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What a Difference a Year Makes: Changes to the Spousal Support Law and the End of *O'Brien*

By Lee Rosenberg

At the end of 2014's New York State Legislative Session, leaders of the Matrimonial Bar fought off what was intended to be a *fait accompli* on the passage of formulaic maintenance guidelines which made the much-criticized temporary guidelines worse and would have compounded the existing morass with an even worse set of final support guidelines including onerous durational mandates, as well as other serious flaws. The problems with that proposed legislation,[1] and vociferous opposition, were well documented,[2] but the air remained filled with the feeling that legislation in this area was inevitable. A year later—some five years after the also-maligned temporary support statute was initially passed[3]—we have a new statute,[4] passed by the Legislature on June 24, 2015 and signed by Governor Andrew M. Cuomo on September 25, 2015. That law is a product of foresight, pro-activism, and compromise which corrects prior drafting errors, eliminates flaws in the temporary support statute, creates a template for fairness, supports judicial discretion, allows for good lawyering, and finally eliminates the concept of enhanced earning capacity fabricated nearly 30 years ago out of the quagmire of the *O'Brien*[5] case.

Certainly there have been already some fine discourses already published on the impact and meaning of the new law by many of our respected colleagues.[6] The major aspects are also referenced in this issue's *Recent Legislation, Decisions and Trends in Matrimonial Law* column. Without necessarily reinventing the wheel then, the essential changes brought about by the statute will, of course, be discussed below and no doubt going forward.

Not to be overlooked, however, are two very salient points:

1. That we as lawyers have an obligation to, and actually can, create positive change and have the ability to continue to shape this area of law for the good of the bar, the bench, and the public.
2. That the need to preserve judicial discretion and not relegate our system of justice to cookie-cutter/one-size-fits-all formulas for the sake of political expediency or otherwise remains an important and noble goal.

The enactment of this new law serves both of these purposes in exemplary fashion.

Inside

Guidance with the Preservation of Judicial Discretion

In *Osborn v. Bank of the United States*,[7] Chief Justice John Marshall wrote of the court's discretion,

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.

Over 200 years before *Osborn*, Justice Edward Coke opined on the concept in *Rooke's Case*,[8]

> Discretion is a science of understanding, to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their men's will and private affections.

Far more recently in *Human Dimension in Appellate Judging: a Brief Reflection on a Timeless Concern*,[9] Judge Judith S. Kaye, discussing views on discretion, including those of Chief Judges Benjamin N. Cardozo and Charles D. Breitel, stated,

> To my mind, the mere statement of the proposition that human values must be abjured by appellate judges exposes its fallacy: how but by the application of some measure of human understanding and contemporary experience could a judge today resolve the unprecedented legal issues that crowd the court dockets? Even if the law were declared dead, always to remain static, the problems confronted by the courts are people's problems, and the infinite ingenuity of the human mind seems never to concoct the identical situation twice. Immediately there is judicial handtailoring to be done, often requiring choices among sound alternatives, simply to fit existing precedents to the very next suit.

The pull and tug between discretion and *stare decisis* has existed for some time.[10] Discretion is needed to address the realities of each individual matter while simultaneously precedents provide the previously charted courses and directives through which subsequent litigants, lawyers, and judges must navigate—predictability with flexibility. Discretion is, of course then, not unfettered. In the soon to be obsolete *O'Brien* case, the Court of Appeals *without precedent* used the reforms of DRL §236B to create the fiction of enhanced earning capacity to right a perceived wrong—asserting that such relief was within the statute's intent, but without considering the impact of the real world.

> Reform of section 236 was advocated because experience had proven that application of the traditional common-law title theory of property had caused inequities upon dissolution of a marriage. The Legislature replaced the existing system with equitable distribution of marital property, an entirely new theory which considered all the circumstances of the case and of the respective parties to the marriage (Assembly Memorandum, 1980 N.Y.Legis. Ann., at 129-130). Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker (id., at 130; see, Governor's Memorandum of Approval, 1980 McKinney's Session Laws of N.Y., at 1863). Consistent with this purpose, and implicit in the statutory scheme as a whole, is the view that upon dissolution of the marriage there should be a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets. Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow "the recipient spouse an opportunity to achieve independence" (Assembly Memorandum, 1980 N.Y.Legis.Ann., at 130).
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> The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests.[11]

Notably, the *O'Brien* court eschewed the idea of rehabilitative maintenance or reimbursement for direct financial contributions instead of the award of the "EEC," finding that "(t)he statute does not expressly authorize retrospective maintenance or rehabilitative awards and we have no occasion to decide in this case whether the authority to do so may ever be implied from its provisions

(but see, *Cappiello v. Cappiello*, 66 N.Y.2d 107, 495 N.Y.S.2d 318, 485 N.E.2d 983)." Of course, those concepts are now well within the lexicon. Further, even in concurrence, Judge Bernard S. Meyer warned of the potential for unfairness in its decision and urged legislative reconsideration—an act that waited nearly 30 full years to occur.

> The equitable distribution provisions of the Domestic Relations Law were intended to provide flexibility so that equity could be done. But if the assumption as to career choice on which a distributive award payable over a number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hand), it should be possible for the court to revise the distributive award to conform to the fact. And there will be no unfairness in so doing if either spouse can seek reconsideration, for the licensed spouse is more likely to seek reconsideration based on real, rather than imagined, cause if he or she knows that the nonlicensed spouse can seek not only reinstatement of the original award, but counsel fees in addition, should the purported circumstance on which a change is made turn out to have been feigned or to be illusory.[12]

So, in the enactment of the new law, the interim and final support aspects of the statute, *inter alia*, have brought the cap upon which the presumptive calculations are to be made down from the present $543,000 to $175,000 of the payor's income[13]—an amount which encompasses the income of over 90% of New York residents; it takes into consideration the payment of child support by altering the percentages if child support is also being paid; it requires the court to consider carrying charge expenses; it permits support to be awarded where income is over the cap as well as the ability to deviate up to the cap based on *discretionary* factors which are already familiar—including the contributions and services of the payee as a spouse, parent, wage earner and homemaker *and to the career or career potential of the other party*; it defines the length of the marriage as date of marriage to the date of commencement of the action; it provides for maintenance to be calculated before child support as the maintenance will be subtracted from the payor's income and added to the payee's income when computing child support; it addresses what is to happen if the payor of child support is also the recipient of maintenance; it provides *discretion* in the length of temporary maintenance and that all such spousal support will terminate upon death and post-divorce remarriage; it provides for modification which may be based on the retirement of the payor spouse and allows for the consideration of retirement assets and eligibility age of both parties on a final award; it permits agreements to be entered into without having to spell out calculations or reasons for the parties' own deviation from the presumptive or advisory amounts; it permits the court to issue a decision on the record as well as in writing; it provides for reasonable and *discretionary* percentages for duration of support which are advisory only in nature and requires the court to consider the listed factors in its decision; it permits non-durational maintenance in an appropriate case.

The new law also brings the Family Court Act in line with the Domestic Relations Law; makes the remarriage provisions of DRL §248 for support termination gender neutral; and, of course, brings our long statewide nightmare of enhanced earning capacity to an end—at least for those whose *new actions are commenced* within the enactment dates of the law—120 days post-enactment for all aspects except temporary maintenance, which is 30 days therefrom. The law does not apply to actions already commenced or commenced outside the enactment periods.

A Pro-Active Effort to Effectuate Positive Legislative Change

As with the legislative enactments of 2010 and the attempt to foist additional bad law upon New York's populace last year, misguided and misunderstood Bills were proposed last-minute and under the radar. They were presented to most of the matrimonial bar as *fait accompli* under the guise of altruism, but without any of the underlying facts and law to lend support to their provisions. The 2014 attempt to "correct" 2010's interim support law, and add even more ill-conceived provisions and onerous mandates, was beaten back with a vengeance up to the 11th hour. What arose from that battle was a coalition of all concerned and on all sides of the issue. Listening to each other and using facts and fairness, it created its own proposal under the auspices of the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee chaired by Hon. Jeffrey S. Sunshine.

The coalition of the New York State Bar Association Family Law Section (Chair Alton L. Abramowitz and Eric Tepper), the New York State Maintenance Standards Coalition (Emily Ruben and Kate Wurmfeld), the Women's Bar Association of the State of New York (Sandra Rivera and Michelle Haskin), and the New York Chapter of the American Academy of Matrimonial Lawyers (Elena Karabatos) with Justice Sunshine analyzed, compromised, discussed, debated, and crafted this Legislation with the goal of reaching common ground that no Legislator would have independently fashioned. In essence, we as matrimonial/family lawyers did what we encourage our clients to do in settling cases—chart our own course and fashion our own remedy. It is a template to be proud of and encouraged. We have the ability and a voice to right

wrongs before they occur—if we are vigilant and pro-active. It is the power we have as lawyers when we present arguments at court and the greater power we have as Bar Associations when we band together.

The Result

What we then have—subject, of course, to good lawyering and fair judging—is an amalgam of statutory guidance and real-life-based discretion which was sorely needed, all born of a pro-active effort to fashion good law for the common benefit. Just what the doctor (O'Brien notwithstanding) ordered.

Endnotes

1. S7266/A9606 (2014).
2. *See* Joel Stashenko, *Maintenance Bill's Formulaic Approach Drew Opposition*, NYLJ July 7, 2014; Sophia Hollander, *Legislator Seeks to Fix New York State's Divorce Law*, Wall Street Journal, June 11, 2013; New York State Law Revision Commission, *Final Report on Maintenance Awards in Divorce Proceedings*, May 15, 2013.
3. *See Khaira v. Khaira*, 93 AD3d 194 (1st Dept 2012); Lee Rosenberg, *Multiple Flaws Abound in New Interim Spousal Support Statute*, NYLJ Feb. 25, 2011; Timothy M. Tippins, *Temporary Maintenance: New Rules, New Problems*, NYLJ Nov. 4, 2010; Elliot D. Samuelson, *New York Matrimonial Law Enters the Modern World*, 42 Family Law Review 2 (Fall 2010); Joel Stashenko, *No-Fault Companion Bill Rases New Concerns*, NYLJ Aug. 16, 2010.
4. Ch. 269 Laws of the State of New York (2015).
5. *O'Brien v. O'Brien*, 66 NY2d 576 (1985).
6. *See e.g.*, A. Abramowitz and E. Karabatos, *Working Under the New Guidelines for Spousal Maintenance*, NYLJ (August 21, 2015); S. Eisman and H. Simon, *State Legislature Passes Landmark Bill on Spousal Support*, NYLJ (July 16, 2015); Nancy E. Gianakos, *Post-No-Fault Maintenance Awards: Will Predictability of Results Trump Equity*, 47 Family Law Review 1 (Spring 2015).
7. 22 U.S. 738 (1824).
8. 5 Co. Rep. 99b (1598).
9. Cornell Law Review, Vol. 73 at 1007 (1988).
10. See Benjamin N. Cardozo, *The Nature of the Judicial Process,* The Stores Lectures Delivered at Yale University, New Haven Yale University Press (1921).
11. *O'Brien v. O'Brien*, 66 NY2d 576 (1985).
12. *O'Brien v. O'Brien*, 66 NY2d 576 (1985), Meyer, J. (concurring).
13. Subject to CPI increases as under the existing child support and maintenance law.

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Policy and Practice Considerations in the Legal System for Reducing Stress and Anxiety in the Separation and Divorce Process

By Roger Pierangelo and George Giuliani

The stress of the separation and divorce process on families is well documented in the literature. This stress can be exacerbated by many factors that are dynamically different from what individuals will normally encounter in life. New emotional patterns are created that are confusing and frightening and soon those emotions may be insulated by anger and rage. Children who experience their parents' adversarial actions often become frightened and insecure. This can directly affect their ability to function in many areas of their lives. The legal process is one which uses a "compartmentalized protection." An attorney's compartment includes his or her individual clients; the judge's compartment is focused on the legal aspects of the case; and the attorney for the child(ren)'s compartment, if one is assigned, is focused on the needs of the children. This compartmentalized system adds to the stress of the situation since individual needs rather than a systematic approach to help this family through this crisis may exist. At times, a Parent Coordinator may get involved but our experience shows that this part usually comes much later in the process, after a great deal of damage has already been done. Consequently, what needs to be done is to install certain factors that will reduce the stress encountered by families. The focus of this article will be on exploring policy and practice considerations in the legal system for reducing stress and anxiety in the separation and divorce process.

