NYSBA WINTER 2016 | VOL. 48 | NO. 3

Family Law Review

A publication of the Family Law Section
of the New York State Bar Association

The Ongoing Dilemma of Parental Alienation

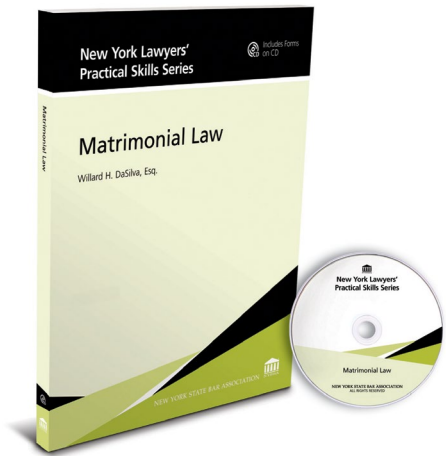
By Lee Rosenberg, Editor-in-Chief

Also in this issue

- Collateral Estoppel
- Appealable Paper and Emergency Appellate Intervention

From the NYSBA Book Store

Matrimonial Law



PRODUCT INFO AND PRICES*

2016-2017 / 394 pp.
PN: 412197 (Book and CD)
PN: 412197E (Downloadable PDF)

NYSBA Members	**$125**
Non-members	$165

Order multiple titles to take advantage of our low flat rate shipping charge of $5.95 per order, regardless of the number of items shipped. $5.95 shipping and handling offer applies to orders shipped within the continental U.S. Shipping and handling charges for orders shipped outside the continental U.S. will be based on destination and added to your total.

Author

Willard H. DaSilva, Esq.
DaSilva & Hilowitz LLP, New City, NY

"This book is very helpful in preparing all legal documents for a divorce action."

Written by Willard DaSilva, a leading matrimonial law practitioner, *Matrimonial Law* provides a step-by-step overview for the practitioner handling a basic matrimonial case. New attorneys will benefit from the clear, basic review of the fundamentals and experienced practitioners will benefit from the numerous "Practice Guides" and use this book to reinforce their own methods of practice.

New and experienced practitioners alike will appreciate the excellent forms and checklists used by Mr. DaSilva in his daily practice. While the substantive law governing matrimonial actions is well covered, the emphasis is on the practical—the frequently encountered aspects of representing clients.

Matrimonial Law is an invaluable guide for the matrimonial practitioner.

The 2016–2017 release is current through the 2016 New York State legislative session.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION
1.800.582.2452 www.nysba.org/pubs
Mention Code: PUB8529NN

NYSBA

Table of Contents

Winter 2016 • Vol. 48, No. 3

Page

The Ongoing Dilemma of Parental Alienation 4
By Lee Rosenberg, Editor-in-Chief

Collateral Estoppel: Preventing a Second Bite at the Apple for Litigants in Contemporaneous Family and Supreme Court Proceedings 11
By Joshua L. Rieger

Appealable Paper and Emergency Appellate Intervention 15
By Glenn S. Koopersmith

Recent Legislation, Decisions and Trends in Matrimonial Law 18
By Wendy B. Samuelson

Welcome New Members 25

Section Officers 26

The Ongoing Dilemma of Parental Alienation

By Lee Rosenberg, Editor-in-Chief

There are few areas of law that are more vexing and complicated than contested custody. The battle over the "best interests" of children is arguably the most personal, stressful, and heavily weighing pressure-cooker one can find oneself in. What, then, is the court do to when one parent—by litigation strategy or psychological bent—creates or allows the children to be alienated from the other parent, further compounding the caldron of emotions? What relief is to be afforded to the alienated parent when the child, despite the opined short and long-term damage, is bonded to the alienating parent? How does the court strike the balance when the child won't agree to even see the other parent? *Gerber v. Gerber,* in three appellate decisions in the Third Department from November 25, 2015,[1] July 14, 2016,[2] and now December 1, 2016[3]—which in each instance affirmed the determinations of the Family Court—offers some insight into this difficult situation. The result of the alienating behavior was a transfer of custody and the ultimate suspension of the alienator's parenting time with the children.

The amorphous best interest of the child standard[4] in which the courts (and lawyers trying to meet burdens of proof) struggle requires an analysis of factors to consider the "totality of the circumstances" such as "the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent."[5] It has also been held that "(p)arental alienation of a child from the other parent, including willful interference with his or her visitation rights, is 'an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [offending party] is unfit to act as custodial parent.'" [6]

That the child's attorney is also bound to advocate for or at least express the child's position, even amid allegations of alienation, may further bolster the alienator's position. Although ultimately, in weighing the child's expressed preference, "the court must consider the age and maturity of the child and the potential for influence having been exerted on the child [citations omitted]."[7] This is particularly true where there is overwhelming evidence that the children's feelings were fostered by the one parent's hostility towards the other.[8] "The desires of young children, capable of distortive manipulation by a bitter, or perhaps even well-meaning, parent, do not always reflect the long-term best interest of the children."[9]

But, how often have we seen that same alienating parent awarded custody at trial or by stipulation or continuing as the custodial parent on applications for modification, notwithstanding such behavior. To say that some gender bias in this regard does not still exist in many cases would be naïve, but that is a column for another day.

The Tortured History of *Gerber v. Gerber*

In June 2011, Mr. and Mrs. Gerber agreed in mid-Family Court trial to joint custody of their three teenage boys, with the parties also alternating physical custody. Shortly thereafter, the father filed violation petitions in Family Court against the mother who then moved for modification of the custodial arrangement. Allegations abounded, including claims (initially supported by two of the boys) that the father menaced the children with a knife. Child Protective Services investigated and criminal charges ensued, with both ultimately falling to the wayside.

The mother then also filed for divorce and the father moved therein for modification of the Family Court custody order, which was based on their June 2011 agreement, and sought "full custody." The Family Court petitions were transferred to Supreme Court, but when the matrimonial case finally settled and the presiding justice who was taking testimony on the custody issues retired, the custody matters were transferred back to Family Court for a *de novo* hearing on the applications. After some failures to appear, the prior dismissal of her modification petition, and a preclusion order against the mother, in October 2014—*three years after the initial order*—the father was awarded sole legal and physical custody of the children with a directive that the mother's parenting time be suspended for six months and then be therapeutic.[10] The Third Department, in looking at the procedural and substantive aspects of the hearing below, affirmed.

> In light of the overwhelming evidence of parental alienation, which essentially was unrebutted by the mother, and taking into account the traditional factors considered in a best interests analysis and the testimony offered relative thereto (*see Matter of Shokralla v Banks*, 130 AD3d 1263, 1264 [2015]), we have no quarrel with Family Court's decision to award sole

> legal and physical custody to the father. Although Family Court's determination admittedly was not in accord with the recommendation made by the attorney for the children, the children's wishes are informative rather than dispositive (*see Matter of Colona v Colona*, 125 AD3d 1123, 1126 [2015])—particularly where, as here, "the evidence received at the hearing supports the finding that the child[ren] [have] been manipulated by one of the parties and the child[ren's] views regarding [their] relationship with the other party are the product of that manipulation" (*Matter of Burola v Meek*, 64 AD3d 962, 966 [2009]). (Footnote omitted).[11,12]

Factually, this appears to be a clear case of alienation; however the inclusion of those factual assertions relied upon is instructive in terms of the evidence presented.

> Here, the father testified at length regarding the change in the children's demeanor following entry of the prior custody order (and in the wake of the mother's various allegations of criminal activity)—including the children's refusal to, among other things, engage in any activities with him, participate in family dinners, wear clothes that he had purchased for them or respond to his repeated efforts to engage them in conversation and attempt to build a positive and respectful parent-child relationship. Additionally, a report authored by Mary O'Connor, the clinical psychologist who performed a court-ordered evaluation of the parties and children in late 2010, was received into evidence. According to O'Connor, the mother, who refused to "fully participate in the psychological evaluation," evidenced a history of behavior that was "consistent with a diagnosis of [n]arcissistic [p]ersonality [d]isorder"—a disorder defined, in part, as "a pervasive pattern of grandiosity and entitlement." Specifically, O'Connor noted that the mother readily "blame[d] all of the difficulties for the children and the family on [the father]," "consistently portrayed herself as a victim," failed to "take any responsibility for any problems in the marriage or with the children" and "did not recognize any role for herself in the conflicts that affect[ed] the children." Notably, O'Connor opined that the mother's negative "remarks and behavior influence[d] the children to disrespect [the father] and resist participating in a healthy relationship with him." Indeed, O'Connor noted that one possible remedy for such parental alienation would be "to reverse custody and immerse the children in the primary custody and residence of the alienated parent," i.e., the father.
>
> The father also offered the testimony of Al Wolfer, a court-referred family counselor who worked with the family from June 2011 to February 2012. Wolfer testified that the children, who eventually refused to participate in the counseling sessions, shared a "distorted reality" with their mother—one in which they possessed no positive experiences with or memories of their father—and opined that, during the time that he was counseling the family, the mother actively engaged in a "campaign of negativity and denigration" that was directed at alienating the children from their father. According to Wolfer, the children "were powerfully motivated by [their mother's] behavior" within the family unit and, to that end, understood "what they need[ed] to do" when they were with their father, i.e., refuse all attempts on his part to interact with them. Wolfer characterized this parental alienation as "moderate to severe" and opined that, to ensure the best chance of fostering a meaningful relationship between the father and the children, the children would have to be separated from their mother—without any contact—for six months followed by supervised visitations with a skilled therapist. (Footnote omitted).[13]

Only three months after the October 2014 Family Court order changing custody to the Father was issued, the Mother filed a pro se petition to modify it, claiming among other things that the children were suffering emotional and physical distress as a result of having been placed in a new school district during the middle of the school year. The Family Court dismissed the petition without a hearing and notwithstanding the "recommendation" of the children's attorney. In affirming the lower court, the Third Department recognized that

> The father was granted sole legal and physical custody of the children in 2014 primarily because of overwhelming evidence that the mother was manipulating the children in ongoing efforts to alienate them from the father (*see Matter of Gerber v Gerber*, 133 AD3d at 1136-1139). *Family Court accordingly expected that awarding the*

> *father custody might cause the children to experience certain short-term trauma given that state of affairs, but found that the mother's efforts at parental alienation would be even more damaging in the long term.* The mother nevertheless sought to modify the 2014 order only three months after it was issued, essentially asserting that the anticipated short-term trauma had actually occurred. (Footnote omitted) (Emphasis added).[14]

A *third* appellate decision on this case was then issued on December 1, 2016.[15]

Within two months of the October, 2014, the Father commenced a violation proceeding alleging that despite her suspended parenting time, she was having continued contact with the children. The Family Court after hearing and, despite the opposition of the children's attorney, found that the mother was in contempt for willfully violating the order, and continued the non-contact order for an additional six-months.[16] The appellate court again affirmed.

