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The Court of Appeals Addresses Family Law: Some Welcome Attention

By Lee Rosenberg, Editor-in-Chief

Although it has been said "There is no truth. There is only perception,"[1] it seems more than just perception that the Court of Appeals has found a renewed interest in family law. That Judge Leslie E. Stein[2] is a former matrimonial attorney and Fellow of the American Academy of Matrimonial Lawyers certainly provides the Court with some welcome additional insight on the issues which are of great import to the Bench and Bar in our chosen field. A look now at some of the High Court's recent rulings with a focus on the two most recent decisions since the last issue of *Family Law Review*.

THE MOST RECENT

In re Brooke S.B. and *In re Estrellita A.*: Standing and the "Non-Biological Stranger"—No Longer So Strange

In *Brooke S.B. v. Elizabeth A.C.C.*, decided on August 30, 2016 along with *Estrellita A. v. Jennifer L.D.*,[3] (both matters jointly referred to herein as *"Brooke"*) the Court addressed the issue of *standing* to assert parenting rights by a "non-biological stranger." The Court overturned its prior ruling in *Alison D. v. Virginia M.*[4] to hold that where a partner shows by *clear and convincing evidence* that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing, as a parent, to seek visitation and custody.

The Court's decision further advances the rights of same-sex couples which have expanded by leaps and bounds from where they stood just a few short years ago and which culminated in the United States Supreme Court's landmark decision in *Obergefell v. Hodges*.[5] That said, *Brooke* establishes a narrow, "fact-specific" test involving a "pre-conception agreement," to be met in order to qualify for standing and does not obviate the greater protections created by adoption or marriage. There is *no* requirement offered in *Matter of Brooke* that such agreement be in writing.

In the now 25-year-old *Alison D.*, the Court ruled that where a couple is unmarried, a partner without a biological or adoptive relationship with that child is not a parent for purposes of standing to seek custody or visitation under DRL § 70(a), notwithstanding their "established relationship with the child." *Brooke* found that *Alison D.*'s definition of "parent" has become unworkable in this day and age. Looking at DRL § 70, the statute addresses the right of "either parent"[6] to apply for custody or visitation with no prima facie right to either and requiring that the court determine what is in the "best interest of the child, and what will best promote its welfare and happiness, and make award accordingly." The term "parent" is found to be undefined by the statute, and therefore left to

Inside

the courts to define. That term is now differently defined by the Court of Appeals than it was when the Court decided *Alison D*. which eliminated a non-marital/non-biological/non-adoptive "de facto" parent's ability to seek custodial rights. Social and legal changes since *Alison D.*, which were prescient in then-Chief Judge Judith Kaye's dissent in that case[7] and later echoed in the concurring opinions of Judges Lippman, Ciparick, and Smith's in *Matter of Debra H. v. Janice R.*, are now found to be outdated in light of the Marriage Equality Act and *Obergefell* and also in contradiction to such de facto parent's ability to be subject to a child support order, but with no right of parenting.[8]

Brooke then, being protective of the fundamental rights of biological and adoptive parents, mandates caution in expanding the definition of "parent" and "*makes the element of consent of the biological or adoptive parent critical.*" Overruling *Alison D.*, the Court of Appeals in *Brooke* establishes the following test to determine *standing*—and *only* standing—in this "limited" and "narrow" circumstance which must be proven by *clear and convincing evidence*. It *does not* adopt a "functional test" which considers a variety of factors, many of which relate to the post-birth relationship between the putative parent and the child. It *does not* adopt a test that will apply in determining standing as a parent for all non-biological, non-adoptive, non-marital "parents" who are raising children. It *rejects* the various requests to declare that one test would be appropriate for all situations, or that the various proffered tests are the only options that should be considered in matters addressing standing in other pending matters or going forward. On the "limited facts" before it, the Court holds that standing may be established to apply to the court for custody and visitation under DRL § 70(a) if:

1. The petitioner is not a biological or adoptive parent.
2. There is a "pre-conception" agreement.
3. The agreement provides that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents.
4. The foregoing is proven by clear and convincing evidence.

The Court goes on to say,

> Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We hold that these allegations, if proven by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Accordingly, *we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.*
>
> Inasmuch as the conception test applies here, we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. We simply conclude that, where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child. *Whether a partner without such an agreement can establish standing and if so, what factors a petitioner must establish to achieve standing based on equitable estoppel is a matter left for another day, upon a different record.*
>
> Additionally, we stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether those rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child. (Emphasis added).

S.L. v. J.R.: The Right to a Custody Hearing vs. "Adequate Relevant Information"

In the last issue of *Family Law Review*,[9] we addressed—in advance—the High Court's consideration of *S.L. v. J.R.*—which was then decided on June 9, 2016.[10] At the appellate level, the Second Department affirmed[11] the *motion court* which, using the "adequate relevant information" standard on an initial custody determination, awarded custody to the father without a hearing based on affidavits, a forensic report, and the recommendation of the children's attorney. The Court of Appeals reversed and remitted the matter back to the "trial" court for hearing. The Court found that while the "general" right to a hearing in custody cases is not an absolute one:

> The undefined and imprecise "adequate relevant information" standard applied by the courts below tolerates an *unacceptably-high risk of yielding custody determinations that do not conform to the best interest of a child* —the first and paramount concern of the court. Nor does this standard adequately protect a parent whose fun-

damental right—the right "to control the upbringing of a child" (Matter of Maxwell, 4 N.Y.2d 429, 439, 176 N.Y.S.2d 281, 151 N.E.2d 848 [1958])—hangs in the balance. For instance, in rendering a final custody award without a hearing, Supreme Court appeared to rely on, among other things, hearsay statements and the conclusion of a court-appointed forensic evaluator whose opinions and credibility were untested by either party. A decision regarding child custody should be based on admissible evidence, and there is no indication that a "best interest" determination was ever made based on anything more reliable than mere "information." Moreover, while Supreme Court purported to rely on allegations that were "not controverted," the affidavit filed by Mother plainly called into question or sought to explain the circumstances surrounding many of the alleged "incidents of disturbing behavior." These circumstances do not fit within the *narrow exception* to the general right to a hearing. (Emphasis added).

The Court also held that "a court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision." Best practice then dictates that a hearing be demanded; that caution be taken to protect the record against attempts to invoke "non-evidentiary" considerations; and that even if allegations which impact upon the ultimate issue to be decided are conceded, explain them and/or contest their applicability to current and future circumstances.

THE SLIGHTLY LESS RECENT

People v. Badalamenti: Vicarious Consent to Recording on Behalf of a Minor Child

Our matrimonial courts have long frowned on the recording of children.[12] Addressing this issue, *People v. Badalamenti*,[13] a case from April 5, 2016 involved the criminality and admissibility of a parental recording made on behalf of a minor child through "vicarious consent" and the attempt therein by a criminal defendant (the child's mother's boyfriend) to suppress the telephonic recording made by the child's father of events, including the alleged assault of the five (5) year old, in the mother's home.

The recording at issue occurred when after

> ...the father tried to reach the mother on her cell phone, using his own cell phone. He called several times without reaching her; the calls went directly to voicemail. Finally, a call went through, but no one said anything to the father. However, the line was open, and the father was able to hear what was occurring in defendant's apartment. Defendant and the child's mother were yelling at the child, who was crying. Defendant threatened to beat him and punch him in the face. The father, using another cell phone, tried to call the landline telephone in the apartment, but no one answered.
>
> At this point, the father decided to record what he was hearing using a voice memo function on his cell phone. On the recording, which was played to the jury at defendant's trial, defendant told the five-year-old boy that he was going to hit him 14 times for lying and that this would hurt more than a previous beating. The father saved the recording on his cell phone. He did not contact the police.

After the subsequent arrest of the defendant and the mother for another incident, the child went to live with the father. In the criminal case against the defendant at trial, the prosecution offered the father's recording in evidence. The defense objected that the recording was inadmissible since the father was not a participant in the call under CPLR 4506 and the recording violated the eavesdropping statute at Penal Law § 250.05. The prosecution argued "vicarious consent"—that the father had the right to consent to the recording on behalf of the child who was present while the recording was made, is heard crying on the recording, and was the victim of the abuse. The recording was admitted, the defendant was convicted at trial, and the conviction was upheld at the appellate level.[14]

The Court found that the father's conduct in recording the events heard did not constitute a criminal violation of Penal Law § 250.00—"mechanical overhearing of a conversation"[15] and that "vicarious consent" exists which also permits the admissibility of the recording where: (1) that parent or guardian had a good faith belief that the recording of a conversation to which the child was a party was necessary to serve the best interests of the child and (2) that there was an objectively reasonable basis for this belief. The conviction against Badalamenti then stands. But what of the Court's adoption of the theory of "vicarious consent" and its effect on family law cases where recordings of children have long been frowned upon?

Judge Stein addressed this issue head-on in her dissent:

> ...while I appreciate the instinctive desire to permit a parent to listen to, and perhaps even record, a conversation such as the one at issue here, surreptitiously or

otherwise, we must be mindful that the circumstances presented here will not be the only—or even the most common—type of situation to which the majority's holding will apply. For example, *parents in the midst of bitter custody disputes will now be less deterred from eavesdropping on and recording (27 NY3d at 447) their children's conversations with the other parent, incentivized by the possibility of obtaining admissible evidence prejudicial to the other parent. The ability to obtain evidence in this manner—evidence which, aside from two recent appellate decisions, has heretofore been deemed inadmissible in New York court proceedings—will undoubtedly lead to increased familial tension, escalation of hostility in divorce and custody proceedings, and will result in mini-trials regarding whether the evidence is admissible, thereby further prolonging such disputes, all to the detriment of the children, themselves*...

In my view, the limitation placed by the majority on the vicarious consent doctrine—namely, the supposedly "narrowly tailored" good faith, objectively reasonable, best interest test—does not adequately circumscribe the plethora of communications that can be molded and manipulated to fit within its framework (majority op at 426). Given the sheer variety and numerosity of the types of situations in which the vicarious consent doctrine may be implicated—including, among others, divorce and custody disputes, criminal proceedings against the third party or the minor, juvenile delinquency and person in need of supervision proceedings, and any other dispute involving intra-family relations—the determination of whether such a doctrine, unmentioned in the Penal Law, is consistent with the State's approach to eavesdropping is complicated and policy-laden. As this Court recognized over two decades ago, "eavesdropping has grown more simple and yet infinitely more (27 NY3d at 448) complex in the modern communication age" (Capolongo, 85 NY2d at 158). The extent to which a parent may consent for a minor child, and under what circumstances such consent is sufficient to outweigh the State's established interest in deterring the covert interception of private conversations, is a matter for the legislature, not this Court.

It remains to be seen how our matrimonial courts will view the fallout from *People v. Badalamenti*. To be sure, the already existing pattern of surreptitious recording of children will increase. It is now up to the bar and our trial judges as the first lines of defense, to curtail the making and use of these recordings.[16]

Cisse v. Graham: Is a Two-Line Decision, Really a Decision?

In a custody modification proceeding with an extensive dissent at the Second Department, the Court of Appeals[17] on January 14, 2016 tersely affirmed the appellate court's holding[18] that the change of custody to the father was proper, stating as follows—nothing more, nothing less:

> *"It remains to be seen how our matrimonial courts will view the fallout from* People v. Badalamenti*. To be sure, the already existing pattern of surreptitious recording of children will increase."*

> Order affirmed, with costs. Record evidence exists to support the affirmed findings of fact upon which the modification of the child custody award was predicated.

In the Second Department, the court had affirmed the trial court order after hearing and used the mother's allegations of a change of circumstances against her since she asserted that the agreed-upon visitation scheduled should be modified to eliminate the mid-week parenting time due to the father's relocation from Queens to Babylon, in Suffolk County with his wife and other children. The now 13-year-old child had always resided with the mother in Queens and had also been going to the United Nations International School in Manhattan at the mother's expense since kindergarten. The mid-week commute for the child was alleged by the mother to have created a burden for the child. Per the dissent, "(t)he record reveals that there are significant differences in the parties' cultural and religious backgrounds. The mother is a Muslim who was born in Senegal, and the father is a Roman Catholic. The parties, who were never married, have one

child together, a daughter born on March 24, 2001. Their relationship ended before the birth of the child. In an order dated June 30, 2004 (hereinafter the 2004 custody order), the Family Court awarded custody of the child to the mother and visitation to the father, with the visitation to occur pursuant to a stipulation signed by the parties." The mother filed her petition in November 2007 and the father filed a cross petition in September 2008 to seek sole custody, alleging that there had been a change in circumstances in that the mother had frustrated his visitation rights, the child wished to reside with him, and the mother left the child in aftercare every day until 6:00 p.m.

The Second Department majority found that the mother could not be heard to argue that no change in circumstances existed to permit modification in the father's favor since she herself alleged a change to have existed. The Court approved the custody change and the reversal of the pre-existing parenting schedule. In finding the trial court to have rendered its decision founded on a "sound and substantial basis in the record," it held

> The evidence at the hearing established that there had indeed been a change in circumstances, as alleged by the mother. Furthermore, the evidence in the record supports the Family Court's finding that in the intervening years since the issuance of the 2004 custody order, the child, who was 12 years old at the time the order appealed from was issued, "has matured and made clearer her needs, her desires, and bases for those desires." Finally, the record supports the Family Court's determination that the best interests of the child would most likely be accomplished by a change of custody and affording the mother a liberal and well-defined schedule of visitation. After a thorough recitation of the testimony of the various witnesses, save for the in camera examination of the child (see *Matter of Lincoln v. Lincoln*, 24 N.Y.2d 270, 299 N.Y.S.2d 842, 247 N.E.2d 659), and an evaluation of the credibility of the witnesses, the Family Court's well-reasoned decision and order offers the mother the opportunity to accomplish precisely what she sought in her petition and what she and the child desire, which is the opportunity to spend more quality time with each other.

