as something akin to seeing a unicorn—an elusive fantasy.

> But, that there is no perfect solution to the divided family does not mean that the court should not recognize the division in fact of the family. Children need a home base. Particularly where alternating physical custody is directed, such custody could, and would generally, further the insecurity and resultant pain frequently experienced by the young victims of shattered families (see Foster & Freed, Law and the Family New York, s 29:6A (1978 Supp.)).
>
> It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion (see, e. g., Dodd v. Dodd, 93 Misc.2d 641, —-, 403 N.Y.S.2d 401, —-, Supra ; Bodenheimer, pp. 1010-1011). As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos.
>
> ...There are no painless solutions. In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is, one to be threatened but never carried out.

"Several recent cases, recognizing modern parenting beliefs and realities, have now addressed joint custody as a viable alternative even after trial."

And so, as we arrive at the tail-end of the 21st Century's second decade, where do we stand?

The Times They Are A-Changing[8]

Several recent cases, recognizing modern parenting beliefs and realities, have now addressed joint custody as a viable alternative even after trial.

In *Hardy v. Figueroa*,[9] the Second Department affirmed the Family Court's joint physical custody award with final authority to the father on educational, extracurricular, and religious decisions, and final authority to the mother with respect to the child's medical decisions. "The Family Court's determination that the child would benefit from equal amounts of time with each parent, and that it would be in his best interest for physical custody to be shared by

the parents is supported by a sound and substantial basis in the record ..."

In *I.L.H. v. A.H,*[10] Nassau County Court Attorney Referee Marie F. McCormack awarded joint legal and physical custody (with certain delineated final decision-making authority) of the parties' two boys after hearing,

> As to an award of joint custody, the Court of Appeals made clear that it is not appropriate when the parties are "embattled and embittered" (Braiman v. Braiman, 44 NY2d 584, 590 [1978]). The Braiman Court, however, recognized that there are situations when joint custody is appropriate and stated, "joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion" (Braiman at 590 [citations omitted]). The holding in Braiman, thus, did not preclude court-ordered joint custody in all circumstances. Moreover, the Court noted the importance of both parents in a child's life. "Of course, other considerations notwithstanding, children are entitled to the love, companionship, and concern of both parents. So, too, a joint award affords the otherwise noncustodial parent psychological support which can be translated into a healthy environment for the child" (Braiman at 589). In the years since the Braiman decision was issued, the courts have fashioned various custodial arrangements, such as shared physical custody and the award of final decision making authority to each parent in distinct areas, in order to foster the involvement of both parents and to achieve an arrangement that is in the best interests of the child...
>
> This Court finds that both parents herein should have a meaningful and significant role in the children's lives. The wife testified that she grew up without parents, and she did not want the same for her children. This Court agrees. The children are entitled to the full involvement and love of both parents. Neither parent should feel more important than the other, and both parents have much to offer the children. Under the circumstances of this matter, this Court finds that both parents should have a role in decision-making for the children, and they both should have an approximately equal amount of time with the children. This Court is hopeful that the parties can put aside their differences and work together to raise their children.

In *J.R. v. M.S.*,[11] from May 5, 2017, New York County Supreme Court Justice Matthew F. Cooper, explored joint custody in the national and historical context. The court awarded joint custody and shared decision-making by use of various final and hybrid zones of decision-making[12] and a parenting coordinator.[13]

> The same way that the arrangements by which divorced parents raise their children have changed over recent years, the language employed to describe those arrangements has begun to change as well. The terms "legal custody," "physical custody," and "visitation"—all deeply ingrained components of the process by which we determine what role each parent will play in the child's life—are gradually giving way to new terms. These new terms are reflective of the greater emphasis that is now being placed on co-parenting.
>
> ...I foresee a time when judges who are called upon to determine parenting issues will be able to proceed directly to deciding decision-making without having to make unnecessary, and sometimes detrimental, custodial designations. But, in light of current appellate case authority, it seems that such as time has not yet arrived. Accordingly, in addition to determining how the parties will handle decision-making, I will decide what form legal custody will take. In particular, I will determine if the custodial designation should be joint custody to both parties or sole custody to the mother.
>
> Nationally, joint custody is increasingly becoming the favored custodial designation. Statutes in 18 states and the District of Columbia create a presumption that joint custody is in the best interests of the child, and those in three other states list it as the preferred option.
>
> ...This case presents a good example of why, even in a situation where hostility and poor-communication abound, courts, when called upon to designate legal custody, should opt, if at all possible, for designating both parents joint

> custodial parents, rather than making one the custodial and the other the non-custodial parent. Whatever the father's idiosyncrasies and personality flaws, he is undeniably a loving, capable, and devoted parent. Moreover, he is the type of involved father who coaches the child's soccer team and is highly active in the child's school's parent association. To designate him a non-custodial parent would, in effect, label him—to the child and the rest of the world—as being somehow defective and inferior to the mother, who, in turn, would wear the crown of custodial parent. Under the circumstances presented here, it is difficult to see how it could be in the child's best interests to have his father's parental standing denigrated in this manner. Consequently, I find that the parties should be designated joint custodial parents.

In *ED. v. D.T.*,[14] the Appellate Division upheld the lower court's award of joint legal custody with residential custody to the mother. The court also affirmed decision-making authority to the mother with respect to the child's medical care and decision-making authority to the father with respect to the child's education.

> When joint custody is not possible because of the antagonistic relationship between the parties, it may be appropriate, depending upon the particular circumstances of the case, to award some custodial decision-making authority to the noncustodial parent... The division of authority is usually made either somewhat evenly, in order to maintain the respective roles of each parent in the child's life or, although unevenly, in a manner intended to take advantage of the strengths, demonstrated ability, or expressed interest of the noncustodial parent with respect to a particular dimension of child-rearing. (citations omitted).

In the "tri-custody" case of *Dawn M. v. Michael M.*,[15] which was discussed at length in the Spring 2017 issue of *Family Law Review*,[16] the three parties—husband/father, biological mother, and non-biological wife—were awarded "shared custody" of the child.

In *Ball v. Ball*,[17] the Third Department—addressing other issues, including the allotment of parenting time and child support on a 50/50 sharing of time—referenced the lower court's award of joint legal custody.

In the July 5, 2017 decision in *Spampinato v. Mazza*,[18] the Second Department, although finding the lower courts "limitation" of the father's "visitation" to be appropriate, modified the lower court's award of sole custody to the mother to award joint legal custody to both parents. Significantly, despite asserting a claim to sole custody, the mother testified that joint legal custody was a "reasonable option."

> However, the Family Court's determination that it was in the child's best interests to award sole legal custody to the mother lacks a sound and substantial basis in the record. "[J]oint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion"... "[J]oint custody is inappropriate 'where the parties are antagonistic towards each other and have demonstrated an inability to cooperate on matters concerning the child'"... .
>
> Here, although it is evident that there is some antagonism between the parties, it is also apparent that both parties generally behave appropriately with the child and in a relatively civilized fashion toward each other. Further, there is no evidence that they are so hostile or antagonistic toward each other that they would be unable to put aside their differences for the good of the child (see Matter of Thorpe v. Homoet, 116 A.D.3d 962, 963, 983 N.Y.S.2d 629). The parties were able to discuss logistical issues relating to the child's care, and they were able to make accommodations for the father to have additional visits with the child on several occasions. The mother stated that joint legal custody "[a]bsolutely" was a reasonable option. (citations omitted).

Matter of McDuffie v. Reddick,[19] issued on October 6, 2017, involves the Fourth Department's review of the Family Court's award of joint custody after an evidentiary hearing.[20] While the Appellate Division reversed the trial court, it did so *not on the merits*, but due to the premature confirmation of the referee's report prior to the expiration of the father's statutory time to make application to confirm or reject the report. The matter was sent back for the opportunity to file motions under CPLR § 4403.

As is addressed in *J. R. v. M. S.*, *supra*, appellate courts have also permitted previously existing joint custody arrangements to remain intact in the children's best interests, despite prevailing acrimony.[21] The deterioration of a joint custodial arrangement will in most cases bring about a hearing to determine if the children's best interests require a change from joint to sole custody.[22]

The Challenge

Given these decisions, trial courts now have greater discretion than previously to award joint custody or to even begin the case with joint custody as the default presumption—barring circumstances which mitigate against it. There also, however, appears to be more custody matters being litigated and appealed than we have previously seen—or maybe it just feels that way. Of course, all too often the fight for joint custody with equal time is cynically used to try and mitigate or eliminate child support[23] or as a pressure tactic to gain some other financial advantage in negotiations.

As Justice Cooper concluded in *J.R. v. M.S.*,

> The only thing standing in the way of the child having all that he needs is his parents' inability to work together on his behalf. One can only hope that with this custody litigation having come to an end, the parties will seize the opportunity to chart a new and better course in raising their son.

Although the bad behavior we see in many of our cases will not go away anytime soon, contrasting Justice Cooper's sentiments with the equivocation in *Braiman* shows how far the idea of joint parenting has come. A further quote from *Braiman* may then be looked at in a new context,

> Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is, one to be threatened but never carried out.

Perhaps in 2017 and beyond, carrying out the "threat" with a rebuttable presumption of joint custody is just what is needed. Let the battle begin...

Endnotes

1. 162 A.D.2d 48 (2d Dep't 1990).
2. *See, e.g.*, *In re Michael B.*, 145 A.D.3d 425 (1st Dep't 2016); *cf. Rochel H. v. Joel H.*, 55 Misc. 3d 1217(A) (Sup. Court Kings County 2017).
3. 55 N.Y.2d 89 (1982).
4. 56 N.Y.2d 167 (1982).
5. 147 A.D.3d 1059 (2d Dep't 2017).
6. 44 N.Y.2d 584 (1978).
7. *See Lee v. Fitts*, 147 A.D.3d 1058 (2d Dep't 2017); *Zall v. Theiss*, 144 A.D.3d 831 (2d Dep't 2016).
8. Dylan, B., *The Times They Are A-Changin,'* Columbia Records (1964).
9. 128 A.D.3d 824 (2d Dep't 2015).
10. N.Y.L.J. 1202736928143, at 1 (September 15, 2015, decided August 31, 2015).
11. 56 Misc. 3d 975 (Sup. Ct., N.Y. Co. 2017).
12. The decision-making areas—being the "essence of the parenting process"—are medical, education, summer-camp, extracurricular activities, and religion.
13. An article written by Professor J. Herbie DiFonzo in the April 2014 issue of *Family Court Review*, *From The Rule of One to Shared Parenting: Custody Presumptions in Law and Policy* (Vol. 52, No. 2) also explored the historical and national developments in joint custody. Professor DiFonzo recently passed away. He was kind enough to provide me with his article for this editorial.
14. 152 A.D.3d 583 (2d Dep't 2017).
15. 55 Misc. 3d 865 (Sup. Ct., Suffolk Co. 2017).
16. L. Rosenberg, *21st Century Custody: Issues in Parentage Continue*, NYSBA *Family Law Review*, Spring 2017, Vol. 49, No 1.
17. 150 A.D.3d 1566 (3d Dep't 2017).
18. 152 A.D.3d 525 (2d Dep't 2017).
19. 2017 N.Y. Slip. Op. 07055 (4th Dep't 2017).
20. The respondent-mother was designated as primary residential custodian.
21. *See, e.g.*, *Tatum v. Simmons*, 133 A.D.3d 550 (1st Dep't 2015).
22. *Zall v. Theiss, Id.*; *Rockhill v. Kunzman*, 141 A.D.3d 783 (3d Dep't 2016); *In re Lebraun H.*, 111 A.D.3d 1439 (4th Dep't 2013).
23. Contrary to the holding of *Bast v. Rossoff*, 91 N.Y.2d 723 (1998). The court can, of course, address the effect of parenting time in other ways, such as by limiting the child support award to the "statutory cap." *Ball v. Ball*, 150 A.D.3d 1566 (3d Dep't 2017).