> The father testified that the tracking device placed on the oldest son's car indicated that the car was in front of the mother's house or in her neighborhood 29 times between November 2014 and January 2015, and those occasions coincided with dates that the oldest son was tardy for or absent from school. Further, the father testified that items from the mother's home, such as shirts, cell phones and toys, suddenly were in the boys' possession. Family Court discredited the mother's testimony that she did not see the children and was unaware that the children were at her house—except on three occasions when she immediately notified either the police or the father.
>
> The evidence also established that the mother, despite having her own email, used her youngest son's email account to dispute and obtain a refund for some Internet charges made by that son, explaining to the company that her son had been "kidnapped" on October 16, 2014. The mother also posted an article regarding her dissatisfaction with the prior custody proceedings. The inappropriate information disseminated by the mother was accessible to, and read by, her youngest son while on the Internet. Family Court further discredited the mother's proffered excuse that she was unaware that her son continued to access his email account, as well as her denial that her conduct was an attempt to communicate with the children. The mother also wrote to Family Court alleging a breakdown in communication and lack of trust between the children and the attorney for the children, which, as Family Court observed, was information that could only be obtained from the mother's communication with the children. Finally, the mother acknowledged that she failed to timely pay the court-ordered fine.

The High Burden of Fighting Alienation

The problems of alienation still seem to require the proverbial "kitchen sink" of proof where the children and alienating parent are bonded, to affect custody in many cases—this is particularly so where the children are older. Courts remain reluctant to disturb that bond as is recently seen in *Matter of Sullivan v. Plotnick*. In *Sullivan*, despite the mother's alienating behavior and deliberate frustration of the father's court ordered parenting rights in which she also "manipulated the children's loyalty, (and) encouraged the estrangement of the father and the children", the parties' 14 year old daughter's bond to the mother foreclosed a change in custody. The court also vacated all orders of parenting time for the father and suspended the father's future child support obligations.[17] And where the alienated parent is of limited resources, the ability to sustain years of litigation becomes challenging, if not impossible. It seems that, as in *Gerber,* the evidence of the alienation must often be "overwhelming."

In *J.F. v. L.F.*,[18] the court—as is often the case—was able to lean on the unanimous conclusions of *three* forensic evaluators in making its decision to transfer custody.

> This Court is faced with unanimous conclusions on the part of the three forensic evaluators, Dr. Lessow, Dr. Sinowitz and Dr. Feinberg, as well as the stated view of the Law Guardian that these children have been alienated from their father by their mother. Where the opinions diverge is whether or not to change custody. This Court accepts and adopts the reports and testimony of the mental health professionals to the extent that they indicate that the mother alienated the children from the father. She psychologically poisoned their minds, despite her love for and devotion to them. The Court finds that the children will have no relationship with the father if left in the custody of their mother. The Court finds, further, that they will continue to be psychologically damaged if they remain living with

the mother. She is apparently unwilling or unable to control her behaviors.

The Court has struggled mightily with this decision, balancing the short term consequences to the children of a change of custody, including foreseeable emotional upset and possible trauma, against the long term consequences of allowing physical custody to remain with the mother, which likely will result in the children having pathological personality traits which would interfere with their ability to establish whole relationships not only with their father but also with peers, future spouses or significant others, with extended family members, with employers and co-workers, and with the risk of their passing down a jaundiced and paranoid view of life to their own children. The mother has "poisoned" their childhood. The poison must be purged to restore them to a healthy state. This Court seeks to restore normalcy to their lives and give them a chance to have a better childhood and a healthy adolescence and adulthood.

Thus, in light of the totality of the circumstances, the Court has concluded that the best interests of these children are served by awarding custody to the father. The Court acts with a weighty awareness of the gravity of its decision. The Court has considered at length less drastic approaches, such as granting the father summer visitation and ordering immediate therapy for the children and parties. The Court has concluded that such remedies would be ineffective. Although the children may be upset, angry and disappointed and may grieve, the Court has faith that in the long run, the children's resiliency, lust for life and underlying goodness and purity will bring them to a place where they can love and be loved by both parents. To this end, the Court directs that the children be in therapy with an appropriate therapist with experience in parental alienation and that the parents cooperate in such therapy. While it is only precatory, the Court urges the stepmother to participate in such therapy to the extent recommended by the therapist.

In *Turner v. Turner*,[19] the appellate court reversed the family court's rejection of the alienating behavior and changed custody to the Father,

Family Court reasoned that respondent's behavior was the result, not of a desire to alienate petitioner from the child, but was prompted instead by respondent's hypersensitivity to sexual abuse, which she and other members of her family had purportedly experienced in the past. We find this rationale unpersuasive, for it is not respondent's motive that is of import, but rather the effect on the child of respondent's manipulation of the child in relation to these false allegations. Respondent engaged in persistent efforts to interfere with petitioner's right to see the child and, as a consequence of the three petitions filed by respondent accusing petitioner of sexual abuse, his relationship with the child was undeniably affected, at the very minimum by the fact that his visitation privileges were suspended and, when not suspended, he was required to endure supervised visitation.

Moreover, it is doubtful that respondent's behavior did not have a negative effect on the child's growth and development. In this regard, it is worth noting that respondent recited the spurious charges in sexually explicit detail while in the child's presence and encouraged the child to tell others—including the manager of the apartment they occupied—what it was "daddy did to you." Further, respondent had this five-year-old child undergo numerous therapy sessions and subjected her to intrusive physical examinations solely because of respondent's unsubstantiated belief that the child had been violated sexually. Respondent's behavior casts significant doubt upon her capacity to provide for the emotional and intellectual development of the child.

By contrast, while the record reveals that petitioner is not the ideal parent, he is not an unfit one and, as Family Court properly found, does not "lack insight into his daughter's needs." This, coupled with his willingness to foster a good relationship between the child and respondent as evidenced by his testimony that "the best parent is both parents," and to do what is best for the child as attested to by his readiness to attend therapy if necessary, compel the conclusion that he is better suited to be the custodial parent.

In *Lauren R. v. Ted R.*,[20] the court considered the effect of prior finding of alienation in a parenting contempt proceeding and stressed the need to address alienating behavior post-haste and detailed the insidiousness of the behavior:

> Parental access, commonly referred to as "visitation," is an important right of the non-custodial parent and the child. See, Weiss v. Weiss,52 N.Y.2d 170. In a scenario where one parent is demonstrated to have interfered with the custodial rights of a parent, a number of mechanisms exist [see, Scheinkman, New York Law of Domestic Relations, Second Edition, § 23.14] to aid in the enforcement of custody orders and judgments, including:
>
> 1. Criminal Sanctions, pursuant to Penal Law § 135.45 and 135.50;
>
> 2. Suspension of alimony or maintenance, pursuant to Judiciary Law § 750, 753;
>
> 3. Tort action for custodial interference;
>
> 4. Orders of Protection, pursuant to Domestic Relations Law § 240.
>
> While the most factually apparent ground to change existing custody arrangements involves physical danger, the act of alienating a child against a parent presents a nefarious form of conduct that must be met with careful consideration and immediate, comprehensive remediation by a Court (see, Zafran v. Zafran, 306 A.D.2d 468; Lew v. Sobel, 46 AD3d 893). A change in custody should not be permitted solely as a means for punishing a recalcitrant parent (see, Lew v. Sobel, supra), but always requires due consideration of all of the other custodial factors. See, Robert T.F. v. Rosemary F., 148 A.D.2d 449.
>
> …Protraction or delay in parental alienation cases often serve to reinforce the offending conduct and potentially undermine any remediation that a court could fashion with appropriate therapy, parent coordination, and/or, a change in custody. See, Steinberger, Father? What Father? Parental Alienation And Its Effect on Children, NYSBA Family Law Review, Spring 2006; Johnston, J.R., Children of Divorce Who Reject a Parent And Refuse Visitation: Recent Research & Social Policy Implications for the Alienated Child, 38 Fam. L.Q. 757, 768–769.Under the circumstances of this case, this Court's finding of a willful violation of an existing order of custody in the form of parental alienation requires a prompt evidentiary hearing to determine whether the children's best interests, under the totality of the circumstances, warrant modification of the previously entered custody order. See, Friederwitzer v. Friederwitzer, 55 N.Y.2d 89; Corigliano v. Corigliano, 297 A.D.2d 328; Martin R.G. v. Ofelio G.O., 24 AD3d 305; Carlin v. Carlin, 52 AD3d 559.

The court outlined the litany of alienating behavior perpetrated by the mother in violation of the parties' joint custody stipulation—which also contained language referencing a prohibition against alienation—and sentenced her to a period of incarceration. On appeal, the Second Department modified under the full caption, *Rubin v. Rubin*.[21] While agreeing that the mother was in willful violation, it directed that the incarceration be suspended pending the mother's future compliance. Similarly in *Dobies v. Brefka*,[22] the family court, after initially denying a change in custody, but finding a willful violation, changed custody of the parties' son from the mother to the father. The custody change was affirmed on appeal, but the lower court's 60-day incarceration order was stayed. The court also upheld the suspension of his child support obligation to the parties' older, but not yet emancipated, daughter. With regard to the custody change for the son, the court upheld an initial one month period of no contact for the mother with the son, "in order to break her influence over him" in the transition period.

In *Rodman v. Friedman*,[23] the First Department upheld a series of self-executing fines and a counsel fee award against the mother for violations of the father's parenting rights "based its finding that the mother had alienated the child from the father not simply on the forensic report, but also on its in camera interview with the child, another forensic report, and numerous documents, interviews and court appearances." On a later appeal, decided in 2013,[24] the appellate court affirmed the suspension of child support payments to the mother:

> Plaintiff's "deliberate frustration" of and "active interference" with defendant's visitation rights warrant the suspension of child support payments (see Ledgin v. Ledgin, 36 A.D.3d 669, 670, 828 N.Y.S.2d 202 [2d Dept. 2007]; Domestic Relations Law § 241). On a prior appeal, we affirmed Supreme Court's finding that plaintiff had alienated the child from defendant (33 A.D.3d 400, 826 N.Y.S.2d 1 [1 st Dept. 2006], lv. dismissed 8 N.Y.3d 895, 832 N.Y.S.2d 898, 865 N.E.2d 7 [2007]). On the instant motion, the court found,

> based on plaintiff's own submissions, that "alienation ha[d] continued unabated" and that "[p]laintiff's conduct remains unchanged: she persists in her denigration of [d]efendant as a parent and as a person and refuses to accept responsibility for the escalating damage being inflicted on her daughter." Under the circumstances, suspension of defendant's child support obligation is necessary to enforce defendant's reasonable rights of visitation.