Inexplicably, the Court of Appeals, after taking the matter, gives us no further insight. One takeaway—be careful what you wish for: anything you say, can and will be used against you.[19]

El-Dehdan: Civil and Criminal Contempt, Prejudice vs. Wilfulness

In *El-Dehdan v. El-Dehdan*,[20] the Court speaks to the differences between civil and criminal contempt. In either case, a contempt is founded on the following basic elements which in a civil context must be shown by clear and convincing evidence[21]:

> First, "it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect" (id. at 583, 466 N.Y.S.2d 279, 453 N.E.2d 508). Second, "[i]t must appear, with reasonable certainty, that the order has been disobeyed" (id.). Third, "the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party" (id.). Fourth, "prejudice to the right of a party to the litigation must be demonstrated."

Civil contempt requires a finding of prejudice and *not* wilfulness. It is the wilfulness which can *elevate* the contempt from civil to criminal, but is not a prerequisite for, nor an element of, a civil contempt.

The Court reminds us that,

> ...civil contempt seeks "the vindication of a private right of a party to litigation and any penalty imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with that right" (McCormick, 59 NY2d at 583, citing State of New York v Unique Ideas, 44 NY2d 345 [1978]). Whereas, criminal contempt "involves vindication of an offense against public justice and is utilized to protect the dignity of the judicial system and to compel respect for its mandates" (id., citing King (26 NY3d at 35) v Barnes, 113 NY 476 [1889]).
>
> ...civil contempt is established, regardless of the contemnor's motive, when disobedience of the court's order "defeats, impairs, impedes, or prejudices the rights or remedies of a party."

Notably, the Court also addresses the ability of the court to find that an adverse inference may be properly drawn when the subject of the contempt invokes a Fifth Amendment right against self-incrimination in a civil matter.[22]

> ...the right against self-incrimination does not automatically insulate a party

to a civil action from potential liability. Both the United States Supreme Court, in *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), and this Court, in *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 42, 427 N.Y.S.2d 961, 405 N.E.2d 205 (1980), have held that *a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination. Here, defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his financial inability to comply with the January 2010 order so as to avoid civil contempt liability* (*United States v. Rylander*, 460 U.S. 752, 758, 103 S.Ct. 1548, 75 L.Ed.2d 521 [1983] [invocation of Fifth Amendment does not "substitute for evidence that would assist in meeting a burden of production"]; *Access Capital v. DeCicco*, 302 A.D.2d 48, 51, 752 N.Y.S.2d 658 [1st Dept.2002] ["(w)hile a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence"]). As we have explained, defendant relied on his conclusory statements that he no longer has the proceeds of the transfers and that he has no funds to deposit with the respondent's attorney. He cannot seek to avoid the consequences of this failure to proffer sufficient evidence by invoking his Fifth Amendment right.

We might view this case differently if defendant had sought relief from Supreme Court to avoid the prejudice he now claims was the result of a joint civil and criminal contempt hearing. *If defendant was concerned about the spillover effect of invoking his Fifth Amendment right, he could have sought to bifurcate the hearing so that the court would first consider plaintiff's criminal contempt allegations* (CPLR 2201; *Britt v. International Bus Servs.*, 255 A.D.2d 143, 144, 679 N.Y.S.2d 616 [1st Dept.1998]). He chose not to do so. Instead, he seeks reversal of the contempt determination, or, in the alternative, that we grant a new hearing solely on civil liability. The latter is essentially a request for the very remedy he could have sought from Supreme Court if he had filed a request to bifurcate. Thus, because he failed to seek this relief before Supreme Court, in the first instance, he cannot complain that Supreme Court erred in drawing negative inferences specifically allowed by law. (Emphasis added).

Matter of Suarez v. Williams: Grandparents Rights

In *Matter of Suarez v. Williams*,[23] the Court reversed the Fourth Department[24] and held

> that grandparents may demonstrate standing to seek custody as against the mother based on extraordinary circumstances where the child has lived with the grandparents for a prolonged period of time, even if the child had contact with, and spent time with, a parent while the child lived with the grandparents.[25] In pertinent part, the issue was whether or not there was a "disruption" in the living arrangements so that the time the child resided with the grandparents was not fully continuous. The mother asserted that by her ongoing contact with the child, her care of him, and her participation in decision-making—the child's "residence" with the grandparents was insufficient to meet the statutory requirements for "extraordinary circumstances." She further averred that the law required the residence with the grandparents to be "nearly complete and that the parent must relinquish all care and control, with little or no contact between the parent and child."
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> The trial court had initially found that the grandparents had standing and awarded them custody of the child as against the mother,[26] however, the appellate division reversed and dismissed their petition, opining that "the grandparents failed to demonstrate *extraordinary circumstances*, in light of the mother's presence in the child's life, even though he was primarily living with the grandparents." (Emphasis added).

In reviewing DRL § 72 in conjunction with *Bennett v. Jeffreys*,[27] the High Court found consistency between them and rejected the mother's (and the Fourth Departments view):

Domestic Relations Law § 72(2) sets forth three "elements" required to demonstrate the extraordinary circumstance of an "extended disruption of custody," specifically: (1) a 24–month separation of the parent and child, which is identified as "prolonged," (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household.

...It would be illogical to construe the statute to mean that, in order to establish an extended disruption of custody, the grandparent must demonstrate that the parent had no contact with the child for 24 months. If that were the case, the statute would be superfluous or redundant of the extraordinary circumstances specifically enumerated in *Matter of Bennett v. Jeffreys*.

...if we interpret the definition of "extended disruption of custody" under Domestic Relations Law § 72(2) to mean that the parent must not have had any contact, or at least any significant contact, with the child for at least 24 months, then this statutory ground of extraordinary circumstances would essentially be eviscerated, or at best redundant and unnecessary. This would contravene the legislative purpose, and would be contrary to the well-established rule that courts should not interpret a statute in a manner that would render it meaningless...Consequently, to give meaning to the separate statutory avenue of establishing standing, Domestic Relations Law § 72(2) must be available for a grandparent even if the parent has had some contact with the child during the requisite 24–month period. To hold otherwise would not only conflict with the legislature's intent, but would also deter grandparents from promoting a relationship between the parent and the child while the child resides with them, contrary to this state's public policy of encouraging and strengthening parent-child relationships.[5] While courts must determine on a case-by-case basis whether the level of contact between the parent and child precludes a finding of extraordinary circumstances, it is sufficient to show that the parent has permitted—as reflected in the statutory designation of the particular extraordinary circumstance at issue—an "extended disruption of custody " (Domestic Relations Law § 72[2][a] [emphasis added]).

For essentially the same reasons, a parent need not relinquish all care and control of the child. Even if the parent exercises some control over the child—for example during visitation—a parent may still, as a general matter, have voluntarily relinquished care and control of the child to the grandparent to the extent that the grandparent is, in essence, acting as a parent with primary physical custody. The key is whether the parent makes important decisions affecting the child's life, as opposed to merely providing routine care on visits.

The Court found that the trial court had properly interpreted the facts and claims and that the mother had essentially transferred custody to the grandparents for years and had "assumed the role of a noncustodial parent in virtually every way." The Court of Appeals points out that it only addressed the issue of standing and not the ultimate issue of custody which was remitted *back to the Fourth Department* to review the trial court's custody determination which had not been previously addressed on appeal due to the appellate court's decision on the standing issue.

THE FUTURE?

The Court has agreed to take on one other family law matter as of the writing of this editorial.

In *Odunbaku v. Odunbaku*,[28] the Court will determine whether or not the service by mail of a Family Court order by the clerk of the court upon a party and *not* the attorney of record serves to begin the statutory time limit to file objections in light of the Court of Appeals' decision in *Bianca v. Frank*.[29] At the appellate level,[30] the Second Department affirmed the denial of the mother's objections to the support magistrate's order as untimely:

Here, contrary to the mother's contention, the Clerk of the Court was not required to mail copies of the findings of fact and orders of the Support Magistrate to her attorney (see Family Ct. Act § 439[e]). Where, as here, the method of procedure in a proceeding in which the Family Court has jurisdiction is not prescribed by the Family Court Act, the procedure shall be in accord with rules adopted by the administrative board of the judicial conference (see Family Ct.

> Act § 165[a]). Since there is *no provision in Family Court Act § 439(e) that addresses the issue of whether the Clerk of the Court is mandated to mail copies of the findings of fact and orders of the Support Magistrate to a party's counsel when the party is represented*, the procedure shall be in accord with 22 NYCRR 205.36(b), which provides, in relevant part, that at the time of the entry of an order of support, the Clerk of the Court "shall cause a copy of the findings of fact and order of support to be served either in person or by mail upon the parties to the proceeding *or* their attorneys." (Emphasis added).

The language in *Bianca* does appear clear and the Court seemed bothered at oral argument by the Family Court clerk's failure to serve counsel. The Court will hopefully reverse and ensure that counsel of record is required to be served before the right to file objections begins to run.

GOING FORWARD

The Court of Appeals' guidance on policy considerations, interpretation of law, and remedying discrepancies between the departments is essential. It remains equally important, though, for the Court to consider some of its past decisions and realize that when an issue arises which has caused consternation in the legal and practical sense, we need the Court to provide correction, as the Court did in *In re Brooke S.B.* The Equitable Distribution Law is now 36 years old. It took nearly that long and extensive legislative maneuvering for *O'Brien v. O'Brien*[31] to finally find its way into the rear-view mirror after years of criticism by Bench and Bar alike on the issue of enhanced earning capacity. That was far too long.

Perhaps Judge Robert S. Smith's important dissent in *Holterman*[32]—addressing child support related double-dipping issues—should also be eyed for consideration just as Judge Kaye's was in *In re Brooke S.B.* Discrepancies in *Keane v. Keane*,[33] in its confusing take on income double-dipping for maintenance after the asset's income stream has been capitalized and distributed, also remain. The ruling in *Keane* is also of import given the Second Department's view in *Palydowycz v. Palydowycz*[34] on this issue where that panel overruled the same court's cogent view in *Rodriguez v. Rodriguez*[35]"to the extent it is inconsistent" and takes a different position than that of other Departments.[39] The error of *Fields v. Fields*,[36] with its reclassification of a separate asset to marital (and another dissent by Judge Robert S. Smith), should also be re-addressed.

We hope that the Court will continue to look at the issues which arise in matrimonial and family law cases to provide greater guidance and continuity and to also ensure that the law addresses the realities of life in the present. At the very least, and with due consideration to Flaubert, the "perception" of that hope may actually be true.

Endnotes

1. Gustave Flaubert (1821-1880).
2. Judge Stein's nomination to the Court of Appeals was confirmed by the New York State Senate on February 9, 2015.
3. N.Y.3d, 2016 N.Y. Slip Op. 05903 (2016).
4. 77 N.Y.2d 651 (1991).
5. 135 S.Ct. 2584 (2015).
6. The Court in its endnote 3 states that the use of the term "either" specifically limits parentage to "two parents, and no more than two, at any given time." What effect advances in reproductive technology may have in the future remains to be seen. See, Kolata, G., *Birth of Baby With Three Parents' DNA Marks Success for Banned Technique,* NY Times (Sept 27, 2016), http://www.nytimes.com/2016/09/28/health/birth-of-3-parent-baby-a-success-for-controversial-procedure.html?_r=0.
7. Judge Kaye sought to have an "in loco parentis" test for standing to seek visitation.
8. *Matter of Brooke* referencing *Matter of Shondel J. v. Mark D.*, 7 NY3d 320 (2006).
9. *The Right to Be Heard on an Initial Custody Determination: The Court of Appeals Considers S.L. v. J.R.*, NYSBA Family Law Review, Spring/Summer 2016.
10. 27 N.Y.3d 558 (2016).
11. 126 A.D.3d 682 (2nd Dept 2015).
12. *See Berk v Berk*, 70 A.D.2d 943 (2d Dept 1979), reversing 95 Misc. 2d 33 (Fam. Ct., Rockland Co. 1979, Miller, J.); *I.K. v. M.K*, 194 Misc. 2d 608 (Sup. Ct., N.Y. Co. 2003, Gische, J.).
13. 27 N.Y.3d 423 (2016).
14. 124 A.D.3d 672 (2d Dept 2015).
15. "The intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment."
16. See also, Tippins, T., *Recording, "Vicarious Consent" and Judicial Overreach,* NYLJ May 26, 2016.
17. 26 N.Y.3d 1103 (2016).
18. 120 A.D.3d 801 (2d Dept 2014).
19. *Miranda v Arizona,* 384 U.S. 436, 469 (1966).
20. 26 N.Y.3d 19 (2015).
21. It has been held that the standard of proof on a criminal contempt is beyond a reasonable doubt. *Rubackin v. Rubackin*, 62 A.D.3d 11 (2d Dept 2009).
22. That, of course, presumes that the privilege is still legitimately available to be invoked.
23. 26 N.Y.3d 440 (2015).
24. 128 A.D.3d 20 (4th Dept 2014).
25. The grandparents in this matter were the *paternal* grandparents.
26. The father had filed his own custody petition, but later withdrew it and supported the grandparent's (his mother and father) position.
27. 40 N.Y.2d 543 (1976).
28. 2015 N.Y. Slip Op. 93515, argued October 20, 2016.

29. In *Bianca v. Frank*, 43 N.Y.2d 168 (1977), a police officer served with an order of dismissal from the Nassau County Police Department was not time-barred from filing a petition to review the dismissal where he was represented by counsel and his attorney was not served with the order. The Court held, "... once counsel has appeared in a matter a Statute of Limitations or time requirement cannot begin to run unless that counsel is served with the determination or the order or judgment sought to be reviewed (*Matter of Hammer v. Suffolk County Dept. of Labor*, 51 A.D.2d 549, 378 N.Y.S.2d 427).