CPLR 5511: Aggrievement Following a *Successful* Child Custody Award Continued—Is a Child a "Full Party"

By Elliott Scheinberg

A fundamental tenet of appellate jurisprudence is that only an aggrieved party may appeal.[1] Aggrievement requires, inter alia, an adjudication against rights, persons, or property,[2] which arises when a party has petitioned for relief that is denied in whole or in part.[3] CPLR 5511 requires that an aggrieved appellant be a "party or a person substituted for him." But who is aggrieved in the event of an improper custody award? Case law acknowledges that a child may be aggrieved by a custody order,[4] which should come as no surprise because the consequences to the child is the axis about which the custody trial rotates.

"The case law is, nevertheless, clear that preservation is, in fact, AFTC driven and binding upon the child."

While the child is not a captioned party to the action, an improper custody award means that the court has not fulfilled its charge of *parens patriae* to secure the child's best interests, with the child enduring the consequences across a lifetime extending long beyond childhood.[5] In *S.L. v J.R.*, 27 NY3d 558 [2016], the Court of Appeals addressed "the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and *enduring result* that, above all else, serves the best interest of a child."

This article addresses the question of the appealability of a child custody judgment or order where the court has granted the prevailing party, assume the mother, custody of the child precisely as she demanded in her complaint or petition. However, now distanced in time from the furor of the trial, the mother realizes that, based on the evidence and the testimony, the child's best interests will not be best or fully served by the relief that she had requested and been granted.

By way of example, during trial, the evidence might have revealed: the depth of the father's troubled psychiatric history possibly complicated by drug abuse; an arrest for DUI while the child was a passenger; infliction of self injuries; suicidal ideations, or attempted suicide. She believes that the court should have granted her greater custodial authority beyond her demand, such as, supervised visitation for the noncustodial parent.

While this evidence would undoubtedly have warranted granting the mother leave midtrial to amend the relief demanded by conforming the pleadings to the proof, the mother, irrespective of the reason, did not so move. Assume that she has only filed a notice of appeal without having moved for reconsideration or modification of the order or the judgment; perhaps the trial court informally indicated that such a motion would be unsuccessful.

The issue is, assuming that the Attorney for the Child (AFTC) declines to pursue an appeal for reasons unrelated to the child, perhaps because of health or family related issues, being overwhelmed by a burgeoning stressful caseload or just being "burnt out" from the intense protracted litigation and constant applications from the same warring parents, eagerness to move on to the next custody case, may the mother, although technically not aggrieved, having been granted the full relief that she sought, appeal and argue, for the first time, that the court erred in failing to have further narrowed its award to the noncustodial parent; the foundation of her argument being that, by not having looked deeper into and beyond her demand, the court did not fully exercise its role of *parens patriae* on behalf of the child?

Because of the implications across the child's life, this issue ought not to be circumscribed or even influenced by the skill or lack thereof of an AFTC who, unlike the mother, is disinterested in the outcome and not vested in the child's future, who was foisted upon the child from a roster of varying legal talent only to have failed to timely preserve critical objections or meet insurmountable jurisdictional deadlines, all of which are now binding upon the child post trial.

Elliott Scheinberg is a Fellow of the American Academy of Matrimonial Lawyers. He lectures on and writes extensively about these areas of law as well as the complex rules of appellate jurisprudence. In addition to appellate representation, he is often consulted from the incipient stages of the divorce action well into the trial itself to help counsel formulate a honed trial roadmap and strategy. He represents clients throughout the state of New York, including Manhattan, Brooklyn, Staten Island, The Bronx, Queens, Westchester, Rockland, Orange, Dutchess, Putnam, Nassau and Suffolk Counties. Mr. Scheinberg may be contacted through his website at www.scheinbergappeals.com.
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An earlier version of this article, entitled *CPLR 5511: Aggrievement Following a Successful Child Custody Award*, was published in the *New York Law Journal* on September 16, 2015.

The case law is, nevertheless, clear that preservation is, in fact, AFTC-driven and binding upon the child.[6]

It is the premise herein that several theories, individually and jointly, permit such an appeal notwithstanding the rigidly unyielding, jurisdictional time frame to appeal set forth in CPLR 5513(a).[7]

Child Custody, Aggrievement

The bedrock of the answer requires an understanding of what custody is and that the mother is not asserting her rights, but those of the child, the sole intended beneficiary of the custody determination.

Child custody is defined as "[t]he care, control, and maintenance of a child awarded by a court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority)."[8] Children are not chattels;[9] there is nothing proprietary[10] in a custody award and neither parent has a "prima facie right to the custody of the child."[11] In sum, while a parent is statutorily charged with child support irrespective of custodial status, a custody award does no more than grant a parent the authority to be the child's caregiver, a modifiable stewardship. Therefore, a custody award is arguably removed from the traditional category of aggrievement which requires that the adjudication have been against rights, person, or property.[12]

Unlike equitable distribution, where the assignment of assets is final and immutable, custody proceeds along a nonfinite continuum that remains permanently subject to judicial review and modification because courts sit in the role of *parens patriae* over children[13] ever mindful of their best interests as the claims of parents are always subordinate to the welfare of child.[14]

A child's rights are superior to the rights of the parties to a stipulation and an order approving a stipulation.[15] Standard custody disputes are not usually subject to res judicata because the best interests of children are more important than any of the benefits of closure.[16] The law does not recognize an irrevocable arrangement regarding the custody of infants. Whether the arrangement be the culmination of agreement between the parties or stipulation by the court, it is susceptible to change if the good of the infant impels a change. The supreme consideration is the interests of the children; whatever is best for them the court will decree.[17] As captured by the Court of Appeals, "[t]he only absolute in the law governing custody of children is that there are no absolutes."[18]

Child custody thus occupies a unique pedestal in law.

Doctrine of Preservation

An appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial.[19] In *Telaro v. Telaro*,[20] the Court of Appeals held:

> [T]he general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: 'if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.' ...
>
> Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time.

Under the above facts, additional factual countersteps would neither add nor refute anything as all the requisite evidence had already been exhaustively laid out, which precludes an argument of changed circumstances. The issue of the proper child-centric relief based on that existing evidence is a question of law—the findings of the court upon the trial state what is material as to the facts upon which the action is based, while the conclusions of law discuss the applicable law to the relief ordered.[21] The conclusion, the question of law, therefore, withstands the doctrine of preservation and is reviewable for the first time on appeal.

Parens Patriae

The state, succeeding to the prerogative of the crown, acts as *parens patriae*. Sometimes the power is exercised legislatively sometimes constitutionally (N.Y. Const. art. VI, s 32), but usually by the court.[22] *Finlay v. Finlay*,[23] defined *parens patriae*:

> The chancellor in exercising his jurisdiction does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate, and careful parent"...and make provision for the child accordingly. ...He is not adjudicating a controversy between adversary parties, to compose their private differences...
>
> He is not determining rights "as between a parent and a child," or as between one

> parent and another...He "interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*"... .

Unlike property rights, which spouses and affianced parties are contractually free to allocate as they wish, contractual provisions concerning custody and visitation are subject to judicial review and modification because courts sit in the role of *parens patriae* to enforce the public policy of ensuring a child's well-being and, as such, are not bound by any agreements, even as between the parents;[24] "a court cannot be bound by an agreement regarding custody and visitation and simultaneously act as *parens patriae* on behalf of the child—courts alone may undertake the task."[25]

Matter of Michael B.

In *Matter of Michael B.*,[26] the Court of Appeals had learned that, during the pendency of the appeal, the appellant had been charged with and admitted neglect of children in his custody (not Michael), which children had been removed from his home and returned to the Commissioner of the Social Services. The Court examined facts dehors the record:

> Appellant's request that we ignore these new developments and simply grant him custody, because matters outside the record cannot be considered by an appellate court, would exalt the procedural rule—important though it is—to a point of absurdity, and "reflect no credit on the judicial process." (Cohen and Karger, Powers of the New York Court of Appeals § 168, at 640.) Indeed, changed circumstances may have particular significance in child custody matters... . This Court would therefore take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining appellant's fitness and right to custody of Michael, and remit the matter to Family Court for a new hearing and determination of those issues.

Critically, although the Court remanded the matter to Family Court, it simultaneously made an interim order: "Pending the hearing, Michael should physically remain with his current foster parents, but legal custody should be returned to the foster care agency." Clearly, the best interests of the child overrides sacred rules of appellate practice even at the highest level.

Public Policy

An appellate court may review issues for the first time on appeal where the issues impact public policy.[27] The Court of Appeals has underscored that public policy concerns abound in matrimonial cases.[28] Child custody is a matter of public policy.[29] Accordingly, by way of example, the prohibition against agreements between parents to arbitrate custody and visitation may be raised for the first time on appeal because "disputes concerning child custody and visitation are not subject to arbitration as 'the court's role as parens patriae must not be usurped.'"[30] The child custody public policy concern thus also brings to the forefront the point that an AFTC's procedural missteps to either meet jurisdictional deadlines or timely preserve objections should not be held against an innocent child—that, per Michael B., above, "procedur[e]—important though it is" not be "exalted to a point of absurdity, and reflect no credit on the judicial process."

CPLR 3025(c)

In *Kimso Apartments, LLC v. Gandhi*,[31] the Court of Appeals repeated that "[u]nder CPLR 3025[b], a party may amend a pleading '*at any time by leave of court*' [] '*before or after judgment to conform [the pleading] to the evidence*' (CPLR 3025[c]) ... leave 'shall be freely given upon such terms as may be just...'." "Such an amendment is permissible 'even if the amendment substantially alters the theory of recovery.' "[32]

A post-judgment motion under 3025(c) requires a prior motion to vacate the existing judgment.[33]

One difficulty with a CPLR 3025(c) application is that, while CPLR 3025(b) states that the motion may be made "at any time," a CPLR 5015(a) motion, with the exception of 5015(a)(1), "ha[s] no stated time limits; [t]he revisors' notes indicate that under paragraphs 2, 3, and 5, a reasonable time is implied."[34] "At any time" and "reasonable time" will rarely, if ever, be congruous in custody cases but also none of the five elements in 5015(a) likely applies to a custody case. Significantly, "the grounds set forth in CPLR 5015(a) are not exclusive; Supreme Court ha[s] 'inherent discretionary power' to vacate its judgment 'for sufficient reason and in the interest[ ] of substantial justice.'"[35]

Furthermore, in the absence of prejudice, an appellate court may, *sua sponte*, exercise its discretion to relieve a party's failure to amend its pleading by deeming the answer amended to conform to the evidence.[36] Prejudice means more than "the mere exposure of the [party] to greater liability"; rather, "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position."[37] Concern over prejudice is inapplicable in the facts discussed herein.