In *Vernon v. Vernon*,[25] the appellate division reversed the trial court's determination not to change custody despite the alienation:

> Respondent engaged in persistent efforts to interfere with petitioner's right to see the child and, as a consequence of the three petitions filed by respondent accusing petitioner of sexual abuse, his relationship with the child was undeniably affected, at the very minimum by the fact that his visitation privileges were suspended and, when not suspended, he was required to endure supervised visitation.
>
> Moreover, it is doubtful that respondent's behavior did not have a negative effect on the child's growth and development. In this regard, it is worth noting that respondent recited the spurious charges in sexually explicit detail while in the child's presence and encouraged the child to tell others—including the manager of the apartment they occupied—what it was "daddy did to you." Further, respondent had this five-year-old child undergo numerous therapy sessions and subjected her to intrusive physical examinations solely because of respondent's unsubstantiated belief that the child had been violated sexually. Respondent's behavior casts significant doubt upon her capacity to provide for the emotional and intellectual development of the child.
>
> By contrast, while the record reveals that petitioner is not the ideal parent, he is not an unfit one and, as Family Court properly found, does not "lack insight into his daughter's needs." This, coupled with his willingness to foster a good relationship between the child and respondent as evidenced by his testimony that "the best parent is both parents," and to do what is best for the child as attested to by his readiness to attend therapy if necessary, compel the conclusion that he is better suited to be the custodial parent. (Citations omitted).

In *Anonymous 2011-1 v. Anonymous 2011-2*,[26] involving Fox television host and author Bill O'Reilly, the court fined the mother counsel fees in the total sum of $310,040.57 for her contemptuous violation of the father's ordered parenting time. The court would not allow the mother to permit the child to "vote with her feet" in facilitating the child's reluctance to see her father. Citing to *King v. King*,[27] the court reiterated, "A father (or mother) may not use his daughter's wishes to shield him from the consequences of disregarding his duty to obey the court's lawful mandate."

Of course, false claims of alienation must also be guarded against as the court did in *Braverman v. Braverman*,[28] where the father—a physician—made numerous false allegations against the mother including abuse, neglect, and alienation in addition to committing acts of "medical child abuse by exaggerating the children's symptoms and repeatedly subjecting them to unnecessary and at times invasive medical treatment." In *Ashton v. Doroski*,[29] the court rejected a claim for a modification of custody in that the mother "failed to present evidence of parental alienation that would justify a change in physical custody," citing to *Roelofsen v. Tiberie*.[30] In *Roelofsen,* the court held that despite the father's alienation contention, "the record reveals that the deterioration of the relationship between the father and the parties' oldest son is due to the father's own conduct and the father's failure to make genuine efforts towards reconciliation."

Evidence and Fortitude

Given the court's need to look at the "totality of circumstances," claims of alienation either in the initial instance or on modification, must be strongly supported. Having some "anti-alienation" language in the settlement agreement may also be of some help here. As *Gerber* and many of the other reported cases in which we are afforded detailed facts bears out, the evidence of alienation may have to be "overwhelming." Since the alienation would, in and of itself, necessitate that the children (and presumptively, their attorney) be aligned with the alienator, the "targeted" parent has an uphill battle to start with. They may also be reluctant to engage in therapeutic or supervised parenting, feeling that they have done nothing wrong and that engaging in such modalities is tantamount to an "admission" of their complicity. Such an approach is usually counterproductive, but it is easy to see how the alienator and the slowly grinding court system will perpetuate the restrictions placed upon the targeted parent whether voluntarily or by court directive.

The court's reliance on the feedback from therapeutic intervention and/or forensic involvement is crucial.[31] Even so, a self-fulfilling prophecy may very well result.

The longer the intervention and the court process continue: the older the children get, the more frustrated the targeted parent grows, and the greater the likelihood that a deal will be struck which gives control to the alienator. The court is not immune from this self-fulfilling prophecy risk. Judges do not like custody cases. They want them settled. They don't want the children in the middle. They want parents making the decisions. They are reliant on the attorney for the child and others such as the mental health professionals for guidance. As the saying goes—"with great power comes great responsibility."[32] So, when the proofs of alienation exist, we need our courts to act—as swiftly as the process will allow and then some. Maybe the kitchen sink of evidence is not there yet, especially when we do not have much by way of discovery on this issue—at least in the First and Second departments[33]—but when the dishes are starting to pile up, an early and hands-on intervention by the court is required, in *parens patriae*.

Endnotes

1. 133 A.D.3d 1133 (3rd Dept 2015).
2. 141 A.D.3d 901 (3rd Dept 2016).
3. 2016 N.Y. Slip Op. 08134 (3rd Dept 2016).
4. See *Friederwitzer v. Friederwitzer,* 55 N.Y.2d 89 (1982); *Eschbach v. Eschbach,* 56 N.Y.2d 167 (1982).
5. *Matter of Islam v. Lee,* 115 A.D.3d 952 (2nd Dept 2014).
6. *Matter of Bennett v. Schultz*, 110 A.D.3d 792 (2nd Dept 2014), in transferring custody to the father, and citing *Entwistle v. Entwistle*, 61 A.D.2d 380, 384-385 [1978]; *Matter of Lawlor v. Eder*, 106 A.D.3d 739, 740 [2013]; *Matter of Doroski v. Ashton*, 99 A.D.3d 902, 903 [2012]; and *Matter of Ahmad v. Naviwala*, 306 A.D.2d 588, 591 [2003]. See also *Carleo v. Pluchinotta*, 138 A.D.3d 833 (2nd Dept 2016); *Young v. Young*, 212 A.D.2d 114 (2nd Dept 1995).
7. *Eschbach, supra* at endnote 4.
8. *See, e.g.*, *Bubbins v. Bubbins*, 136 A.D.2d 672 (2nd Dept 1988); *Zelnik v. Zelnik*, 196 A.D.2d 700 (1st Dept 1993); *O'Connor v. O'Connor*, 146 A.D.2d 909 (3rd Dept 1989).
9. *Matter of Nehra v. Uhlar*, 43 N.Y.2d 242 (1977).
10. The mother was also fined $500, with said sum to be paid to the father.
11. *Gerber, supra* at endnote 1.
12. The children apparently wished to testify at the hearing in support of the mother; however, the court opted in its discretion to hold a *Lincoln* hearing instead. The appellate court also stated at footnote 6, "A child—regardless of age—'should not be placed in the position of having his or her relationship with either parent further jeopardized by having to publicly relate his or her difficulties with them when explaining the reasons for his or her preference' (*Matter of Casarotti v. Casarotti*, 107 AD3d 1336, 1338-1339 [2013], *lv denied,* 22 N.Y.3d 852 [2013] [internal quotation marks, brackets and citations omitted]; *see Matter of Battin v. Battin*, 130 A.D.3d at 1266)."
13. *Gerber, supra* at endnote 1.
14. *Gerber, supra* at endnote 2.
15. *Gerber, supra* at endnote 3.
16. One child had already turned eighteen and was no longer subject to a custody order.
17. 2016 N.Y. Slip Op. 08873 (2nd Dept 2016)—the parties had three children: a son who turned 18 during the proceeding, a 17-year-old daughter, and a 14-year-old daughter. *See also* e.g., *John A. v. Bridget M.*, 16 A.D.3d 324 (1st Dept 2005), *lv den.*, 5 N.Y.3d 710 (2005), reversing the lower court's transfer of custody [see 4 Misc. 3d 1022(A) (Fam. Court NY County 2004)], despite the mother coaching the children to claim that the father sexually abused them.

    > It is psychologically abusive for a parent to plant in the mind of a three- or four-year-old child the false notion that the other parent is sexually abusing the child. The record in this case shows that, fortunately, the mother has desisted from misconduct of this kind for a substantial period of time. Thus, we have reason to expect that such misconduct will not be repeated in the future.
    >
    > To sum up, we believe that, under the totality of the circumstances, custody should be returned to the mother under the conditions indicated. The mother should realize, however, that the custody issue may be revisited if she again seeks to interfere with the father's relationship with the children (see Victor L. v. Darlene L., 251 A.D.2d at 179, 674 N.Y.S.2d 371). While we recognize that Family Court's action imposed great distress on the mother, it bears noting that this predicament is one the mother brought on herself by seeking to alienate the children from their father. It is in the mother's power to maintain custody by refraining from further abuse of her power as the custodial parent.

18. 181 Misc. 2d 722 (Fam. Court, Westchester Co. 1999), *aff'd* as *Faneca v. Faneca*, 270 A.D.2d 489 (2nd Dept 2000), *lv den.*, 95 N.Y.2d 756 (2000).
19. 260 A.D.2d 95 (3rd Dept 1999).
20. 27 Misc. 3d 1227(A) (Sup. Court, Nassau County 2010).
21. 78 A.D.3d 812 (2nd Dept 2010).
22. 83 A.D.3d 1148 (3rd Dept 2011).
23. 33 A.D.3d 400 (1st Dept 2006), *lv. dismissed*, 8 N.Y.3d 895 (2007).
24. *Rodman v. Friedman*, 112 A.D.3d 537 (1st Dept 2013).
25. 260 A.D.2d 953 (3rd Dept 1999).
26. Denny, A., *Judge Fines Bill O'Reilly's Ex-Wife Over Violating Custody Agreement*, NYLJ, Sept 19, 2016.
27. 124 Misc. 2d 946 (Sup. Court, NY County 1984).
28. 140 A.D.3d 413 (1st Dept 2016).
29. 136 A.D.3d 899 (2nd Dept 2016).
30. 64 A.D.3d 603 (2nd Dept 2009); see also, *Melissa C.D. v. Rene I.D., Jr.*, 117 A.D.3d 407 (1st Dept 2014), "Significantly, in performing its analysis, the court failed to give sufficient weight to the mother's role in the alienation of Pascal and Scarlet's affections, as well as her inability to accept any responsibility for the deterioration of her relationship with them (see *Matter of Muzzi v. Muzzi*, 189 A.D.2d 1022, 1024, 592 N.Y.S.2d 869 [3d Dept.1993] [it was inappropriate for Family Court to favor one party's contentions where neither party blameless])."
31. Differing perspectives on addressing alienation continue to exist. *See e.g.*, Family Court Review, *Special Issue on Alienated Children in Divorce and Separation: Emerging Approaches for Families and Courts,* Vol. 48, Issue 1 (2010).
32. Attributed, in various forms, to the 1793 French National Convention, Winston Churchill, Franklin D. Roosevelt, and Stan Lee, among others.
33. *See e.g.*, discussion in *Matter of Dominick R. v. Jean R.*, 7 Misc. 3d 1027(A) (Fam. Court Kings County 2005); see also *Ferguson v. Ferguson*, 2 Misc. 3d 277 (Sup. Court Nassau County 2003).

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

Collateral Estoppel: Preventing a Second Bite at the Apple for Litigants in Contemporaneous Family and Supreme Court Proceedings

By Joshua L. Rieger

Introduction

How many times has a client walked into your office with two separate but related pending actions, e.g., a custody proceeding in Family Court and a divorce action in Supreme Court? You say to yourself, "Okay, time to consolidate...". Most often, the cases will be consolidated via stipulation or motion practice. But what if the cases remain in separate forums?

What if the custody action is adjudicated in Family Court prior to the divorce trial—would the parties be permitted to relitigate the same underlying factual issues before the Supreme Court to bolster their economic claims?