Recommendation #1: Court-Ordered Parent Coordination

Whenever a separation or divorce case involves children, the parents should be mandated to meet with a Parent Coordinator as soon as possible. When judges feel that a specific issue or issues are preventing parents from moving the case forward, they may order court-appointed therapeutic intervention. Here, the court clearly outlines what the therapist is asked to resolve and is strictly limited to those issues and those issues only. In Nassau County, New York, this program is called the Parent Coordination Program. For instance, if a judge feels that certain aspects of a visitation/parenting schedule need to be resolved or a holiday schedule needs to be determined, then this type of intervention should be available. This can be very useful when the flow of the legal process and levels of cooperation are high. In these cases, the participants should be assigned this process when the unresolved issues identified by the judge are not symptomatic of larger more destructive issues. For instance, two well-meaning parents may need a third party to fully understand all of the options and resolution techniques necessary to end a minor dispute.

However, all too often what is seen as a minor issue may really be a larger more destructive pattern that will never be resolved using this technique. If one parent needs to control, intimidate, hurt or invalidate the other, then this will be a problem in all of the issues discussed and would require a more intense form of intervention with less restrictions. Otherwise, this would be like trying to reduce a fever when the real issue is a serious infection. You may lower the fever temporarily but the symptoms of the infection will eventually show up in other forms. In many instances, courts mistakenly identify a problem as a specific issue rather than a more pathological pattern that could have serious repercussions.

Recommendation #2: Civility Coaching

From our experience, the role for a new form of therapeutic intervention is needed to work with the specific and unique dynamics present during the process of separation and divorce. This process should be initiated at the very beginning of the separation and divorce process when children are involved, not after years of potential rage and the psychological destruction of children. Historically, once parents make the decision to separate or divorce, the battle begins and the emotional distance and lack of civility between the two parents exponentially increases. For all intents and purposes, the lawyers lead the battle for the parents, who are confused, frightened and hurt, and may stay in the background and become observers or informants. The problem here is that the severe emotional state of the parent may at times distort perception and influence judgment and the determination of real priorities. What can then develop are feelings of anger, revenge and control, rather than logic, common sense and fairness.

Once the "battle" begins, the parents rarely, if ever, speak with each other in an attempt to resolve issues with the children. This increased emotional and physical distance actually increases anger, misconceptions and distrust. Everyday issues that need to be dealt with for the sake of the children are avoided. What the children see are two individuals whose anger, hostility and resentment are communicated through body language or verbal rage. Any other form of communication is usually done through lawyers' letters and motions, most which cannot

immediately assist the safety and security needs of the children.

In our professional opinion, a therapeutic intervention that would actually force parents to get closer (not emotionally but civilly) should be mandated. You do not have to like someone in order to be civil, but the motivating factor behind "Civility Coaching" is that you have to *love your children more than you hate each other.* For many parents, this issue is often lost. Not because they do not love their children but because there is no one providing a frame of reference with fair, logical and common sense boundaries and a monitoring environment to work out issues that will help reduce anxiety on a regular weekly basis. Most parents in the legal process of separation and divorce dread the thought of being in "therapy" with their spouse. That is because they are using the traditional concept where you get out your anger, pull scabs off wounds, fight and hear threat after threat, lie after lie, accusation after accusation and numerous historical negative experiences. That is neither the purpose nor the goal of Civility Coaching.

Civility Coaching is a very direct and therapeutically confrontational form of sometimes daily communication and weekly intervention sessions that factors in the psychological, legal and personality constructs of the individuals involved. While the parents formally attend weekly sessions, issues are resolved in a timely manner, sometimes daily (use of phone conferences with the Civility Coach, email, etc.) in order to calm the situation, reduce feelings of helplessness, make people feel heard and provide a logical and fair arena for issues to be resolved. In this way, both parents begin to feel more anchored, less frightened and hopefully more willing to listen, delay inappropriate reactions, and more clearly see the implications of their behavior. It is a form of intervention whose main goals are to:

- Protect the children from serious emotional game playing by the parents.
- Protect the children from hostile behaviors on the part of parents that may artificially confuse their feelings about a parent.
- Protect the children from being used as pawns in the court case.
- Protect the children from their own parents who quite frequently have lost their ability to reason, maintain perspective and muster enough common sense for resolution.
- Provide common sense, logical and fair rules and avenues of civility for the parents.
- Make the parents accountable for the well-being of their children.
- Make parents accountable for their behavior and provide healthier outlets for their feelings.
- Empower children with the tools that will assist them through this turmoil.
- Teach children how to be neutral during the separation and divorce process by providing practical tools.
- Provide children with a common sense and logical anchor during this process that is available to them seven days a week.
- Provide immediate outlets for tension by having someone to turn to so that it does not build into something destructive.
- Provide better tools of civility for parents so their voices can be heard.

Many times, anger is really not the lead emotion but rather the vehicle for the real emotion. For instance, panic may come out as anger, vulnerability, fears of abandonment, feelings of being unprotected and so on are also emotions that may be misread because the person exhibits anger, which is a form of tension release for the real emotion. All too often, it is the anger that is reacted to by those around the person and not the real emotional need (e.g., the need for security and protection). As a result, the person never feels heard since the reactions are to the wrong emotion. Civility Coaching teaches people to read, label and verbalize the primary emotional need and reduce the need for angry outbursts.

In our experience, Civility Coaching can only work if parents are court ordered to cooperate with the Civility Coach. In traditional therapy, the therapist may take months to get the couple to agree on some compromise, whether it involves having the children call the other parent, getting kids ready for parenting time, not denigrating the other parent in front of the children and so on. In the meantime, these inappropriate and destructive behavior patterns go on and the children begin the process of being scarred, sometimes for life. In Civility Coaching, it is clearly understood from the beginning that there are healthy ways to act if the children are truly the concern of the parents. In Civility Coaching, the parents are not the primary concern; the well-being of the children is the sole focus. Keeping in mind that the more civil the two parents are, the easier it is for the children to relax and be less tense and anxious. Reducing the distance between the two parents also makes it easier for children to go back and forth without fears of reprisal or guilt, what we call "fluid interaction."

Civility Coaching, rather than traditional therapeutic techniques, is a more realistic approach during this process. Parent Coordinators would be in the best position to use this technique, which is based on logical, common sense, fairness, and loving your children more than you are angry at each other. All Parent Coordinators should be trained in these techniques since the use of traditional therapeutic techniques may aggravate the situation.

Recommendation #3: Arena Parenting

The process of separation and divorce is filled with a myriad of complications, unnatural arrangements, fears, frustrations, anxieties, and resentments. Children exposed to these feelings and the resulting behaviors on the part of their parents are often confused, frightened, anxious and fearful. Nowhere is this potential volatility more apparent than in the case of two parents in the midst of a very hostile and volatile divorce proceeding and still living in the same house. All too often when in the process of a separation and divorce, parents may be told by their attorneys to stay put and not leave the house, either to strengthen their legal position and assist in negotiations or because they are unable to afford separate housing arrangements. However, they are left in this position with no guidance, support or "arena" to vent their frustrations and learn how to cope with this very stressful arrangement. As a result, a new "living arrangement" should be instituted by the courts with very clear guidelines, boundaries and a monitoring system to protect the health, welfare and safety of the children. We call this system "Arena Parenting." Arena Parenting is a process that establishes a set arena time for both parents where the health, welfare and safety needs of the children are taken care of by one parent without the intrusion of the other. Arena Parenting is a process that allows for a more civil atmosphere for parents and children living in the same house during the separation and divorce process. It is imperative upon the courts to mandate this process as quickly as possible to calm the dangerous and damaging behaviors that arise from this stressful situation. Arena Parenting can provide more consistency, logic, common sense and predictability to a very tense environment.

The Arena Parenting schedule would mirror a "visitation type schedule" as if the parents were not living together. During one parent's Arena time, the children would know that any issues, questions, etc. would be taken to the parent "on duty" that night. The other parent is free to do whatever he or she wishes and must stay out of the other parent's arena that night. The Arena Parenting Plan would be determined by the Parent Coordinator—with, of course, the understanding that the court has the ultimate jurisdiction to decide these issues. For instance, the father has Monday, Wednesday and Friday one week and takes care of all the issues and responsibilities during his time at home with the children's mother. The children know it is his night to parent and go to him for any of their needs. The mother may have Tuesday, Thursday and Saturday that week and the same restrictions and protections occur. This Arena Parenting Plan stops the tension caused by intrusion, invalidation, pitting one parent against the other, forcing the children to choose between parents and relieves the need to constantly defend decisions made by a parent in everyday life during this stressful time. The Parent Coordinator would monitor the handling of the rules.

Recommendation #4: Marital Assessments

There are many types of assessments used in all professions. Schools use formal and informal academic and psychological assessments at the beginning of the school year to determine the strengths and limitations of children so that expectations are in line with their abilities and capabilities. Most schools will use kindergarten screening before children enter school to identify high-risk children who will need special attention and support. This type of assessment reduces problems that some children would have in transitioning to school. The medical profession uses pre-op testing to make sure that all the conditions are within acceptable limits for patients prior to surgery. Doctors will also use extensive medical tests before any intrusive and/or extensive procedures are undertaken by the physician. Psychologists will use psychological examinations and intakes at the start of therapy to determine the mental status of a patient so that the therapist is aware of any fragility, mental illness, psychopathology, etc.

Unlike other professions, the legal profession in separation and divorce cases has no such vehicle to help determine the dynamics of parents and children at the start of this process. Consequently, judges and lawyers almost always blindly enter the litigation process. In general, the only intervention and awareness of family dynamics sometimes comes many months or years into a difficult case when a forensic evaluation is requested by the court. By the time these results are made available, so much damage may have taken place in the psychological development of the children that it may be irreversible.

A marital assessment, by a highly qualified and trained mental health professional, would be a requirement by the Court of all parents after filing for divorce where there are one or more children involved.

Historically, the filing of divorce papers is assumed to mark the start of a process that will be filled with a great deal of anger, anxiety, vulnerability, threats, confrontation and lack of civility. However, the presence of such feelings, in most cases, probably started well before any filing and has the potential to reach a point where the mental status and emotional well-being of the parents and the children can be severely impaired. When judges first review a case, they are very often completely unaware of the mental state and other pertinent information of the parents and children, as well as the dynamics that are present in the family at the time they first appear in court. Consequently, a great deal of time may be lost until an attorney for the child(ren) is assigned or a forensic evaluation is requested by the judge. And even then, the child's attorney may not have the training to provide the judge with specifics regarding family dynamics.

A marital assessment at the start of divorce proceedings would provide a clear and comprehensive report

informing the judge of the overall assessment of the present family interactions and dynamics. A marital assessment would not involve making recommendations or forensic suggestions. Instead, it would allow the judge to determine whether or not immediate court intervention is required for the children in the form of therapy or for the parents in the form of parent coordination, civility coaching or re-entry therapy (professional intervention is required to repair an alienated relationship between children and a parent). These factors should be addressed right from the start so that any damage to the psychological state of the children is prevented.

Recommendation #5: Workshops for Children on Surviving Divorce

As is mandated by the courts for parents who attend workshops on divorce, the court should have the availability of workshops for children of all ages to provide information and tools on how to survive the process. These workshops would be led by Parent Coordinators or other qualified professionals with the primary goal being to empower children and help them cope with the difficulties encountered during the separation and divorce process. However, unlike the two or three sessions that parents may attend, children should have a series of workshop sessions available to them over time to monitor their progress and help reduce changes of tension building up that may affect their performance in school or life.

Recommendation #6: Setting a *Pendente Lite* Financial Arrangement

One of the greatest fears in the separation and divorce process is money. One spouse may fear not having any financial cushion, especially with children, while the other may fear that he/she will be taken advantage of financially. Unfortunately, both parents may use money to control or seek revenge on the other. All the while, this financial vulnerability of having one's financial control in the hands of an angry spouse or being afraid to wind up with nothing because there are no boundaries on the spouse needs to be changed. Since this issue creates so much stress and fear, it should be resolved immediately so that the contributing spouse knows exactly how much he/she will be paying every month rather than using money as a weapon by holding back payments, paying less, etc. What is being suggested to alleviate this stress is that the judge establish a *pendente lite* (refers to support payments that are paid to a spouse during the pendency of a divorce proceeding) order as soon as possible in the process so that there are no fears or games played and both parties know exactly what they must pay or will have to work with during this process.