Winters, Maddox

The Second and Fourth Departments offer guidance from decisions relating to child support, *Maddox v. Doty*[38] and *Winters v. Winters*,[39] respectively. In *Winters*, the Fourth Department held: "Family Court was not bound by the amount of support requested in the petition, but was free to award an amount appropriate to the proof adduced at the hearing." The Second Department, in *Maddox*, similarly held: "the Hearing Examiner was not bound by the amount of support requested in the petition."

Winters explained that this is so because of "the rebuttable presumption that application of the [statutory c]hild [s]upport guidelines yielded a correct amount of child support." Inherent in this explanation is that child related issues, which are matters of public policy, obligate a court, in executing its duties, to look beyond the relief requested by a parent.

Although *Winters* and *Maddox* addressed prejudgment determinations, by parity of reasoning, the Appellate Division may render the judgment it finds warranted by the facts, since its power is as broad as that of the hearing court in its review of a determination following a nonjury trial.[40]

Does Child Have Full-Party Status

The Fourth Department has held that "a child in a custody matter does not have full-party status." In *Lawrence v. Lawrence*,[41] the AFTC, appealed from an order dismissing the mother's petition to modify a custody order. The Fourth Department, citing its own precedent case law, *Kessler v. Fancher*,[42] and *McDermott v Bale*,[43] held that a child in a custody matter does not enjoy full-party status:

> "Inasmuch as 'the mother has not taken an appeal from that order[, the] child [ ], while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned." A child in a custody matter does not have "full-party status", and we decline to permit the child's desires "to chart the course of litigation."

In *Kessler*, the Fourth Department, citing *McDermott*, denied the children an appeal, by way of their AFTC, from an order that dismissed the mother's petition for modification of custody where the mother had abandoned her appeal.

In *McDermott*, the AFTC appealed from a custody order, which order incorporated the terms of a written stipulation, over the AFTC's objection. The Fourth Department declined to give "children in custody cases [] full-party status such that their consent is necessary to effectuate a settlement." "There is a significant difference," the court stated, "between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement." *McDemott* amplified the role of the AFTC, whom a "court is not required to appoint ... although that is no doubt the preferred practice":

> Although [] the AFC [] " 'must be afforded the same opportunity as any other party to fully participate in [the] proceeding ' " ... and that the court may not "relegate the [AFC] to a meaningless role" ... the children represented by the AFC are not permitted to 'veto' a proposed settlement reached by their parents and thereby force a trial.
>
> The purpose of an attorney for the children is "to help protect their interests and to help them express their wishes to the court" (Family Ct. Act § 241)[44] ... [C]hildren in a custody proceeding [do not] have the same legal status as their parents, inasmuch as it is well settled that parents have the right to the assistance of counsel in such proceedings (§ 262[a][v] ...).
>
> [W]here the court [] appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests. Parents who wish to settle their disputes should not be required to engage in costly and often times embittered litigation merely because their children or the attorney for the children would prefer a different custodial arrangement.

Unlike *Lawrence* and *McDemott*, the mother, in *Kessler*, had also petitioned for an order of protection, presumably because of domestic violence or threats of violence. Nevertheless, the *Kessler* court held that the children were not aggrieved by the orders that dismissed the mother's petition. This raises an eyebrow in light of the uncontrovertible fact that domestic violence has a long term effect on children, as captured, in *Havell v. Islam*, 186 Misc 2d 726 [Sup.Ct. 2000].[45]

The error in *McDermott*'s reasoning over "allowing [a child's] wishes to scuttle a proposed settlement" is apparent. Plainly, a child is powerless to unilaterally "scuttle" or otherwise disrupt a settlement. The Appellate Division offered no substantive reason as to why the children's appeals in *Lawrence*, *McDermott*, or *Kessler* were not worthy of review because, in each instance, the merits of the chil-

dren's appeals had been filtered through their AFTC's considered knowledge and judgment as a predicate to asking the appellate court to scuttle the agreement. An appeal by children neither does violence to the agreement nor to the judicial process because their appeal is no different from any other appeal wherein an appellant seeks review of an agreement. The merits of a child's appeal should be considered and not draw automatic rebuke because the child endures the consequences of a flawed custody agreement, and such an agreement violates public policy because it is not in the best interests of the child.

This "non full-party" status that the Fourth Department has created is without meaning in appellate jurisprudence because, as noted above, CPLR 5511 requires that an aggrieved appellant be a "party or a person substituted for him;" incomplete status is not recognized. The "non full party" iterations in *Lawrence*, *McDermott*, or *Kessler* are at odds with other iterations from the same Court which have held that children may be aggrieved from custody orders.[46] Since the Legislature did not create a hybrid status or hybrid aggrievement in CPLR 5511, the child must, therefore, be inherently imbued with full party status.

McDermott and *Kessler* also perch children who were not fortunate enough to have had a discretionary AFTC appointed in an unfavorable position because of the absence of counsel to rescue objections and jurisdictional deadlines from the extinctive jaws of non-preservation of issues—a possible equal protection issue which mitigates in favor of AFTC appointments for all children.

It is noteworthy that non-full party status is addressed in Family Court Act § 1035, where the intervenor's rights are statutorily circumscribed and distinguished by case law from those of an intervenor under CPLR 1012, 1013.[47] CPLR 1012(a)(2) can, by parity of reasoning constitute such a basis for the child:

> (a) Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:
>
> (2) when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment.

Significantly, however, on June 28, 2017, in *Noel v. Melle*,[48] the Second Department reversed an order, on an appeal taken only by the child. Supreme Court, without a hearing, granted the father's violation petition that the mother had violated the terms of a custody and visitation order and awarded the father custody of the child notwithstanding that the father had not only not sought a transfer of custody but had also told the court that he did not want custody. The Appellate Division held that the order was "without any apparent consideration of the child's best interests."

The Legislature can easily remedy this dilemma.

Conclusion

Under the facts and procedural setting posited at the beginning of this article, a remittal would be valueless because all of the evidence had already been fully vetted at trial. The mother's failure to amend her demand during trial should not inure against the child, whose best interests she is asserting and which the court is charged with protecting. Her argument may and should be heard for the first time on appeal.

That the AFTC is not inclined to appeal the order ought not be of any moment because, in the final analysis, upon the conclusion of the trial, the disinterested AFTC exits the courtroom stage and marches off into the child's horizon awaiting his or her next assignment; only an interested parent is awarded custody to care for the child, not an AFTC. Clearly, this avenue of relief should be available only in the atypically compelling case.

Endnotes

1. CPLR 5511.
2. *DiMare v. O'Rourke*, 35 A.D.3d 346 [2nd Dept 2006].
3. *Mixon v. TBV, Inc.*, 76 A.D.3d 144 [2nd Dept 2010].
4. *In re Zanna E.*, 77 A.D.3d 1364 [4th Dept 2010]:

   > [E]ven assuming, arguendo, that the daughter is aggrieved by the determination, we conclude that she is not entitled to seek affirmative relief inasmuch as her attorney did not take an appeal from the order.

   Angel D. v. Nieza S., 131 A.D.3d 874 [1st Dept 2015]:

   > Respondent-mother has not appealed from the order denying her request to relocate. To the extent the appellant child is aggrieved by the order...the court's determination that relocation would not be in the child's best interests has a sound and substantial basis in the record.

   Also: *Baxter v. Borden*, 122 A.D.3d 1417 [4th Dept 2014] *lv. to appeal denied*, 24 N.Y.3d 915 [2015] ("Assuming, arguendo, that the children are aggrieved by the issue raised on appeal by the Attorney for the Children .."); *Simonds v. Kirkland*, 67 A.D.3d 1481 [4th Dept 2009].
5. *Havell v. Islam*, 186 Misc. 2d 726 [Sup. Ct. 2000]:

   > A review of literature on the topic of domestic violence reveals that domestic violence produces physical and psychological ramifications in women victims, often causing women to develop "battered woman's syndrome." Walker, Lenore E., The Battered Woman Syndrome (1984). *It is also well established that domestic violence poses a significant threat to children, and that exposure to violence affects a child's emotional stability, future outlook, and ability to function at school*. Division of Developmental and Behavioral Pediatrics, Silent Victims: Children Who Witness Violence, 269 JAMA 262, 262 (1993). *Children who witness domestic abuse are particularly vulnerable to emotional and developmental problems. Clinical data now indicates that children who witness family violence will perpetu-*

ate the abuse as adults: Boys will use violence to resolve conflicts, and girls will see abuse as an integral part of a close relationship.

In re A.M., 44 Misc. 3d 514, 520 [Fam. Ct. 2014], the court underscored: "The petitioner has proven the allegations of neglect [] in that Mr. M.'s repeated acts of domestic violence in front of the subject children had a direct and demonstrable harmful affect on them."

6. *In re Zanna E.*, 77 A.D.3d 1364 [4th Dept 2010]:

> [E]ven assuming, arguendo, that the daughter is aggrieved by the determination, we conclude that she is not entitled to seek affirmative relief inasmuch as her attorney did not take an appeal from the order.

Baxter v. Borden, 122 A.D.3d 1417 [4th Dept 2014] *lv. to appeal denied*, 24 N.Y.3d 915 [2015]:

> Assuming, arguendo, that the children are aggrieved by the issue raised on appeal by the Attorney for the Children...the issue is not before us in either appeal because the Attorney for the Children did not file a notice of appeal from either order...

In re Yorimar K.M., 309 A.D.2d 1148 [4th Dept 2003]:

> The Law Guardian for the neglected child failed to file a notice of appeal, and thus the issues raised by that Law Guardian are beyond our review.

Matter of Zena O., 212 A.D.2d 712 [2d Dept 1995]:

> [T]he Legal Aid Society, as Zena's Law Guardian, did not file a notice of appeal from the order [] and therefore may not seek to have that order reversed...

Simonds v. Kirkland, 67 A.D.3d 1481 [4th Dept 2009]:

> [E]ven assuming, arguendo, that the child was aggrieved when the court denied the mother's request that the court recuse itself [] the Law Guardian did not take a cross appeal from the order and thus may not seek affirmative relief with respect to the denial of the mother's request.

In re Brittni K., 297 A.D.2d 236 [1st Dept 2002]:

> Indeed, it is fundamental that issues may be raised in a proceeding only by an aggrieved party... . Even assuming standing, the law guardian did not object at the hearing when the court denied Nilda's request for counsel. Thus, the law guardian has not preserved the issue for appellate review (CPLR 5501[a][3]). Finally, the law guardian failed to raise before the Family Court the additional unsupported claim, raised for the first time on appeal, that Brittni was denied her constitutional right to have custody determined in her best interests by virtue of the court's failure to appoint counsel for Nilda.