    Indeed, once a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf. This is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified (see, e.g., CPLR 2103, subd. (b); 7506, subd. (d); Executive Law, s 168; Administrative Procedure Act, s 307)."

30. 131 A.D.3d 617 (2d Dept 2015).

31. 66 N.Y.2d 576 (1985).

32. *Holterman v Holterman*, 3 N.Y.3d 1 (2004).

33. 8 N.Y.3d 115 (2006).

34. 138 A.D.3d 810 (2d Dept 2016).

35. 70 A.D.3d 799 (2d Dept 2010).

36. *See* Scheinberg, E. and Klein, R.J., *"Keane": Double Dipping, Tangible v Intangible Assets*, NYLJ May 24, 2007; Galasso, P., *The Death of Double-Dipping in Divorce Context?*, NYLJ Aril 27, 2016; Bronstein, P. E. and Typermass, D.A., *From O'Brien to Keane: Building on a Weak Foundation*, NYSBA Family Law Review, Winter 2009; Jones, R.W., *The Inequity of Keane v. Keane: A Call for Corrective Action*, NYSBA Family Law Review, Spring/Summer 2016.

37. 15 N.Y.3d 158 (2013).

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S.L. v. J.R.: A Clarion Call for Clarity in Custody Cases (LOL)

By Robert Z. Dobrish

The Court of Appeals in *S.L. v. J.R.*,[1] decided on June 9, 2016, has reversed a unanimous decision by the Appellate Division, Second Department[2] affirming the trial judge who had granted custody of a minor child to the father without the necessity of a hearing. The trial court apparently had before it the history of the proceedings, admissions by the mother, the conclusions of the neutral forensic mental health evaluator, the opinion of the family therapist, the court-appointed attorney for the children and the agency supervising the mother's visits, which all supported granting custody to the father.

Our Highest Court has, nevertheless, determined that due process requires a hearing at which time admissible evidence could be received—declaring that the evidence before the Court on this record did not satisfy "the undefined and imprecise adequate relevant information standard which had been adopted by the courts." That "imprecise" standard held that where a court had before it adequate relevant information to enable it to make an informed determination with respect to the best interests of the child, an evidentiary hearing was not necessary for a temporary custody determination.[3]

The Court of Appeals ruled that this standard tolerated "an unacceptably high risk of yielding custody determinations that do not conform to the best interest of a child." But there is something that rings hollow here. We are being told that "adequate relevant information" is a vague term (as if "reasonable doubt" or "preponderance of the evidence" or "unconscionable" are more precise). I submit that the vaguest of all of the terms in the court's reasoning—the term that truly defies definition—is "the best interests of the child." If that term is given a more precise definition, perhaps we could have a basis for granting summary judgment in custody cases. It might have made more sense for the Court to have said the "best interests" of the child standard was imprecise and in too many instances presents an unacceptably high risk of yielding determinations that do not conform to the "adequate relevant information standard."

Are "Best Interests" the Best Standard?

How could anyone criticize a standard so perfect, so pure and simple as "Custody issues should be determined in the best interests of the child"? But, as Oscar Wilde wrote, "The truth is rarely pure and never simple,"[4] and so it is with custody decisions. Indeed, the "best interests" of a child are rarely served by custody decisions being made by a court and the "best interests" of a child are, in fact, never served by awarding custody to one parent over another. The question in these cases is not what serves the child's best interests, but what methodology (and result) causes the least harm.

It is well-known and probably universally agreed that a contentious divorce harms a child. It is well-known that changes in a young child's routine are harmful and that results are often misguided when a court takes a long time to decide on a custody issue, because during that time the child's position changes. From those well-known truths we must conclude that, to protect children, custody decisions will not be well-made unless they are made quickly, with certainty and a minimum of contention. It is for that very reason that controversial proposals have been put forward that are designed to do away with the "best interests" standard in favor of a more predictable and simple procedure where the determination can be accomplished almost formulaically—bringing about, what is supposed to be certainty, efficiency and economy.

Arrival and Early Application of the Best Interest Standard

For more than half a century, the "Tender Years Doctrine" was arguably the "rule of thumb" in almost all child custody proceedings across the country. That doctrine presumed that a mother's care is in the best interest of the child and, therefore, the mother is the preferred custodian for young children unless the father can prove that the mother is "unfit." Eventually states rejected the Tender Years doctrine, reasoning that "sound application of the 'best interests of the child' criteria requires that the court not place a greater burden on the father in proving suitability for custody than on the mother."[5] Since the Tender Years Doctrine fell into disfavor and courts began prohibiting reliance on gender preferences in the early 1970s, the best interest standard has unquestionably dominated child custody determinations across the country. "The primary purpose of the best interest standard, at least formally, is to underscore the priority of the welfare of the child who is an innocent bystander to the parents' adversarial litigation, as opposed to any presumption that treats the child's welfare as subordinate to parental rights and entitlements."[6] Proponents of the best interest standard argue that it promotes both flexibility and adaptability. They also argue that it allows courts to apply knowledge from psychological research to the specifics of each custody case, and allows judges to respond to changing social and legal trends.[7]

The best interest standard, however, has also been heavily criticized. By definition it is indefinite, providing no objective basis for any determination. Its administration is subject to broad discretion even where lists of factors are employed and therefore allows—or even encourages—personal biases to influence any decision. Many would say that generally biases favor the mother, but in

some cases not. The unpredictable brings about contention, the contention leads to delay, and the delay is harmful to the child.

Competing Doctrines That Have Attempted, but Failed, to Replace the Best Interest Standard

A Women's Rights Movement which reappeared in the 1970s ran parallel with a father's rights movement resulting in vast changes in our society.[8] As more women entered the work force and more fathers began to spend additional time with their children, more research was done on the effects of divorce on children and the need of children to spend time with each parent.

Psychological Parent

In 1973, Joseph Goldstein, Anna Freud and Albert Solnit published "Beyond the Best Interests of the Child," arguing, in essence, that the State had no authority, and even less skills, to make custody determinations when there was a psychological parent available to do so. They asserted that a loving parent would make decisions at least as well as a judicial officer might, and it was always better for a child to have a parent make a decision rather than the State.[9] They proposed that the psychological parent could be determined based on the historical pattern that had been created during the time when the family was intact, or, if that had never occurred, what had been occasioned before court intervention. Carving out limited exceptions, they asserted that such a system would provide prompt and predictable results. Their positions were never adopted and became controversial, mainly because, as part of their proposition, they advocated that the psychological parent should make the decision regarding the amount of time the non-psychological parent would spend with the child. Judges and mental health professionals universally disagreed with that aspect of the theory.

Decision-Analytic Framework

In 1975, Robert Mnookin wrote an article that ran parallel to the Goldstein, Freud, and Solnit approach, using what he referred to as a "decision-analytic framework" to deconstruct the best-interest standard.[10] In the article, he claims that the best interest standard applied by courts to determine child custody is indeterminate and that decisions about children should be vested in private hands, essentially the family, except in cases where the state's power is necessary for the child's protection. He explains that "a single set of substantive standards and procedures to govern all custody disputes would be. . .unwise" because "even if accurate predictions were possible in more cases, our society today lacks any clear-cut consensus about the values to be used in determining what is 'best' or 'least detrimental.'" Instead, disputes between private individuals who cannot agree on how to share responsibility for the child should be resolved by creating a preference for a psychological parent's claim over that of a genetic parent "who lacks any substantial prior connection to the child's life."

The psychological parent standard and the "decision analytical framework" lay dormant for over two decades while the best interest standard and concepts of joint custody developed. But just as all pendulums have a way of swinging the other way the manner in which custody evaluations were being done to determine "best interests" began to be questioned,[11] leading to examination of the extraordinary discretion required in making these determinations. In addition to criticizing the methodology of mental health professionals and making recommendations without scientific validity,[12] in 2001, the prestigious American Law Institute endorsed the approximation standard over best interest as the better standard for making custody determinations.

"The Approximation Standard provides that custody decisions should be based on the proportion of time that each parent participated in caretaking prior to the separation."

Approximation Standard

The Approximation Standard provides that custody decisions should be based on the proportion of time that each parent participated in caretaking prior to the separation.[13] While a number of states have incorporated the concept in their factors only West Virginia has adopted the rule.[14]

Critics of the approximation standard argue that it lacks reliable social science support. Specifically, that "it mistakenly assumes that past caretaking is an index of qualitative aspects of parent-child relations" by "overlook[ing] parents' intangible, yet significant, contributions to their child's well-being" and that "quantity of care does not correlate with quality of care."[15] Additionally, it is argued that the approximation rule would not eliminate litigation, but instead would just change what is litigated by focusing on each party's claims and proof about their past division of time with the children. With this analysis it is inevitable that the quality of that time will need to be evaluated, and, as a result, will also

be litigated. In the end, the approximation rule goes the way of the psychological parent and becomes another factor that could be considered under the best interest standard.

Practices That Attempt to Supplement the Best Interest Standard's Deficiencies

While no doctrine has managed to replace the best interest standard, it is obvious that the best interest standard standing alone deceives its namesake and has resulted in widespread dissatisfaction and a desire for supplements that serve a child's best interest in the decision making quest.

Client-Directed Representation of Children

In custody matters, attorneys for children are sometimes appointed "for children who…require the assistance of counsel to help protect their interests and to help them express their wishes to the Court."[16] "Client-directed representation refers to a situation where the child's preference sets the objectives of the attorney's representation."[17] Generally an assessment of an individual child's cognitive abilities determine whether the child is capable of consulting with and directing the attorney and the rule of thumb is at about 14-to-15 years old.[18]

However, critics argue that this model is flawed because it focuses too heavily on the child's cognitive abilities and does not take into consideration the child's emotional life or maturity of thought.[19] Children's thinking processes about cause and effect are less developed than those of adults. Likewise, even more emotionally and cognitively developed adolescents do not have the same capabilities as adults to consider the future consequences of their present actions or statements.[20] As a result, critics are concerned that not only are children incapable of effectively participating in the divorce process, but their fears and worries are exacerbated by placing them in the middle of the dispute.[21]

Mediation

Some states or individual courts require the parties to attend mediation before their custody proceeding can move forward in the court system. Most judges employ methods designed to avoid the decisions being made by the court rather than by the parents themselves. Justice Ellen Gesmer, of the Appellate Division, First Department, while sitting as a matrimonial judge at New York County's Supreme Court, published the remarks she made to divorcing couples who appeared before her, encouraging the parties to act in their children's best interests by settling their case. She explained that "trials concerning children raise very intimate issues. I will listen very carefully to the testimony and arguments that your very good lawyers will present. But I will never know as much as you do about you and your children, your values and priorities, and what you each have to contribute to their lives. So you are in a much better position than I am to craft a plan that accounts for your strengths and weaknesses as parents, and your children's wishes and dreams."[22]

It is understood by those who are intimately involved in custody cases that the best interest of the children would be to have the parents, who know the needs of their children best, decide their children's future. Moreover, it promotes healthy co-parenting after a divorce is finalized by helping the parties end the process with a better relationship.

However, despite this knowledge and the encouragement given to resolve custody disputes, some cases don't settle, and some are inappropriate to the process of mediation. In those cases, a court must have some basis on which to decide custody other than gender preference, personal bias, coin flip or fight to the death. Forty (40) states currently have factors that must be considered. New York has only one factor that is listed in the statute as a required consideration: domestic violence. While New York does not have a statutory list of factors, there are nevertheless standards that are usually considered. These standards have been established by case law, and include each parent's ability to care for the child; each parent's mental health and physical well-being; any history of domestic violence in the family; the parents' availability; the child's preferences, depending on the child's age; the parents' ability to cooperate with each other; existing agreements; forensic evaluations; among other factors.[23] At the end of the day, we are left with a vague standard that defies definition—allowing each case to be influenced by biases, predilections, good and bad lawyering, and in particular, common sense and judicial wisdom. If the best interests standard could be as clear as, let us say, "adequate relevant information"—which "you know it when you see it"—perhaps we could devise a mechanism for a determination akin to summary judgment, permitting judges to make custody determinations without a hearing upon "adequate and relevant information."

Endnotes

1. 27 N.Y.3d 558 (2016).
2. 126 A.D.3d 682 (2d Dep't 2015).
3. *Assini v. Assini,* 11 A.D.3d 417 (2d Dep't 2004); *Hom v. Zullo,* 6 A.D.3d 536 (2d Dep't 2004).
4. Wilde, O., *The Importance of Being Earnest: A Trivial Comedy for Serious People* (1885)
5. *State ex. rel Watts* v. *Watts,* 77 Misc. 2d 178, 179 (Fam. Ct., N.Y. Co. 1973).
6. Warshak, R.A., *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"* (Baltimore Law Review, Vol. 41, 12/16/2011).
7. *Id.*

8. *See also Watts v. Watts*, 77 Misc. 2d 178 (Fam. Ct., N.Y. Co. 1973) (holding that any presumptive preference in favor of maternal custody violated the father's right to equal protection under the fourteenth amendment).
9. Goldstein, J., Freud, A., and Solnit, A., *Beyond the Best Interests of the Child* (1973).
10. Mnookin, R., *Child Custody Adjudication & Judicial Function in the Face of Indeterminacy*, Law and Contemporary Problems, Vol. 39, No. 3 Summer, 1975.
11. Baerger, D.R., Galatzer-Levy, R., Gould, J.W., Nye, S.G., *A Methodology for Reviewing the Reliability and Relevance of Child Custody Evaluations* (AAML Journal, Vol. 18, 2002).
12. *See, e.g.*, Melton, G.B., et al., *Psychological Evaluations for the Courts* (2nd Ed.) Chapter 16; series of articles written on Custody Evaluation by Timothy M. Tippins for the New York Law Journal, 2004-2006.
13. Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2001).
14. W. Va. Code § 48-11-206. Allocation of custodial responsibility. (a) Unless otherwise resolved by agreement of the parents under section two hundred one of this article or unless manifestly harmful to the child, the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action, except to the extent required under section two hundred nine of this article or necessary to achieve any of the following objectives:...).
15. Warshak, *supra* note 6.
16. N.Y. Fam. Ct. Act § 241.
17. Kaplan, W.H., *Does Client-Directed Representation of Children Make Good Sense Based on Neuroscience and Child Psychology?*, NYSBA Family Law Review, Fall 2014, Vol. 46, No. 3.
18. *Feltman v. Feltman*, 99 A.D.2d 540 (2d Dep't l984) Child of 11 is not mature enough to weigh intelligently factors necessary to make a wise choice as to his or her custody; *Robert T.F. v. Rosemary F.*, 148 A.D.2d 449 (2d Dep't 1989); *see also* Kaplan, *supra* note 17.
19. Kaplan, *supra* note 17.
20. *Id.*
21. *Id.*
22. Gesmer, E., *Note to Divorcing Parents: Resolve Your Issues About Children*, NYLJ, September 21, 2015 (available at: http://www.newyorklawjournal.comlid=12027376815321Note-to-Divorcing-Parents-resolving-Your-Issues-About-Children#ixzz3mUZEDtR6).
23. *Eschbach v. Eschbach*, 56 N.Y.2d 167; *Auffhammer v. Auffhammer*, 101 A.D. 2d 929 (3d Dep't 1984); *McCrocklin v. McCrocklin*, 77 A.D.2d 624 (1st Dep't 1981).