Recommendation #7: Direct Deposit for Child Support

One of the issues that creates tension not only for parents, but also for children is the method of leaving monthly payments to one spouse. This power position is frequently used as a weapon, and unfortunately, inaccurate or late payments are used as a means of gaining control or passive aggression. Further, in many cases where this occurs, the children are often used to try to get the payments from the late-paying spouse. Placing the children in the position of asking the paying spouse if he/she has the check is psychologically devastating. The use of children as messengers and payment collectors places them in such stressful roles because the results are usually filled with angry, abusive, degrading or rejecting comments to be delivered to the other parent. What is being suggested is that immediate direct deposit be provided to avoid the insecurity and panic response that frequently accompany this situation. It will also protect the children from ever being in that position.

Recommendation #8: Greater Accountability of What Attorneys Put in Writing and Say

From our experience, one of the most devastating times in the separation and divorce process is when someone is served with divorce papers. What ensues can be very devastating, vicious, demeaning, embarrassing, cruel, and in some cases statements are made that border on criminal. The truth is, in the end no one really knows the level of credibility of any of these statements. However, unfortunately, and all too often, we have seen papers where what was stated was completely untrue, never happened and was beyond an exaggeration of the facts.

Lawyers are only open to one side and may accept every statement from their clients as fact without the need for evidence. In general, lawyers may not have the time, training or objectivity to monitor their own clients' behaviors that may facilitate or aggravate the process and, further, prove destructive for the children. What follows then is the need of the other party to counter these statements to the court with his/her own "stories" and fabrications and elevations of the truth since he/she must overcompensate for the viciousness of what was said or written about him/her. This vicious atmosphere does nothing but aggravate an already tense situation and makes resolution even more difficult.

We feel that judges need to step in and hold lawyers accountable for the determination by fact, observation, records, reports and investigations of whether or not the statements being made to the court are indeed truthful. After all, fabrications, exaggerations and lies should not be the basis upon which a judge should decide the fate of anyone's future, especially when children are involved.

Further, the final decision should also not be the result of how well a lawyer argues a case since that has no bearing if the great argument is being presented with facts that are not true.

Recommendation #9: Operationally Define Terms in All Agreements

Many of our cases with the courts have involved post-divorce counseling where the parties have unresolved issues concerning the interpretation of the divorce agreement. Considering that many of our clients have paid well over six-figure dollar amounts getting this agreement, it is questionable at best that they must figure out the meaning of some of the conditions in the agreement. Terms such as "liberal visitation," "extracurricular activities," "sensible late period for pick-ups," "within a reasonable amount of time" and other terms are what can be thought of as vague generalities. These vague generalities create an atmosphere where the two parties must engage again after a bitter struggle and relive the battles for control again. While some parties are able to successfully work this through with the assistance of a therapist or parent coordinator, most either fight or return to court for a decision on the interpretation. Operationalizing all terms means that there is no misunderstanding and all the terms are objectively defined. For example, "within a reasonable amount of time" could be worded as the parent picking up the children must do so within a 15-minute window. If the parent is unable to pick the children up at the designated time or within 15 minutes, then he or she is required to make other arrangements for pick-up so as not to hold up the other parent with his or her plans. We are not looking to define the terms in this article; what we are recommending is that the terms be operationalized so there is no confusion as to their meaning.

Recommendation #10: Provide Post-Divorce Transition Counseling

Just because a couple has finalized its agreement does not stop the emotional upheaval that has been created by this process. Turning the key off on a train going 100 miles an hour does not stop the train on a dime. A series of post-divorce counseling sessions should be required for the sake of the parents, but more importantly for the best interests of the children. Topics such as co-parenting, schedules, the agreement conditions, stress factors and responsibilities as a single parent, in-law reactions, etc. all need to be discussed now that the parents are entering a new life and parenting style.

Recommendation #11: Dynamic Divorce and Separation Training

One of the most difficult functions facing court officers (e.g., children's attorneys, court-appointed therapists and judges) is the determination of the true motive behind the reluctance of a child at any age to maintain visitation/access time with a parent during separation and divorce cases. In order to fully understand the dynamics behind reluctance and the many possible motives, one must first explore the developmental characteristics and variables that influence children in dealing with the stressors of separation and divorce.

For instance, the presenting problem first encountered by court officials may be a rigid, non-negotiable stance by the child that involves realistic reasons for the reluctance of participating in parenting time. If this presenting problem is taken at face value, which all too often occurs by untrained personnel, then the child may actually be placed in a compromising position that will aggravate his/her already stressful situation. Instead of immediately accepting the rationale of the child as fact, court officials need to be aware of the variety of underlying motives that all present in the same fashion, namely reluctance. A child's reluctance to see a parent has numerous possible motives (e.g., identification with the aggressor) and it is imperative that the correct motivation be understood. Believing that children's true motives always lie on the surface may result in decisions that add to the trauma of the situation.

Recommendation #12: Stop the Game Playing

All too often, clients are confronted with "games" by the other party. An example of this is in the case of child support papers. All too often, deadlines are missed, payments are made late, illegal deductions are taken out at whim and some payments are not even made. Since this money is in the best interests of children's needs, the courts should jump on this "game" immediately if presented with facts of game playing.

A second game that too often happens is the cancellation of parenting time at the last minute, which places undue stress on the waiting parent. While this may realistically happen, a factually presented pattern should be dealt with immediately since it can be evidence of passive aggression, irresponsibility or narcissism. None of these are acceptable since the stress, burden and possible interference of plans are on the parent waiting.

A third example is a parent making plans or appointments (that can easily be made at other times) on the parenting time of the other parent. This is also a control issue, and while responsibility should be shared, this pattern becomes obvious when it presents as a pattern.

Currently, when situations like these arise, the aggrieved parent will file an application with the court and the case may be heard several months later. Further, the guilty parent may change the pattern right before court so that the offense is minimized. But, after the court appearance and ruling, many return to the same "games." Ulti-

mately, all "game playing" needs to be seriously assessed and stopped if patterns are evident.

Recommendation #13: Parent Accountability

Parents involved in matrimonial cases will often expound on their virtues when it comes to the welfare of their children. They will speak about how they truly want their children to have a healthy relationship with their spouse, want the children to be happy, be willing to do anything to prevent scars for their children, cooperate with their spouse, etc. However, all too often their behavior and words never line up, and what occurs is often the complete opposite. The parents' fragile emotional state, brought on by a sudden fears involving possible severe changes in finances, safety, sense of protection, environmental living conditions, social connections, emotional and sometimes vocational needs, become the new and overwhelming focus in their lives. Since these fears now drain energy like never before, the judgment and perceptions of parents from issues that might be in the best interests of their children now become distorted. What may result are actions and behaviors toward each parent that do not take into account the impact on the well-being of children.

The period of time when parents are involved in the legal process of separation and divorce can become a very artificial, unnatural and psychologically destructive time for their children. This is a time when logic, common sense and fairness may not be the driving force behind the parents' behavioral choices. Consequently, parents may exhibit or initiate behaviors that create extreme stress on their children, almost sacrificing their well-being, in an attempt to get revenge, control, or express extreme anger towards the other parent.

The choices of behavior on the part of the parents will need to be identified as quickly as possible by judges, children's attorneys or parent coordinators assigned to the case. If these destructive and unhealthy parental behaviors are not identified quickly, and intervention does not take place, then permanent damage to the children's mental health has a very high probability of becoming a reality. There is no excuse on the part of the legal or psychological system to allow such destructive behaviors to continue once identified. While parents may deny that they do these things, the behavior of the children almost always provides a record of what is actually taking place and what true messages are being conveyed, direct or indirect, to the children. Behavior is always a message and it is very important that professionals involved in separation and divorce cases learn to better understand children's behavior so that they can intervene quickly and reduce their stress.

The psychological devastation that can occur in children as a result of unhealthy parental behaviors during the divorce process may first show up in school and sleep patterns. The tension brought on by the child's hesitation in saying things, fear of hurting the other parent, guilt, fears of retaliation and abandonment, etc. add so much tension that concentration, focus, motivation, judgment, and patience, completion of tasks, grades, and appropriate behavior all deteriorate quickly, since the required energy for these factors is drained away to deal with the inner turmoil brought on by the parental behaviors.

These destructive and stress-provoking behaviors on the part of parents may at times be very subtle. Some may be motivated by personal neurotic needs, while others are motivated by nothing more than to hurt and neutralize the other parent's role in the life of the child as much as possible.

The Parent Coordinator assigned to the family should monitor such behaviors, attempt to retrain, or assist to change such behaviors. However, if the parent continues these destructive tactics that jeopardize the health, welfare and safety of the children then the court would need to step in and set boundaries. A behavioral contract that outlines acceptable behaviors and consequences of not following these guidelines can be developed between the Parent Coordinator and the parent in question.

Recommendation #14: Keep Clients Frequently Updated

It is imperative that lawyers recognize the importance of their position to a client going through the pain and fear, and panic of a separation and divorce. Like a lifeguard and protector, a lawyer anchors the client during a time when fear, anxiety, confusion, anger, guilt, and, above all, fears of abandonment are present. While the process is a long one and lawyers are burdened with so many factors on a daily basis, some type of consistent communication should be explored. Clients know that a lawyer's time is valuable and spread very thin among so many clients. However, all clients like to feel that they are part of a lawyer's thinking on a regular basis and not just when they reach out with anxiety-driven emails, some of which can be very confrontational or angry. However, since anger insulates many other emotions like fear and panic, a lawyer initiating a spontaneous short email every so often would be beneficial in keeping down fear, anxiety and panic, which many times is displaced on children.

We feel that there are several types of clients that should be recognized by lawyers as needing this type of encouragement. Depending on the issue, the communication to the client can sometimes even be handled by an administrative assistant, law clerk, intern, etc. so as to not burden the lawyer. Any communication makes the client feel less alone and frightened, including short notes like, "Still waiting to hear from the other lawyer—hang in there," or "Just received a letter from your husband's

attorney; I'll get back to you later this week to discuss." It is not realistic to send these out often, but lawyers should realize that it is far better for them to be in control with the emails than get a barrage of questioning, long, and angry emails at times that are not within their control. What sometimes happens then is the lawyer is way too busy to answer these long emails and the fears and anger on the part of the client become worse. Such communication initiated by lawyers will calm down clients and allow them to delay clients' fears of not knowing what is going to happen. Keep in mind that high levels of anxiety sometimes create rigidity and demanding behavior on the part of clients and may make negotiations or working out issues more difficult since the client may feel powerless and take a stand on the wrong issue.

Recommendation #15: Provide a Step-by-Step Checklist for Clients

Most clients that we have worked with through the separation and divorce process have no real idea of the specific legal steps that they will be going through while in this process. As an attorney, you may have handled thousands of cases. But for your client, this is all brand new and he/she is out in the ocean without a life raft when everything initially begins. Providing all clients with a step-by-step guide with approximate timelines can make the process easier to understand and alleviate a lot of the stress, as well as many questions back to you. Most clients just see this process as a black hole and have no idea where they are heading or how long it will take. It becomes your job to guide them and show them the start process, the middle and the how closure is obtained.

Conclusion

The bottom line is that, in general, all professionals involved in the separation and divorce process need to do a better job as a whole. The reality is that the stress and emotional turmoil that face children through this legal process can be devastating and destructive. But it does not have to be; it really doesn't. There needs to be a sense of balance. A sense of doing what's right—not just because it betters the client, but because it's fundamentally protecting the best interests of the children. There needs to be accountability on the part of what gets said by parents and about parents. In truth, we could have written many more policy and practice considerations for this article, but length of space prevents it. The message is clear. We hope that all Officers of the Court take the time to process what we have addressed and maybe begin opening up dialog about making the legal system involving separation, divorce and family law a much more psychologically healthy area of law for the children impacted by it.

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Joint Legal and Residential Custody—A Win-Win-Win

By Marie F. McCormack

In our adversary system, one party wins and one party loses. Undoubtedly, the adversary system is a masterfully designed process to arrive at the truth and to administer justice. However, when it comes to custody matters, the adversary system presents the court with a dilemma. In such matters, the court is not only weighing the respective positions of two parties, but is also considering the position of the children, and therein lies the difficulty. When one parent wins and the other parent loses, the child often loses as well. The child loses because he or she is being deprived of the full involvement of both parents. The concept of one "winner" and one "loser" is further detrimental to the parent-child relationship in that it may change the children's perception of their parents, as Judge Ellen Gesmer insightfully pointed out in a recent article.[1]

> At the end of the trial, your children may well perceive that one of you has lost and one of you has won. They may feel badly for the parent who "lost," and they may feel compelled to try and manipulate the schedule so that they can spend more time with that parent. Or they may think that they should side with the "winner" and be dismissive of, or even cruel to, the parent whom they perceive as the "loser." In either event, it puts them in a terrible bind.[2]

The parent-child relationship is one of the most precious of human relationships and critical to a child's development. The challenge facing the Courts is how to preserve a meaningful relationship with both parents in the context of a custody dispute. The courts have tried to resolve this dilemma by fashioning custodial arrangements which attempt to foster the involvement of both parents in the child's life, and have awarded joint legal and physical custody,[3] even after trial.