For example, assume that in their custody proceeding, each parent testified and offered evidence in an attempt to establish that they were their children's primary caretaker, that they sacrificed their education, career, etc. Both parties faced cross examination, expert witnesses and factual witnesses testified to corroborate and rebut the parties' testimony and evidence. The Family Court judge then rendered a decision and made findings of fact and opined on credibility.

In an accompanying divorce action, in order to demonstrate their contributions to the marriage and possibly, their lifestyle, could the parties testify and offer evidence of the underlying facts previously adjudicated in the Family Court custody proceeding in support of claims for maintenance, child support and equitable distribution? Essentially, could the parties relitigate the facts and contentions addressed in the prior Family Court custody proceeding?

The Family Court Case

Hypothetical: Parent A files a petition for custody in Family Court. Parent B then files for divorce in Supreme Court. The Family Court custody case goes to trial first. During trial, Parent A testifies that despite his or her high level of education, since the birth of the children, her or she has tailored his or her work schedule for the children. Parent A is the one who woke up with the children in the morning, prepared their food, fed them, arranged for and took them to and from activities. Parent A was the parent who was available to take the children to the doctor, went to parent teacher conferences and assisted with their homework on a nightly basis. Parent A went to holidays at Parent B's family's home and traveled with his or her spouse on business trips solely to watch over the children while Parent B was engaged in meetings.

At the conclusion of the Family Court trial, the Judge finds virtually all of Parent A's testimony to be untrue. To the contrary, the Judge finds Parent B to be credible and that Parent B's testimony, evidence and witnesses established a much different narrative—one in which Parent A was gainfully underemployed and never sought to obtain gainful employment despite the fact the children were in day care and cared for by family members while Parent A was unaccounted for.

The Judge found that Parent A did not go with Parent B on business trips to watch the children, but instead would disappear for hours on end, leaving them in the care of others. Further, while Parent B was the bread winner and at work longer hours than Parent A, Parent B did everything to "steer" the proverbial ship of their children's lives while Parent A was simply an occasional passenger. Parent B is awarded custody of the children in Family Court.

The Family Court Judge's findings of fact and decision directly impacts Parent A's claim for equitable distribution. In fact, all of the facts underlying his/her claim for custody are paramount to establish Parent A's non-financial contributions to the marriage.

Is Parent A legally entitled to a second bite at the apple in the Matrimonial Court? Can Parent A relitigate the same arguments and facts in the Supreme Court case on economic matters after having previously litigated them in a Family Court custody proceeding?

Existing case law would indicate that the answer is "no."

Collateral Estoppel Defined

The doctrine of Collateral Estoppel "precludes a party from relitigating an issue which has previously been decided against him/her in a proceeding in which he/she had a fair opportunity to litigate the point."[1]

Collateral Estoppel is based on common law principles "...intended to reduce litigation and conserve the resources of the court and the litigants and is based on the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it."[2]

The doctrine holds that once a particular question of fact has been decided in one administrative judicial forum, that "same question of fact may not be reopened for further litigation in the context of a subsequent administrative or judicial proceeding between the same parties."[3]

In *American Ins. Co. v. Messinger*,[4] the Court of Appeals opined that the doctrine of issue preclusion does "... not depend on any manifested or presumed intention or the parties; they rest on the desirability in the public interest of judicial repose and of the orderly termination of controversy."[5]

The elements of collateral estoppel are as follows:

> (1) the identical issue necessarily must have been decided in the prior action and be decisive of the present action whether or not the tribunal or causes of actions are the same; and
>
> (2) the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination.[6]

Relevant Court of Appeals Decisions

While no case law on collateral estoppel directly addresses the factual scenarios that may confront the matrimonial practitioner, the following Court of Appeals cases do offer guidance.

In *Parker v. Blauvelt Volunteer Fire Co.*,[11] the Court of Appeals affirmed the Second Department's decision to grant the defendant's motion to dismiss as "all the factual issues dispositive of the constitutional claims being raised in the instant action were necessarily decided in the prior Article 78 proceeding." [12]

The facts of *Parker*, are as follows: the plaintiff initially commenced an action under 42 USC §1983 in order to litigate civil rights claims for damages that were severed from his Article 78 proceeding. In the Article 78 proceeding, the plaintiff alleged that the defendants violated his due process rights, *inter alia*: that the Fire Department (one of the defendants) suspended him without a hearing to determine probable cause; brought charges that were impermissibly vague; failed to give proper notice of the charges and enforced rules in a arbitrary and discriminatory manner; and violated his freedom of speech.

"In order to invoke the doctrine of collateral estoppel, a moving party must demonstrate that the 'identical issue necessarily must have been decided in the prior action and be decisive in the present action.'"

In order to invoke the doctrine of collateral estoppel, a moving party must demonstrate that the "identical issue necessarily must have been decided in the prior action and be decisive in the present action."[7] If the moving party establishes the first prong, the burden shifts to the non-moving party to establish the absence of a full and fair opportunity to litigate the issue in the prior action.[8]

In *Interboro Inst. Inc. v. New York State Higher Educ. Servs. Corp.*,[9] the Third Department dismissed the appellant's Article 78 petition under the theory of collateral estoppel as it determined that the allegations and arguments in appellant's Federal Complaint were "nearly verbatim" of those in his Article 78 proceeding. Moreover, the petitioner relied on the same factual claims, documentary evidence and affidavits in support of each matter.

The Third Department opined that "...the doctrine of collateral estoppel will permit any discrete factual issues necessarily decided in the prior action to be given preclusive effect, regardless of the over-all legal context."[10]

This is of great significance to the matrimonial practitioner faced with the scenario of two separate but related contemporaneously litigated matters in Family and Supreme Court.

One must be fully prepared to present the facts throughly and create and clear record during the custody trial—as the facts established therein it will be binding in the subsequent matrimonial proceeding.

The plaintiff's claims arose out of his dismissal as a firefighter following a disciplinary action taken against him by the defendant. In said proceeding, the Supreme Court granted defendants' motion to dismiss the 42 USC §1983 causes of action for damages "without prejudice" because they were "not incidental to the primary relief sought of reinstatement as a firefighter." Since the remaining claims in the petition raised substantial evidentiary issues, the Supreme Court transferred the petition to the Second Department.

The plaintiff then commenced a plenary action under 42 USC §1983 to litigate the civil rights claims of damages that were severed from the prior proceeding. The Supreme Court denied the defendant's motion to dismiss. The Second Department reversed and dismissed his 42 USC §1983 civil rights action on the grounds that it was barred under the doctrines of res judicata and collateral estoppel.[13]

The Court of Appeals opined that "...Plaintiff should not be allowed in this action to raise any of the issues he unsuccessfully litigated in his prior CPLR Article 78 proceeding."[14]

The Court of Appeals found that the "dispositive factual and legal issues" in plaintiff's claims of deprivation of his constitutional rights in the 42 USC §1983 civil rights action were identical to the allegations of constitutional violations asserted as a basis for annulment of defendant's disciplinary determinations and were decided against plaintiff in the prior CPLR Article 78 proceeding.[15] Further, the Court of Appeals noted that even though the claims for damages under USC §1983 were severed from the Article 78 proceeding, all of the constitutional rights violations alleged in plaintiff's petition remained in tact and were before the Appellate Division.[16] Accordingly, "...all the factual issues dispositive of the constitutional claims being raised in the instant action were necessarily decided in the prior Article 78 proceeding."[17]

The Court of Appeals also found that the plaintiff failed to meet his burden of establishing that he lacked a full and fair opportunity to litigate the foregoing issues in the prior proceeding and thereby avoid the preclusive effect of an adverse determination of those issues,

> Nothing prevented him from fully litigating the constitutional grounds he advanced for invalidating the disciplinary determination against him...plaintiff raised the very same legal and factual issues in asserting the violations of due process and freedom of speech that now form the basis of his current action. Consequently, plaintiff may not now relitigate these issues.[18]

Similarly, in *Suffolk County Dep't of Social Servs. ex rel. Michael V. v. James M.*,[19] the Court of Appeals upheld the Second Department's affirmation[20] of the defendant's motion for summary judgment under the doctrine of collateral estoppel. The Family Court therein granted the Suffolk County Department of Social Services' motion for summary judgment for an order of protection against the petitioner (stepfather) in favor of his sons, without holding a dispositional hearing. This decision was upheld by the Second Department as it ruled that the Family Court had properly applied the appellant's (stepfather) criminal conviction of sexual abuse as "conclusive proof" that he had sexually abused one of his sons and correctly adjudicated one son to be an "abused child " and the other to be a "neglected child." The stepfather appealed.

The Court of Appeals found that the acts of sodomy for which the appellant was convicted fell within the broad allegations of the abuse petition.[21] The Court held that the petitioner satisfied its burden as the proponent of applying collateral estoppel. Specifically, petitioner established that the "identical" issue of the appellant's sexual abuse of his son in the instant child protective proceeding was resolved against him in the criminal proceeding.[22]

Likewise, in *Ryan v. New York Tel. Co.*,[23] the Court of Appeals reversed the First Department's decision[24] and upheld the lower court's initial order granting defendant's cross motion to dismiss several of plaintiff's causes of action pursuant to the doctrine of collateral estoppel.[25]

In *Ryan*, the plaintiff was discharged from his employ by the defendant for theft of company property. Company security investigators (also defendants in the action) observed plaintiff removing what appeared to be company property from the workplace. They stopped him and called the police, who arrested plaintiff. Plaintiff was charged with petit larceny and criminal possession of stolen property.

Following his discharge from work, plaintiff filed for unemployment insurance benefits but was rejected on the ground that he was discharged a result of his own misconduct. Plaintiff appealed to an Unemployment Administrative Judge. After considering the testimony of the witnesses (including plaintiff)—who the Court noted were examined and cross-examined extensively—the Administrative Judge disallowed the benefits, finding that the plaintiff was seen removing company property from company premises without proper authorization and therefore lost his employment due to his own misconduct.

The determination was affirmed by the Unemployment Insurance Appeal Board and again upheld by the First Department.

Plaintiff then commenced the Supreme Court action asserting claims for false arrest, malicious prosecution, slander, wrongful discharge and an additional claim for injuries to his wife. Defendants pleaded affirmative defenses of res judicata and collateral estoppel. Plaintiff moved to dismiss these affirmative defenses and Defendants cross-moved to dismiss several causes of action.