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The Art of Business Valuation

By Peter J. Galasso

Most matrimonial practitioners confronted with a divorce case involving a complex business valuation often wisely turn to their favorite business valuator for help. While historically a business valuator could rely on a normalized five year financial look back to establish an estimate of future cashflows and, therefore, potentially opine an approximate value for a company. The rapidly changing faces in today's business world have rendered valuators far less confident about their opinions than they were a decade or so ago. And with good reason.

To uncover how the business unknowns have exponentially grown, one need not drive very far. For example, contrary to the expectations of many investors counseled by allegedly erudite industry experts, the previously inclining value of a NYC Taxi Medallion literally dropped like a stone once Uber found its innovative way into the public transportation market. Those attorneys who reflexively traded off the inflated value of a taxi medallion for a stable marital asset of equivalent value are still to this day dodging their clients' irate Monday morning calls over their lack of prescience.

Divining the worth of a niche business or one challenged by an unforeseen adversity often requires that the court consider a multitude of factors that may affect future cashflows, such as emerging economic and technological factors that may influence future revenue and profitability. Virtually every business owner in today's frantic world is worried about what the future may bring. When in the throes of a divorce, a business owner naturally hopes to convince the court that a profitable past is not a reliable indicator of future value. General and specific industry risks now more than ever drive the valuation mantra. As most seasoned matrimonial litigators can attest, how well an attorney is able to demontrate the legitimacy of those risks which threaten a company's future vitality can potentially make a multimillion dollar difference in the ultimate outcome of a divorce action.

1. The Forensic: Neutral vs. Advocate

The first decision an attorney usually must make in a case where a business needs to be valued is whether or not to agree to the designation of a neutral business valuator. Too often, an attorney's impulse is to leave the valuation issues in the hands of a neutral accountant. However, because that valuator's potentially unbiased, misguided or financially crippling opinion may be readily adopted by an arithmetically challenged jurist anxious to avoid a battle of alleged "hired guns," a true advocate best serves his client by respectfully opposing the engagement of an unconstrained and costly neutral and hiring his own expert with whom he can collaborate in producing an opinion on value that can be factually and logically justified and that also simultaneously achieves the client's litigation objectives. As will be explained, while a neutral is certainly capable of aggregating and simplifying the historical financial data of a business, to persuasively articulate where extrinsic business and economic factors may steer a business in the future, an advocate needs to enlist an expert who is ready to embrace your client's vision of the future.

2. The Subject Business: "LB"

For the didactic purposes of this article, we selected a family owned lighting business ("LB") to value. In this example, the husband started LB during the marriage, which as of the date of the commencement of the parties' divorce action, maintains two suburban retail locations. LB has been in business for twenty strong profitable years but recently suffered a significant decline in revenue due in large part to the advent of intense internet competition and the grand opening of a Home Depot a quarter mile from its primary revenue-producing location. Although strategic moves are being contemplated to address the loss of customers to Internet-based purchases, that often beat the prices LB charges, and the new price competitive and highly visible Home Depot that just moved into town, the timing of the parties' divorce from a valuation and, therefore, judicial perspective, could not be worse. The key for an attorney looking to take advantage of the uncertainty that will necessarily permeate the valuation process is to learn everything he or she can about the business and then play cynic.

3. The "Amazon Effect"

With the marketplace chaos that imperils many businesses as its backdrop, the business community has identified a phenomena known as the "Amazon Effect," which has proven to be as devastating to small businesses as Tom Hanks' mega bookstore in "You've Got Mail" was to Meg Ryan's neighborhood bookstore, "The Shop Around The Corner." Small businesses are obviously not alone in their vulnerability to the Amazon Effect, a fact to which the formerly ubiquitous Borders will readily attest.

Diagnosing the business impact of the Internet and of other technological advances on the valuation process calls for a thoughtful fact-based analysis. In our example, it requires that the wife's attorney collaborate with her expert to figure out how best to leverage the intangibles of the business and minimize the risks that the Internet, competition and the future may hold to increase the value of LB and thereby enhance the wife's equitable interest. Conversely, it necessitates that the husband's attorney work with his expert to discount the historical financial data of LB and maximize the specific risks that

LB is likely to confront in the future to ensure that the wife's award does not turn into a windfall. The conclusions drawn by the judge from the relevant business and economic information you furnish through your expert's testimony in a case where value can only be determined by capitalizing the expected future cashflows of the business can be quite dramatic, as the disparate valuations presented in the Arizona Ice Tea partnership dissolution case revealed.[1]

4. "RAIDS"

The responsive cry to an owner spouse's lament over the Amazon Effect or some other business hindrance is the shrill sound of the mnemonic known as "RAIDS," or Recently Acquired Income Deficiency Syndrome. Once that mnemonic caught the attention of the Matrimonial Bar a few decades ago, a husband whose career was honestly on a decline could not buy a break before incredulous jurists infected by the RAIDS virus.

After a number of highly publicized business collapses, the judiciary's reluctance to seriously entertain the distinct possibility that a husband was actually telling the truth about his Glengarry Glen Ross[2] moment gradually began to lessen. Whether the judge is fascinated or intimidated by the valuation chore, it is fair to say that the judiciary's view of matrimonial landscape has radically changed. Today's judges have prudently concluded that the risks of a business can no longer be disregarded. The world has gone full circle. And it is the attorney's obligation to work with his expert to convince the court to appreciate or discount the risks most responsible for the variations in each party's expert's valuation opinion.

5. Internal Revenue Ruling 59-60

Most accountants begin their valuation analysis by quoting Internal Revenue Ruling 59-60, which defines the fair market value of a business as " the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts." Although initially presented for use in estate and gift tax calculations, this 57-year-old Revenue Ruling remains the definitive outline of the approach, methods and factors to be considered in valuing privately held businesses. A key element of R.R. 59-60 is that a "sound valuation will be based upon all the relevant facts, but the elements of common sense, informed judgment and reasonableness must enter into the process of weighing those facts and determining their aggregate significance." Cognizant of the need for flexibility in connection with the valuation of a privately owned business, this Revenue Ruling acknowledges that, "[p]rior earnings records usually are the most reliable guide as to the future expectancy, but resort to arbitrary five-or-ten-year averages without regard to current trends or future prospects will not produce a realistic valuation."

6. Standard of Value: "SSVS"

In every business valuation report, the valuator identifies and defines the different valuation approaches recognized by the Statements on Standards for Valuation Services ("SSVS") as appropriate for the valuation of a small closely held business. The three approaches are the Market Approach, the Net Asset Value Approach (or Cost Approach) and the Income Approach.

A. The Market Approach looks at comparable business sales for guidance. It is a reliable method provided several similarly situated businesses were recently sold in the same geographical area and your valuator is privy to the circumstances surrounding those sales, thereby supporting the use of the same valuation equation for the subject business. This approach is most commonly used in valuing real estate. Rarely can one find small businesses that have the comparability that residential real estate enjoys.

B. The Net Asset Value Approach is another name for the breakup value of the business. This approach is best where the sum of the assets less its liabilities is greater than the value determined by the Income or Market Approaches.

C. The Income Approach looks to capitalize an income stream to derive a value. This can be done under a single period method known as the Capitalization of Cash Flows or the multi-period method known as the Discounted Cash Flow method. The Income Approach requires that the appraiser calculates a proper income stream and divides that income stream by a capitalization rate to determine the value.

7. Excess Earnings Approach

Where the business produces a profit in addition to having a net asset value, the appraiser can elect to use a hybrid method of the Asset and Income approaches known as the Excess Earnings Approach. Simply stated, this method adds the value of a company's goodwill to the value of the company's net tangible assets. The spin on this methodology, like all income-based valuation methodologies, makes for an interesting challenge for the judge, namely, how to determine what constitutes the excess income of the business and, second, what should be the multiple of that excess earnings stream to properly reflect the goodwill of the business.

Like political pundits trying to take the public's pulse in this year's Presidential election, in employing the Income Approach, business valuators are being effectively asked to predict the future. But as history has taught us, the economy is hardly predictable. It is through that prism that the presentation of your expert must be carefully choreographed.

8. Qualifying the Expert

We begin the business valuator's examination at trial by qualifying him as an expert whose opinion on value should be admitted into evidence. Usually an accountant, this part of the examination primarily focuses on the expert's education, work experience, valuation experience, and courthouse experience. Before the court will deem your witness an expert, however, your adversary will be permitted to challenge, probe and seek to discredit your expert's credentials to prevent the introduction of his testimony. While some attorneys enjoy poking fun at the expert during their voir dire, courts seldomly decline to deem a Certified Public Accountant an expert in valuation, especially one whose testimony in other cases has been admitted by colleagues on the bench.

After calling and having the expert sworn, the proponent's examination should proceed as follows:[3]

> **Q**: Good Morning, Mr. Expert.
>
> Were you engaged by the Plaintiff in this divorce action pursuant to a written retainer agreement?
>
> **A**: Yes
>
> **Q**: I show you what has been marked as Exhibit "29" for identification and ask whether it is the original retainer agreement you executed in connection with your engagement in this case?
>
> **A**: Yes.
>
> After offering Exhibit "29" into evidence, usually admitted by the trial judge without objection, which would never be sustained in any event, you should follow up in this way:
>
> **Q**: Exhibit "29" reads in part that your opinion as to the value of the Business would not be influenced by the fact that the plaintiff has agreed to pay you for your services. Is that a term that is to be taken seriously?
>
> **A**: Absolutely. My reputation as a witness that judges and attorneys can trust depends upon their favorable perception of my integrity and credibility. No one case would ever be a good trade for that.

Obviously, preemptively dealing with the "hired gun" branch of your adversary's anticipated cross can be further elongated by having your expert rattle off the names of fellow judges who have deemed him an expert and the prominent attorneys from the local bar who have engaged his firm . Most of the matrimonial bench are familiar with the players in the business valuation community and usually err on the side of admitting expert testimony to allow for appellate review, and thereafter decide how much, if any, weight to give to the testimony.

At this point the expert's curriculum vitae should be identified by your expert and be offered into evidence. To the extent you wish to amplify the information contained in your expert's CV, you should do so. For example, you may wish to have your expert testify about cases where he was deemed an expert in connection with the valuation of a similar business or about valuation seminars in which he participated in the county the case is pending or about the frequency your adversary has utilized his services. Once you complete qualifying your expert, you can then make a request that the court deem your witness an expert and permit him to testify as to what the value of the business is as of the date of commencement and as of the date of trial, unless you believe you can justify selecting a different but more advantageous date. The witness will then be tendered to your adversary to voir dire. A typical but condensed voir dire from your adversary may sound something like this:

> **Q**: Did you testify as an expert in *Cole v. Cole*?
>
> **A**: Yes.
>
> **Q**: Are you aware that in her decision after trial, Justice Curmuggia not only rejected your opinion as to value but also found that you had employed the wrong valuation methodology? Did I read that decision correctly?
>
> **A**: Yes you did.

Once your adversary finishes his voir dire and lodges his objection, you will respond that your adversary's objection goes to the weight to be given your expert's testimony, not to its admissibility. Indeed, in every contested case, the court is free to adopt one expert's opinion over another's. That decision favoring one expert's opinion over another does not disqualify the expert whose opinion was rejected from ever testifying as an expert in the future; otherwise, every expert whose opinion is rejected by a judge, who himself may be wrong, would be precluded from testifying as an expert in any future proceeding. We turn now to the substantive testimony that needs to be elicited from your expert.

9. Valuation Testimony

> **Q**: What business did you value in this case and what was the valuation date utilized?
>
> **A**: I was asked to value LB as of the date this divorce action was commenced and as of the date of trial.

A. Setting a Valuation Date

The expert's answer assumes that the court had not already designated a specific valuation date in a pretrial order, which should only be rarely done on consent, given how precarious the time spent litigating may prove to be relative to the value of the business. Always critical to your expert's testimony is the valuation date that you want the court to adopt in rendering its decision as to the value of the business. Pursuant to DRL § 236B(4)(b), the court is encouraged to set a valuation date for the parties' marital assets as early in the litigation as possible. That date can be any date between the date of commencement and the date of trial. As suggested above, given the volatility of the marketplace and the chance of an unforeseen business bonanza or catastrophe, the court should be encouraged to defer a determination until as close to trial as possible. To appreciate this admonition one need only imagine stipulating early in the litigation to set the date of valuation on the date of commencement. Then imagine a hurricane like Sandy wiping out your client's business the day before trial. Under existing law, what happens after a valuation date is agreed upon is irrelevant. Despite the fact that something might happen that the parties simply did not anticipate, the court does not have the inherent power to modify an agreed-upon valuation date order. To avoid a litigation crisis, the court's valuation date determination needs to be deferred to the latest date possible to keep your options open.