Simonds v. Kirkland, 67 A.D.3d 1481 [4th Dept 2009]:

> [E]ven assuming, arguendo, that the child was aggrieved when the court denied the mother's request that the court recuse itself, we conclude that the Law Guardian did not take a cross appeal from the order and thus may not seek affirmative relief with respect to the denial of the mother's request.

7. *Cappiello v. Cappiello*, 66 N.Y.2d 107 [1985]:

> The failure timely to serve a notice of appeal goes to jurisdiction over the subject matter, which may be raised at any time.

Retta v. 160 Water Street Associates, L.P., 94 A.D.3d 623 [1st Dept 2012]:

> The time for filing a notice of appeal is nonwaivable and jurisdictional (Matter of Haverstraw Park v. Runcible Props. Corp., 33 N.Y.2d 637, 347 N.Y.S.2d 585 [1973]); Jones Sledzik Garneau & Nardone, LLP v. Schloss, 37 A.D.3d 417, 829 N.Y.S.2d 230 [2007]).

Mileski v. MSC Indus. Direct Co., Inc., 138 A.D.3d 797 [2d Dept 2016]:

> An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry (CPLR 5513[a]). The time period for filing a notice of appeal is nonwaivable and jurisdictional...

France v. State, 204 A.D.2d 1066 [4th Dept 1994]:

> Motion for extension of time to file and serve notice of appeal and for other relief denied. Memorandum: The time in which to take an appeal is jurisdictional and cannot be extended unless authorized by statute ... see also, CPLR 5513, 5514, 5520).

8. Black's Law Dictionary [10th ed].

9. *Tropea v. Tropea*, 87 N.Y.2d 727 [1996]; *Berlin v. Berlin*, 21 N.Y.2d 371 [1967]; also *Bachman v. Mejias*, 1 N.Y.2d 575, 582 [1956] ("A child is not a chattel which may be used as a consideration for an agreement of compromise. The child's rights are superior to the rights of the parties to a stipulation and an order approving a stipulation.").

10. *Ex parte Livingston*, 151 A.D. 1 [2nd Dept 1912].

11. DRL § 240(1)(a).

12. *DiMare v. O'Rourke*, 35 A.D.3d 346 [2nd Dept 2006].

13. *Finlay v. Finlay*, 240 N.Y. 429 [1925].

14. *Ex parte Vzga*, 200 Misc. 732 [Sup. Ct. Columbia Co. 1951]; *People ex rel. Walters v. Davies*, 143 Misc. 759 [Sup. Ct. Fulton Co. 1932].

15. *Bachman v. Mejias*, 1 N.Y.2d 575 [1956].

16. *Gloria R. v. Alfred R.*, 166 Misc. 2d 141 [Sup. Ct. 1995], *aff'd*, 227 A.D.2d 207 [1st Dept 1996].

17. *People ex rel. Spreckels v. De Ruyter*, 150 Misc. 323 [Sup. Ct. 1934]; *La Porte v. La Porte*, 85 Misc. 2d 1009 [Sup. Ct. 1976] (Regardless of the agreement between the parties, the court is never relieved from the responsibility of protecting the rights of innocent children, even against the wishes of their parents, for children are not chattels whose rights can be bargained away by parents. (*Bachman v. Mejias*, 1 N.Y.2d 575.) Rather, it is the duty of the court to subject such an agreement to very close scrutiny. (*Van Dyke v. Van Dyke*, 278 App. Div. 446.))

18. *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 [1982].

19. *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. 342 [1955].

20. 25 N.Y.2d 433 (1969); *Bingham v. New York City Transit Authority*, 99 N.Y.2d 355 [2003] (A new issue, even a pure law issue, may be reached on appeal only if it could not have been avoided by factual showings or legal countersteps had it been raised below).

21. *Schuyler v. Curtis*, 147 N.Y. 434 [1895]; *Brooks v. Curtis*, 50 N.Y. 639 [1873]; *Forty-Second St., M. & St. N. Ave. R. Co. v. Cantor*, 104 A.D. 476 [1st Dept 1905].

22. *Agur v. Agur*, 32 A.D.2d 16 [2nd Dept 1969].

23. 240 N.Y. 429 [1925].

24. *Schechter v. Schechter*, 63 A.D.3d 817 [2nd Dept 2009]; *Glauber*, above.

25. *Glauber,* at 94; see *Finlay*, *id*.

26. 80 N.Y.2d 299 [1992]; also *Leval B. v. Kiona E.*, 115 A.D.3d 665 [2nd Dept 2014]; *Bosque v. Blazejewski-D'Amato*, 123 A.D.3d 704 [2nd Dept 2014]; *Chow v. Holmes*, 63 A.D.3d 925 [2nd Dept 2009]; *Gatke v. Johnson*, 50 A.D.3d 798 [2nd Dept 2008].

27. *Niagara Wheatfield Adm'rs Ass'n v. Niagara Wheatfield Cent. School Dist.*, 44 N.Y.2d 68 [1978]; *Aurora Sportswear Group Limited. v. Eng*, 29 A.D.3d 445 [1st Dept 2006].

28. *Hirsch v. Hirsch*, 37 N.Y.2d 312 [1975]; *see DeCicco v. Schweizer*, 221 N.Y. 431 [1917].

29. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benjamin*, 1 A.D.3d 39 [1st Dept 2003].

30. *Goldberg v. Goldberg*, 124 A.D.3d 779 [2d Dept 2015], quoting *Glauber v. Glauber*, 192 A.D.2d 94 [2nd Dept 1993].

31. 24 N.Y.3d 403 [2014]; see *Cave v. Kollar*, 2 A.D.3d 386 [2d Dept 2003]; *In re Denton*, 6 A.D.3d 531 [2d Dept 2004].

32. *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411 [2014]; *Dittmar Explosives v. A.E. Ottaviano, Inc.*, 20 N.Y.2d 498, 502–503 [1967], *DiSario v. Rynston*, 138 A.D.3d 672, 674 [2d Dept 2016].

33. *F & C Gen. Contractors Corp. v. Atl. Mut. Mortg. Corp.*, 268 A.D.2d 556 [2d Dept 2000].

34. Prof. David Siegel, Practice Commentaries, C5015:3.

35. *Lovelace v. RPM Ecosystems Ithaca, LLC*, 14 N.Y.S.3d 815 [3d Dept 2015], citing *Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62 [2003].

36. *Cave v. Kollar*, 2 A.D.3d 386 [2d Dept 2003]; *Cartwright Van Lines, Inc. v. Barclays Bank of New York,* 120 A.D.2d 478 [2d Dept 1986]; *In re Denton*, 6 A.D.3d 531 [2d Dept 2004]; *Kennelly v. Mobius Realty Holdings LLC*, 33 A.D.3d 380 [1st Dept 2006].

37. *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403 [2014]; *Loomis v. Civetta Corinno Const. Corp.*, 54 N.Y.2d 18 [1981].

38. *Maddox v. Doty*, 186 A.D.2d 135 [2d Dept 1992].

39. *Winters v. Winters*, 154 A.D.2d 884 [4th Dept 1989].

40. *Hertz Corporation v. Holmes*, 127 A.D.3d 1193 [2nd Dept 2015]; *Neiss v. Fried*, 127 A.D.3d 1044 [2nd Dept 2015].

41. 151 A.D.3d 1879, 54 N.Y.S.3d 358 [4th Dept 2017].

42. 112 A.D.3d 1323 [4th Dept 2013].

43. 94 A.D.3d 1542 [4th Dept 2012].

44. Cf., *Matter of Marilyn H.*, 100 Misc. 2d 402, 403–04 [Fam. Ct. 1979]:

> A guardian ad litem appointed by the court pursuant to Article 12 of the CPLR performs the function of prosecuting or defending on behalf of an infant who is a party to a suit ... It has been held in a matrimonial action where the court was called upon not only to decide custody and visitation but also to make a "definitive declaration as to the legal status of (a) child," i. e., legitimacy, that due process required that the child be made a party...
>
> The rationale of these cases is readily applicable here. The ultimate issue in a proceeding to terminate parental rights is whether the subject child should be given a new legal status. All rights may eventually be found to be subordinate to what is in her best interests. The court grants the child status as a party whose interests should be protected by a guardian ad litem.

45. See footnote 5, *supra*.

46. See footnote 6, *supra*.

47. *Matter of Holmes*, 134 Misc. 2d 278, 279–80 [Fam. Ct. 1986]:

> [T]he non-respondent father, who has been granted intervenor status in this child protective proceeding in which his child's mother is the respondent, *moves, pursuant to Section 1035(d), to be permitted full party status at the fact finding*, including the right to call and cross examine witnesses, present evidence and object to the admission of evidence.
>
> In arguing for full party status, the father relies on the traditional rule that an intervenor, once granted that status, becomes a party for all purposes ... While it is true that an intervenor usually does receive full party status, the legislature, in enacting Section 1035(d), *intended to grant less than full party status to an intervening parent*.
>
> A comparison of Section 1035(d) with Civil Practice Law and Rules Section 1012 (Intervention By Right) and Section 1013 (Intervention By Permission) is instructive. The CPLR speaks of intervention without any limiting language. Section 1035(d), however, specifically limits the intervenor to "seeking temporary and permanent custody of the child." That limitation follows logically from the legislature's statement of its intent to protect the due process rights of respondent parents. (FCA § 1011; Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 101 S.Ct. 2153; Matter of Hanson, 51 A.D.2d 696, 379 N.Y.S.2d 415.)

A.C. v. L.H., 195 Misc. 2d 342, 344 [Fam. Ct. 2003]:

> [W]hile the father did not formally seek to be permitted full party status under § 1035(d)...

Matter of Ricky P., 135 Misc. 2d 28, 32 [Fam..Ct. 1987]:

> FCA § 1035(e) ... delineates intervention in child protective proceedings, rendering inapplicable CPLR § 1013 which controls permissive intervention generally...

Rockland County Dept. of Social Services on Behalf of Michael McM. v. Brian McM., 193 A.D.2d 121 [2d Dept 1993]:

> [T]he right of a nonparty parent to intervene in the fact-finding stage of a child protective proceeding does not include the right to object to the admission of evidence."

48. 151 A.D.3d 1065 [2nd Dept 2017].