From *Braiman* to the Present

It is well settled that the essential question to be addressed by the court in a custody/parenting time proceeding is what arrangement is in the best interests of the child[4] in promoting the child's "welfare and happiness."[5] The court must evaluate the best interests of the child in light of the "totality of the circumstances."[6]

As to an award of joint custody, the Court of Appeals in *Braiman v. Braiman*[7] made clear that it is not appropriate when the parties are "embattled and embittered." The *Braiman* Court, however, did not close the door on the issue of joint custody after trial. The Court recognized that there are situations when joint custody is appropriate and stated, "joint custody is encouraged *primarily* as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion" (citations omitted, emphasis added).[8] The holding in *Braiman,* thus, did not preclude court-ordered joint custody in all circumstances. Moreover, the Court noted the importance of both parents in a child's life.

> Of course, other considerations notwithstanding, children are entitled to the love, companionship, and concern of both parents. So, too, a joint award affords the otherwise noncustodial parent psychological support which can be translated into a healthy environment for the child.[9]

"When one parent wins and the other parent loses, the child often loses as well."

In the years since the *Braiman* decision was issued, the courts have fashioned various custodial arrangements, such as shared physical custody and the award of final decision making authority to each parent in distinct areas, in order to foster the involvement of both parents and to achieve an arrangement that is in the best interests of the child. In *Hardy v. Figueroa*,[10] the Court awarded shared physical custody with equal time with each parent and distinct areas of decision making authority. In *Prohaszka v. Prohaszka*,[11] the court affirmed the trial court's award of joint custody and primary physical custody and final decision-making to the mother, but required the mother to "consult with the defendant regarding any issues involving the children's health, medical care, education, religion, and general welfare prior to exercising her final decision-making authority." *Jacobs v. Young*[12] involved distinct areas of decision making authority. In *Margaret M.C. v. William J.C.,*[13] the Court awarded joint legal and physical custody with equal parenting time. The Court in *D.Z. v. C.P.*[14] awarded joint legal and physical custody with spheres of decision making, even though there was some conflict between the parties, including the existence of an order of protection. The Court found that the circumstances surrounding the order of protection were not "of particular value in determining this custodial dispute."[15] It is important to emphasize that a history of domestic violence is an issue of great significance in custody matters, and will generally not be conducive to joint custody.[16] *D.Z.* involved isolated instances of domestic violence arising from the contentiousness of the litigation, and did not

involve a pattern of domestic violence. The issue of domestic violence is fact specific, and the courts must address the circumstances of a particular case. In *D.Z,* the Court cited a "plethora of research on the viability of a joint custodial arrangement" since the *Braiman* decision-[17]and further found that the parties were able to work out a parenting time agreement, during the litigation, and adhere to it. In addition, the parties lived relatively close to each other, making a joint custody arrangement more feasible. Both parents were hard working and each had a suitable home for the child, and the attorney for the child argued that the child "can and will thrive by spending approximate equal time with both of her parents."[18]

Advocating for Joint Custody Before and at Trial

The family law practitioner, including the attorney for the child, should consider advocating for joint legal and physical custody in appropriate cases, during both the negotiation and the trial phases of the litigation. From the standpoint of the attorney for the parent, it is important to advise the client that the involvement of both parents is often beneficial to the child, and an emotionally healthier and happier child will ultimately benefit all parties. Joint physical custody is beneficial in that it prevents the child from feeling like just a "visitor" in the home of one of his parents, which can diminish the importance of the parent-child relationship. It also permits the child to enjoy fully the love and companionship of both parents. Joint legal custody is beneficial to the child in that major decision making is a critical parental role, and the child deserves the wisdom and guidance of both parents with regard to major decisions.

Additionally, there are purely practical reasons for an attorney to discuss joint legal and physical custody with the client. If a joint arrangement is discussed with the client, counsel can advocate for a specific arrangement that best fits the needs and particular strengths of the client. It is always better for the litigant to have input into the final custody arrangement than to have one imposed upon the litigant by the court. Counsel could explore such issues as the client's work schedule and ability to transport the child, the location of the child's school district, and the schedule regarding the child's extra-curricular activities, in order to develop a practical joint custodial arrangement. As to joint legal custody, if true joint decision making is not possible, spheres of final decision making are a viable alternative to discuss. Each parent has particular strengths and weaknesses. For example, one parent may be more adept at making major educational decisions, while one parent may be more adept at major medical decisions. If, for instance, one parent was the parent that generally took the child to the doctor, perhaps that parent should have final decision making with regard to medical issues. Consultation with the parent who does not have final decision making in a particular sphere is vital, so that both parents are involved in the major decisions for the child. Mechanisms to insure meaningful consultation, such as an appointment with a professional, for example, the child's doctor or guidance counselor, can be built into the agreement. Geographical issues are also important, and must be considered. When the parties live in close proximity to each other, shared physical custody, with nearly equal time, is particularly feasible, as school week overnight parenting time is easier to implement. If the parents intend to live in different school districts, a choice of school district for the child must be addressed. When the parties do not live relatively close to each other, one of the parents can enjoy more weekend parenting time or more time on school vacations. Geographical distance certainly does not preclude both parents' involvement in major decisions.

"If the parties can be made to understand that joint legal and residential custody can be best for their child or children, and best for themselves, they may rise to the occasion and put aside their differences in order to parent their children, jointly."

The role of the attorney for the child is of utmost importance in any custody arrangement, and his or her input provides guidance with regard to what best accommodates the needs and desires of the child. The attorney for the child must assert his or her client's position, with narrow exceptions.[19] Hopefully, in most cases, the child will want to spend meaningful time with both parents. Additionally, the position of the child is a factor for the court to consider, but is not the sole determining factor.[20]

Although it may seem, at first glance, counterintuitive to seek joint custody at trial, this is not necessarily so. Even at trial, a parent may want to testify to a specific arrangement that he or she desires and comports with his or her schedule and particular strengths, so that the parent has a voice with regard to the ultimate custodial arrangement ordered by the court.

Conclusion

Clearly, joint custody will not be workable in all matters, and all decisions regarding custody depend upon the circumstances of a particular case. Nonetheless, counsel should keep in mind that most litigated custody matters are by their very nature contentious. This does not necessarily preclude a joint custody arrangement. If the parties can be made to understand that joint legal and residential custody can be best for their child or children, and best for themselves, they may rise to the occasion and put aside their differences in order to parent their children, jointly. Perhaps then "win-lose" can become "win-win-win."

Endnotes

1. Ellen Gesmer, *Note to Divorcing Parents: Resolve Your Issues About Children*, NYLJ, Sept. 21, 2015.
2. *Id.*
3. For purposes of this article joint physical custody is defined as "as near to equal time with each parent as the circumstances allow."
4. *Tropea v. Tropea*, 87 NY2d 727 (1996).
5. *Eschbach v. Eschbach*, 56 NY2d 167 (1982).
6. *Friederwitzer v. Friederwitzer*, 55 NY2d 89, 95 (1982).
7. *Braiman v. Braiman*, 44 NY2d 584, 590 (1978).
8. *Id.* at 589-590.
9. *Id*. at 589.
10. *Hardy v. Figureroa*, 128 AD3d 824 (2d Dept 2015).
11. *Prohaszka v. Prohaszka*, 103 AD3d 671 (2d Dept 2013).
12. *Jacobs v. Young*, 107 AD3d 896 (2d Dept 2013).
13. *Margaret M.C. v. William J.C.*, 41 Misc3d 459, 2012 NY Slip Op. 22408 (Sup. Ct. Orange County 2012).
14. *D.Z. v. C.P.*, 18 Misc3d 1123(A), 2007 NY Slip Op. 52528(U) (Sup. Ct. Queens County 2007).
15. *Id.* at *8, FN4.
16. *See* Domestic Relations Law §240(1)(a-1) and *Braiman, supra* (which involved allegations of domestic violence).
17. Citing to Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 Tex. L. Rev., 687 (1985*); Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 Ariz. L. Rev. 753, 846 (1999*); Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*, 31 Hofstra L. Rev. 547 (2002); *Two Parents for Every Child of Divorce: Sustaining The Shared Parenting Ideal of Maine's Custody Law*, 14 Me. B.J. 86 (1999).
18. *D.Z., supra* at *4, FN1.
19. 22 NYCRR §7.2(d)
20. *Eschbach, supra* at 173.

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Sticks and Stones and Names All Hurt: Does Domestic Abuse Rise to the Level of Marital Fault so as to Satisfy the "Egregious"and "Shock the Conscience" Standard?

By Esther M. Schonfeld

One of the most contentious points in a divorce other than custody is the distribution of property. New York is known as an "Equitable Distribution State," meaning that upon dissolution of marriage, the court must divide all marital property "equitably."[1] This doesn't necessarily require an equal division of the couple's assets. Rather, the court will strive to divide and distribute the marital property and debts for a fair outcome, based upon what the court perceives to be the most financially "fair" arrangement. The guiding principle of equitable distribution is that "both parties in a matrimonial action are entitled to fundamental fairness in the allocation of marital assets and that the economic and noneconomic contributions of each spouse are to be taken into account."[2] In recognizing a marriage as an economic partnership, the Domestic Relations Law mandates that the equitable distribution of marital assets be based on the circumstances of the particular case and directs the trial court to consider a number of statutory factors.[3]

As matrimonial practitioners, one question we frequently are asked is whether the fault or misconduct of a spouse can be considered by the Court in distributing marital assets. The "fault" alleged can range from incidents of domestic violence to adultery to economic fault where a spouse takes actions that hurt the economic relationship between them.

As a general rule, marital fault of a party is not a relevant consideration under Equitable Distribution law[4] and there is no such specific factor set forth in the Domestic Relations Law that specifies that marital fault would be taken into consideration.[5] Courts generally make their determination without regard to fault, so they will not typically punish or reward either party to the marriage on that basis.[6] This is partly because the issue of who did wrong in a marriage is not appropriate for a court to consider.[7] The New York Court of Appeals recently noted in a decision that fault will usually be difficult to assign and that the introduction of the issue relating to fault may involve the court in "time-consuming procedural maneuvers relating to collateral issues."[8]

In very limited circumstances, however, courts have in fact considered fault in the division of marital assets.[9] The Domestic Relations Law, which lists the factors to be considered by a court when distributing property in a divorce action, provides a catch-all factor that allows the judge to take into account "any other factor which the Court shall expressly find to be just and proper."[10] Several commentators have noted that the last factor was included because the Legislature was unable to reach agreement on whether fault was to be considered under equitable distribution.[11] The Domestic Relations Law also provides that the court may consider the effect of a "barrier to remarriage" as an additional factor in distributing property.[12] There are those who would argue that a spouse's failure to remove barriers to remarriage is another form of misconduct or fault.