"Always critical to your expert's testimony is the valuation date that you want the court to adopt in rendering its decision as to the value of the business."

B. Moving a Valuation Report into Evidence

At this point, the expert's report should be offered into evidence, subject to your adversary's cross-examination. Most judges will accept the report into evidence, while some may deny or defer admission until after the expert's testimony concludes. If the judge chooses to be "old school" and cling to the rules against the admission of hearsay, even if the report actually does not constitute *inadmissible* hearsay, given that your expert is available for cross-examination on the Report, you can always plod through the report by questioning your expert about exactly what he did and what he read or considered in developing his valuation opinions.

> **Q**: I show you Exhibit "31," which was previously marked for identification and ask whether this is the Valuation Report you prepared and whether it contains the values you attributed to the business on the two valuation dates selected and also sets forth the information you relied upon in reaching your opinions on the two values?
>
> **A**: Yes.
>
> **Q**: Judge, I move Exhibit "31" into evidence.

C. Valuator's Methodology and Opinion

> **Q**: Can you state with a reasonable degree of accounting and business valuation certainty the value you attributed to LB in your expert opinion, as of the date of commencement and as of the date of trial?
>
> **A**: Yes. As of the date of commencement, I valued LB at $1 million and as of the date of trial I valued it at $500,000.
>
> **Q**: Does your report identify the documents you reviewed and the people you interviewed and relied upon in reaching that opinion?
>
> **A**: Yes.
>
> **Q**: Does your report also include your analysis of those documents and the valuation methodology you employed in opining the value of LB on those two dates?
>
> **A**: Yes.
>
> **Q**: What valuation methodology did you employ in arriving at your opinion of LB's value?
>
> **A**: I utilized an income approach that is based on the capitalization of the expected future cash flows of LB. The expected future cash flows of LB are capitalized by an appropriate risk rate derived from the application of the "Build Up" method.
>
> **Q**: Before you explain what the Build Up method entails, what other valuation methods were considered?

A: The Market approach and the Net Asset Value approach.

Q: Why did you choose to employ the Income approach rather than the Market or Net Asset Value approaches?

A: The Market approach is a reliable way to value a business when data regarding the sale of comparable businesses is available. Unfortunately, I could not find a comparably sized business situated in a comparable business environment that had been sold in the last five years from which I could extrapolate LB's value. As a result, since the identification of comparable businesses is a condition precedent to the use of the Market approach, it was not a viable valuation methodology here.

Q: What about the Net Asset Value approach?

A: The Net Asset Value approach is a valuation methodology for businesses which derive their value from the sum of the parts of the business as if it was being liquidated, which is not the case here. That left me the only viable and reliable valuation option for a business like LB, which is an approach that measures cashflow and then attempts to apply a capitalization rate to yield the value of the business.

Q: Please take us through the Income approach calculations and considerations that led you to your opinion as to the date of commencement and the date of trial values you attributed to LB.

A: To begin, the wife's expert and I agreed that the normalized level of income generated by LB before compensation to the owner is $500,000. This amount includes direct and indirect income to the husband last year. By direct income, I mean the combination of the husband's salary and of the profit reported by LB. Indirect income is comprised of the husband's perks. Utilizing the income approach, my next step was to determine what the husband would make as reasonable compensation for the job he performs at LB. Toward that end, I researched in ERI[4] and RMA[5] databases. Based upon that research, I determined that the annual reasonable compensation for the husband's annual overall management and sales work is $150,000. This estimate also took into consideration the actual amount he paid to his other managers and part-time sales people. Subtracting the husband's reasonable compensation from his average annual earnings over the past five years, we arrived at profit before taxes figure of $350,000. After applying a tax rate of 40% I calculated a profit after tax of $210,000. We then adjusted the profit after tax for needed working capital, depreciation and amortization, capital expenditures, and tax impacted interest expense. After those adjustments were made, we determined the net free cash flow to be $300,000, which was then used as a proxy for the future expected net cash flow of LB to which to apply the build-up rate and opine the value of the business, before consideration of discounts for lack of marketability and lack of control.

Q: Was your employment of the Build Up method in this case consistent with SSVS (Statements on Standards for Valuation Services)?

A: Yes. Utilizing the Income Approach here is also consistent with the principles contained in other widely relied upon texts such as, *Valuing a Business, 5th Edition: The Analysis and Appraisal of Closely Held Companies*, written by Shannon Pratt. The Build Up method is the best way for valuing businesses like LB.

Q: Please take us through your computations in valuing LB.

A: LB's value is calculated by capitalizing a net free cash flow from LB by a capitalization rate determined under the build-up method. The computation requires that the $300,000 net cash flow be multiplied by the expected growth rate and then as divided by the capitalization rate. The capitalization rate is derived by adding together the long-term treasury bond rate, the equity investment premium over bonds, a size premium, the specific industry risk premium, and the company specific risk premium, less the expected growth rate.

Q: Explain why it makes sense to adopt this valuation equation and inform the court from where the data emanates that determines the rates and premiums set forth above?

A: Since the goal in calculating the value of a business is to opine how much a hypothetical buyer would pay to benefit from the future cash flow of LB, we utilized information from the market that showed us what return a typical investor could expect when investing in the market on the safest investment (long-term treasury bond). We added to that rate the additional perceived risk when investing in a large publicly traded stock and the additional return premium expected when investing in a small publicly traded company and the additional risk associated with the specific industry in which LB operates which are statistics found in Ibbotson Associates, Duff & Phillips LLC *Risk Premium Report 2015*. In view of the fact that investing in a small privately held business is far riskier than investing in a long-term treasury bond or in a large or publicly traded business, small privately held companies must also be adjusted for the specific industry risks that are likely to be confronted before a buyer would be willing to part with his hard earned money on a purchase. The consensus of accountants who endorse this valuation methodology believe a buyer would want a return far greater than what he could earn in a market-based investment. That is where the company's specific risk premium comes in to play.

Q: How is the specific company risk premium percentage determined?

A: From everywhere, at least potentially. In determining the percentage associated with a specific company risk, a valuator is to look at company specific factors, such as, the ferocity of the competition, imminent taxation and regulatory changes, relevant technological developments, among many other factors that might alter the risks that impact the confidence of our projections about LB's future cash-flow.

Q: Is there an authoritative set of accounting or business guidelines that provides us a chart for the specific company risk premium you used for LB?

A: Actually "no." Common usage of this statistic ranges from a low of 10%, where the perceived risks are low, and 1%, where the business looks like it is about to go out of business.

Q: If I understand your report, the first four factors in the Build-Up of LB's value remained relatively constant while the company specific risk premium doubled in the two years this action has been pending, correct?

A: Yes.

D. Specific Industry Risk

What comes next is the guts of your argument, depending on which side of the caption you are representing. Because no rule book exists for determining the company's specific risk premium, it is attorney advocacy in the same brand as the conflicting advocacy that takes place in personal injury cases on the issue of damages, but here the jury is the judge. Perhaps the issue should be properly decided by a jury, given the enormous difference a judge's calculation to the company specific risk premium may have on the value attributed to the business. But this is not the only area of valuation where the court is asked to analyze conflicting financial data and statistics in applying the Income approach, as the questioning below reflects.

Q: Let me digress for a moment and return to your calculation of the central figure in the valuation equation, the "net free cash flow of the business," also referred to as the return on the owner's investment in the business each year. How do you justify your decision to ignore two of the past five year's tax returns in calculating the average net income figure that you used in your valuation equation?

A: Based on my experience. Which is the same reason why I weighted the three years I did consider differently, given that I felt that the earnings generated in the last year deserved the greatest weight in comparison to the earnings generated four years ago, which was the year LB opened its second location. The earnings from five years ago were disregarded because only one store existed then and the earnings from two years ago were of limited value because one third of LB's main store was destroyed by Sandy.

Q: Revenue Ruling 59-60 states that a valuator should look at the five years that precede the date of valuation, does it not?

A: Revenue Ruling 59-60 was written in 1959. Our economy is changing far more rapidly than it did back then. In any event, Revenue Ruling 59-60 should be

viewed as a helpful guide but not as a set of valuation commandments.

Q: What was the percentage you attributed to LB's company specific risk and how was it calculated?

A: 5%. My thought was that LB is experiencing a change in its business model whereby they are moving away from brick and mortar stores to a more Internet-based platform. The future of LB will be dependent on its ability to adapt and change. Its historical cash flow is just that, historical. In predicting whether LB will realize that level of profit in the future will be dependent on its ability to change I have assigned a risk factor that I believe is sufficient to account for the uncertainty about LB's future profitability.

11. Attorney Advocacy

As the above exchange reflects, valuing a small business is far more an art than a science. Too many attorneys think that a valuation is nothing more than an accounting assignment. To the contrary, valuation is a thinking assignment that has elements of accounting to consider, but has logic, common sense, and an exacting business climate scrutiny as its driving force. The best business valuation is the product of a Socratic-based collaboration with your client, together with an appreciation of his company specific risks and the utilization of your expert accountant to chart out LB's financials and act as a conduit for the valuation perspective that favors your client and that can be intelligently justified.

In the end, it is the attorney's obligation at the very outset of a case to determine whether a business lends itself to a logical, measurable or tangible business risk that can be leveraged into an appreciably different and more favorable company specific risk percentage. In those niche business valuation situations, an attorney armed with the most persuasive argument on how the specific industry risk factor should be determined has the advantage. What needs to be appreciated is the fact that in some situations valuation is the greatest form of advocacy. Where the valuation range is substantial the company-specific risk premium should properly be a battle of experts no less than the battles opposing expert physicians engage in medical malpractice actions. Like a jury in a medical malpractice case, in cases where a complex business valuation is at issue, a trial judge is positioned to make a multi-million dollar decision favoring one party or the other that has only limited appellate review. That is an extraordinary responsibility to impose on a jurist. And that is an extraordinary risk to be taken by a litigant wary of a judge's hidden predisposition on the valuation issue.

12. Wait and See

A better way of managing the distribution of the value of a niche or unpredictable business is through a classic earn-out approach, often utilized when the future prospects of a business are murky. In those cases where the parties are confident in the legitimacy of the financial documents and tax returns of the business but nervous about what the future may hold, rather than selecting a value derived from a valuator, it would behoove litigants to adopt a wait-and-see approach that ties the value to be equitably shared to the actual performance of the business. Unfortunately, a wait-and-see approach in matrimonials has yet to catch on like it has in most private business sales. If divorcing spouses could only learn to trust one another based on the business oversight safeguards set up by their attorneys, the anxiety connected with having a lone jurist speculatively decide their financial fate could be dramatically lifted.

Endnotes

1. 2014 N.Y. Slip Op. 32830(U) (Sup. Ct., Nassau Co. Driscoll, J.).
2. *Glengarry Glen Ross*, D. Mamet (1984, Pulizter Prize); *see also* film *Glengarry Glen Ross*, http://www.imdb.com/title/tt0104348 (1992).
3. You will notice that many of my questions appear to be objectionable as being arguably "leading." Judges who are inclined to streamline the matrimonial process usually do not prohibit attorneys from utilizing leading questions on matters that will not compromise the court's fact-finding role. For example, matters that are preliminary in nature or not subject to dispute lend themselves well to leading questions. The contents of a CV falls into that category. Other compound questions are posed in this article that are also technically objectionable to expedite the introduction of preliminary and undisputed evidence.
4. Economic Research Institute.
5. Risk Management Association.

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Military Pension Division and the 2017 Radical Rewrite

By Mark E. Sullivan

Introduction

The 2017 Department of Defense Appropriation bills from the House and the Senate have similar provisions for rewriting entirely the process of military pension division upon divorce in a majority of the states. Upon passage, the law would require *all* military retired pay to be divided according to the rank and years of service at the time of the pension division order. This new nationwide standard would overrule pension division requirements in all but half a dozen states. Here are some questions to clarify the issues and the problems.

What's Happening?

Questions:

1. What do you mean, a "radical rewrite"? Give me an example of what the changes would do.

Let's say that John Doe just retired as a sergeant major (E-9) in the Army with 30 years of service under his belt. He was divorced from Mary Doe ten years ago; they married when he entered the Army. The pension division order was entered on the date of divorce, when he was a sergeant first class (E-7) with 20 years of creditable service.

- In 90% of the states, the way it works is that John's actual retired pay would be divided, but Mary's share would be discounted to give John the benefit of the last ten years of post-divorce longevity and promotions. In virtually every state, Mary would receive 50% of 20/30 of John's *actual retired pay*.
- The "new rule" would require the court to order for Mary 50% of *the retired pay of a sergeant first class* with 20 years of service (as if he'd retired on the date of the pension order). That would be a federal government requirement, regardless of what state law says her share should be. Mary would still be receiving half of the marital share, but her share would be frozen as of the date of the MPDO (military pension division order).