Drafting Prenuptial Agreements—Love 'Em or Leave 'Em

By Robert Z. Dobrish

The Prenuptial Agreement has become increasingly more popular in recent decades as the pool of married persons has been changing. Although fewer young people dive in, first-time–arounders have never been huge consumers of prenups. Presently, more and more same-sex couples want them as well as persons who are thinking about marrying for the second, third or fourth time. Just as the population clamoring for prenuptials has been altered, so has the law regarding their enforceability. Where New York was once known as a state in which almost any writing would be honored absent demonstrable fraud or overreaching,[1] the sanctity of these contracts has recently been successfully challenged and courts are becoming much more vigilant in protecting the rights of individuals who have entered into unfair agreements without having the kind of protection they needed. Thus waivers of support,[3] waivers of counsel fees,[4] and waivers of temporary maintenance,[5] have been held to be in violation of an amorphous public policy, which is apparently there to protect the unwary innocent. And now, even equitable distribution waivers, which were once untouchable, are being scrutinized—and seriously skewed waivers sometimes bring down the entire agreement.[6]

Swimming in these treacherous waters is best left to seasoned professionals. Those who only wade in the tributaries are well advised to avoid them completely. Indeed, many of the most accomplished attorneys do just that and leave this task to others. The reasons for this avoidance behavior is that (a) the drafter of a prenuptial is sometimes disqualified from representing the party in a subsequent divorce, particularly if there is a challenge to the agreement; (b) the attorneys involved in the drafting may become witnesses at the time of the uncoupling, subject to deposition and discovery (and who pays for that time?); and (c) the cost of negotiating and drafting these documents is usually significantly more than most people expect or want to pay. The fees earned turn out to be just not worth the time, effort, responsibility, continuing obligation and risk of being sued for malpractice.

Lawyers who do chose to embark on this type of project, despite the many sinkholes, generally fall into three categories: generalists, trusts and estates lawyers, and matrimonial lawyers. Trying to avoid bias and prejudgment, this article will discuss some of the differences in the type of representations given by each of these groups.

Generalists

Attorneys who practice in rural areas, or in neighborhoods where consumers of most personal legal services cannot afford specialized services and pricey lawyers, of necessity are generally generalists who handle criminal defense, personal injury, family law, immigration, housing and real estate as well as wills, among other areas. Generalists ordinarily find it difficult, if not impossible, to keep up with the latest developments in every area of law in which they practice and rely on journals and the internet to obtain the latest word on what is occurring.

Because they handle so many different areas of the law, their experiences are more varied but less intense, and their understanding of subtle issues is likewise so. They have access to forms, of which there are many. In non-complicated matters, they will generally be able to produce very acceptable documents at very modest cost. The best of them sometime perform outstandingly in that they might ask more questions, make unconventional demands that are nevertheless meaningful, and give very good advice. The worst of them produce, at best, very ordinary form agreements to begin with, pay little attention to nuances of each situation, and devote little or no time to complexities.

Trusts and Estates Lawyers

Many lawyers who specialize in trusts and estates are asked to negotiate and draft prenuptial agreements. This is especially true in situations where the idea of an agreement is initiated by the family (particularly parents) of one of the parties. In those cases, it is generally family money, family trusts and family businesses which are seen by the older generations as being at risk in a marriage. Parents are usually most concerned that their children might not receive the full benefit of parental largesse if their children were among the many who got married and then divorced. The parents often turn to their own lawyers, who might be trusts and estates lawyers themselves, or the

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law partners of trusts and estates lawyers. After all, if the concern is the protection of assets which are passed down (often through wills or trusts), who better to deal with the protection of those assets than a wills and trusts lawyer?

Trusts and estates lawyers often approach prenuptial agreements in the same manner as they approach drafting wills and trusts: there is property to protect—draw an instrument that protects it. They know how to do that and they usually do it well. Often the first draft of a prenuptial agreement initiated by a trusts and estates lawyer who is close to the family of the marrying party is a tightly drawn instrument that calls for the total waiver of all rights upon divorce and death, including equitable distribution, spousal support, occupancy of residences, and counsel fees. Total waivers such as these, however, often end up beginning the process in a divisive way that can sometimes prove fatal to the wedding plans in the first place, or fatal to the agreement's enforceability at the end.

A prenuptial agreement is a special kind of contract. Unlike other contracts for real estate, services or widgets it is not possible to find a replacement product should the negotiations fail to achieve a result. There is rarely an alternative spouse available in the wings waiting to take the place of the walk-away affianced. This is a deal that must be done. But the trusts and estates lawyer who drafts the ironclad waivers may nevertheless insist that those waivers be accepted after they are questioned by opposing counsel. "Sign, or there will be no wedding" becomes the mantra. Clearly the latter choice results in a situation where love is not able to conquer all—not even at its most romantic moments. So the loving couple is left to engage in private negotiations ("It is just for my family. We will rip it up after we're married" or "Don't worry, I would never enforce this thing. It doesn't mean anything" or "Don't listen to your lawyer (s)he is just in it for the money."). These discussions, which take place in private, will sometimes result in the agreement being signed over the objections (or even after the walkout) of the lawyer of the non-monied party. In such a case, the lawyer for the monied party might believe a good job has been done; however, courts have been known to overthrow the agreement.[7]

The Matrimonial Lawyer

Many, if not most, prenuptial agreements are drawn by matrimonial lawyers. This is particularly true in situations where one or both of the parties have been married before or where the party opting for the agreement has significant wealth. The reason for this distinction has to do with the fact that in those cases, it is divorce which is uppermost in the mind of the monied spouse, not death. Often the estate waiver is deemed to be important only in the early years of a marrage since the occasion of death in a successful marriage may be the time of the greatest need for economic support.

The matrimonial lawyer may not know as much about estate or trust issues as trusts and estates lawyers, but certainly knows more about divorce—about what happens during a divorce and about what leads up to a divorce. Thus, divorce lawyers will often raise concerns about exclusive occupancy of a residence, about children not being asked to move while school is in session, about moving costs and counsel fees upon divorce, about use of vehicles, household staff and pets following a separation. Also, matrimonial lawyers will sometimes want to suggest mechanisms that preserve separation of assets, but do not cause resentment during the marriage—such as ways to divide jointly used property which is purchased with one party's separate property, or the creation of joint investment accounts to provide both an asset to be delivered or divided upon divorce and a feeling of joint entrepreneurship during the marriage, which is sometimes eliminated by some of the waivers. Certain waivers might be subjected to a "sunset clause"—disappearing after a certain amount of time.

Of course there are trusts and estates lawyers who take all these things into consideration, just as there are sophisticated matrimonial lawyers who know more than enough about the uses of trusts and inheritance laws. A good lawyer knows what (s)he does not know and knows how to find the answers and solutions when necessary.

Some Additional Points

There is a great deal of litigation over prenuptial agreements though there is not a plethora of written decisions. In many of the cases which survive summary judgment motions, the lawyers who drafted the agreements are deposed and/or called as witnesses. As such, they may be disqualified to act as counsel in the divorce proceeding. As witnesses, there may be a question regarding their entitlement to be paid for their time, since they are not serving as expert witnesses, but as fact witnesses. Some lawyers may be farsighted enough to provide for future payment in their retainer agreements. Some lawyers charge very significant minimum fees in order to take into consideration the responsibilities and possible future involvement.

Another reason to not draft has to do with malpractice claims. Disgruntled (or disappointed) litigants often want to blame former attorneys for the mistakes they themselves made.[8] While there is ordinarily a three-year statute of limitations for such a claim,[9] the statute of limitations on prenuptial agreement claims has been held to be tolled during the marriage, so it is conceivable that the malpractice claim may not ripen until the divorce action is commenced.[10] By the time the agreement

is challenged, the lawyer (who still has a file) may have forgotten some of the details. Thus it becomes important to keep notes of the conversations and to have memos of meetings and copies of emails or letters to the client to preserve a record of the advice given.

All of that being said, there is something appealing about drafting prenuptial agreements. It is supposed to be a time of joy for the parties and the lawyer has the chance to protect the client from the antagonisms that sometimes result during these types of negotiations. Since this is a deal which "must be done," a lawyer is given the opportunity to craft creative compromises designed to satisfy legitimate objections and needs. In the end, having saved the wedding, one might even be saved a piece of the wedding cake.

Endnotes

1. *Bloomfield v. Bloomfield*, 97 N.Y.2d 188,194 (2001); *see also Stawski v. Stawski*, 43 A.D.3d 776 (1st Dep't 2007).
2. *Smith v. Smith*, 129 A.D.3d 934, 935 (2d Dep't 2015) citing *Petracca v. Petracca*, 101 A.D.3d 695, 698 (2d Dep't 2012).
3. *Cron v. Cron*, 8 A.D.3d 186 (1st Dep't 2004); *see also Molodofsky v. Molodofsky*, 43 A.D.3d 1011 (2d Dep't 2007).
4. *Kessler v. Kessler*, 33 A.D.3d 42 (2d Dep't 2006); s*ee also Anonymous v. Anonymous*,123 A.D.3d 581 (1st Dep't 2014).
5. *Lenox v. Weberman*, 109 A.D.3d 703 (1st Dep't 2013); s*ee also Vinik v. Lee*, 96 A.D.3d 522 (1st Dep't 2012).
6. *Petracca v. Petracca*, *supra*.
7. *Cioffi-Petrakis v. Petrakis*, 103 A.D.3d 766 (2d Dep't 2013).
8. Dobrish, R.Z., *Mal(Content) Practice Cases: Disgruntled Litigants and Unpaid Fees*, NYLJ, April 13, 2011.
9. *See* N.Y.C.P.L.R. §§ 203 (g) and 213 (1)(8).
10. *Bloomfield v. Bloomfield*, *supra*.

The New Divorce by Mutual Consent in France

Recognition and Risks of Post-Divorce Litigation in Common-Law Countries: The Examples of England and the United States

By Delphine Eskenazi, Carmel Brown, Irwin Mitchell, and Jeremy D. Morley

Introduction

With effect from January 1, 2017, French divorce law has been the subject of a historic reform: in the event of a full settlement between the spouses, their divorce agreement is no longer reviewed and approved in court by a French judge.

The agreement is merely recorded in a private contract, signed by the spouses and their respective lawyers. Such agreement is subsequently registered by a French *notaire*, which allows the divorce agreement to be an enforceable document under French law. Instead of a judicial divorce, the French divorce, in the event of an agreement between the spouses, has become purely administrative.

The implications and consequences of this reform in an international environment were deliberately ignored by the French legislature, with a blatant disregard for the high proportion of divorces with an international component in France.

In particular, the most important risk of this reform is that the French divorce by mutual consent may not be recognized or enforced in many foreign countries, in particular common law countries, thus significantly multiplying the risks of post-divorce litigation. From an amicable divorce to an acrimonious post-divorce, the possibilities to re-litigate have increased significantly with this new French administrative divorce.

Carmel Brown, a solicitor practicing in England, and Jeremy Morley, a lawyer practicing in the United States, consider these issues of recognition and post-divorce litigation, following a French administrative divorce, in their respective countries of practice. Delphine Eskenazi, a lawyer practicing in France (also admitted to practice in New York), will present first the main provisions of this new French administrative divorce by mutual consent.

I. What Is the New French Divorce by Mutual Consent?

A. The Lack of Control or Involvement of the French Courts

In accordance with the new article 229 of the French Civil Code, spouses who agree on the principle of the dissolution of their marriage as well as on all of the consequences of such dissolution, may record their agreement in a contract, without the need to obtain the review or approval by the French courts.

The process is simple: a draft agreement is written by the parties' counsel and signed by the spouses and their attorneys together. After the expiration of a mandatory 15-day reflection period, the agreement is sent by either party to a *notaire*, who will register it and keep an official record. A French court may review the agreement only if a minor child requests to be heard by the judge.