The Court of Appeals ultimately found that the critical issue in the prior administrative proceeding was whether the plaintiff was discharged by reason of his misconduct and, therefore, not entitled to unemployment benefits. The Administrative Law Judge specifically found that plaintiff was guilty of unauthorized removal and possession of company property. The Court of Appeals held that the Administrative Law Judge's determination was conclusive and "...dispositive of the subject claims asserted by the plaintiffs." [26]

The Court of Appeals discussed the dispositive facts related to each cause of action brought by plaintiff, *to wit*:

> 1) False imprisonment—the Administrative Judge's determination of criminally

> chargeable misconduct is dispositive of the presence of such justification;
>
> 2) Malicious prosecution—prior determination that the defendants' investigators actually witnessed plaintiff removing property, therefore, had probable cause to bring charges against him;
>
> 3) Slander (i.e., that plaintiff stole something from his workplace)—the Administrative Judge found that he was seen removing company property from company premises without authorization—this was an essential predicate to the determination that he was discharged for misconduct;
>
> 5 & 6) Grounded in allegations of Wrongful Discharge—but the Administrative Judge's determined that his discharge was justified by his misconduct.[27]

The Court of Appeals concluded that the defendant satisfied the first prong of the test for collateral estoppel, finding, "It is clear...that the criterion for issues identicality and decisiveness is satisfied for each of the subject causes of action."[28]

As for the second prong of collateral estoppel, the Court of Appeals found that the plaintiff had a full and fair opportunity to litigate the "question of his own misconduct" in the prior administrative proceeding.[29]

> The realities of the prior litigation are that it was sufficiently extensive and fully adversarial hearing presided over by an Administrative Law Judge; that the hearing was initiated by Ryan himself to demonstrate his entitlement to unemployment benefits....[30]

Conclusion

Pursuant to the relevant case law, a party would be collaterally estopped from relitigating underlying factual issues that were decided in a prior custody proceeding in the accompanying matrimonial action.

The findings of fact and decision in the Family Court custody case will greatly impact the economic issues and define the parameters of the parties' claims in the Supreme Court divorce case. Deciding whether to litigate contemporaneously in both Family and Supreme Court must be carefully considered if you so choose to litigate in two forums. The parties' prior custody trial may very well limit and/or preclude issues related to contributions for equitable distribution.

Endnotes

1. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449 (1985).
2. *Id*. at 455.
3. *Sun Ins. Co. v. Hercules Sec. Unlimited*, 195 A.D. 2d 24, 31 (2nd Dept 1993), citing *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494 (1984).
4. 43 N.Y.2d 184 (1977).
5. *Id*. at 192.
6. *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343 (1999); *Suffolk County Dep't of Social Servs. ex rel. Michael V. v. James M.*, 83 N.Y.2d 178 (1994); *Ryan v. New York Tel. Co., supra* at endnote 3.
7. *Parker v. Blauvelt Volunteer Fire Co., Id*.
8. *Id*. at 455.
9. 256 A.D.2d 1003 (3rd Dept 1998).
10. *Id*. at 1004-1005, citing *Lee v. Jones*, 230 A.D.2d 435 (3rd Dept 1997).
11. 93 N.Y.2d 343 (1999).
12. *Parker v. Blauvelt Volunteer Fire Co., supra,* endnote 6, at 483.
13. 251 A.D.2d 389 (2nd Dept 1998).
14. *Parker v. Blauvelt Volunteer Fire Co., supra*, endnote 6, at 482.
15. *Id*. at 483.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Suffolk County Dep't of Social Servs. ex rel. Michael V., supra* at endnote 6.
20. 188 A.D.2d 603 (2nd Dept 1992).
21. *Suffolk County Dep't of Social Servs. ex rel. Michael V., supra*, endnote 6, at 637
22. *Suffolk County Dep't of Social Servs. ex rel. Michael V., supra* at endnote 6.
23. *Ryan v. New York Tel. Co., supra* at endnote 3.
24. 94 A.D.2d 646 (1st Dept 1983).
25. *Ryan v. New York Tel. Co., supra,* endnote 3, at 502.
26. *Id*.
27. *Id*. at 503-504.
28. *Id*.
29. *Id*.
30. *Id*.

Joshua L. Rieger is a partner at Rieger & Fried, LLP. He is a graduate of Hofstra University School of Law and has exclusively practiced matrimonial law since joining the firm in 2012. Mr. Rieger has been was selected as a New York Metro Super Lawyer "Rising Star" since 2014. He may be reached at jlr@rfmatlaw.com.

Appealable Paper and Emergency Appellate Intervention

By Glenn S. Koopersmith

One of the most consistent areas of confusion with regard to the appealability of orders, judgments and related "papers" in matrimonial litigation involves whether a given determination is appealable and, if so, whether the appeal is as of right [pursuant to CPLR 5701(a)] or requires a motion for leave to appeal [pursuant to CPLR 5701(c)]. This article will explore these issues and (hopefully) clarify and simplify the necessary inquiry.

What May Be Appealed

"Appealable paper" is defined in CPLR 5512 which states that "(a)n initial appeal shall be taken from the judgment or order of the court of original instance and an appeal seeking review of an appellate determination shall be taken from the order entered in the office of the clerk of the court whose order is sought to be reviewed...." *Thus, if you are seeking review of any determination that is not an order or judgment, it is not an "appealable paper*."

It is now well established that no appeal lies from a decision.[1] Nor does an appeal lie from a court transcript,[2] unless it has been "so ordered" by the court.[3] Finally, no appeal lies from a temporary restraining order,[4] though as addressed hereafter in greater detail, the Appellate Division may address an improper temporary restraining order by staying the relief granted in the lower court's order to show cause.

The conduct of the parties can dictate whether certain orders and judgments are appealable. For example, orders entered on consent are not appealable since there is no aggrieved party.[5] Similarly, no appeal lies from a judgment entered on default; a party who has failed to oppose a claim on the merits is not aggrieved and cannot appeal.[6] Rather than appeal, the proper remedy is to move to vacate the default.[7] Where opposition is offered at an inquest, the appeal "is limited to matters which were the subject of contest before Special Term."[8]

Appeals as of Right and by Permission

Pursuant to CPLR 5701(a)(2), a party may appeal to the Appellate Division *as of right* from, *inter alia*:

> (a) "Any final or interlocutory judgment except one entered subsequent to an order of the Appellate Division which disposes of all the issues in the action; or"
>
> (b) An order "where the motion it decided was made upon notice and it..." "affects a substantial right" or "involves some part of the merits."

Appeal from the Final Judgment

Pursuant to CPLR 5501(a)(1), an appeal from a final judgment brings up for review any non-final judgment or order which "necessarily affects" the final judgment. The standard for determining whether a prior order or judgment necessarily affects the final judgment was liberalized by the Court of Appeals in *Siegmund Strauss Inc. v. East 149th Realty*.[9] In *Siegmund Strauss*, the Court of Appeals reversed the First Department, holding that "because the Supreme Court's dismissal of the counterclaims and third party claim necessarily removed that legal issue from the case (i.e., there was no further opportunity during the litigation to raise the question decided by the prior non-final order), that order necessarily affected the final judgment."

In a matrimonial context, appeals from temporary support orders (including awards of temporary counsel fees) are not reviewable on an appeal from a final judgment since, if modified, they do not affect the foundation of the judgment.[10] Similarly, decisions pertaining to a preliminary injunction cannot be reviewed on appeal from the final judgment.[11]

Appeals from an Order

While judgments are generally appealable as of right, the critical question with respect to the appealability of an order is *not* whether it is "interlocutory," but rather, whether it determined a motion "upon notice."[12] Orders that do not meet this criterion and are not appealable "as of right"[13] may be reviewed only if the court grants leave to appeal pursuant to CPLR 5701(c). Such orders include, but are not limited to, preliminary conference orders, discovery orders, relief granted in orders to show cause, and orders issued during the pendency of a trial.

Similarly, orders issued after a hearing or trial (which do not determine a motion on notice), which *appear* to resolve the outstanding issues, but direct the submission of a "judgment on notice," technically are not appealable as of right. Where a trial or hearing has concluded and a court issues a "Memorandum Decision" or a "Decision After Trial," it is generally not transformed into an appealable paper simply because it concludes with the words "this constitutes the decision and order of the court." In deciding whether a decision is really an order, the Appellate Departments will consider several factors including, but not limited to: whether it recites the underlying papers upon which it is based; if it contains decretal, "Ordered" paragraphs; and/or if it contemplates the submission of a further order or judgment. Although it is likely that an appeal from a decision ultimately will be dismissed, the safer practice is to file a Notice of Appeal from a decision which refers to itself as an order, or con-

tains decretal paragraphs (and file an additional Notice of Appeal when a more formal, appealable order is subsequently entered).

Where a decision references itself in some way as an "order" but does not contain the elements of a valid order,[14] it is imperative to insist that the court either "so order" the decision or sign a separate short form order codifying it terms. This is especially important since an attempt to appeal from such a document is likely to result in dismissal of the appeal, which can negate the time and effort that have been expended (and prove to be a great embarrassment to the unwitting appellate attorney). In addressing this issue, it should be noted that the court cannot render a decision while refusing to sign an order or judgment effectuating its terms since it otherwise would frustrate a litigant's right to appeal.[15]

Emergency Appellate Intervention

Having addressed the formal, *technical* appealability of a given document, consideration must be given to issues emanating from a directive (or series of directives) contained in an order or decision which is not *technically* appealable but which may nevertheless dramatically prejudice the client if enforcement is sought in the lower court.

Fortunately, notwithstanding the technical non-appealability of these determinations, the Appellate Division may grant interim review of a prejudicial, technically non-appealable directive for which there is otherwise no available remedy. For example, although a decision or order after trial (or hearing) may not be appealable in advance of the entry of judgment, if it contains a specific directive ("and it is ORDERED that...") requiring affirmative conduct within a given time span,[16] the Appellate Division may grant a temporary restraining order. Similarly, if an order to show cause contains palpably improper temporary relief (i.e., directs the immediate payment of $25,000 in counsel fees), the Appellate Division may grant a temporary restraining order to prevent enforcement, until the motion is finally determined.[17] Although such decisions and orders are not appealable (and the appeal ultimately will be dismissed when the appeal from the ensuing judgment is determined) since the lower court may enforce such directives (regardless of their appealability), the Appellate Division may issue a temporary restraining order if it deems the underlying directive to be sufficiently improper and/or prejudicial. In the absence of such intervention, these pre-judgment directives would remain immune from appellate review.

Conclusion

Hopefully, this article will ease the anxiety that you may have experienced in the past upon receipt of an unusual directive. Remember, judgments are generally appealable as of right, as are orders deciding a written motion "on notice." Other orders may be reviewed only upon the granting of leave to appeal. Finally, even when a directive is set forth in a non-appealable document, the Appellate Division may grant a temporary restraining order staying that directive if it is sufficiently prejudicial and there is no other available judicial review.