2. What problems would occur if this approach becomes law?

Since there have been no hearings, and there is no extensive committee analysis, we can only guess what the problems will be. Here are three which will certainly occur—

- *COLAs.* There is no mention of COLAs (cost-of-living adjustments) for Mary to allow her share to rise over time from John's pension division date to his actual retirement. Her dollar share will be fixed as of the date of the decree, like a fly frozen in amber. All of the COLAs would go to the military member or retiree.
- *"One Size Fits All."* In addition, there's no provision for settlements and agreed orders so that the parties could decide on a different method of pension division. About 90-95% of all military pension orders are done by settlement. Unless a consent order rigidly complies with the "fixed benefit" requirement, it will be rejected by the retired pay centers (Defense Finance and Accounting Service and the Coast Guard Pay and Personnel Center). The parties are no longer free to settle their cases in their own way—they have to comply with the decree of Congress.
- *Immediate Payment.* In California and all of the western community property states, the law allows a spouse's share to be determined based on the rank of the military member when the retired pay begins or else—upon the spouse's choice—at the time of divorce with pay based on that rank and years of service, with payments to begin immediately. Yes, that's right—immediate payments, even though the member has not yet retired. Well, the logical result of this new rule will be for every spouse to demand immediate payments, since the rank and years of service must be frozen at the time of the MPDO. Why should a spouse wait till the day that pension payments start? All spouses will demand immediate payment, rather than postpone the monthly pension share.
- *Removal to Federal Court.* Plus there is no reason why the disgruntled spouse/retiree can't open the door to federal court if he or she is not satisfied with how the state court divided the pension. When federal law establishes the test, then federal law preempts any contrary substantive provision in state law. If there were an issue or challenge on pension division, why wouldn't a party have the right to remove the case to federal district court on *federal question jurisdiction*? When a state court judge (against the claims and wishes of a litigant) makes a determination that is at odds with the statute, or writes the order incorrectly and refuses to correct it, then the aggrieved party would be able to petition to remove the case to federal court.

No Time for Adjustment

3. Will there be any "breathing room" so that the states can adjust to this radical change?

No. The new rule will require legislative changes in most of the states, but there's no decent interval set out

to allow the states to write up, propose and enact laws consistent with the "new rule." Enough time must be allowed to let the states implement the new rule, yet none is granted.

As a result, a warped formula will occur in most of the state military pension orders, one that imposes a double discount on the spouse. First of all, her share will be fixed and frozen at the rank and years of service at the time of the order. In addition, since state laws have not been rewritten to revise the "marital fraction," it will still be calculated in 90% of the states based on years of marital pension service divided by total pension service years (marital years/total years), rather than marital pension service years divided by the years of pension service up to the date of the order. It is essential to stop the clock for the denominator at the date of the MPDO since the benefit is also fixed at that date. Anything else would doubly dilute the pension benefit granted to the spouse. See *Douglas v. Douglas*, 2014 Tex. App. LEXIS 12398 (holding that, in a "hypothetical clause," the denominator is months of creditable service during marriage up to the date of divorce, rather than the date of retirement, citing *Berry v. Berry*, 647 S.W.2d 945, 946-47 (Tex. 1983); accepting the husband's proposition that denominator should be total years of service would impermissibly dilute the ex-wife's share acquired during parties' marriage).

And yet no time is allowed for state legislatures to adjust to the change and rewrite the state laws. The law would become effective and binding on the states upon enactment.

4. Is anyone in Congress even aware of all these problems?

Probably not. These time bombs and landmines show clearly the error in trying to insert into the U.S. Code a new national standard for military pension division when this issue hasn't been studied, has received no hearings, and in reality should be left for state court decisions. State lawmakers have far more knowledge about these matters than members of Congress, who have never before enacted substantive rules on how to divide the military pension.

This bill represents a huge expansion of Congressional power over family law issues. When it was passed in 1982, the Uniformed Services Former Spouses' Protection Act wisely avoided the intrusion issue; it created a structure that is a respectful acknowledgment of state laws and courts, which have preeminent powers and expertise in this area.

"Tighten Up"—The Federal Straightjacket

5. Why would Congress want to dictate to the states how they are to divide pensions for military personnel?

That's the "24-carat question." The expertise of Congress in division of federal pensions is best described as NONE. That's because Congress makes the broad general laws allowing the division of the six federal pensions (military, Foreign Service, CIA, federal civil service [CSRS or FERS] or Railroad Retirement). Pension provisions in the U.S. Code do not "get down in the weeds" to tell the states how to do their job.

These proposals intrude in a field which has always been reserved for the states. Why should *Uncle Sam* step in, take over and dictate the outcome? Each case is unique, and a single national standard would tie up military cases involving pension division into a federal straightjacket.

State Expertise vs. "A National Standard"

6. How are the states doing in this arena?

Fewer than ten states (including Texas, Florida, Oklahoma, Tennessee, Kentucky and Maine) require the "Frozen Accrued Benefit" method, which is another name for this method of pension division. This approach "fixes the retirement benefit" that was earned as of the date of separation or divorce.

All the rest, either by statute or by court decision, use the "Time Rule" in dividing a defined benefit plan, whether it's civil service, state government, military, local government or a private pension.

- The *time rule* approach involves the presumptive share of 50% for the spouse or former spouse times the actual retired pay of the retiree.
- Then, to discount the benefit and give the member credit for post-divorce longevity and promotions. This is multiplied by the *marital fraction,* which is years of marriage during employment divided by total years of employment. This reduction factor makes sure that the former spouse will not be overpaid.

Over the last 30+ years, the states have entered hundreds of thousands of orders for the division of military retired pay. They have built up a substantial body of case law and statutory rules regarding how the division is done. The pension order is required to be fair, neutral and even-handed, regardless of whether the retiree or employee is the *husband* or the *wife*, whether it's a "safe job" like an office worker, or one fraught with danger, such as a soldier, policeman, CIA agent or firefighter. The states have the responsibility, and they're doing their job.

The *time rule* in the vast majority of states would be cast aside in favor of ONE SIZE FITS ALL. The "federal rule" for military pension division—all without hearings in Congress—will require that the pension divided would be fixed at the rank and years of service of the military member at the time of the court order making the division.

7. How about the other five federal retirement systems? Does Congress dictate how they do the division of the pension?

No. Congress has left the job to the states for how to divide these five other federal pensions.

8. Where's the current law found regarding division of military pensions?

It's contained in the Uniformed Services Former Spouses' Protection Act ("FSPA"), which is found at 10 U.S.C. § 1408. At the time FSPA was passed, there was a clear understanding in Congress that the states would be granted the power to divide military pensions (or refuse division). The federal government was accorded limited powers, such as the power to enforce orders through garnishment and the duty to ensure that federal jurisdiction tests were met.

Where's the Beef?

9. So who is claiming that FSPA needs radical surgery?

You be the judge. Here's an April newspaper piece—

April 28 article by Tom Philpott—*Northwest Florida Daily News*:

> ***Ex-Spouse Law Tweaked****—The 1982 Uniformed Services Former Spouses Protection Act allows divorce courts to divide military retired pay as property jointly earned in marriage.*
>
> *Congress hasn't considered even modest changes to the USFSPA for more than a decade. But on Wednesday freshman congressman Steve Russell, R-Okla., a combat veteran and retired infantry officer, won bipartisan support for a USFSPA amendment to benefit members who divorce after the defense bill is enacted into law.*
>
> *Russell took aim at a "windfall" feature of the USFSPA that retirees have criticized for decades. If a member is not retired when divorced, state courts often award the ex-spouse a percentage of future retired pay.*
>
> *In effect, that allows the value of the "property" to rise based on promotions and longevity pay increases earned after the divorce. In 2001, the Armed Forces Tax Council said this was inconsistent with treatment of other martial assets by divorce courts.*
>
> *The amendment would end the windfall in future divorce cases by directing that an ex-spouse's share of retirement must be based on a member's grade or rank at time of divorce. Making such a change retroactive would force recalculation of tens of thousands of divorce settlements, an unpopular idea with ex-spouses. So the change is prospective only. But both Republicans and Democrats praised the amendment as fair. It cleared committee on an uncontested voice vote.*

10. What's this business about a "windfall"?

That's anyone's guess. In the "zero-sum game" of divorce, *everything* can be labeled a windfall if it benefits one side to the detriment of the other. If the husband gets the house, the wife claims that he got a windfall. If the wife receives a share of the husband's 401K plan, he's sure to shout about the windfall that she received. As a practical, factual matter, there are NO windfalls in the world of military divorce and pension division. But lots of people write to Congress about their own divorce and how unfair certain things are, and they may not like how certain state rules apply to them.

Thus, for example, California and several other community property states allow the pension to be divided based on final retired pay, or else divided at the time of divorce with payouts commencing immediately (based on the rank and years of service of the military member at that time). Is that a "windfall" for the former spouse?

On the other hand, Puerto Rico does not allow the dividing of military pensions at all. Indiana and Arkansas require the pension to be "vested" to be divided, which means the spouse gets nothing when there's less than 20 years of service. North Carolina requires the spouse to get expert testimony on valuation of the military pension, or else it cannot be divided at trial, making it a steep, uphill battle for the non-military partner. Alabama requires the pension to be vested and evaluated and obtained through ten years of military service concurrent with ten years of marriage. Maine does not allow the apportionment of COLAs (cost-of-living adjustments) to the former spouse. Are all of these state rules "windfalls" for the military member?

Congress has done nothing to eliminate any of these alternative methods found in the 50 states. It now proposes, however, to create a single nationwide standard—the "Frozen Accrued Benefit" approach—to require that the division of retired pay always and everywhere be based on the rank and years of service of the member at the time of the court order for division.

11. Is this new? Has Congress tried this before?

There have been attempts to rewrite FPSA (or to remove it entirely from the federal law landscape) going back decades. Every time someone in Congress has tried to change the law in this area, the American Bar Association and other critics have asked, "Where's the beef?" What is the problem?

A Solution in Search of a Problem

12. So what is the problem that this proposal is supposed to be solving?

There is no reported case in which a court determined that the *time rule,* the present system of pension division in most states, created a "windfall" for the former spouse. The bill is *a solution in search of a problem*. Where is the problem which would allegedly be solved by such legislation? There's a simple answer—no such problem exists. With no defined problem as the reason for these bills, one has to wonder why we would want to change the law in most of the states, thus creating unfortunate, costly and easily foreseeable new consequences in military pension division cases.

13. Even if there WERE a problem, where does it say that Congress gets to do this? Can Congress tweak, change and correct anything in state procedures that it thinks might be "unfair"?

Congress has never held the power to reach out and correct what it thinks should be changed in the laws of the states. Our nation has, as it should, a vast variety of methods of reaching a fair and just division of marital or community property. FSPA was meant to protect these varied methods of dividing military retired pay, since they have been developed in state courts and legislatures over the last 30-plus years.

Who's So Special?

14. Why are *military pensions* to be given such special treatment?

No one knows. The new rule will require statutory or case law revisions in 90% of the states because it makes the military pension *super-special.* And it does so without any recognition of terms for state court division of all the other defined benefit plans (e.g., IBM, state government, local government) or even the federal defined benefit plans which Congress has enacted (i.e., FERS, CSRS, CIA, Foreign Service, Railroad Retirement).

In addition, if enacted, this "special treatment legislation" will lead to inequitable and unfair results in every divorce in which a spouse (most of whom are women) is married to a military member. The spouse, in 90% of the states, would have her own pension divided according to her actual retired pay, but she would be denied this same treatment when it comes to dividing the military member's pension, which would be "frozen" at the date of division; thus the military member will have a greater interest in her benefits than she has in his, creating an obvious unfairness.

Perhaps some readers will be reminded of the text from George Orwell's *Animal Farm*—"All animals are equal; but some animals are more equal than others." Thus military retirees are so super-special that they have to have their pensions divided by a Congressional edict, unlike every other federal, state or private pensioner. For example, no one who's retired from the State Department, the Federal Marshal's Service or the CIA is treated to this type of federal division requirement upon divorce. It's reserved for only military retirees.

15. I thought that the courts could give consideration to how the efforts of "Mary Doe" and her husband during the marriage could benefit him in terms of future promotions.

That's right. The *time rule* is based on the "marital foundation theory," which recognizes that the individual's final retired pay is based on a foundation of marital effort; a servicemember would never have attained the rank of sergeant major (with 30 years of service) if it hadn't been for the efforts expended during the marriage up to the rank of sergeant first class over 20 years, when the parties divorced. That's one reason why a large majority of states have adopted the time rule for dividing pensions of all kinds and stripes—it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., Mary Doe's inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

16. How are pensions divided now at the retired pay centers?

The military pension award may be a—

- Fixed dollar amount;
- Percentage of retired pay;
- Formula clause (e.g., 50% of 120 months of marital pension service divided by X total months of creditable service times final retired pay); or
- Hypothetical award, fixing the benefit at a specific time for rank and years of service purposes (such as "the pay of a sergeant first class with over 20 years of service at the date of divorce/separation").

State courts may, depending on what is fair and equitable, use any of these approaches as allowed by state law. The FSPA revision would torpedo this "state law approach." It would dictate the use of the hypothetical award (above) or "fixed benefit" approach for every case, whether settled or tried, and regardless of whether it produces a fair or unjust result.

Helping (or Hindering!) the Servicemember

17. Is the fixed benefit clause easy to do?

"Fixed benefit" division is the hardest to handle of the four pension clauses mentioned above. An attorney at one of the retired pay centers that processes military pension division orders put it this way: "I estimate that over 90%

of the hypothetical orders we receive now are ambiguously written and consequently rejected. Attorneys who do not regularly practice military family law do not understand military pension division or the nature of…military retired pay. This legislative change will geometrically compound the problem."

But everyone will have to know how to do it. Since almost no one now can write one competently without a lot of research and a handful of Excedrin, this means the cost of military divorce will go up once again, with rejection letters flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval.

Then it's back to the drawing board for another crack at it, or else farm it out to some expert who can do it properly (IF there's enough information available to figure it out, including the member's "High-3" annual compensation) (and an expert can be located) (and enough money is left to pay the expert draftsman for the next stab at this!).

18. Where can I find an explanation of the "time rule" and the "fixed benefit" approaches to pension division?

For an explanation of the difference between these approaches, see—

- Brett R. Turner, *Equitable Distribution of Property* § 6.26 (3d ed. 2005 and 2015 Supp.)
- *Prescott v. Prescott*, 736 So. 2d 409 (Miss. Ct. App. 1999)
- *In re Marriage of Hunt and Raimer,* 909 P.2d 525 (Colo. 1996).