In the absence of a review by the courts, there is no requirement for the spouses to have any connection with France to be able to use this new method of divorce, the consequence being that certain authors consider, rightfully, that "*France will become the new Las Vegas of divorce.*"[1]

The other consequence of this purely French administrative divorce is that no independent third party will ensure that the spouses have freely consented to the agreement or, that their agreement is fair and strikes the right balance between both parties' interests (in particular as regards the provisions relating to the children).

The only requirement intended to ensure the existence of the spouses' free will is the obligation for each party to have his or her own lawyer, which assumes that the lawyer will be committed to the defense of his or her client's best interests.

The lack of control by a neutral and independent third party could nevertheless allow the possibility of agreements where one party will accept a completely unfavorable agreement, even after having received proper advice from his or her lawyer, for the sake of efficiency for instance (given how long divorce litigation can be otherwise in France).

B. The Lack of Financial Disclosure

The issue of spousal support, also called "compensatory maintenance" (*prestation compensatoire*) in France, is also a symptomatic example of the difficulties raised by the reform.

Before this reform, when the divorce agreement was reviewed and approved by the courts, and the parties had agreed that one of the parties was awarded an amount for "compensatory maintenance," there was an obligation to provide to the court a financial disclosure through a

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statement of net worth (*declaration sur l'honneur*), prepared and signed by each party.

The new law does not provide for an obligation to exchange or attach any such statement to the divorce agreement. The *circulaire* (which is a document published by the French Ministry of Justice to explain how the new law should be applied in practice) recommends that the parties should exchange such a statement of net worth. This recommendation does not mean, however, that there is a strict legal requirement to do so, sanctioned by the courts. Therefore, the spouses may simply proceed with the divorce agreement, without any form of financial disclosure.

C. The Lack of European Certificates

Finally, the legislature has explicitly recognized that the only certificate which will be issued by the *notaire* is the one provided by Article 39 of the European Union's Brussels II bis Regulation. The certificate of Article 41 of the same Regulation, concerning access to children and the return of children, will not be issued. The certificates provided by the new European Regulation on Maintenance Obligations will not be issued either, which means that the maintenance creditor will not be able to benefit from the facilitated form recognition provided by this regulation.

One can understand from this succinct presentation that the possibility for one of the spouses to attempt to re-open the litigation in other countries such as England or the United States, in the hope of obtaining an additional amount for asset division or spousal support or better arrangements as regards child custody is significant.

Carmel Brown and Jeremy Morley will detail and explain below the reasons for which such possibility could indeed exist in their respective countries of practice.

II. Will the French Divorce by Mutual Consent Be Recognised in England and Wales?

A divorce granted within the European Union will almost always be automatically recognized in England and Wales, provided that it was granted in accordance with the laws of that particular member state. Accordingly, given that the divorce by mutual consent would be prepared in accordance with the law—by a deed, signed by both parties and countersigned by the independent lawyer and a notary, it should be recognized in England and Wales. However, it would need to be accompanied with a certified translation in the usual way. It is fundamental, however, that the divorce is not a "transnational divorce," and instead, must have started and finished in France.

It is a worry that, given a judge will play no active role in the divorce by mutual consent, there will be no control over the validity of the divorce agreements and this is likely to increase litigation and post-divorce disputes in France and open up the possibility of secondary litigation in England and Wales, by way of "top-ups."

If the French courts have not triggered their jurisdiction, owing to the fact that the divorce by consent is just a contract, then there is surely still the ability for another country to seize jurisdiction.

A. Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984)

England is often referred to in the media as the divorce capital of the world. It is widely known to be one of the more generous to wives in the world. Not only this, but the English court can in some circumstances order a divorce settlement even where a couple have already divorced (and received financial provision) in another country.

Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984) provides the English court with discretion to step in and make financial orders upon divorce, provided certain jurisdictional requirements are met.

Essentially, once jurisdiction is accepted, the English court is able to make the same orders as if the divorce had been granted in England, which may include orders for maintenance claims, lump sum orders, property adjustment orders and pension sharing orders. Accordingly, if a party has entered into a divorce by mutual consent in France, and is genuinely dissatisfied with the settlement, possibly in circumstances where they have not had proper independent legal advice with full financial disclosure, they may seek to make an application in the English courts. This is particularly likely given there will be no judicial control or guidance.

The leading authority is the case of *Agbaje v Akinnoye-Agbaje*, which held that the purpose of a Part III application was *"the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England."*

The range of outcomes is wide and will depend on the circumstances of the case—but we may see one party after a French divorce by mutual consent seeking to re-open their financial claims in England (providing there is the requisite connection to England), notwithstanding that there has already been financial provision in a foreign jurisdiction.

Until now, it has been significantly harder to run a successful Part III claim in England and Wales after a foreign divorce in a westernized country, and particularly the EU, given that Part III applications often arise after settlements in more traditional cultures, i.e., those that may still treat women differently, therefore making inadequate provision.

However, that may all change given that French settlements will not be subject to judicial scrutiny and many may sign up to imbalanced and unreasonable settlements, failing to meet both parties' and the children's needs. Practically speaking, this will clog up our court system given that the proceedings are complex, lengthy and expensive.

The English court will, however, be unwilling to entertain an application if it considers the French applicant is simply trying to get a "second bite of the cherry" after a financial award in France by mutual consent.

There is another unresolved issue of relevance, which is whether a matrimonial award, with an element of maintenance in another EU state, automatically precludes the courts of England and Wales from making a Part III maintenance order.

Given that the European Union's Maintenance Regulation is designed to enable a maintenance creditor to easily obtain an Order that is automatically enforceable in another member state without further formalities, it seems reasonable for Part III to remain unaffected by the Maintenance Regulation.

However, the question is whether the recognition of the decisions of the other Member States merely means "recognizing" that actual decision and the payer's liability or whether it allows a determination of the liability under the laws of England and Wales. The preamble states at s25 *"Recognition in a Member State of a decision relating to maintenance obligations has its only object to allow the recovery of the maintenance claim determined in the decision."* (Section 25 of Part III of the Matrimonial and Family Proceedings Act 1984). That said, it does appear reasonably clear that the purpose is not to protect the payer from a Part III claim.

Although a maintenance award made in another EU state will have significant weight on whether leave is granted under Part III and in relation to the substantive application, in practice it is likely that a prior maintenance award in another EU country would not prevent financial provision outside of the scope of the Regulation. Accordingly, if a party has already obtained a maintenance award in France, a Part III application dealing with all financial matters and including maintenance may still be on the table.

B. Children Matters and Contact

The new French legislation has unfortunately failed to deal with cases with international issues and elements and there is no method for obtaining the Certificates provided in the European Regulations (apart from Article 39 of the Brussels II bis), and a notary may not issue such certificates.

Accordingly, the implications are vast and we lose the ability for French Orders complying with the conditions set out in Articles 20 and 40-42, to be directly recognized and enforceable in England and Wales.

The English Courts would consider it unsatisfactory for there to be conflicting Orders in existence in different states affecting children, yet this is the problem we will be faced with in circumstances where we will lose the benefits of the European Regulations.

III. Will the French Divorce by Mutual Consent Be Recognized in the United States?

The extent to which courts in the United States will recognize French administrative divorces is uncertain and raises a host of interesting questions. The issues are rendered particularly complex because of the unusual features of the divorce recognition principles that apply in the U.S., including the American concept of "divisible divorce," the imprecise nature of U.S. comity rules, the unique impact of the due process clause in the U.S. Constitution, the different statutory provisions in the 50 states, variations in judicial interpretations from state to state, and the particular jurisdictional rules as to child custody jurisdiction.

A. Recognition of the "Bare" Divorce

American courts will normally recognize foreign court divorce judgments under the doctrine of comity if one spouse was domiciled in the foreign country when the case was commenced, meaning that it was the place of the spouse's true, fixed, permanent home and principal establishment, and to which, during any absence, the person intends to return. But recognition may nonetheless be refused if the foreign legal system was partial or unfair or if the judgment was procured by duress or fraud.

There are very few reported cases in the U.S. concerning non-judicial divorces. It is likely that U.S. courts will follow the general principle that a divorce regularly obtained according to the laws of the country where at least one spouse is domiciled will usually be recognized as effectively dissolving the marriage. In a case in Hawaii, a decision to recognize a Taiwanese administrative divorce was recently upheld on appeal, and foreign administrative divorces were likewise recognized in some immigration cases.

However, the new French procedures authorize administrative divorces even if neither spouse is domiciled in France or even connected to France. Therefore there is a great likelihood that a French administrative divorce of spouses who were both not domiciled in France will generally not be recognized in the United States.

An exception to this principle may well apply in New York, whose courts have long recognized foreign "bilateral" consent divorces, such as Dominican judicial divorces where one spouse flies there for a weekend with a power of attorney signed by the other party, even though neither was domiciled there. However, courts elsewhere in the U.S. have refused to follow the New York rule.

Another exception will likely apply to prevent a spouse from contesting a divorce if he or she has relied on the divorce in order to obtain any kind of benefit or advantage. However, that would not preclude a third party, such as the U.S. immigration authority, from refusing to recognize the divorce.

B. Recognition of the Financial Consequences of the French Divorce

In order for a U.S. court to recognize the financial component of a foreign divorce decree, each party must have had a significant connection to the foreign country, or have been served with process in that country or have submitted to the foreign court's jurisdiction. This element will presumably be satisfied in the case of French administrative divorces since the consent of both parties is required for the divorce.

However, subsequent and serious problems may well arise if a party has second thoughts about the financial terms, and seeks to have them set aside in a court in the United States. Any such effort will benefit from the fact that the French procedures do not require in a compulsory way any prior financial disclosure.

Courts in the U.S. will normally not reopen the financial issues that have been determined in a foreign divorce case unless there is clear proof of fraud or duress, as long as the foreign court had jurisdiction over the marriage and personal jurisdiction over the defendant. A U.S. court will normally not even allow a party to make claims about assets that were not considered by the foreign court unless it is clearly established that the foreign court had no power to consider those assets.

However, administrative divorces may well be treated differently, since they are based on the mere agreement of the parties and they require no judicial oversight. U.S. courts will likely apply to such divorces the more flexible and liberal principles that they have developed concerning the avoidance of spousal settlement agreements leading to a judicial divorce. In general, U.S. courts may set aside a financial settlement agreement at the request of a spouse who establishes that his or her consent was procured by undue influence or in some jurisdictions merely because the result is unfair.

In reviewing the financial provisions of a French administrative divorce the relevant factors will certainly include whether or not, before entering into the French agreement, the complaining spouse had adequate knowledge of the relevant financial facts, received full and frank financial disclosure, adequately understanding what was being agreed to and the consequences of entering into the agreement, and had separate and independent legal representation. The attitudes of courts in different U.S. states to such claims will vary from state to state, based on the specific case law that has been developed in each such state concerning the avoidance of divorce settlement agreements, the specific provisions of any governing local legislation and the attitudes of local judges.