Several leading New York cases[13] have held that marital fault may be a consideration by a court based on this catch all provision which allows for the Court to allow any other factor deemed "just and proper."[14] The cases specify that marital fault must be so "egregious" as to "shock the conscience."[15] While this may be perceived as a glimmer of hope for those who believe that marital fault should be a consideration in the distribution of property, this is a difficult standard to prove.[16]

In 1985, New York highest Court adopted the "egregious conduct" rationale in the landmark case of *O'Brien v. O'Brien*,[17] where the Court of Appeals held that "except in egregious cases which shock the conscience of the court, however, [marital fault] is not a 'just and proper' factor for consideration in the equitable distribution of property."[18]

The New York Supreme Court explicitly considered domestic abuse as sufficiently egregious so as to shock the conscience. In the case of *DeSilva v. DeSilva*,[19] Justice Jacqueline W. Silbermann awarded the Wife 100% of the marital assets finding that the pattern of domestic violence which involved both physical and verbal abuse rose to the level of egregious fault.[20] In *DeSilva*, there was a long history of abuse during the parties' 11-year marriage, including incidents of the Husband yelling obscenities in the presence of the children, throwing a bag at his pregnant Wife's abdomen and throwing his Wife to the ground. He had also been arrested five times for altercations with other people.[21]

Prior to the *DeSilva* case, in *Havell v. Islam*,[22] the "egregious standard" was held to encompass domestic violence. In *Havell*, Justice Silbermann looked to case law, statues and literature from other States in its determination whether to expand the egregious conduct standard to include a pattern of physical and emotional abuse during a lengthy marriage. The Court held, "a pattern of domestic violence, properly proven by competent testimony and evidence, is a 'just and proper' factor to be considered by the court in connection with the equitable distribution of marital property."[23] In so holding, the Court also found, "[i]n the case at bar, the wife alleges the husband engaged in conduct resulting in lasting emotional and physical harm to herself and the parties' children. In this court's view, such conduct, if proven, is so egregious and shocking that the court must invoke its equitable power so that justice may be done between the parties."[24]

These cases are very important because they are but a few cases in which reprehensible behavior has been deemed to constitute egregious fault sufficient to affect equitable distribution. Specifically, in *Havell,* the Appellate Division, First Department, upheld the trial court's decision which awarded the Wife all but 4.5 percent of the marital estate where her Husband beat her with a barbell and a pipe, causing multiple contusions and lacerations, along with neurological damage and other serious injuries to her.[25] While the Husband pleaded guilty to first-degree assault on his Wife, the First Department accepted the lower court's finding that the Husband's attack amounted to attempted murder and constituted egregious marital fault.[26] In conclusion, the Court concluded that egregious fault could include domestic violence.

While the *DeSilva* case may not have the same "shock value" as the *Havell* case, which involved serious physical abuse involving a barbell, the message from both these cases is clear: domestic violence will not be tolerated and abusers must be held accountable.[27]

Since the determination of what constitutes egregious conduct is left to the discretion of the court, it is interpreted by different courts in different ways. As a result, the "egregious" standard is difficult to attain, hard to prove and results in cases that are sending the wrong messages to abusers. It is likewise unfortunate that in the limited cases where the standard has been met to the satisfaction of the judge, the definition of domestic abuse for all intents and purposes has been limited to physical abuse. The courts have failed to consider the harrowing emotional and psychological abuse that plagues most victims.

A review of some of the New York case law demonstrates the narrow interpretation of egregious conduct and how the courts have historically dealt with the issue of marital fault. For example, an early case discussing marital fault in depth, *Blickstein v. Blickstein*,[28] concluded that as a general rule, marital fault is not a relevant consideration in distributing assets. The *Blickstein* court, however, noted that there will be cases that the marital fault by virtue of its "extraordinary nature" becomes relevant and should be a consideration but will be "very rare."[29]

McCann v. McCann,[30] another case addressing the issue of fault, is a disturbing one. In *McCann*, a Husband got married with the express promise to his Wife to have children. He subsequently refused to fulfill that promise after several years of lying, and as a result, his Wife passed her child bearing years and was no longer fertile.[31] The court found that while the Husband's misconduct showed "a blatant disregard for the marital relationship" and was "morally reprehensible," his conduct did not constitute egregious marital conduct sufficient to be considered in equitably distributing the marital assets.[32] To be deemed egregious, the court concluded, conduct must "callously imperil[] the value our society places on human life and the integrity of the human body."[33]

In *Kellerman v. Kellerman*,[34] the Appellate Division, Third Department, overruled the lower court's decision to allow marital fault to be considered in equitable distribution. In so holding, the court reasoned that "[d]efendant's conduct, which consisted predominantly of verbal harassment, threats and several acts of minor domestic violence, is in our view not so outrageous as to shock the conscience of the court and to justify his divestiture of certain of the parties' marital property."[35] According to the decision, the Wife alleged 27 acts of cruel and inhuman treatment. One can't help but wonder if the alleged acts were proved, shouldn't this cruelty rise to the level of marital fault?

Similarly, in *S.A. v. K.F.,*[36] the Supreme Court, Kings County, found the level of egregious conduct was lacking in the case. The Court reasoned that "the husband's conduct in this case consisted of threats, harassment, and certain acts of domestic violence."[37] Furthermore, the court went on to say, "although this court heard the wife's credible testimony that she believed her husband would attempt to carry out his threat of carving certain letters into her stomach with broken glass, fortunately, this did not occur. Thus, in accordance with the existing case law, this court is constrained not to take the issue of domestic violence into consideration for purposes of equitably distributing the marital assets."[38]

In *Orofino v. Orofino*,[39] the court found that the Husband's conduct of, among other things, physically abusing and verbally abusing the Wife, threatening to commit arson, placing the muzzle of a rifle to her head, and threatening to kill her did not rise to the level of that "rare occasion" where marital fault should be considered.[40] A review of this case law reinforces the problem that the term "egregious" can have many different connotations and is often seen in the eye of the beholder

The key authority on the standard is the recent New York Court of Appeals case of *Howard S. v. Lillian S.*[41] where the Court held that the Wife's conduct did not rise to the level of egregious fault since she did not "endanger the lives or physical well-being of the family members, nor deliberately embarked on a course designed to inflict extreme emotional or physical abuse."[42] The Husband claimed that the Wife's misrepresentation to him that one of their children was his, when the child was a result of an adulterous relationship, was egregious fault.[43] The Husband claimed that this had caused him to raise the child as his own and caused him to have made certain personal and economic decisions he would not have made had he known that this child was not his.[44] In affirming the lower court and the Appellate Division's denial of the Husband's request for discovery on the issue of egregious marital fault for purposes of equitable distribution, the Court held that the circumstances of the case were insufficient for that purpose, stating that in order to be a factor in making determinations on the economic aspects of the marriage, the egregious conduct "must consist of conduct that falls well outside the bounds of the basis for an ordinary divorce action."[45] It added, however, that there may be situations where grounds for divorce and egregious conduct will overlap, but "it should be only a truly exceptional situation, due to outrageous or conscience-shocking conduct on the part of one spouse, that will require the court to consider whether to adjust the equitable distribution of the assets."[46] The dissent (Pigott, J., dissenting) argued that it was premature to rule that the Wife's behavior does not as a matter of law constitute egregious misconduct.[47] It is also interesting to note that according to the dissent in the Appellate Division case, (Nardelli. J., dissenting), the Wife's conduct, which included, among other things, misleading health care providers as to the child true genetic background, many secret escapades with her paramour and her dissipation of assets, was sufficient for the Husband to state the claim for egregious conduct.[48]

In relying on *Howard S.*, the court in *Eileen G. v. Frank G.*,[49] held that the Wife was entitled to compel disclosure regarding marital fault as a potential factor in the distribution of property. The Court reasoned that it "cannot be seriously argued" that the allegations of molestation of a child could "never be sufficient basis under *Howard S.* for a finding of 'outrageous' or 'conscience-shocking' conduct."[50] The *Eileen G.* court mentioned a footnote in the *Howard S.* case which noted that to the extent the cases can be read to limit egregious conduct to behavior involving extreme violence, the definition should not be so restrictive.[51] As the *Eileen G.* Court reasoned, this statement leaves the matter open to individual assessments on a case-to-case basis, without a narrow reference to one particular type of conduct or injury.

A prior case that found abusive conduct as egregious is noteworthy. In *Debeny v. Debeny*,[52] the defendant's misconduct toward the plaintiff of using her as a punching bag, treating her as an indentured servant, was so brutal as to "clearly demonstrate gross and complete disregard of the marital relationship."[53] The court concluded the defendant's assaults toward the plaintiff were, at the very least, egregious and must be considered in determining equitable distribution.[54]

Conclusion

The National Coalition Against Domestic Violence defines domestic violence as the "willful intimidation, physical assault, battery, sexual assault, and/or other abusive behavior perpetrated by an intimate partner against another."[55] Statistics show one in every four women will experience domestic violence in her lifetime and an estimated 1.3 million women and 835,000 men are victims of physical assault by an intimate partner each year.[56] According to the U.S. Department of Justice, between 1998 and 2002, of the almost 3.5 million violent crimes committed against family members, 49% of these were crimes against spouses.[57] Too many spouses have been held captive by domestic violence, whether it be through physical abuse, financial abuse, emotional abuse or a combination of all. In the media and on social network, we are inundated with news stories about domestic violence. Domestic violence is a widespread problem and not only has effects on spouses, but also their children. This problem is not one that will go away quickly or quietly. Even under the best of circumstances, divorce is complicated and emotionally trying, but for victims of abuse, the process is exponentially more difficult.

Yet despite the well-publicized statistics and news stories, it would appear from an analysis of the relevant case law that unless there is significant egregious physical violence between the parties, the court will not alter equitable distribution on the basis of marital fault. In the majority of divorce cases, the shift to the removal of fault from divorce has made the process more streamlined. However, in cases of abuse it is an inappropriate erasure of culpability. The message the courts are sending in cases with domestic abuse is that such conduct is not so egregious so as to warrant economic relief. The courts have the statutory ability to grant the relief victims so deserve, if only they would be more liberal in exercising it.

Endnotes

1. N.Y. Domestic Relations Law §236 (B)(5)(c). "Marital property shall be distributed equitably between the parties, considering the circumstances of the cases and of the respective parties."
2. *Holterman v. Holterman*, 3 N.Y.3d 1, 8 (2004).
3. N.Y. Domestic Relations Law §236 (B)(5)(d).
4. *Havell v. Islam*, 301 A.D.2d 339 (1st Dep't 2002), *lv denied*, 100 N.Y.2d 505 (2003). "The general rule in New York is that marital fault should not be considered in determining equitable distribution (Scheinkman, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B, at 437-440)."
5. See N.Y. Domestic Relations Law §236 (B)(5)(d).

6. However, some courts will factor in any conduct by either party which has served to depreciate the marital estate and the assets thereof in some way; spouses who purposely liquidated or depreciated assets will generally be viewed unfavorably by the court when it makes its determination as to the division of the marital estate.
7. See *Howard S. v. Lillian S.*, 14 N.Y.3d 431 (2010). "Marriage is, among other things, an economic partnership and that the marital estate should be divided accordingly."
8. *Howard S.*, 14 N.Y.3d at 435-436.
9. But see, *Howard S. v. Lillian S.*, 14 N.Y.3d 431 (2010) (noting that New York's Domestic Relations Law allows for consideration of marital fault only in a limited set of circumstances).
10. N.Y. Domestic Relations Law §236 (B)(5)(d).
11. *Blickstein v. Blickstein*, 99 A.D.2d 287 (2d Dep't 1984).
12. N.Y. Domestic Relations Law §23 (B)(5)(h).
13. See *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985); *Havell v. Islam*, 30 A.D.2d 339 (1st Dep't 2002).
14. *Howard S. v. Lillian S.*, 14 N.Y.3d 431 (2010).
15. See *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985); *Havell v. Islam*, 30 A.D.2d 339 (1st Dep't 2002). Marital fault can only be taken into consideration where "the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that 'shocks the conscience of the court thereby compelling it to invoke its equitable power to do justice between the parties." *Havell v. Islam*, 301 A.D.2d at 344-345 (citing *Blickstein*, 99 A.D.2d at 292).
16. For example, *see Kellerman v. Kellerman*, 187 A.D.2d 906 (3d Dep't 1992), where the Court held, "Defendant's conduct, which consisted predominantly of verbal harassment, threats and several acts of minor domestic violence, is in our view not so outrageous or extreme as to shock the conscience of the court and to justify his divestiture of certain of the parties' marital property." *Id*. at 907-908.
17. *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985).
18. *Id.* at 719.
19. 2006 N.Y. Misc. LEXIS 2489 (Sup. Ct. N.Y. County 2006).
20. *Id*.
21. *Id*.
22. 186 Misc. 2d 726, *aff'd*, 301 A.D.2d 339 (2000).
23. *Id*. at 731-732. The *Havell* Court adopted the analysis of the court in *McCann v. McCann*, 156 Misc. 2d 540 (1993) where the court found that a Husband promise to have children and his subsequent refusal to have children resulting in the Wife's infertility did not constitute egregious conduct. In *McCann*, the Court found that while the Husband's conduct was "morally reprehensible and a "blatant disregard for the marital relationship," it was not egregious. *McCann,* 156 Misc. 2d at 547-549.
24. Id. at 731. "The allegations in the instant action involve the physical and emotional intimidation of the wife and children over the course of many years. A review of literature on the topic of domestic violence reveals that domestic violence produces physical and psychological ramifications in women victims, often causing women to develop 'battered woman's syndrome.'" *Id.* at 731 (citing Walker, *The Battered Woman Syndrome* [1984]).
25. *Havell v. Islam*, 301 A.D.2d 339 (1st Dep't 2002).
26. *Id*. at 342.
27. Joanna Grossman, *The Financial Penalty For Spousal Abuse: A New York Judge Ups The Ante, By Awarding All Marital Property Of The Abusive Victim*, www.writ.news.findlaw.com/grossman/20060905.html.
28. 99 A.D.2d 287 (2d Dep't 1984).
29. 99 A.D.2d at 292. The court also noted the role of marital fault may be different in the context of awarding maintenance. *Id*. at 293.
30. 156 Misc. 2d 540 (Sup. Ct. 1993).
31. *Id*. at 547-549.
32. *Id*.
33. *Id*. at 547.
34. 187 A.D.2d 906 (3d Dep't 1992).
35. *Id.* at 908.
36. 22 Misc. 3d 1115(A) (Sup. Ct. Kings County 2009).
37. *Id*.
38. *Id*. It should be noted that the Court did consider the Husband's refusal to deliver a Get, thereby removing barriers to remarriage, would be a basis to exercise its discretion under the second prong of the Get Law to disproportionately distribute marital assets. *Id*.
39. 215 A.D.2d 997 (3d Dep't 1995).
40. 215 A.D.2d at 998. See also, *Stevens v. Stevens*, 107 A.D.2d 987 (3d Dep't 1985) (holding, "while plaintiff's fault is to be heeded in arriving at the maintenance award, her misconduct in the waning months of the marriage was not, in our view, so outrageous and extreme as to work a divestiture of the property interest she earned over 15 years of marriage to defendant.").
41. *Howard S. v. Lillian S.,* 14 NY3d 431 (2010).
42. 62 A.D.2d at 192.
43. *Id*. at 188-189.
44. *Id.*
45. *Howard S. v. Lillian S.,* 14 N.Y.3d 431, 436 (2010).
46. *Id.*
47. *Howard S. v. Lillian S.,* 14 N.Y.3d at 437-438 (Pigott, J., dissenting).
48. *Id*. at 201.
49. *Eileen G. v. Frank G.*, 34 Misc. 3d 381 (Sup. Ct. Nassau County 2011).
50. 34 Misc. 3d at 384-385.
51. *Id.* at 384 (citing *Howard S. v. Lillian S.*, 14 N.Y.3d 431 (2010)).
52. 1991 N.Y. Misc. LEXIS 844 (Sup. Ct. Nassau County 1991).
53. *Id.*
54. *Id.*
55. http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf.
56. *Id.*
57. http://www.americanbar.org/groups/domestic_violence/resources/statistics (11/19/2014).