The *Hunt and Raimer* case contains a limited summary of "Time Rule" states (now up to about 40 jurisdictions

> The "time rule" formula has been approved by a number of jurisdictions. *See, e.g., Cooper v. Cooper,* 167 Ariz. 482, 808 P.2d 1234, 1242 (Ct.App.1990), *review denied,* (Ariz. May 7, 1991); *In re Marriage of Freiberg,* 57 Cal.App.3d 304, 127 Cal.Rptr. 792, 796 (1976); *Stouffer v. Stouffer,* 10 Haw.App. 267, 867 P.2d 226, 231 (1994); *Warner v. Warner,* 651 So.2d 1339, 1340 (La.1995); *Lynch v. Lynch,* 665 S.W.2d 20, 23-24 (Mo.Ct.App.1983); *Rolfe v. Rolfe,* 234 Mont. 294, 766 P.2d 223, 226 (1988); *Gemma v. Gemma,* 105 Nev. 458, 778 P.2d 429, 431 (1989); *Berry v. Meadows,* 103 N.M. 761, 713 P.2d 1017, 1023 (Ct.App.1986); *Welder v. Welder,* 520 N.W.2d 813, 817 (N.D.1994); *Woodward v. Woodward,* 656 P.2d 431, 433-34 (Utah 1982).

19. Where are these House and Senate provisions located?

The terms in the Senate bill, S. 2943, are found at Sec. 642; the House equivalent is H.R. 4909, Sec. 625. Sen. John McCain of Arizona is the sponsor for the Senate Bill and Rep. Mac Thornberry of Texas is the sponsor for the House Bill.

Bar Association Opposition

20. Where do the American Bar Association and the American Academy of Matrimonial Lawyers stand on rewriting FSPA?

The American Bar Association has been on record for over three decades on the role of Congress and the states in the division of military retired pay. As stated in the 1998 Congressional testimony of Las Vegas attorney Marshal Willick, representing the ABA:

> There are two formal statements of policy by the ABA. One was in 1979, urging that all forms of deferred compensation be allowed to be subject to State dissolution laws, and the other one in 1982, in the wake of McCarty [McCarty v. McCarty, 453 U.S. 210 (1981)], and that was a formal policy, again, strongly urging specifically that military retirement be made divisible as would any other asset so that military members are treated like civilian employees of the Federal Government, employees of State governments, and private citizens all throughout the United States.

The ABA is on record opposing any attempt to "federalize" the means of dividing military retired pay.

And the American Bar Association has made it clear that complex family matters are best reserved to the states, which over the course of time have developed appropriate expertise and mechanisms to make fact-driven determinations regarding military pension division. Federal efforts to legislate the division of military retired pay depart from the long-standing history of deference to state laws in matters involving property division.

The American Academy of Matrimonial Lawyers has specifically addressed military retirement benefits and military related divorce matters, including detailed position papers submitted to Congress in 2001 and 2010 regarding the Uniformed Services Former Spouses Protection Act and related issues. In a resolution dated June 24, 2016 and a letter by President Joslin Davis dated July 6, 2016, the Academy has made it clear that we are opposed to any attempt to "federalize" the division of military retired pay:

- The states would no longer be able to use their own time-tested and finely tuned rules regarding military pension division.
- The new rule would take the entire military pension division process away from state courts and judges, forcing an awkward "national solution" which would transform everyone's divorce case into "one size fits all."
- And a proposal which seeks to military retirement—out of all defined benefit plans—carved out for special treatment and calculated differently is counterproductive and inequitable. It would provide military spouses with lesser property rights than all other spouses.

The AAML likewise strongly advocates the rejection of these legislative proposals.

21. What can I do to stop this?

If you are opposed to such a radical rewrite of FSPA and the removal of the powers, duties and abilities of the states to handle military pension division, then write your Senators and your Representative to urge them to stop this ill-advised scheme…or at least to conduct hearings on the issue (as happened when Congress passed FSPA in 1982) so that the voices of those affected—attorneys and their clients—may be heard.

Conclusion

These FSPA rewrite proposals contain serious flaws. Passage in the Department of Defense Authorization Act for Fiscal Year 2017 would lead to a major intrusion into federal court for courts, lawyers, servicemembers, former spouses and retirees. It will certainly cost them dearly in time and money spent in court and with attorneys. Family law attorneys should contact their representatives in the House and the Senate. State bars and bar associations should let their voices be known regarding this a radical revision of federal law, by means of clear and strong resolutions and statements on the record. If enough voices are heard in Washington, these unnecessary and harmful changes may *never* become federal law.

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of *The Military Divorce Handbook* (Am. Bar Assn., 2d Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been board-certified in family law since 1989. He works with attorneys and judges nationwide as a consultant and an expert witness on military divorce issues in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com (alternate: 919-306-3015, mobile; law.mark.sullivan@gmail.com).

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Family Court Act § 651(1) and Domestic Relations Law § 240(1-a) amended, effective June 18, 2016: Custody and Permanency Hearings

Family Court Act § 651(1) and Domestic Relations Law § 240(1-a) were amended to provide that, where a child protective or permanency proceeding is pending in Family Court at the same time as a proceeding brought in the Supreme Court involving the custody of, or right to visitation with, the same child of a marriage, the Family Court may hear the child protective or permanency proceeding while the other proceeding is pending in Supreme Court. That is, consolidation is not mandatory. The Supreme Court, however, has the option to refer the custody proceeding to the Family Court.

Family Court Act § 153-c amended, effective April 1, 2016: Temporary Orders of Protection

Family Court Act § 153-c was amended by adding subsection (b), which authorizes the Chief Administrator of the courts to implement a pilot program for the filing of petitions of temporary orders of protection by electronic means and the issuance of such orders *ex-parte* by audio-visual means. The purpose of this addition is to accommodate litigants who are unable to attend court due to a potential risk of harm, but need to obtain emergency relief.

Civil Practice Law and Rules § 2103 amended, effective January 1, 2016: Service of Papers

CPLR 2103(b)(2) was amended to provide that, where papers are served on an attorney by mail and service is deemed complete upon mailing, five days shall be added to the prescribed service period if the mailing is within the state and six days shall be added to the period if the mailing is made outside of the state.

Court of Appeals Roundup

Prenuptial agreement that did not contain parties' net worth statement is valid

***In re Fizzinoglia*, 26 N.Y.3d 1031 (2015)**

In a probate action, the wife sought to invalidate the prenuptial agreement that waived her elective share of the decedent-husband's estate. The wife argued that the omission of a statement of the parties' assets and liabilities nullified the agreement. The Surrogate's Court denied the wife's motion for summary judgment. The Appellate Division affirmed, and so did the Court of Appeals. The wife testified that she was aware when the agreement was signed that the statement regarding the parties' assets and liabilities was missing, and that the decedent-husband's finances didn't matter to her at that time. The wife failed to show that the prenup was the product of fraud, duress, or overreaching, or that the decedent attempted to conceal or misrepresent the nature or extent of his assets, and failed to present prima facie proof that "a fact-based, particularized inequality" existed at the time of the execution of the agreement.

Modification of custody from mother to father

***Cisse v. Graham*, 26 N.Y.3d 1103 (2016)**

In my Winter 2014-2015 column, I reported on *Cisse v. Graham*, 120 A.D.3d 801 (2d Dept. 2014), a custody modification case, where the Second Department affirmed the Family Court's finding that a change of custody from the mother to the father was in the best interests of the parties' daughter. The court based its determination on evidence that the mother interfered with the father's visitation, failed to acknowledge the importance of the daughter's relationship with her father, worked hours that hindered her ability to spend quality time with the daughter, and the daughter's expressed desire to live with her father.

Thereafter, the mother moved for leave to appeal and the Court of Appeals granted the motion. *See Cisse v. Graham*, 24 N.Y.3d 1028 (2014). The Court of Appeals affirmed in a one-sentence decision.

Grandparents' visitation: extraordinary circumstances existed where extended disruption of mother's custody

***Suarez v. Williams*, 26 N.Y.3d 440 (2015)**

The Court of Appeals held that grandparents may demonstrate standing to seek custody based on extraordinary circumstances where the child has lived with the grandparents for a prolonged period of time, even if the child had contact with, and spent time with, a parent while the child lived with the grandparents.

The child at issue lived with his paternal grandparents, beginning when he was less than 10 days old and continuing until he was almost 10 years old. The child's father moved out of state when the child was 2, and has had visitation since then. The child's mother lived approximately 12 miles from the grandparents for the child's first few years, until the grandparents moved the mother (and her daughters from a previous relationship) into a trailer that the grandparents purchased and situated in a trailer

park across the street from their residence. When the child was approximately 4, the parents obtained a consent order awarding them joint legal custody of the child; yet, the child continued to reside with his grandparents. When the child was 6, the grandparents moved with him to a new county. They continued to help the child's mother to move closer to them. This enabled the mother to see the child regularly as well as, stay overnight and take vacations with her child.

In 2012, after the father of the child sought custody from the mother and a termination of his child support payments to her, she refused to return the child to the grandparents relying on a 2006 court order granting her custody. Additionally, the mother told the grandparents that because they had the child for many years, it was her "turn now" to have custody, and they could no longer see him.

The grandparents brought a petition for custody of their grandchild. After a 10 day hearing, the Family Court found that there had been an extended disruption of custody between the mother and the child, and that the mother voluntarily relinquished care and control of him to the grandparents, and this amounted to extraordinary circumstances. After considering the child's best interests, the court granted joint custody to the grandparents and the father, with primary physical custody to the grandparents and visitation to each parent.

The Appellate Division reversed and dismissed the grandparents' petition finding that they lacked standing because they were unable to prove extraordinary circumstances. The court found the arrangement similar to joint custody, with the grandparents having primary physical custody and the mother having visitation.

The Court of Appeals reversed, finding that the grandparents proved extraordinary circumstances, despite the mother having some contact with the child.

DRL § 72(2)(a), provides that grandparents may apply for custody where extraordinary circumstances exist, including where there is an extended disruption of custody, which is defined to

> include, but not be limited to, a prolonged separation of the respondent parent and the child for at least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than [24] months." (Domestic Relations Law § 72[2][b])

The Court rejected the mother's contention that extended disruption of custody means no contact or very limited contact, because otherwise DRL § 72(2) would be rendered meaningless. The Court found that the key to determining whether the parent relinquished control is determining whether the parent makes important decisions affecting the child's life as opposed to merely providing routine care on visits. Here, the mother signed documents giving the grandparents permission to make medical and education decisions for the child, with no restrictions on whether or not the mother was available to make said decisions. The mother therefore allowed the grandparents to assume control over and responsibility for the child while he resided with them for many years, and the mother assumed the role of non-custodial parent. Therefore, the grandparents proved extraordinary circumstances and had standing to request custody. The Family Court determined that it was in the child's best interest to remain with his grandparents. However, since the Appellate Division did not reach that issue, the high court remanded to the appellate division to determine the child's best interests.

Other Cases of Interest

Child Custody

Relocation granted on initial custody determination

Matter of Yu Chao Tan v. Hong Shan Kuang, 136 A.D.3d 933 (2d Dept. 2016)

The parties were married in 2004 and have two unemancipated children. After residing in California from 2006 to 2011, the family relocated to New York and shortly thereafter, the parties separated. Both parties sought custody of their two daughters, and the mother further requested permission to relocate with the parties' children to California. The Family Court granted the mother's cross-petition to the extent of awarding her custody of the parties' children, but denied that portion of the mother's cross-petition seeking to relocate to California with the children.

On appeal, the mother argued that relocating to California would improve her and the children's economic situation and that she was willing to facilitate visitation between the father and the children. The Second Department reversed, noting that the strict application of the factors relevant to a relocation petition was not required in the context of an initial custody determination, and relocation is but one factor to be considered in determining what is in the child's best interests. The court held that a liberal visitation schedule with extended visits in the summer and over school vacations would enable the father to maintain a meaningful relationship with the children. The case was remitted to the Family Court to establish a post-relocation visitation schedule for the father.

No extraordinary circumstances exist warranting custody to the paternal grandmother where the mother was the victim of domestic violence, and left the child in the grandmother's care temporarily

***Elizabeth SS. v. Gracealee SS.*, 135 A.D.3d 995 (3d Dept. 2016)**

The subject child was born in 2007. The child's mother and father were married, but due to allegations of domestic violence, the mother left the marital residence and moved into a shelter in 2010. The mother left the child in the care of the child's paternal grandmother. In June 2010, the paternal grandmother was awarded legal and physical custody of the child with limited parenting time granted to the mother. Since that time, the mother's parenting time gradually increased, and in January 2011, joint legal custody was awarded to the mother, the paternal grandmother, and the father. Thereafter, in 2013, the mother submitted a petition seeking full custody of the child. The Family Court granted the mother physical custody, with joint legal custody to the mother and the father, and limited parenting time to the father and the paternal grandmother.

The paternal grandmother appealed the Family Court's decision, arguing that extraordinary circumstances existed to warrant an award of custody to her. The Third Department affirmed. Absent extraordinary circumstances, such as surrender, abandonment, persistent neglect, unfitness or an extended period of custody disruption, a parent has a claim of custody to his or her child superior to all others. The appellate court held that the mother's initial acquiescence to the grandmother's primary physical custody of the child in 2010 was a "temporary emergency situation," resulting from the fact that the child was not allowed at the domestic violence shelter. Over the course of the three years that followed, the mother strived to create a stable home environment for herself and the child near the home of her parents and attempted to regain custody of the child several times. This, coupled with the grandmother's hostility toward the mother's visitation with the child and unfounded allegations of the mother's unfitness, warranted a change of custody from the grandmother back to the mother.