C. Recognition of the Child Custody Elements of the French Divorce

American courts will certainly not recognize any portion of a French administrative divorce that deals with the custody of children except to the extent that the statutory jurisdictional rules of the local U.S. state are satisfied.

Each U.S. state has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), except Massachusetts, which has adopted a prior but similar statute. In very broad terms, it provides that a child's "home state"—meaning the state or foreign country where the child has lived for the past six months—has exclusive jurisdiction to issue an initial child custody order and has continuing exclusive jurisdiction neither the child not either parent lives in that state or country.

This means that if, for example, a French administrative divorce were to purportedly settle custody issues concerning a child who does not live or has not lived in France, the custody terms would almost certainly be unenforceable in the United States.

D. Support Provisions

Significant problems will arise in the U.S. concerning the enforcement of the child support and spousal support provisions of a French administrative divorce. The Uniform Interstate Family Support Act, adopted throughout the U.S., provides measures to enforce "support orders" issued by other U.S. states or by most foreign countries. However, the term "support order" is defined as "a judgment, decree, or order, or directive" that has been "issued by a tribunal," meaning "a court, administrative agency, or quasi-judicial entity." Since the support terms of a French administrative divorce will not be in the form of a judgment, order or the like issued by a "tribunal," it may well be especially difficult to enforce such provisions in the U.S.

Conclusion

The enforceability of French administrative divorces in the United States and in England will raise a host of complex and interesting legal issues. Full disclosure of such issues to parties who have a connection to a common-law country is strongly recommended.

In summary, these changes in France are likely to have various and quite large-scale implications in other countries, in particular in countries such as the United States and England and Wales, which are based on a very different legal culture.

We are hopeful that the comments of practitioners are noted and the necessary and appropriate changes are made.

Endnote

1. See Alexandre Boiché, in the French family law journal, *AJ Famille*, January 2017.

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

22 N.Y.C.R.R. 202.50(b) amended to add NYCRR 202.50(b) (3), effective August 1, 2017

Administrative Order 100/17 amends 22 N.Y.C.R.R. 202.50(b) to add a new section 202.50(b)(3), requiring every uncontested and contested divorce judgment to contain certain decretal paragraphs, including one concerning the venue where post-judgment Supreme Court applications for modification or enforcement should be brought.

> ORDERED AND ADJUDGED, that the Settlement Agreement entered into between the parties on the day of , an original OR a transcript of which is on file with this Court and incorporated herein by reference, shall survive and not be merged in this judgment,* and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms or conditions were set forth in its entirety herein; and it is further
>
> * In contested actions, this paragraph may read either [shall survive and shall not be merged into this judgment] or [shall not survive and shall be merged into this judgment].
>
> ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specially enforcing, such of the provisions of that (separation agreement) (stipulation agreement) as are capable of specific enforcement, to the extent permitted by law, and of modifying such judgment with respect to maintenance, support, custody or visitation to the extent permitted by law; or both; and it is further
>
> ORDERED AND ADJUDGED, that any applications brought in Supreme Court to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment shall be brought in a County wherein one of the parties reside; provided that if there are minor children of the marriage, such applications shall be brought in a county wherein one of the parties or the child or children reside, except, in the discretion of the judge, for good cause. Good cause applications shall be made by motion or order to show cause. Where the address of either party and any child or children is unknown and not a matter of public record, or is subject to existing confidentiality order pursuant to DRL § 254 or FCA § 154-b, such applications may be brought in the county where the judgment was entered; and it is further

22 N.Y.C.R.R. 202 amended to add 202.16-b, effective July 1, 2017

Administrative Order 99/17, amends 22 N.Y.C.R.R. 202 to add a new section 202.16-b, addressing the submission of written applications for *pendente lite* relief in matrimonial actions for maintenance, child support, counsel fees, exclusive occupancy, custody and visitation.

An application for relief designated as an emergency without good cause may be punishable by sanctions.

All motion papers must be submitted on one-sided copy, have one inch margins on 8.5 x 11-inch paper with all additional exhibits tabbed, and be in Times New Ro-

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man font 12 and double-spaced. They must be in dark ink for ease of reading. Self-represented litigants may submit handwritten applications so long as they are legible.

Affidavits, attorney affirmations, and memorandum of law in support of a motion or in opposition to a motion shall each not exceed 20 pages. Expert affidavits shall not exceed 8 additional pages. (It's unclear if that means 8 pages or 28 pages.) Reply affidavits or affirmations shall not exceed 10 pages. Sur-reply affidavits can only be submitted with prior court permission. With respect to exhibits to motion papers, they must be tabbed and shall not exceed three inches of thickness, with the exception of the net worth statement, retainer agreement, maintenance guideline worksheet and/or child support worksheets, and counsel fee billing statements.

If the papers exceed the page or size limitations, counsel must certify in good faith the need to exceed such limitation, and the court may reject or require revision of the application if the reason is deemed insufficient.

22 NYCRR 202.21(l) and 202.50: Divorce packet for undefended divorce actions, effective March 1, 2017

Administrative Order 102/17 modifies the undefended divorce packet forms and reflects increases in the self-support reserve as of March 1, 2017 ($16,281) and the poverty level income for a single person ($12,060).

Military pensions: Section 641 of the National Defense Authorization Act (NDAA) of 2017

Section 641 of the National Defense Authorization Act (NDAA) of 2017, signed into law by President Obama on December 23, 2016, amends the definition of disposable pay in the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408.

Under the new law, the former spouse's share of the retirement is "frozen" as of the date of dissolution, and cannot include any future promotions or longevity increases. As such, the traditional *Majauskas* formula will not be recognized for military pension distributions. The method that is now going to be the standard, has actually been around for some time, and was optional. It is just now that the military is making it mandatory.

The military member's disposable income is limited to "the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order" and increased by the cost-of-living amounts granted to military retirees from the time of the divorce to the date the member retires.

In order to enable the Defense Finance and Accounting Service (DFAS), Garnishment Operations to calculate the "new" disposable retired pay amount, a court order entered after December 23, 2016,that provides for a division of military retirement pay **must** provide the following components.

If the member entered the service *before* September 8, 1980:

- A fixed amount, a percentage, a formula, or a hypothetical amount that the former spouse is awarded;
- The member's pay grade at the time of divorce;
- The member's years of creditable service at the time of divorce; or in the case of a reservist, the member's creditable reserve points at the time of divorce.

If the member entered military service *on or after* September 8, 1980:

- A fixed amount, a percentage, a formula or a hypothetical that the former spouse is awarded;
- The member's high-3 amount at the time of divorce (the actual dollar figure);
- The member's years of creditable service at the time of divorce; or in the case of reservist, the member's creditable reserve points at the time of divorce.

Special thanks to Thomas Treacy of QDRO Advisors, Inc. (www. qdroadvisors.us) for his assistance in this military pension section.

Child Support

Credits for overpayment of child support against child support add-ons

McGovern v. McGovern, 148 A.D.3d 900 (2d Dep't 2017)

The parties executed a stipulation requiring the father to pay the mother child support for their two children, up until one of the children began attending college, at which time the support obligation would be reduced. The stipulation also required the father to pay 60% of the children's college expenses, and allowed him to deduct room and board payments from his child support obligations.

The father made significant child support overpayments after his eldest child started college in 2011. So in 2014, the father filed a petition seeking a downward modification of his child support payments and requested an overpayment credit on the grounds that the Support Collection Unit failed to reduce his payments, after his child started college in 2011.

The mother then filed a cross-petition to enforce the stipulation and alleged that the father failed to pay his 60% payment toward the children's college expenses. The Support Magistrate denied the mother's cross-petition, downwardly modified the father's child support obligation, and credited him for past support overpayments.

The mother objected to the Support Magistrate's order, which was denied by the Family Court, and thereafter, the mother appealed. The Appellate Division reversed,

and remitted the matter to the Family Court to determine the amount of child support arrears.

There is a strong public policy against restitution or recoupment of the overpayment of child support payments, and repayment is only appropriate under limited circumstances. Here, the father failed to set forth a sufficient basis for the exception to the rule. However, even though child support overpayments may not be recovered by reducing future basic child support payments, public policy in New York does not forbid offsetting add-on expenses against an overpayment, including educational expenses. Therefore, the father is permitted to reduce his share of the college expenses against the overpayment of basic child support.

Imputation of income

***Gao v. Ming Min Fan*, 148 A.D.3d 897 (2d Dep't 2017)**

The mother filed a petition for child support against the father for the parties' child. The Support Magistrate ordered the father to pay child support in the amount of $888 per month based on his imputed annual income of $70,000. Thereafter the father filed objections to the Support Magistrate's order, which the Family Court denied.

The Appellate Division affirmed, and reasoned that since the father purposely reduced his income in order to reduce his child support obligation, it was appropriate for the Support Magistrate to impute income to him based on his past employment income and rental income.

Custody and Visitation

Step-grandfather lacks standing under grandparent visitation statute

***B.S. v. B.T.*, 148 A.D.3d 1029 (2d Dep't 2017)**

The paternal grandmother and paternal step-grandfather commenced an Article 6 Family Court Act proceeding for visitation with their grandchild. After a hearing, the court granted visitation to the grandmother and step-grandfather. The mother appealed.

The Appellate Division determined that the step-grandfather's petition should have been dismissed since he lacked standing pursuant to DRL § 72, due to lack of biological or legal ties to the child. However, Supreme Court properly held that the grandmother had standing to seek visitation under equitable circumstances, since she had an ongoing affectionate relationship with her grandchild (despite having an acrimonious relationship with the mother). Moreover, since the father unexpectedly died during the proceeding, the grandmother acquired automatic standing. Although the grandmother and mother had an acrimonious relationship, this did not affect the grandmother's right to visitation. However, the visitation schedule was modified to conform to the child's best interests such as requiring the grandmother to provide transportation for the child during all court-ordered visitation periods and adjustments were further made to the timing and frequency of the schedule.

Family Court did not lack subject matter jurisdiction where newborn child never lived in New York

***In re Milani X.*,149 A.D.3d 1225 (3d Dep't 2017)**

The mother, a New York resident, gave birth to her daughter in a Pennsylvania hospital. Social Services commenced a neglect proceeding based on allegations that the mother abused drugs during her pregnancy and the child was hospitalized for withdrawal symptoms. The mother moved to dismiss based on lack of subject matter jurisdiction on the grounds that the child had never lived in New York, which was denied.

The Appellate Division affirmed on the grounds that subject matter jurisdiction does not depend on where the neglect takes place but rather upon satisfying the standards set forth in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), i.e., determining the child's home state. When the child is less than six months old, the state where the child lived from birth with a parent is the home state. Since the child did not have the opportunity to live with her parents, the child has no home state.

Where a child lacks a home state when a neglect proceeding is commenced, the alternative UCCJEA basis governs, DRL 76(1)(b), which requires that the child and the child's parent have a significant connection with the state and there is substantial evidence available in the state relating to the child's care, protection, training and personal relationships. Here, the child's father has significant connections to New York, CPS in New York became involved with this case after the child was hospitalized, and the child has relatives who are able to take care of her in New York. Therefore, New York has subject matter jurisdiction over the matter.