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"Good to Go" (and Return!) Part 3: Planning and Prevention

By Mark E. Sullivan

[The previous two sections of this article covered the ground rules for protecting and advising a military custodian, and the danger of adverse court action if the servicemember doesn't plan ahead. This article concludes with a prescription for avoiding disaster by crafting the court's custody order with an eye to the future and a plan for who gets custody when the military member is absent.]

It didn't have to be this way, of course. There should not be a crisis when a sailor is called to sea duty and he has custody of a minor child. The Defense Department has issued clear instructions as to the responsibilities of service members,[1] of commanders[2] and of legal assistance attorneys[3] on base and at sea in regard to matters involving single parents, custody orders and non-custodial parents who reside elsewhere. Appendix 1 on page 22 shows the responsibilities of service members and commanders in developing and implementing the family care plan.

The Navy has undertaken very clear instructions as to duties and responsibilities in these types of cases. The Navy's regulation on family care plans, OPNAV INSTRUCTION 1740.4D (27 Oct 09), states:

> 4.b. Exclusive reliance on a family care plan without the assistance of implementing court orders or written agreements from natural or adoptive parents, non-military personnel or institutions, may result in challenges to custody and/or denial of services by institutions.
>
> 4.c. When single, domestically separated, and/or divorced Service members with minor children are required to travel unaccompanied for extended periods of time (e.g., training exercises, temporary duty (TEMDU), deployments, and unaccompanied tours), there is a possibility that the other natural or adoptive parent of the minor children, or others with legally enforceable custody rights will challenge the family care plan or existing court orders and seek to create or modify the custody and support status of the Service member's minor children. This action can only be addressed through detailed and thorough planning and action. Single, domestically separated, and divorced Service members with minor children should contact a legal assistance office for advice and assistance in evaluating the effectiveness of their proposed family care plan and complying with any legal formalities necessary to prevent unwanted challenges to custody and support arrangements.
>
> 6**. Requirements.**
>
> c. The family care plan shall include written provisions for:
>
> …(7) Verification of consent from all natural and adoptive parents, and other legal custodians, regarding the planned designation of custody or guardianship of a minor child or written documentation that reasonable efforts have been made to obtain such consent. In the alternative, proof of a court order reflecting that the planned designation is acceptable. Where a separation agreement, court order, or divorce decree addressing child custody and support issues is in force, the family care plan should be consistent with such court agreement, order, or decree.

NAVPERS Form 1720/6 contains the following statement:

> 9. In the event of my…incapacity, [name, address telephone number] has agreed to assume temporary responsibility for my minor children until…a legal guardian or other custodian is appointed by a court of competent jurisdiction, or until my child(ren)'s noncustodial natural parent assumes custody, whichever occurs first.

The Family Care Plan Checklist at Enclosure (3) of OPNAV INSTRUCTION 1740.4D contains the following information:

> 2. Family Care plan contains provisions for:…

[ ] Legal review for relocation of minors subject to custody and visitation orders.

[ ] Legal review for relocation of minors without the consent of the natural or adopted parent.

3. Caregiver(s) briefed by Service member on:

[ ]Responsibility under the Family Care Plan.

[ ]Logistical, financial, medical, and legal arrangements.

[ ]Possible challenges to custody, visitation, and support of minor children and adult family members/dependents.

It's hard to imagine a stronger set of directives or a clearer incentive to take into account the possibility of the non-custodial parent's return to court to obtain custody (and, as an added bonus, monthly child support by garnishment) when the sailor becomes unavailable to care for the minor child.

There are numerous cases in which the military parent who has custody seizes the moment to craft a comprehensive order which anticipates not only his routine "shore duty" but also his periods of "sea duty." The might be called a "Plan A/Plan B" situation. Good planning, the advice of a good attorney, and the wisdom of a judge who can see beyond the immediate issue of custody and into the future of the parents' relationship are what is needed.

Consider the situation where the military parent is to be granted primary or sole custody of the child. When a judge decides, or the parties agree, that a third party (such as a new spouse of the custodian or a grandparent of the child) should replace the non-custodial parent, it makes sense to place appropriate findings for third-party custody in the order (pursuant to appropriate state law, which usually does not favor third-party custody).[4] The following is an example of language to insert:

> Since Jane Doe is a member of the U.S. Navy and may be deployed in the future on an unaccompanied tour (that is, an assignment where family members are not allowed), her current husband, Ralph Roe, is hereby designated alternate custodian of Jack Doe, the minor child of the parties, in such an event. He shall hold and exercise all the rights and responsibilities of a custodial parent during such a deployment and shall promptly return the child to Jane Doe at the deployment's end. The above appointment is being made in place of John Doe, the father of Jack Doe. [This clause should be followed by one specifying why the other parent, John Doe, is not fit for alternate custody in the event of military absence, or stating that John Doe has consented to this arrangement, with his signature accompanying the order, or has waived any claim to alternate custody, with appropriate findings as to how he waived his rights.]

While it is always wise to draft the custody order for a military custodian (active duty or Guard/Reserve) with provisions for "Plan B" in case of mobilization or deployment, there is no guarantee that such a provision will be upheld or enforced in court if challenged, especially if it grants custody to a non-parent and the child's other parent has a change of heart. To make the consent order "airtight," consider the following checklist:

- Join all necessary parties; those who are left out will complain the loudest!
- Set out the circumstances, environment and living situation of each party, as well as any special facts or needs regarding the children. Do this in detail. The more "specifics," the stronger your order will be, as against a later challenge that there has been a subsequent change of circumstances.
- Specify in the findings of fact and conclusions of law that the "Plan A" custody arrangements are in the best interest of the children, as is their return after the military custodian's deployment or mobilization ends.
- State *why* the return of the children and the "Plan A" environment are in the children's best interest.
- State that it is in the children's best interest for them to reside temporarily with the noncustodial parent if there is a mobilization or deployment.
- Research state law to be sure that such "alternate custody plans" are allowed and binding on the non-custodial parent.

Endnotes

1. Enclosure 3, "Procedures," to Department of Defense Instruction 1342.19 states that:

   > (2) Each Member shall:
   >
   > (b) Attempt, to the greatest extent possible, to inform the non-custodial biological or adoptive parent of his or her children, as applicable and as far in advance as practicable, of his or her impending absence due to military orders…

2. The same source, Enclosure 3, "Procedures," to Department of Defense Instruction 1342.19, provides the following requirements for Navy commanding officers: (3)…Commanders shall:…

e. Inform Members of the overriding authority of State courts to determine child custody arrangements, notwithstanding a family care plan.…

f. Advise Members of the risks involved if they are unable or unwilling to contact or gain the consent of the non-custodial biological or adoptive parent if the family care plan would leave the child in the custody of a third party. Strongly encourage them to obtain legal advice as far in advance of the absence as is practicable about the implications of failing to include the noncustodial biological or adoptive parent in the family care plan process. Emphasize that the failure to involve, or at least inform, the non-custodial biological or adoptive parent of custody arrangements in anticipation of an absence can undermine, or even render useless, the family care plan.…

g. Encourage Members to seek the assistance of military and community support resources, to include family support centers; legal assistance offices; family program directors, coordinators, and ombudsmen; Service relief organizations; the CEW Readiness Cell; and online resources (e.g., Military OneSource), in the completion of the family care plan.

3. From Enclosure 3, "Procedures," to Department of Defense Instruction 1342.19 -- 4. LEGAL ASSISTANCE ATTORNEYS. Legal assistance attorneys or other qualified legal counsel shall, when appropriate, ensure their clients receive:

(1) A full explanation of the potential consequences of not including the non-custodial biological or adoptive parent in the creation of a family care plan.

(2) A discussion of appropriate courses of action, to include the benefits of validating temporary custody arrangements and the return of the child to the Member upon the Member's return, with an appropriate court.

4. Note that some states, at least in contested matters, do not allow for contingent changes of custody. See Dellinger v. Dellinger, 278 Ga. 732, 609 S.E.2d 331 (2004). Be sure to read the case law, understand the contrary cases, and build in as many facts and factors as possible when writing up a consensual contingency for change of custody.

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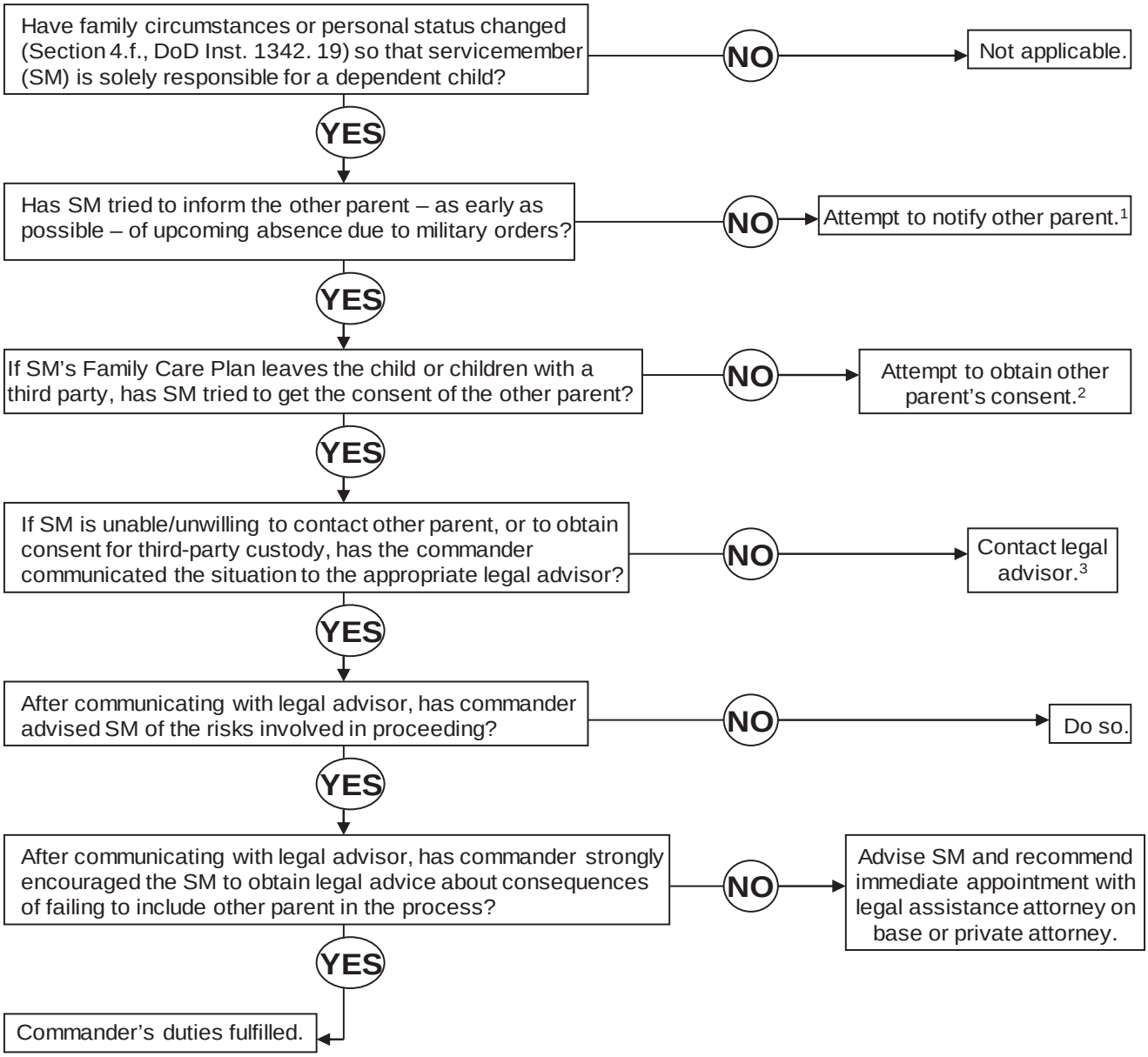
APPENDIX 1