Endnotes

1. *In re New York Cent. & H.R.R. Co.*, 60 N.Y. 112, 115 (1875); *Matter of Kessler v. Fancer*, 112 A.D.3d 1323 (4th Dept 2013).
2. *Sarate v. Garcia*, 272 A.D.2d 464 (2nd Dept 2000).
3. *Smith v. United Church of Christ*, 95 A.D.3d 581, 582 (1st Dept 2012).
4. *Crane v. New York Council 66 of the American Federation of State, County and Municipal Employees*, 101 A.D.2d 682 (3rd Dept 1984); *State v. Fuller*, 31 A.D.2d 71 (2nd Dept 1968).
5. *Lefkowitz v. Lefkowitz*, 276 A.D.2d 598 (2nd Dept 2000); N*utkiewicz v. Nutkiewicz*, 123 A.D.2d 378 (2nd Dept 1986).
6. *Double Diamond Equity v. Valerie*, 23 A.D.3d 1103 (4th Dept 2005); *Hereida v. Hereida*, 263 A.D.2d 524 (2nd Dept 1994).
7. *Wohl v. Wohl*, 26 A.D3.d 326 (2nd Dept 2006); *Matter of Belinda "O,"* 210 A.D.2d 853 (2nd Dept 1994).
8. *Dorkin v. Spodek*, 201 A.D.2d 509 (2nd Dept 1994); *see James v. Powell*, 19 N.Y.2d 249 (fn.3) (1967).
9. 20 N.Y.3d 37 (2012).
10. CPLR 5501; *Maddaloni v. Maddaloni*, 142 A.D.3d 646 (2nd Dept 2016); *Samuelson v. Samuelson*, 124 A.D.2d 650 (2nd Dept 1986).
11. *Founders Ins. Co. Ltd. v. Everest Nat. Ins. Co.*, 73 A.D.3d 402 (1st Dept 2010); *Cinerama Inc. v. Equitable Life Assurance Society*, 38 A.D.2d 698 (1st Dept 1972).
12. CPLR 5701(a)(2)(b).
13. The statute expressly states that certain orders involving provisional remedies, applications to resettle a transcript and granting or refusing a new trial are not appealable as of right. [CPLR 5701(a)(2)(i), (ii) and (iii)].
14. This can occur, inter alia, where the document is called a "Decision" but concludes with the phrase "this constitutes the decision and order of the court" or where the court generally resolves certain issues without any including decretal paragraphs or specific directives.
15. *Hochberg v. Davis*, 171 A.D.2d 192 (1st Dept 1992); *Matter of Grisi v. Shainswit*, 119 A.D.2d 418 (1st Dept 1986).
16. This is happening with increasing frequency because of the seemingly ever increasing time span between the issuance of Decisions After Trial and the ensuing entry of a Judgment of Divorce.
17. The Appellate Division may address this procedural quagmire by granting a temporary restraining order and then delaying the final disposition of the appellate motion until the lower court reviews the responsive motion papers and issues an order deciding the underlying motion (which will determine a motion "on notice" and is appealable as of right).

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

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson, Esq.

RECENT LEGISLATION

Domestic Relations Law § 245 amended, effective September 29, 2016: Elimination of requirement to exhaust other remedies before contempt can be sought for failure to pay child or spousal support

Domestic Relations Law § 245(1) was amended to permit a person who is owed one payment of child or spousal support to bring a contempt proceeding against a recalcitrant payor in state Supreme Court without having to first exhaust other remedies such as income execution, money judgment, sequestration, etc. Punishment may be by fine or imprisonment. There is no need to demand payment first prior to making a contempt application; rather, all that is required is that an uncertified copy of the judgment or order of support is served on the income payor. The amendment mirrors the less stringent Family Court Act § 454, which does not require the exhaustion of remedies prior to making a contempt application. The purpose of the amendment is to protect spouses and children and allow the expeditious collection of support and to permit support recipients to use either the Family Court or the Supreme Court to enforce their support awards.

Incarceration continues to be a remedy of last resort. Spouses who are unable to pay support may raise that as a defense to a finding of contempt. Also, the court's current capacity to exercise all other remedies of enforcement continues.

Domestic Relations Law § 248 amended, effective January 23, 2016: Modification of support provisions upon cohabitation or remarriage, gender-neutral language

In recognition of the recent passage of same-sex marriage, Domestic Relations Law § 248 was amended to provide gender neutrality within the statute. DRL § 248 previously provided that a "husband" could seek modification in support orders with proof that his "wife" was holding herself out as the spouse of another man and living with him. To ensure gender neutrality, the language of the statute has changed from references of "husband" to "payor" and from references of "wife" to "spouses and "payee" and the third person is now recognized as "other person."

Family Court Act §§ 1027-a, 1055, 1081, and 1089(F) amended, effective November 16, 2016: Contact with siblings in child protective, permanency and termination of parental rights proceedings

Family Court Act § 1027-a was amended to include 1027-a(b) and (c), which provide that in the event that a child is not placed with his/her sibling or half-sibling, because it was not in the child's best interest to do so, the social services official is then required to facilitate contact between the siblings on a regular basis to ensure that their relationship is maintained. Moreover, if the child is not provided with regular contact with his/her sibling or half-sibling, a motion for placement or contact may be made by the child through his/her attorney or parent. Family Court Act § 1055(c), which addresses motions to strengthen parental relationships, was amended to include the motion provided in § 1027-a.

Family Court Act § 1081 was amended to include 1081(2)(b), which provides that a child who has been placed in the care of social services has the right to make a motion in order to obtain visitation and contact with his/her siblings and the siblings have the right to petition the court for contact as well. Family Court Act § 1089(F), permanency hearings, was amended to include the motion provided in § 1027-a and § 1081(2)(b).

Additional language added to proposed Findings of Fact and Conclusions of Law and Judgments of Divorce where the action was commenced on or after January 25, 2016

All cases commenced on or after January 25, 2016 require the following additional language in order to be in compliance with the new maintenance guidelines.

I. Findings of Fact and Conclusions of Law

See under "Tenth" section:

❑ D) Court Determination Where the Action for Divorce was Commenced on or after January 25, 2016

1. Fill in the following information:

(I) The adjusted gross income of the Plaintiff is $_____ and the adjusted gross income of the Defendant is _____ per year (copy your answers from Form UD-8(1) Annual Income Worksheet Lines 1A and 1B)

(ii) The date of your marriage_____; The date your divorce action was commenced_____; The number

of years you were married to the date your divorce action was commenced : _____

(iii) The range that maintenance would be payable according to the Advisory Schedule for Duration of Award in Appendix E _____ (copy your answers from Line 4a of Maintenance Guidelines Worksheet (form UD-8(2)).

2. Check which boxes below apply:

❑ Child Support will not be paid for children of the marriage; **OR** ❑ Child Support will be paid for children of the marriage (**Note: see page 7 of the Instructions for the definition of "children of the Marriage.")**

❑ Maintenance Payor is the custodial parent; **OR** ❑ Maintenance Payee is the custodial parent (copy your answers from Lines 2A and 2B of the Maintenance Guidelines Worksheet.

3. Based on the foregoing, the court has determined that:

(I) ❑ Plaintiff ❑ Defendant

is the Maintenance Payor ("Maintenance Payor") under the "Maintenance Guidelines Law" pursuant to DRL § 236(B)(6) who will pay maintenance to ❑ *Plaintiff* ❑ *Defendant* (The "Maintenance Payee") in the sum of $_____ ❑ *per week* ❑ *bi-weekly* ❑ *per month* ❑ *semi*-monthly (the "Award") for a period of_____; commencing on _____, and expiring on _____.

(ii) The guideline amount of maintenance that would be payable under the Maintenance Guidelines on income of Maintenance Payor up to $178,000 is $_____per year (from Paragraph 3B of Maintenance Guidelines Worksheet). ❑ The Award includes an annual award of $_____ on income of Maintenance Payor up to $178,000 per year. In computing said Award, the court ❑ *applied the Maintenance Guidelines Law;* OR ❑ *adjusted the guideline award of maintenance due under the Maintenance Guidelines Law because it is unjust and inappropriate based on one or more of the factors in DRL 236B(6)(e)(1), as follows, including the effect of a barrier to remarriage on said factors where appropriate:*

(iii) If Income of Maintenance Payor exceeds $178,000 per year:

❑ The Award includes an award of maintenance on $_____ of Maintenance Payor's income in excess of $178,000 per year based on one or more of the factors in DRL 236B(6)(e)(1), as follows, including the effect of a barrier to remarriage on said factors where appropriate:

OR

❑ The Award did not include any maintenance on income of Maintenance Payor in excess of $178,000 per year based on one or more of the factors in DRL 236B(6)(e)(1), as follows, including the effect of a barrier to remarriage on said factors where appropriate:

(iv) ❑ Since the Maintenance Payor has defaulted, and/or the court was provided with insufficient evidence, the award of maintenance was based on the needs of the Maintenance Payee or the standard of living of the parties prior to the marriage, whichever is greater.

(v) The court determined that the Award should be paid until _____. In determining how long the Award should be paid, the court considered the factors in DRL § 236(B)(6)(e)(1), and based its decision on one or more of said factors as stated below, including the effect of a barrier to remarriage on said factors where appropriate,

_____
_____
_____
_____

In determining how long the Award should be paid, the court also ❑ *considered* ❑ *did not consider* the Advisory Schedule in DRL § 236(B)(6)(f)(1) pursuant to which the award would have been paid for _____years.

In determining how long the Award should last, the court

❑ considered anticipated retirement assets, benefits, and retirement eligibility age of both parties **OR**

❑ anticipated retirement assets, benefits, and retirement eligibility age of both parties was not ascertainable;

II. Judgment of Divorce

See under section 23:

ORDERED AND ADJUDGED that:

A) ❑ Pursuant to the

❑ *agreement of the parties*

❑ *Court's decision*

the shall pay to

❑ *Plaintiff* ❑ *Plaintiff*

❑ *Defendant* ❑ *Defendant*

the sum of $_____ as

❑ *per week* ❑ *bi-weekly*

❑ *semi-monthly* ❑ *monthly*

and for maintenance**:**

❑ *payments to be made as set forth in the agreement;*

❑ *commencing on the __ day of _____,____, and continuing until the ____ day of _____,____; month year*

month year

Payment shall be

❑ *a direct payment,*

❑ *by an Income Deduction Order issued simultaneously herewith;*

==========OR==========

B) ❑ *that there is no award of maintenance per the court's decision;*

❑ *that there is no request for maintenance;*

❑ *that the guideline award of maintenance under the Maintenance Guidelines Law (L.2015 c. 269), if applicable, was zero.*

and it is further;

==========OR==========

C) Pursuant to the court's decision for cases commenced before 1/25/16

the ❑ *Plaintiff* ❑ *Defendant* shall pay to ❑ *Plaintiff* ❑ *Defendant*

the sum of ❑ *$ _____ per week;* ❑ *$ _____bi-weekly;*

❑ *$_____semi-monthly* ❑ *$_____per month*

as and for maintenance

commencing on the ____ day of _____,____, and continuing until the ____ day of _____,____; month year

Payment shall be ❑ *a direct payment,* ❑ *by an Income Deduction Order issued simultaneously herewith;*

==========OR==========

D) Pursuant to the court's decision for cases commenced on or after 1/25/16

the ❑ *Plaintiff* ❑ *Defendant* shall pay to ❑ *Plaintiff* ❑ *Defendant*

the sum of ❑ *$ _____ per week;* ❑ *$ _____bi-weekly;*

❑ *$_____semi-monthly* ❑ *$_____per month*

as and for maintenance (the "Award") *commencing on the ____ day of _____,____, and continuing until the ____ day of*

_____,____; month year

Payment shall be ❑ a direct payment, ❑ by an Income Deduction Order issued simultaneously herewith;

The guideline award of maintenance under the Maintenance Guidelines Law is $_____

For the reasons stated in the Findings of Fact and Conclusions of Law, which are incorporated here in by reference:

(Check the applicable boxes:)

❑ *The Award includes an award on income of maintenance payor up to $178,000 per year. In computing said award, the Court applied the Maintenance Guidelines Law (L.2015, c.269) ;* OR ❑ *the court adjusted the guideline award of maintenance due under the Maintenance Guidelines Law because it is unjust and inappropriate.*

❑ *The Award includes maintenance on income of maintenance payor in excess of $178,000 per year* OR ❑ *The Award does not include maintenance on income of maintenance payor in excess of $178,000 per year.*

New Statement of Net Worth and Preliminary Conference Order forms, effective August 1, 2016

New Statement of Net Worth forms and new Preliminary Conference Order forms have been approved by the Administrative Board of the Courts. The forms can be accessed on the New York Courts website. The Statement of Net Worth form now includes the value of the asset or liability as of the date of the commencement of the action and the current value.