Father equitably estopped from contesting paternity

***Aranessa L. v. Isaac C.*, 148 A.D.3d 609 (1st Dep't 2017)**

The Family Court properly concluded that it was within the best interests of the child for the putative father to be equitably estopped from obtaining DNA testing and denying paternity where he led the child to believe, for the past 15 years, that he was her biological father.

Relocation from Floral Park to East Hampton denied

***DeFilippis v. DeFilippis*, 146 A.D.3d 750 (2d Dep't 2017)**

While the divorce action was pending, the wife sought to relocate from Floral Park to East Hampton. The husband opposed, claiming that if the children moved so far away, he would be unable to remain involved in their daily lives, school, or extracurricular activities, and he would only be able to see them on the weekends. The court below granted the wife's motion, and the husband appealed. The Second Department reversed, stating that the wife failed

to show a sound and substantial basis that the requested move will be in the children's best interest and outweigh the father's ability to foster a close relationship with the children.

Modification of custody where there were false allegations of sexual abuse

***In re Oscar S. v Joyesha J.*, 149 A.D.3d 139 (1st Dep't 2017)**

The father petitioned for a modification of custody of the parties' four children. The Family Court granted the father sole legal and physical custody of the children and visitation to the mother. The mother appealed. The evidence adduced at the hearing was that the mother purposefully tried to disrupt the children's relationship and contact with the father by making repeated false sexual abuse allegation against him, and often failing to produce the children for visitation. The father was best able to foster a good relationship between the children and the mother, and was therefore properly awarded custody. However, the matter was remanded back to Family Court for an order addressing the process of the transfer of custody to the father and to conduct a hearing regarding whether it is still in the oldest child's best interest for custody to be transferred to the father in light of new issues raised by the child's attorney on appeal.

Equitable Distribution

The appreciation of separate property life insurance policies paid with marital funds deemed marital property

***Seale v. Seale*, 149 A.D.3d 1164 (3d Dep't 2017)**

The parties were married for eight years, and have two children ages 3 and 7. The husband owned a car wash business prior to the marriage. During the marriage, he transferred his 50% interest in the business to his business partner in exchange for other businesses. The court below did not err in concluding that the property that the husband took title to during marriage was separate property because he received it in exchange for separate property. Pursuant to DRL § 236[B][1][d][3], separate property includes property acquired in exchange for separate property. In addition, the wife's valuation expert lacked credibility, and she was unable to prove that the husband's separate property business appreciated in value during the marriage.

The trial court erred in concluding that all of the insurance policies purchased by the husband were entirely his separate property due to the fact that he took out the polices prior to the marriage or, for policies taken out after the marriage, in exchange for his separate property. Where a life insurance policy appreciated in value and the husband used marital income to pay the premiums, the wife should have been awarded a share of the life insurance policy. At bar, the appellate court awarded the entire amount of the appreciation to the wife.

The court below properly imputed $173,000 of income to the husband and $50,000 of income to the wife. For purposes of the husband's income, the court discredited the parties' experts and relied on the tax returns from 2002-2011, the parties' net worth statements, and the husband's credit applications, and the husband's testimony. With respect to the wife's income, the wife had a master's degree in reading and had taught at various times prior to and during the marriage, earning between $45,000–$50,000. At trial, she was only a substitute teacher. The court found her testimony that she would be unable to become employed again as a teacher incredible.

Marital debt equally divided despite some funds that were used to finance the husband's medical practice, which was his separate property

***Marin v. Marin*, 148 A.D.3d 1132 (2d Dep't 2017)**

The parties were married for 19 years and have two children, ages 12 and 16. The plaintiff wife was the primary caretaker of the children, and the defendant husband owned a medical practice, and was the sole source of financial support for the family.

The Supreme Court imputed income to the husband of $350,000 and thereafter awarded the wife maintenance of $3,500 per month for two years, child support of $4,362.46 per month, declined to direct the husband to pay for the children's college expenses, declined to award the wife *pendente lite* support arrears, and declined to award the wife counsel fees.

The wife appealed. The Second Department modified the order of maintenance to $5,000 per month until the emancipation of the parties' second child, and then $7,000 per month, to terminate in seven years after the marital home is sold. In addition, it reversed the denial of counsel fees, and awarded the wife $118,000 in counsel fees, which was one-half of her total fees.

The wife disputed the husband's income, and claimed that the court should have imputed income to him of more than $350,000. However, his 2007-2011 tax returns showed a declining income, with the highest amount earned to be approximately $336,000. The court found the husband's testimony credible that his income declined as a result of managed care. However, the court properly imputed additional income to the husband based on substantial cash income.

The lower court did not abuse its discretion in allocating debt equally between the parties, despite the fact that some funds were used to finance the husband's medical practice, which was his separate property. Even though the funds were used to benefit the husband's medical practice, the medical practice was the sole source of income in supporting the family, so the court determined

that the debt was not incurred for the sole benefit of the husband.

This case was brought before the maintenance guideline statute came into law, and therefore, maintenance is governed by the statutory factors rather than a formula. The Appellate Division held that the maintenance award was inadequate in amount and time since the parties were married for almost 20 years, the wife was a housewife and the primary caretaker for the children, and the wife had a limited employment history and education level.

The court below did not err in failing to direct the husband to pay for a portion of the children's future college expenses where the parties had already set aside a substantial amount of funds to pay for college. With respect to the parties' younger child, the issue of college was premature.

Invoices of art purchases, standing alone, are not evidence of ownership

***Anonymous v. Anonymous*, 150 A.D.3d 91 (1st Dep't 2017)**

In this divorce action, the husband claimed separate ownership of tens of millions of dollars' worth of art, while the wife claimed the art was jointly owned. The wife also claimed to separately own four specified works of art purportedly worth a total of approximately $22 million. The parties' prenuptial agreement does not instruct how the parties' artwork is to be divided; rather, it states that any property owned on the date of execution of the prenuptial agreement or thereafter acquired by one party remains that party's separate property. A property acquired in the parties' joint names shall be the parties' marital property.

During the marriage, the parties agreed to acquire certain art as a joint collection. The wife claims that this art was jointly held. The husband claims that there was no blanket agreement that all pieces from those vendors would be considered marital property. Rather, he states that he relied on the prenuptial agreement and purchased certain works solely in his name when he wanted them to remain his separate property. The husband moved for a declaratory judgment that the title to the artwork as listed on the invoices determines whether the art is marital or separate property.

The motion court relied on the invoices as proof of whether the art was jointly or individually held. The First Department reversed, and concluded that invoices, standing alone, may not be regarded as evidence of title or ownership of the art. While the invoice may be indicative of the price paid, it is not necessarily indicative of the actual owner. For example, two people may purchase the art, but only one person may be listed on the invoice. In determining title to artwork in question, all facts and circumstances of acquisition must also be considered. The matter was remitted to the Supreme Court for further proceedings, including discovery and an evidentiary hearing to determine ownership of the disputed art.

Legal Representation

Party lacked authority to retain counsel where guardian *ad litem* appointed

***Yerushalmi v. Yerushalmi*, 149 A.D.3d 793 (2d Dep't 2017)**

During a divorce action and prior to the completion of the continued hearing on the husband's motion to terminate his temporary maintenance obligation, the husband suffered a stroke. When he appeared *pro se* for the continuation of the hearing, the Supreme Court determined that he was no longer competent, and directed the appointment of a guardian *ad litem*. Three days later, the husband retained counsel to represent him.

The wife moved to disqualify counsel and for a release of funds from escrow. The lower court's denial of the wife's motion was error. Once a guardian *ad litem* is appointed for a party, only the guardian *ad litem* can retain counsel, and therefore the husband did not have authority to retain counsel. In addition, it was error not to release $133,000 from escrow since the release was necessary to pay capital gains taxes on the sale of the marital home.

Welcome New Family Law Section Members

The following individuals joined the Family Law Section from April 24, 2017 to October 11, 2017.

Adrienne Abraham
Jessica L. Anderson
Irene Angelakis
Kelly Aran
Deana Balahtsis
Jessica P. Barry
Hayat Bearat
Shabina Begum
Alan S. Benedict
Lauren G. Blau
Michelle L. Browne
Brendan H. Buschman
Amanada Calton
Malorie A. Carbone
Annmarie R. Cellino
Melissa Cara Rose Chernosky
Suzanne Marie Chilcote
Neha Choudary
Michelle Y. Cimino
Desiree Marie Claudio
Stephanie Gail Conners
Cathy Ann Cramer
Matthew T. Davis
Laurieanne DeLitta
Vanessa Diaz
Amy Elizabeth Donehower
Dominique Donila
Anthony Nicholas Elia
Danielle Angelica Erickson
Anna Naomi Feldberg
Lissette G. Fernandez
Michele Ferrara
Beth B. Finkelstein
Katelyn Arlene Fitzmorris
Michael N. Fleischman
Anna Elzbieta Florek-Scarfutti
Elizabeth Ann Fox
Patrice Fraccio
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In Memoriam

A Tribute to Bill DaSilva

By Elliot D. Samuelson
Editor Emeritus

> *'One of the brightest lights in the matrimonial bar has been extinguished.'*

One of the brightest lights in the matrimonial bar has been extinguished. Willard DaSilva, after over 50 years of practice, died this past May. He was regarded by his colleagues as one of the Deans in his field. He was an author, scholar and admired consummate gentleman who practiced law with dignity, humility and professionalism. Bill's word was his bond. Once he agreed to the terms of an agreement, adjournment, or stipulation, no writing was needed to memorialize the understanding.

Bill served, among other honorary positions, as President of the American Academy of Matrimonial Lawyers, New York Chapter; Chair of the New York State Bar Association Family Law Section; and was one of the founding members, Master, and President of the New York Family Law American Inn of Court in Nassau County.

He had an incisive sense of humor, and delighted to phrase a pun. Despite his addiction to practicing law (a well-known workaholic) he had time to enjoy the arts, and was quite philanthropic. His charitable contributions included the establishment of scholarships to the Columbia and Hofstra law schools in his name. His textbook, *Matrimonial Law*, is still being offered by the New York State Bar Association.

I enjoyed Bill's friendship ever since he was admitted to practice, and was his law partner for a short period of time. He was indefatigable and literally could work around the clock. I remember one night when I left the office rather late at 10:30 p.m., Bill asked me why I was leaving so early stating, "Elliot, it's only the shank of the evening."

Recently, he received a posthumous award of the Alfred Reinharz medal for civility and professionalism from the Nassau County Family Law Inns of Court.

One of the pleasures to have known Bill DaSilva was to have had the opportunity to brainstorm a pleading, motion, or appeal. He was able to get to the heart of the matter, frame the issue, and write with verve and brevity. We spent long hours together challenging each other's opinions, but finally reaching agreement as to a course of conduct that would lead to success in a hotly contested matter.

The consummate practitioner, he will be sorely missed.

Elliot D. Samuelson, Editor Emeritus of this publication, is the founding partner at Samuelson Hause Samuelson, LLP in Garden City, NY.

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