Mother's repeated false allegations of sexual abuse against the child warranted a modification of custody to the father

***Kortright v. Bhoorasingh*, 137 A.D.3d 1037 (2d Dept. 2016)**

The Family Court awarded custody of the parties' 7-year-old child, born out of wedlock, to the mother and visitation to the father. Thereafter, the father filed a petition seeking to modify the order by granting him sole custody of the parties' child. The Family Court granted the father's petition, and the mother appealed. On appeal, the Second Department affirmed, citing the mother's numerous, baseless allegations of sexual abuse against the father, which resulted in the child undergoing various examinations by medical, law enforcement, Administration for Children's Services, and mental health personnel over several years. The mother's behavior directly interfered with the father's relationship with the parties' child and negatively impacted the child's overall well-being. Therefore, the mother was unfit as a custodial parent and that it was in the child's best interests to modify custody to the father.

Change in custody warranted where the father interfered with the mother's relationship with the child

***Ladd v. Krupp*, 136 A.D.3d 1391 (4th Dept. 2016)**

The mother petitioned the Family Court to modify the prior court order of joint custody of the child to sole legal and physical custody. Finding that a significant change in circumstances occurred since the entry of the custody order, the Family Court granted the mother's petition and awarded her sole custody of the subject child. The father appealed, arguing that the mother supported her petition with events that occurred between the date of the court hearing on the issue of custody, i.e., July 19, 2012, and the entry of the custody order on February 5, 2013, rather than with events that occurred after the entry of that order, and therefore failed to meet the burden of establishing that a significant change in circumstances occurred since the date of entry of the prior custody order.

The Fourth Department affirmed. The father's behavior toward the mother and the acrimony that existed between them made it impossible to continue with a joint custody arrangement. In particular, the court cited to evidence that the father interfered with the mother's relationship with the child by discussing the pending litigation with the child contrary to the court's order not to do so, limiting the mother's access to the child, and repeatedly telling the child that the mother was unintelligent and irresponsible. The court reasoned that the mother's showing of a "continued deterioration in the parties' relationship" was a significant change in circumstances justifying a change in custody.

Grandparent visitation

***Fitzpatrick v. Fitzpatrick*, 137 A.D.3d 784 (2d Dept. 2016)**

The paternal grandparents of the subject child petitioned for visitation with their grandchild, which was granted by the Family Court despite objection by the child's parents. The Second Department affirmed, finding that the grandparents had standing to petition for visitation under the equitable circumstances clause of the grandparent visitation statute, and that visitation was in the best interests of the child. Based on the evidence presented by the grandparents in the form of testimony and photographs, it was evident that the grandparents

enjoyed regular contact with the subject child and his siblings for several years before the parents refused to permit such contact. In determining whether visitation was in the best interests of the child, the Appellate Division explained that "an acrimonious relationship is generally not sufficient cause to deny visitation."

Child Support

Exceptional case of recoupment of child support overpayments

***Weidner v. Weidner*, 136 A.D.3d 1425 (4th Dept. 2016)**

Pursuant to the parties' judgment of divorce, the husband was directed to pay maintenance to the wife in the sum of $3,000 per month for three years, counsel fees to the wife in the sum of $5,000, and the wife was directed to pay child support to the husband in the amount of $142.53 per week. The wife appealed, arguing that the trial court abused its discretion by setting the amount and duration of maintenance, determining her child support obligation to the husband with the amount of maintenance awarded to her included in the income calculation, and awarding her only $5,000 in counsel fees.

The Fourth Department, in affirming and modifying the trial court's order, found that the trial court properly established the amount and duration of maintenance, explaining that the wife was capable of increasing her earnings and becoming self-supporting in the future. Additionally, the court affirmed the trial court's award of counsel fees in the sum of only $5,000, finding that the wife also engaged in dilatory and obstructionist conduct throughout the proceedings.

The court below erred in including the wife's maintenance award in the income calculation. When omitting the maintenance award, the wife's income falls below the poverty line, and therefore the wife's obligation was modified to $25/week. The court also directed that the wife be entitled to recoupment of her child support overpayments despite that there is a strong public policy against doing so. The court found it appropriate under the limited circumstances of this case, including the wife's very low income, the husband's high-income job, and the husband's repayment of child support to the wife would not detract from his ability to adequately provide for the children, while allowing the wife the ability to maintain a suitable home for the children.

Father's child support suspended because of mother's active interference with his visitation

***Argueta v. Baker*, 137 A.D.3d 1020 (2d Dept. 2016)**

The parties have a 12-year-old child born out of wedlock. Pursuant to a child support order stipulated to by the parties, the father was directed to pay $123.63 per week in child support to the mother, with $30 of that payment allocated toward child care expenses, and to maintain the child under his health insurance plan. When the mother relocated to Florida without the father's consent, the father petitioned the court to terminate or suspend his child support obligations. The petition was dismissed, and the father appealed. The Second Department reversed, holding that the father's child support obligations should be suspended because the mother deliberately frustrated and actively interfered with the father's visitation because the mother relocated to Florida with the child, failed to provide the father with the child's Florida address, declined the father's requests to visit the child in Florida, and neglected to notify the father when the child was in New York. Furthermore, the Appellate Division concluded that the father was entitled to an order terminating his obligation to pay child care expenses, because the evidence established that the mother was no longer incurring such expenses. Lastly, the court directed that the mother be responsible for the child's health care insurance because the mother unilaterally moved the child to Florida, the father's health insurance was ineffective in Florida, and the mother requested that the father cancel the insurance.

Equitable Distribution

Short-term marriage, high income case

***Doscher v. Doscher*, 137 A.D.3d 962 (2d Dept. 2016)**

The parties to this divorce action were married five years and have a 3-year-old child. The husband was employed as a bond trader on Wall Street, earning approximately $600,000 per year. The wife had only a high school diploma, and upon agreement of the parties, quit her job at a textile company to stay at home with the parties' child. The trial court awarded the wife non-taxable maintenance of $12,000 per month for five years, child support of $8,500 per month, 50% of the marital assets, counsel and expert fees, and 9% pre-judgment statutory interest on her distributive award. The husband appealed.

The appellate court upheld the maintenance award. However, it reduced the child support order from $8,500 to $5,100, and found that it was error to base the husband's child support obligation on his entire $600,000 of annual income. In high income cases, where the parental income exceeds the $136,000 statutory threshold (the threshold at that time), an award of child support should be based on the child's actual needs, rather than the wealth of either party. There was insufficient evidence in the record to support the wife's accounting of the child's expenses, and therefore the court capped the husband's income at $360,000 before applying the CSSA formula.

It was error to equally divide the marital assets in this short-term five year marriage especially considering the maintenance award and the wife's award of exclusive occupancy of the marital residence; therefore, the Appellate Division modified the trial court's order and

awarded 30% of the marital assets to the wife and 70% of the marital assets to the husband. The appellate court upheld the trial court's award of pre-judgment interest on the award, but found that a certain account should have been tax-impacted at 40%.

Lastly, the Second Department affirmed the trial court's award of counsel and expert fees to the wife, citing the husband's superior financial position and litigious behavior throughout the proceedings.

Counsel Fees

***Brody v. Brody*, 137 A.D.3d 832 (2d Dept. 2016)**

The parties in this action were married, divorced, remarried, and again divorced. Over the course of the most recent divorce action, the wife was awarded over $400,000 in interim counsel fees, which included $270,513 to the husband's counsel, and the remainder to the attorneys for the children as well as the neutral mental health professional. As a final award, the trial court awarded the wife $150,000 in counsel fees, and the wife appealed. The Second Department affirmed, finding that the trial court properly considered the husband's status as the monied-spouse and the wife's conduct in dissipating assets during the pendency of the action.

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

Ms. Samuelson may be contacted at (516) 294-6666 or WSamuelson@SamuelsonHause.net. The firm's website is www.SamuelsonHause.net.

A special thanks to Nicole M. Savacchio, Esq. Christine Kaiser and Bianca Siuni for their editorial assistance.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

----------x
VICTORIA MORGENSTEIN,

Plaintiff,

-against-

MARVIN MORGENSTEIN,

Defendant.
----------x

DECISION AND ORDER

Index No.: 1569/2013

Motion Sequence # 6

The following papers, numbered 1 to 8[1], were read in connection with the application of Kantrowitz, Goldhamer and Graifman, P.C., (hereinafter "KGG") as outgoing counsel to Defendant, seeking an award of counsel fees and charging lien:

Order to Show Cause/Affirmation of Daniel B. Schwartz, Esq./Exhibits(A-F).....1-2
Affirmation of Richard J. Feinberg, Esq./Exhibit(A).....3
Affirmation of Daniel B. Schwartz, Esq./Exhibits(A-B).....4
Affirmation of Karen Winner in Opposition to the Former Counsel's Order to Show Cause/Exhibit(A).....5
Affirmation of Karen Winner in Reply to the Opposition and In Further Support/Exhibits(1-5).....6
Affirmation of Daniel B. Schwartz, Esq./Exhibits(A-G).....7
Reply Affirmation to Affirmation in Opposition to Cross-Motion.....8

Upon the foregoing papers, it is ORDERED that these applications are disposed of as follows:

Kantrowitz, Goldhamer and Graifman, P.C. (hereinafter "KGG") seeks an award of counsel fees in the sum of $54,876.06 pursuant to Domestic Relations Law §237. KGG also seeks a charging

[1] By Decision and Order dated August 25, 2015, the Court disposed of Plaintiff's cross-motion seeking the imposition of sanctions (Motion Sequence #8) and the Order to Show Cause submitted by Defendant's counsel (Motion Sequence #7). Inasmuch as submissions pertained to more than one application, the Court will refer to them to the extent they bear upon this motion.

lien on any equitable distribution award in favor of Defendant pursuant to Judiciary Law §475, claiming that they were not discharged for cause and there was no misconduct on their part. Plaintiff opposed the application, arguing that Defendant's application constitutes a successive request for counsel fees that the Court has previously considered and denied.

By Decision and order dated August 25, 2015, the Court scheduled a November 2, 2015 hearing in connection with this application. At this appearance, the Court was informed that Defendant had filed for bankruptcy protection and stayed all further proceedings in this action pending the resolution of those proceedings.

Defendant received a discharge in bankruptcy and KGG requested that the Court reschedule the counsel fee hearing that was previously stayed. Plaintiff, Plaintiff's counsel and KGG appeared at this May 23, 2016 hearing. Prior to commencing the hearing, Plaintiff's counsel argued on the record that KGG's motion for counsel fees should be denied based upon Defendant's bankruptcy discharge and KGG opposed this argument. The Court afforded the parties an opportunity to submit memoranda of law in support of their respective positions. The Court has read and considered the contents of same. The question presented is whether an attorney for one spouse may recover counsel fees from the other spouse pursuant to DRL §237 when its former client's liability has been discharged by bankruptcy.

KGG argues that although there are no reported cases directly on point, a close examination of the language of DRL §237 supports their position that they may recover counsel fees from the spouse of their former client. KGG points out that the text of DRL §237(a) allows a court to make an interim award of counsel fees "to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties". KGG emphasizes that DRL §237 explicitly permits attorneys for either spouse to maintain such an application in his or her own name and not on behalf of their client, or, in this case, former client. According to KGG, an attorney "owns his fee" and DRL §237 confers a right to assert this ownership interest against the monied spouse. Following this line of reasoning to its logical conclusion gives rise to the following question: If the fee that an attorney has an ownership interest in is discharged in bankruptcy, what, if any, ownership interest remains to assert in a DRL §237 counsel fee request?

KGG posits that the bankruptcy proceedings did not discharge their counsel fee obligation in its entirety, but rather only Defendant's responsibility for this obligation. Thus, it is free to seek counsel fees from Plaintiff via this application. KGG equates Defendant's bankruptcy filing as an admission of his inability to pay his former counsel, a scenario contemplated and provided for under DRL §237.

Plaintiff maintains that there is no need for a hearing on counsel fees, as Defendant no longer has a debt based upon the bankruptcy discharge. Plaintiff submits that Defendant's obligation to KGG for counsel fees is simply a personal debt memorialized in a retainer agreement that has now been extinguished by bankruptcy. Plaintiff also references the prior applications for counsel fees and that an award of counsel fees would not serve DRL §237's explicit purpose of enabling Defendant to carry on or defend this action.

DRL §237 permits the court to direct either spouse "to pay counsel fees...directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties... Any applications for fees and expenses may be maintained by the attorney for either spouse in his or her own name in the same proceeding". This statute authorizes the court to shift the financial responsibility that would otherwise be borne by one party to the other party. Given this authority, the Court finds that direct financial responsibility of one party to its counsel, former or present, is a prerequisite to a counsel fee application pursuant to DRL §237 application seeking to shift that responsibility to the other party. The Court is unpersuaded by KGG's arguments that its "ownership interest" in its fee can somehow exist separate and apart from the direct financial responsibility from its former client, which has now been discharged. The Court finds that such a situation was neither contemplated nor provided for under DRL §237.

KGG's arguments that Defendant would be unable to discharge a counsel fee award because such an obligation would be deemed a domestic support award under applicable bankruptcy provisions is of no moment, as such arguments are premised upon such an award being made prior to a bankruptcy filing, which did not occur in this action.

Based upon the foregoing, KGG's motion seeking counsel fees pursuant to DRL §237 and a charging lien pursuant to Judiciary Law §475 is denied in its entirety.

The parties are hereby advised that this matter is scheduled for trial on **November 28, 2016** at **9:30 a.m.**.

-3-

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
July 18, 2016

ENTER

HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel for Plaintiff	Outgoing Counsel for Defendant	Counsel for Defendant
Richard J. Feinberg, Esq.	Kantrowitz, Goldhamer & Graifman, P.C.	Law Office of Karen Winner, Esq.

-4-

NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
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