COURT OF APPEALS ROUND-UP

Time to file objections to support magistrate's support order runs from the date the attorney for the party is served, not when the party receives notice

In the Matter of Odunbaku v. Odunbaku, 2016 N.Y. Slip Op. 07705 (2016)

The father moved for a downward modification of his child support obligations, which was granted by the support magistrate. The support magistrate's support order was mailed to the parties directly and not to their respective retained counsel. The mother did not notify her attorney about the papers until a month later, and objections were filed 41 days after the papers were received. The Family Court denied the objections because they were submitted past the 35-day, statutory due date with service by mail. The Family Court held that neither the Family Court Act § 439(e) nor 22 NYCRR 205.36(b) requires the orders to be specifically mailed to parties' counsel. The Appellate Division affirmed.

The Court of Appeals reversed, relying on the case *Bianca v. Frank*, 43 N.Y.2d 168 (1977), which holds that once a party retains counsel who appears on behalf of a party, the statutory time requirements of judicial decisions do not commence until counsel is served with the order or judgment. The high court reasoned that failure to notify counsel diminishes the parties' ability to be adequately represented.

Since the mother was served with the order, and not the attorney, the 35-day time limitation to file an objection to the support order had not yet commenced. The matter was remitted to the Family Court for a determination on the objections.

OTHER CASES OF INTEREST

Stipulations

Ambiguity of duration of life insurance policy requires a hearing

***Leibowitz v. Leibowitz*, 143 A.D.3d 675 (2d Dept 2016)**

The parties settled their divorce action by stipulation of settlement on the record. The wife waived her share of the cash surrender value of the husband's whole life insurance policy "in consideration of the husband maintaining life insurance for the duration of his obligations under this agreement." The wife agreed to maintain a term life insurance policy of $400,000, naming the parties' children as irrevocable beneficiaries, "until the 20–year term expires." The husband agreed to maintain a $1.2 million term life insurance policy for the benefit of the children as irrevocable beneficiaries, but the provision did not include the language "until the 20-year term expires." The husband's 20 year term policy was due to expire prior to the child's emancipation.

The parties submitted competing proposed judgments of divorce to the court, each defining the length of time the husband was required to maintain the life insurance policy. The husband's proposed judgment stated "until the 20 year term expires," whereas the wife's judgment stated until the husband's obligations under the agreement have terminated.

The Supreme Court entered the husband's judgment. The wife appealed, claiming that the court impermissibly modified the terms of their agreement. The Second Department held that the lower court improvidently exercised its discretion because the terms of the parties' agreement are ambiguous, and a hearing is required to determine the parties' intent. The matter was remitted to the court below for a hearing on the parties' intent.

Child Custody and Visitation

Relocation from New York to Tennessee granted

***Nairen McI. v. Cindy J.*, 137 A.D.3d 694 (1st Dept 2016)**

The mother, who had custody of the child, relocated from New York to Tennessee. The father brought a motion to modify the court order to require the child to live in New York State, and the mother cross-moved for relocation. The court below found that the mother proved, by a preponderance of the evidence, that relocation was in the child's best interests, including the following factors: the child would have a better quality of life in Tennessee because of decreased living and health care costs; the mother secured employment in Tennessee; the child displayed better academic performance compared to when she was in school in the Bronx; the child preferred to live with her mother in Tennessee; and the father failed to pay child support. The First Department affirmed, but modified the Family Court order to increase the father's parenting time when the child had extended breaks from school.

History of mental illness does not preclude an award of custody

***In re Michael B.*, 2016 N.Y. Slip Op. 08101 (1st Dept 2016)**

The parties had a child out-of-wedlock, who, at the time of the appeal, was 9 years old. For the first three years of the child's life, the child lived with her mother. The father was absent for the first six months of the child's life, and thereafter had limited contact. When the child was 3, the mother stopped taking her psychiatric medication due to pregnancy and was hospitalized for a few weeks. During her hospitalization, the father received a temporary order of custody, with supervised visitation to the mother, which remained in place for five years. During this time, the paternal grandmother acted as the child's primary caretaker, and the father provided for her financially but did not maintain a warm and loving relationship with the child or spend much quality time with her. During the five years, the mother remained very active in the child's life, visiting her every weekend and the entire summer, and attending school events and meeting with the child's teachers. The mother did not work, was living on Social Security benefits, and had three other children in her custody.

During an 18-day custody hearing, the forensic psychologist testified that it would be in the child's best emotional interest to be in the custody of her mother. The court below awarded custody to the father.

The Appellate Division reversed, holding that the court below improperly gave too much weight to the fact that the father had temporary custody for almost five years. The temporary award was made *ex parte*, and no evidence was adduced as to the child's best interests. Moreover, the child spent more time with her mother than her father, and was more emotionally bonded with her mother. The court below gave too much weight to the father's ability to provide for the child financially, rather than focusing on the parent who can provide the child with emotional and intellectual support. The court below was too dismissive of the forensic psychologist's report, which the Appellate Division determined to be well-investigated. The psychologist determined that the mother's psychological history does not pose a risk to the child. Having concern about the mother's past mental health should be recognized, but evidence weighing in the child's best interest should not be overlooked. Here, the mother was in remission for five years, had not been hospitalized since, and was compliant with her psychological treatment. It's inappropriate to focus on speculation that the mother may have a relapse. Finally, the court below improperly treated this case as a relocation case and applied the *Tropea* factors, when this is an initial custody determination, and the mother's residence in Connecticut is only one factor to be considered.

Domestic partner who is not the biological or adoptive parent has standing to seek custody or visitation where there is a pre-conception agreement

***Frank G. v. Renee P.F.*, 142 A.D.3d 928 (2d Dept 2016)**

Domestic partners Frank and Joseph lived together for 5 years and wanted to raise a child together. Joseph's sister, Renee, agreed to be the surrogate of their child, and she was impregnated with Frank's sperm. Renee also entered into a surrogacy contract relinquishing her parental rights to Joseph so that he would be able to adopt the child. Thereafter, Renee gave birth to twins. For the first four years of the children's lives, even though Joseph did not adopt the twins, Joseph and Frank both cared for their children and shared all major responsibilities together. The children referred to both men as their father. Later, Frank and Joseph separated. The kids continued to live with Frank, and Joseph regularly cared for and visited the children every day. A few months later, Frank cut off all contact with Joseph and moved to Florida with the children without Joseph's knowledge or consent. Joseph sought custody. Frank moved to dismiss, claiming that Joseph lacks standing under DRL § 70 because he was not the biological or adoptive parent of the children. The Family Court denied Frank's motion, and Frank appealed.

The Second Department affirmed, and so did the Court of Appeals. The former meaning of "parent" under DRL § 70 writ of habeas corpus proceedings applied only to biological or adoptive parents pursuant to the Court of Appeals' case, *Alison D. v. Virginia M*, 77 N.Y.2d 651 (1991). However, as the appeal was pending, another Court of Appeals case overruled that meaning, *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016), holding that a non-biological non-adoptive partner may seek standing where s/he shows "by clear and convincing evidence" that the parties agreed to conceive a child and to raise the child together.

In this case, Joseph, the non-biological, non-adoptive partner, raised the children with Frank and cared for them as a parent for four years, there was a pre-conception agreement between the parties, and the surrogacy contract displayed even more intention for the parties to raise the children together as parents. Therefore, Joseph had standing to seek custody and visitation of the children.

Equitable Distribution

Pre-judgment interest awards under CPLR 5001 are discretionary

***Fori v. Fori*, 2016 N.Y. Slip Op. 08135 (3d Dept 2016)**

The parties entered into a separation agreement, which obligated the wife to pay the husband a distributive award of more than $216,000. When the wife failed to pay the amount, the husband moved to enforce the agreement plus statutory interest from the date due. The court below awarded the husband a money judgment in the amount due, plus interest actually earned on the amount, but not pre-judgment interest pursuant to CPLR 5001.

The Appellate Division affirmed, holding that in matrimonial proceedings, pre-judgment interest is not an automatic entitlement but rather in the court's discretion, as well as the rate and date from which interest shall be computed.

Here, the wife claimed that the husband had failed to transfer certain real property to her pursuant to the agreement. The wife's obligation to pay the equitable distribution award to the husband was not contingent upon the husband transferring the deeds. However, the wife's counsel advised her to withhold payment and instead put the sum due in a separate interest-bearing account until such time as the deeds were transferred to her. Therefore, the court below did not abuse its discretion in awarding only the interest earned on the distributive award.

Date of commencement of foreign action to obtain a divorce is not proper valuation date in later action to obtain a distribution of marital property

***Drake v. Mundrick*, 144 A.D.3d 1661 (4th Dept 2016)**

The parties obtained a valid foreign divorce judgment three years prior to the wife commencing an action for equitable distribution. The court below used the date of the commencement of the foreign divorce action as the valuation date of the parties' marital assets. The Appellate Division reversed.

DRL § 236(B)(4)(b) provides that a valuation date may be set at any time from the commencement of the divorce action until the date of the trial. Both the action for dissolution of the marriage and this action to obtain a distribution of marital property following a foreign judgment of divorce are included in the statutory section entitled "Matrimonial actions" under DRL § 236[B][2][a]). However, since equitable distribution was not available in the foreign divorce action and the foreign court did not have jurisdiction over the marital assets, the date of the commencement of the foreign action could not serve as the valuation date for equitable distribution of the marital property.