DoD Family Care Plans - PROCEDURES



[1]Upon notification, attempt to get consent as to transfer of child/children to other parent or 3rd party. If consent, formalize in written agreement or court order. If notification attempts fail, document them in detail.

[2]If obtained, formalize in written agreement or court order. If no consent, document attempts and reasons for disagreement.

[3]Provide facts and, if available, court documents or written agreement. Obtain advice, memorialize recommendations, communicate to SM any which require his/her action.

Separated, but Not Divorced: The Long-Term Care Planning Implications

By Anthony J. Enea

I recently read an article about Katherine Hepburn's illustrious acting career and life. The article described her longtime romance with fellow actor, Spencer Tracy. It was reported that Mr. Tracy was a devout Catholic who, in spite of his romance with Ms. Hepburn, refused to divorce his wife, an arrangement for which, I am willing to venture, Mrs. Tracy was handsomely compensated.

The following is an overview of the Medicaid and Estate issues affecting those who are separated but not divorced. I suspect that there are thousands of people in New York who may one day suffer detrimental financial consequences because they have not legally finalized their divorce and have not adequately addressed Right of Election and Medicaid eligibility issues.

For purposes of Medicaid eligibility and pursuant to 18 N.Y.C.R.R. § 360-4.3(f), the income and resources of "legally responsible relatives" are considered in determining the eligibility of the applicant for Medicaid. 18 N.Y.C.R.R. § 360-1.4(h) defines the only "legally responsible relatives" to be:

(a) A spouse for the other spouse;

(b) A parent for a child under the age of twenty-one (21) years; or

(c) A step-parent for a step-child under the age of twenty-one (21).

Thus, a spouse that is separated but not divorced is included as a "legally responsible relative" whose income and resources are considered for eligibility purposes. Although the separated spouse has the ability to execute a "spousal refusal" pursuant to § 366(3(a) of the Social Services Law, the "spousal refusal" will not relieve the spouse of the liability for the medical care paid for by Medicaid, and Medicaid can pursue recovery against a refusing spouse for the actual expenses paid to the applicant to the extent of the resources in excess of the Community Spouse's Resource Allowance ($74,820 to $119,200 on a sliding scale for 2015).

Medicaid can pursue recovery of assets against a separated spouse even if the spouse were separated from and living apart from the applicant prior to the applicant's institutionalization, although the separated spouse's refusal to divulge income and asset information will not affect the applicant's eligibility. In New York State, Medicaid's decision to pursue or not pursue recovery against separated spouses, just as with married non-separated couples, often depends on how aggressive a particular County is in pursuing recovery.

Imagine, however, the surprise and shock separated spouses may experience when they learn that they may have financial responsibility for the medical care of spouses from whom they have been separated. It is not a situation one should ever allow him or herself to be placed.

Pursuant to the New York Estates, Powers and Trust Law ("EPTL") 5-1.1, the surviving spouse of a New York domiciliary who died on or after September 1, 1992, is entitled to a statutory elective share equal to the greater of $50,000 or one-third of the net estate (being the probate estate less certain debts and expenses) plus one-third of the testamentary substitutes, e.g.: gifts, causa mortis, Totten trust accounts, etc. EPTL 5-1.1-A provides a comprehensive description of what is considered to be a "testamentary substitute."

It is clear that the right to an elective share may affect one's future eligibility for Medicaid, irrespective of the existence of a waiver of the right of election in a separation agreement, where one is separated but not divorced from his or her spouse.

Unless one is divorced at the time of the death of the first spouse, Medicaid will consider the surviving spouse to be entitled to an elective share for Medicaid eligibility purposes. Additionally, if one were to execute a Waiver of a Right of Election, it is treated by Medicaid as a non-exempt transfer of assets, which creates a period of ineligibility for Medicaid. Further, the period of ineligibility is calculated not from the date the waiver was executed but from the date of death of the spouse.

For purposes of Medicaid eligibility an "available asset" includes any income or resources to which an individual is entitled to but, because of any action or inaction on his or her part, does not receive. Thus, for example, if a surviving spouse is already a Medicaid recipient, and he or she fails to exercise the Right of Election, Medicaid can discontinue his or her benefits. Procedurally, Medicaid must only send the recipient a notice requesting that the person exercise the Right of Election. If the Medicaid recipient fails to do so, Medicaid will deem the person to have refused to accept an "available asset" and either discontinue or deny benefits.

As can be seen from the above, there are some significant financial issues that those separated, but not divorced, will encounter. While I am not advocating that every separated individual obtain a divorce, it may be critical for those who have separated to take the steps necessary to formalize a divorce if they wish to avoid the potential problems that may arise with respect to Medicaid eligibility and the Right of Election.

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Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy Samuelson

Recent Legislation

New Maintenance Guidelines Legislation Signed into Law

On June 25, 2015, the New York State Legislature passed the Office of Court Administration's Maintenance Guidelines legislation. Governor Cuomo signed the bill into law on Friday, September 25, 2015. The temporary maintenance provisions become effective 30 days thereafter (i.e., Sunday, October 25, 2015 but effective Monday October 26, 2015), and the permanent maintenance provisions and balance of the law (i.e., eradication of valuing degrees and licenses) is effective 120 days after signing (i.e., Saturday, January 23, 2016, but effective January 25, 2016).

The new legislation changes the way temporary maintenance is calculated, provides a formula for post-divorce maintenance, different calculations for households with and without children, as well as advisory guidelines as to the duration of support based on the length of the marriage. It caps income at $175,000 with bi-annual CPI increases (reduced from the current cap of $543,000), although the court has discretion to go above the cap. The court will no longer distribute the value of the enhanced earnings of a license, degree, or celebrity goodwill, but shall consider the direct or indirect contributions of one spouse to the enhanced earning capacity of the other spouse for purposes of equitable distribution. Actual or partial retirement is now a grounds for modification. Temporary and post-divorce maintenance shall be calculated prior to child support, because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

Social Services Law § 111-i amended, effective October 14, 2015: Calculating Child Support Orders

Beginning in 2016, Social Services Law § 111-i was amended to provide that the Combined Parental Income Amount (CPIA), as set forth in the Child Support Standards Chart for the purpose of calculating child support, will be updated on March 1st every two years, rather than January 31st. The purpose of this amendment is to coordinate the effective date of the updated CPIA with the effective date of annual updates to the Poverty Level and Self-Support Reserve. This modification will promote increased accuracy and consistency in the calculation of support obligations.

Family Court Act Article 5-B repealed and amended, effective January 1, 2016: Uniform Interstate Family Support Act

Family Court Act Article 5-B was repealed and amended, such that the 2008 Uniform Interstate Family Support Act (UIFSA) will replace the 1996 version of UIFSA presently contained in Article 5-B. In summary, the 2008 UIFSA further clarifies issues relating to the duration of support orders, choice of law considerations, order determinations, telephonic testimony, and redirection of support payments.

E-filing

On August 31, 2015, Governor Cuomo signed into law Chapter 237 of the Laws of 2015 (Chapter 237) in relation to E-filing. For matrimonial cases in the Supreme Court, the chief administrator shall consult with the county clerk of each county before the use of electronic means is to be authorized. If authorized, e-filing in matrimonial cases will take place only upon consent of all parties of the action. This program shall be strictly voluntary. Consent will also be required by all parties to participate in E-filing of appeals in the Appellate Division.

In Family Court, the chief administrator, with the approval of the administrative board of the courts, may set forth rules authorizing a program in E-filing for (1) the origination of proceedings and (2) the filing and service of papers in pending proceedings. Participation in this program shall be strictly voluntary and will take place only upon consent of all parties. The chief administrator may eliminate the requirement of consent in a petition to determine abuse or neglect pursuant to Article 10 of this act by a child protective agency.

Cases of Interest

Child Support

Suspension of child support for parental alienation

Coull v. Rottman, 15 NYS3d 834 (2d Dept. 2015)

The father petitioned the Family Court to suspend his child support obligations based on the mother's alienation of the 13-year-old child and her interference with the father's regular visitation schedule. The mother petitioned to suspend the father's visitation. The Family Court granted the mother's petition to suspend the father's visitation but denied the father's petition to suspend his child

support obligations. After participating in therapy with the father for months in an attempt to repair their broken relationship, the child still fervently objected to all visitation with the father. As a result of the child's maturity, the court determined that the child's adamant opposition to visitation would be given great weight. The Appellate Division affirmed the suspension of visitation but modified by terminating the father's obligation to pay child support to the mother.

Upward modification of *pendente lite* child support with new proof of father's income

***Finn v. Piesco*, 127 AD3d 525 (1st Dept. 2015)**

The trial court providently exercised its discretion in imputing income of $75,000 to the wife and denying her motion for temporary support and counsel fees since her income was the same as the husband's reported income. The wife, who was an experienced attorney with a valid real estate license as well as a master's degree in public administration, failed to adequately explain her failure to earn any income in the previous year.

However, the trial court erred in denying the wife's request for an upward modification of the husband's temporary child support obligation of $153 per week for two children—an amount that was agreed upon by the parties in a separate Family Court proceeding. There was a substantial discrepancy in the $30,000 of income used to determine child support in the Family Court proceeding and the $75,000 of income reported by the husband on his income tax returns in the instant proceeding. The wife submitted evidence that she and the children were receiving food stamps, and that she had substantial outstanding bills for household necessities and the children's expenses. Therefore, the case was remanded to the trial court for recalculation of the husband's obligation.

Author's note: Given that the wife was on food stamps, was it a proper exercise of discretion to deny her maintenance and counsel fees? Then again, the re-calculation of child support may make up the difference and will provide tax-free support.

Gambling addiction not sufficient excuse for failure to pay support

***Matter of Elyorah E. v. Ian E.*, 127 AD3d 449 (1st Dept. 2015)**

The Appellate Division affirmed the trial court's holding that the husband willfully violated the child support order. The father argued that he demonstrated his inability to pay by establishing that he suffers from a mental illness and gambling addiction. However, the father failed to establish that his gambling addiction impacted his ability to work, since he often gambled away his earnings and his mother largely contributed to his child support payments and living expenses.

No downward modification of child support where agreement contemplates possibility of children changing households

***Zaratzian v. Abadir*, 128 AD3d 953 (2d Dept. 2015)**

Prior to the October 2010 effective date of the modification of child support amendments to Domestic Relations Law §236(B), the parties entered into a separation agreement setting forth their child support obligations, which was incorporated, but not merged, into the parties' judgment of divorce. Thereafter, a change in custody occurred, resulting in an award of sole custody of two of the parties' three children to the father. Thereafter, the father petitioned for an upward modification of the mother's child support obligation.

Explaining that modification of an agreement executed prior to the 2010 amendments requires a showing of an unanticipated and unreasonable change in circumstances resulting in a concomitant need, the court below properly denied the father's request on the basis that the parties' separation agreement expressly contemplated a potential change in custody, and allowed the father to seek a downward modification of his own child support obligation, but did not allow him to seek child support from the mother. Also, the father's annual income was four times that of the mother, which enabled him to provide for the needs of the children without modification of the mother's child support obligation.

The father's request that he be reimbursed for the mother's one-third share of the children's private school tuition, summer camp, and after school programs was properly denied since he failed to obtain the mother's consent prior to incurring such expenses.

Child Custody

New York not a convenient forum 12 days after child moved to another state

***Matter of Luis F.F. v. Jessica G.*, 127 AD3d 496 (1st Dept. 2015)**

The order of the Bronx Family Court, which granted the mother's motion to dismiss the modification of a custody petition on forum non-conveniens grounds, was unanimously affirmed. Twelve days after the mother moved from New York to Connecticut with the parties' child, the father, who lived in Pennsylvania, commenced a proceeding to modify a New York order granting the mother sole custody of the child. Although Connecticut was not the "home state" of the child, the Appellate Division found that substantial evidence relating to the child's care, protection, and personal relationships was no longer available in New York. Since the child's school, doctors, and residence were now located in Connecticut, the court determined that Connecticut was the more convenient forum.

Parental alienation by the mother warrants custody to the father

***Matter of Viscuso v. Viscuso*, 129 AD3d 1679 (4th Dept. 2015)**

On two appeals from the decision of the Family Court, the Fourth Department affirmed the award of sole custody of the parties' child to the father and counsel fees to the father's attorney. In the first appeal, the mother challenged the Family Court's decision to grant the father's petition for sole custody of the parties' daughter, with specified visitation to the mother. The court found that the mother's persistent pattern of alienating the child from the father "is likely to result in a substantial risk of imminent serious harm to the child." The alienation consisted of "blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in the child a fear of the father, and encouraging the child to medicate herself before going to visit the father." The attorney for the child did not violate her ethical duty to advocate zealously for the parties' child by taking a position that was contrary to the expressed wishes of the child. The court rejected the mother's argument that the alleged history of domestic violence by the father warranted an award of primary custody to her because there was no evidence in the record to support a finding that the domestic violence existed beyond an isolated incident nor that there were negative repercussions to the child. In the second appeal, the Fourth Department found that an award of counsel fees to the father was proper and supported by the mother's consistent and lengthy delays in litigation by repeatedly replacing her attorneys**.**

Award of custody to non-parent

***Matter of Wilson v. Hayward*, 128 AD3d 1475 (4th Dept. 2015)**

In 2008, while a child neglect proceeding was pending against the father, the father asked the non-parent family friend to take custody of the children. Thereafter, the non-parent petitioned for and was granted custody of the four children, with visitation to the father. Following the Family Court's issuance of an order containing a finding of neglect against the father, the Family Court ordered that the father's visitation with the children be supervised by the Department of Social Services.

In April of 2013, the father filed a petition to modify the 2008 custody order by granting him custody of the children. The non-parent cross-petitioned for a reduction in the frequency and length of the father's supervised visitation with the children. The court properly found that extraordinary circumstances existed to warrant custody to the non-parent where the father voluntarily surrendered custody of the children to the non-parent seven years ago, only attended supervised visitation with the children on an intermittent basis, behaved inappropriately during his visitation time with the children, and did not know the children's birth dates, ages, or grade levels at school.

Relocation to London granted without a hearing

***Lecaros v. Lecaros*, 127 AD3d 1037 (2d Dept. 2015)**

The parties' stipulation, which was incorporated but not merged into the judgment of divorce, provided that the parties have joint custody of their three children, with the mother having primary physical custody, and the father having liberal visitation. The father moved to restrain the mother from relocating to London with the children, which was denied without a hearing, but the court stated that a post-relocation visitation schedule should be established for the father. The father appealed and the Second Department affirmed. The mother established by a preponderance of the evidence that the move was economically necessary, the children's lives would be enhanced emotionally and educationally by the relocation, the move would not have a negative impact on the quality of the contact between the father and the children, and that the father's relationship with the children could be preserved through a suitable extended visitation schedule. The relocation was the children's stated preference and the position of the attorney for the child. The court found that extended visits during school vacations and the summer would permit the father to maintain a meaningful relationship with the children. The matter was remitted to the trial court for a determination as to an appropriate post-relocation visitation schedule for the father.

Maintenance

Downward modification of maintenance where father lost job

***Kaplan v. Kaplan*, 130 AD3d 576 (2d Dept. 2015)**

The parties were married for 20 years and there were two unemancipated children of the marriage. The parties' judgment of divorce, which incorporated, but did not merge, the parties' separation agreement, awarded the husband sole legal and physical custody of the parties' children, set the wife's child support obligation to the husband at $25 per month, and granted the wife maintenance in the sum of $16,666 per month for a period of 10 years. The parties' respective maintenance and child support obligations were based on the husband's 2009 income of $1.8 million and the wife's status as unemployed.

In 2012, two years after losing his job, the father moved to modify the maintenance and child support provisions of the parties' separation agreement. In turn, the mother moved for an award of child support from the husband for the period commencing after the parties' youngest child began to reside with her.

The court below properly granted the father's motion for downward modification of his maintenance

obligation because enforcing the award would create an extreme hardship since the father's loss of employment was unavoidable and he made diligent efforts to secure employment commensurate with his qualifications and experience. Thus, the court imputed income to the father of $450,000/year and modified his maintenance obligation to $6,375/month.

However, the trial court erred in directing that the father recoup the overpayment of his maintenance obligation made since the filing of his motion as a credit against his future maintenance obligation since it is against public policy to do so.

Also, the trial court erred in granting that branch of the father's motion which was for an upward modification of the wife's child support obligation. A party seeking to modify the support provisions contained in a stipulation of settlement incorporated, but not merged, into a judgment of divorce which was executed prior to the effective date of the 2010 amendments to Family Court Act § 451 has the burden of establishing a substantial, unanticipated, and unreasonable change in circumstances resulting in a concomitant need. In that case, the husband failed to show that he was unable to support the children during the five months prior to his making the motion.

It was improper for the trial court to direct that the cost of the children's college tuition, room and board, and unreimbursed medical expenses be divided between the parties based on their pro rata share of the combined income because the parties' agreement provided for a specific division of these responsibilities.

Finally, the trial court also erred in directing that the parties' youngest child could become emancipated in any manner recognized under New York law because the parties' separation agreement contains its own distinct definition of emancipation that permits, under certain circumstances, for the child to remain unemancipated until his 22nd birthday.

Equitable Distribution

Spouse entitled to life insurance proceeds where other spouse violates automatic restraint against change of beneficiary

***Reliastar Life Ins. Co. of N.Y. v. Cristando*, 129 AD3d 701 (2d Dept. 2015)**

After the husband commenced the divorce action and prior to the start of the divorce trial, the decedent wife changed the primary beneficiary of her life insurance policy from the husband to her brother. Following the conclusion of the divorce trial, but before entry of the judgment of divorce, the wife died. Thereafter, the husband and the brother both filed claims for the proceeds of the decedent wife's life insurance policy. The plaintiff life insurance company commenced this action and the trial court, finding that the change of beneficiary was a violation of the automatic restraining orders, directed that the full proceeds of the life insurance policy be paid to the husband. Upon appeal by the decedent wife's brother, the appellate court affirmed.

Discovery

Husband ordered to turn over electronic devices where he "bugged" wife's iPhone

***Crocker C. v. Anne R.*, 2015 WL 5664299 (Sup. Ct. Kings County 2015)**

In a decision by Judge Jeffrey Sunshine of Kings County Supreme Court, a husband was ordered to turn over his iPhone and computers after the wife's computer expert discovered that the husband installed spyware on the wife's phone prior to his commencement of the divorce action in order to intercept confidential communication between her and her attorney. This specific spyware provided the husband with information regarding the wife's physical GPS location as well as all of the iPhone's e-mails, call history, and text messages. In order to ensure that the husband did not access confidential and privileged communications between the wife and her attorney during the three-month period that the spyware was unknowingly present on the wife's iPhone, the court ordered that the husband's iPhone and computers be examined by a referee either agreed upon by the parties or else selected by the court. In addition, the parties may either select a neutral data forensic expert to assist in the task or else each hire their own expert. The court denied without prejudice the husband's request that the wife, as the monied spouse, be ordered to pay $350,000 of attorney's fees (where she already paid her attorney approximately $950,000) since the husband failed to submit a net worth statement and retainer agreement

Facebook postings

***A.D. v. C.A.*, 16 NYS3d 126 (Sup. Ct. Westchester County 2015) (Ecker, J.)**

In a hotly contested matrimonial action and bitter child custody dispute of a four-year-old child, the husband requested that the court order the wife to produce printouts of all pictures, posts and information posted on her Facebook page over the last four years, or alternatively, all computer hard drives, data storage systems, flash drives, CD/DVDS created by the wife, and a copy of the SD card of the wife's iPhone. The husband alleged that these items contain pictures and information relating to the wife's whereabouts and travel without the child and would demonstrate the lack of time she spent with the child and that the husband was the primary caretaker.

The court, noting that the wife's time spent away from the child would be relevant to its ultimate custody determination, ordered the wife to produce all Facebook postings relating to her travels outside of the New York City area in the last four years (whether alone or with the

child) to the court for an *in camera* review, and to submit an authorization permitting the court to have access to her Facebook postings during the applicable time frame. However, in view of the husband's failure to rebut the wife's argument that her computer hard drives, data storage systems, flash drives, and CD/DVDS do not contain copies of her Facebook postings and that her iPhone does not contain an SD card, the court denied this request as an overly broad fishing expedition.

Pendente Lite Support and Counsel Fees

Kaufman v. Kaufman, 2015 WL 5125433 (2d Dept. 2015)

The wife was a homemaker and stay-at-home mother of the parties' teenage children and the father was a partner in a national law firm. The parties and their two children enjoyed an affluent standard of living which included, *inter alia*, numerous vacations, luxury automobiles, live-in domestic help, an expensive home, and expensive clothing. The trial court determined that the husband's adjusted gross income was $522,729, based upon gross annual income of $774,729, which was reflected in the husband's unfiled K–1 statement, less federal and state taxes reported, and did not consider the wife's allegations that the husband had approximately $200,000/year in prerequisites from his firm. The husband failed to file a tax return for the prior year, or explain his drastic decrease in income from the prior year.

The wife was awarded combined *pendente lite* child support and maintenance of $4,000/month and directed that the husband pay certain carrying charges on the marital home.

The appellate court reversed and remitted for a recalculation of child support and maintenance, finding that the court did not have sufficient evidence of the husband's income and that the award did not support the wife and children's pre-separation standard of living. In calculating the presumptively correct amount of *pendente lite* maintenance, the court was presented with insufficient evidence to determine the husband's gross income and, therefore, the court should have ordered temporary maintenance based upon the needs of the wife, or the standard of living of the parties prior to commencement of the divorce action, whichever was greater. The court deviated from the presumptively correct amount of *pendente lite* maintenance, but failed to explain the reasons for the deviation, nor did it compute the wife's living expenses.

In awarding *pendente lite* child support, the court failed to provide any reason for declining to perform the calculation in accordance with Child Support Standards Act (CSSA), nor did it provide any explanation as to how it determined the amount of the award.

The award of interim counsel fees to the wife of $25,000 was considered insufficient and the appellate court modified the award to $75,000, where there was a significant disparity between the financial circumstances of the parties, the litigation had already become contentious, and there was a likelihood that the litigation would be protracted, and there were complex issues including the valuation of the husband's law practice.

Correction

Evgeny F. v. Inessa B., 127 AD3d 617 (1st Dept. 2015)

In the Summer 2015 edition of my article, I incorrectly referred to the parties in the above-cited case as "husband" and "wife," when in fact, the parties to the child custody proceeding were never married. In that case, the court found that an award of interim counsel fees in the sum of $525,000 and expert fees in the sum of $38,000 to the mother was appropriate based on the financial circumstances of the parties and the father's litigious conduct throughout the parties' child custody dispute. In appealing this award, the father argued that Domestic Relations Law § 237(b), which provides for a rebuttable presumption in favor of awarding counsel fees to the less-monied party, only applies when it is a spouse seeking attorney's fees. The Appellate Division rejected this contention and explained that the statute expressly authorizes the court to award counsel fees to a "spouse or parent" in custody proceedings.

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