Recusal

Court abused its discretion in failing to recuse itself after it obtained an order of protection against the party to the proceeding

***Matter of Trinity E. (Robert E.)*, 144 A.D.3d 1680 (4th Dept 2016)**

A day after the Family Court made a finding of permanent neglect against the father and scheduled a dispositional hearing, he made a death threat toward the court, the attorney for the child, the caseworker, and the police. The court secured an order of protection against the fa-

ther. Before the dispositional hearing commenced, the father moved for the judge to recuse himself. The court denied the motion, and proceeded with the hearing. The father appealed.

The court below abused its discretion by failing to recuse itself where it had an order of protection against the father. The dispositional order was vacated and remitted for a new determination before a different judge.

ADDITIONAL CASES

Maddaloni v. Maddaloni, 142 A.D.3d 646 (2nd Dept 2016)

Based on Domestic Relations Law § 236(B)(3), the couple's maintenance provision in a postnuptial agreement was found to be unconscionable and unenforceable. The agreement gave the wife $50,000 in full satisfaction of claims, while the husband owned a business worth $3 million, a business which grew while the husband worked there throughout their 25-year marriage. Further, the modification agreement entered into during the divorce action was set aside as manifestly unfair to the plaintiff due to the nature and magnitude of the rights that she waived and the vast disparity in the parties' income and net worth. Further, the husband had her sign the agreement by providing it directly to her instead of through counsel, which was deemed to be overreaching. The court awarded 10 years of maintenance as well as 25% of the appreciation of the husband's jewelry business and reversed the lower court finding of the husband's contempt of the trial decision, as it did not constitute an "order" upon which contempt may lie.

Van Dood v. Van Dood, 142 A.D.3d 661 (2nd Dept 2016)

This case involves an issue of equitable distribution with marital property. The Supreme Court was required to determine the value of the property before awarding it solely to the plaintiff. Where the proof of value is insufficient to make a determination, the court can, among other things, appoint a neutral appraiser. In this case, the court erred in failing to value and equitably distribute the defendant's investment in a rental property and the parties' remaining interest in property in a separate location and failed to support a finding that the husband dissipated all of the $400,000 in loan proceeds. The matter was remitted for a new trial on the issue of equitable distribution of marital property.

Young v. Young, 142 A.D.3d 612 (2nd Dept 2016)

It was found that the court should have vacated the child support provision because it did not contain a calculation of basic child support or a recital that such a calculation would result in the presumptively correct amount. The Court also found that the father's obligation to pay basic child support and his obligation to pay the child's college tuition, not required by statute, were "inextricably intertwined," and no distinction was made in the provision between the two so that the entirety of the support obligation, including the college and other child-related expense provisions, had to be vacated. Notably, the determination was made on motion and not by plenary action, as the application to set aside the child support provisions was made before the judgment of divorce was entered.

Shkreli v. Shkreli, 142 A.D.3d 546 (2nd Dept 2016)

Since the husband did not establish the actual value of the wife's enhanced earning capacity or establish that he substantially contributed to her degree, he was not entitled to any credit for the enhanced earning capacity resulting from her bachelor's degree. Further, the court properly decided that the marital house was marital property because the husband did not establish the value of a claimed separate contribution to the property which was purchased during the marriage. However, the court took into account that there was evidence that some unknown amount of the plaintiff's separate property was used to purchase and construct the marital residence by awarding him a greater percentage share (60%) of the proceeds of the sale of the marital residence.

Lieberman v. Lieberman, 142 A.D.3d 1144 (2nd Dept 2016)

The Supreme Court in this case evaluated the testimony, considered the recommendations of a forensic expert, interviewed the subject children in camera, and considered the attorney for the children's opinions, and determined that that best interest of the children would be to award sole legal and physical custody to the defendant. The Appellate Court noted that the lower court improperly exercised discretion in admitting into evidence the defendant's diary of events that occurred in the marriage, and that the forensic expert relied on inadmissible hearsay in reaching his opinion. Yet, the Appellate Court concluded that these errors were not prejudicial, as there is sound and substantial basis in the record for the court's determination. Further, considering the parties' disparity in incomes and the value of the marital estate, the court properly exercised discretion in directing the defendant to pay for the marital credit card debt, the children's private school tuition, etc. The lower court improperly made the defendant solely responsible for paying unreimbursed medical expenses and summer camp. Since the plaintiff earned 20% of the combined parental income, the Appellate Court concluded that she should pay 20% of the above expenses.

Osorio v. Osorio, 142 A.D.3d 1177 (2nd Dept 2016)

The court reversed two orders of protection where the appellant was not advised of her right to counsel nor did the record show she was validly waiving the statutory right to counsel. The court must inquire whether any such waiver was made knowledgeably, intelligently, and voluntarily. The record supported the contention that the appellant was deprived of her statutory right to counsel and

the matter was remitted for a new hearing at which the appellant shall either appear with counsel or knowingly, voluntarily, and intelligently waive her right to counsel, and new determinations on the petitions thereafter.

***Matter of Fedeline A. (Verdul S.)*, 143 A.D.3d 977 (2nd Dept 2016)**

The family court properly found that the boyfriend sexually abused the girlfriend's child, yet the evidence did not support a finding of "derivative abuse" in regards to the boyfriend's biological son because the son did not move to the country until months after the abuse had ended.

***DeVita v. DeVita*, 143 A.D.3d 981 (2nd Dept 2016)**

In a case regarding a modification of custody, the Appellate Court agreed that there was a change in circumstance that was necessary to modify custody for the best interest of the child from joint custody to sole custody for the father. Without specifying the underlying facts that served as the basis of the decision, the court, looking at the totality of the circumstances, noted relative credibility, the child's relationship with each parent, and stated, "(p)articularly relevant in this case is the clearly stated preference of the child, a mature 13 year old at the time of the hearing."

***Montoya v. Montoya*, 143 A.D.3d 865 (2nd Dept 2016)**

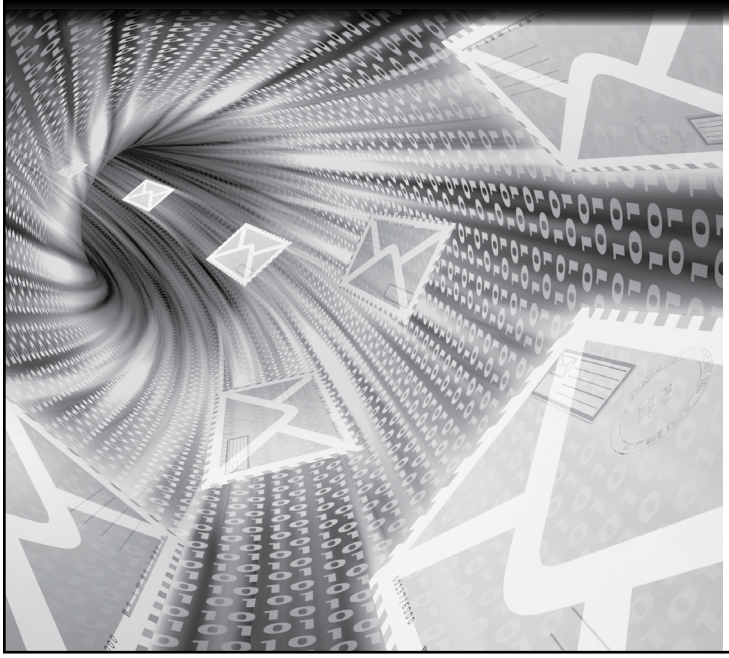
This case involves attorneys' fees as asserted against the adverse spouse. The Court stated that the evidence produced by the plaintiff demonstrates that the attorney failed to prove substantial compliance with the rules requiring periodic billing statements at least every 60 days. Accordingly, the application for fees, which did not contain proper itemized billing statements, was denied without prejudice. The court noted that "(a) showing of substantial compliance must be made on a prima facie basis as part of the moving party's papers."

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

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

A special thanks to Lea Moalemi and Anna Rusanov, Esq. for their editorial assistance. Additional thanks to Christina Oddo, Elisabeth Haub School of Law at Pace University, JD Candidate 2017, for assistance on the "additional cases" section.

REQUEST FOR ARTICLES



The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar. Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word (pdfs are NOT acceptable), along with a hard copy, to:

Lee Rosenberg
Editor-in-Chief
Saltzman Chetkof and Rosenberg, LLP
300 Garden City Plaza, Suite 130
Garden City, NY 11530
lrosenberg@scrllp.com

Welcome New Family Law Section Members

First District
Peter C. Alkalay
Elise A. Bloustein
Matthew A. Feigin
Timothy S. Feltham
Roy P. Kozupsky
Elona Kukaj
Nicholas W. Lobenthal
Stephanie Dunbar Manes
Benjamin Donly Thomas Moore
Edward Perkins
Lindsay Pfeffer
Cynthia Cameron Reed
Elliot J. Rosner
Lauren J Sakofsky
Valentina Shaknes
Katherine J. Weall

Second District
Anne Esther Glatz
Lisa F. Grumet
Vladimir Nikhman
Lee Danielle Tarr
Kathleen Wahl

Third District
Rebecca L. Balzac
Diana Kelly Bangert-Drowns
Ellen Becker
Shelley A. Bower
Jaya Lakshmi Connors
Heather L. Dukes
Lisa Gordon
Joseph A. Granich
Ting Kwok
Carolyn Snyder Lemmon

Fourth District
Alice M. Breding
Ashley Lydia Mahserjian

Fifth District
Ann M. Ellis
Susan M. Faust
Gina M. Glover
Joseph Victor Maslak
Anne M. Zielenski

Sixth District
Daniel B. Altwarg
Kelley M. Eckmair
Jhilmil Ghaleb
Nicole L. Kulik
Donielle Maier
Carol Ann Malz
Madison S. Marcus
Sian Eluned Matt
Arthur John Meldrim
Susan Oakes
Lauren Anne Praske
Holly M. Zurenda-Cruz

Seventh District
Leigh Ann Chute
Christina Marie Gullo
Christa Marie Hibbard
Christopher Michael Palermo
Maureen N. Polen
Emily M. Rudroff
Henry Ward Williams, Jr.
Stephanie Helen Wolter

Eighth District
Marissa M. Hill
Lori A. Rutkowski-Roman

Ninth District
Marc J. Ackerman
Ashley Arcuri
Jillian Ashley Castrellon
Arnold D. Cribari
Michele A. D'Ambrosio
Marcos Fernandez
Barbara D. Finkelstein
Marian Genio, Esquire
Mary Jean Howland
Erika Kissh
Sarah Lynne Maida
Debra Lynn Mechanick
Gillian Paige Menza
Yejide Oyinkansola Okunribido
Victor N. Piacente
Jessica Lee Piperis
Christina Randazzo
Shivani Shreedhar
Antonio Jermaine Smith
Katerina Sperl
Marc Wohl, Esq.
James D. Zerafa

Tenth District
Sara Beth Carissimi
Hon. Andrew A. Crecca
James M. Gallagher
Tammi Kwalbrun
Hon. John J. Leo
Natasha Meyers
Mark A. Murray
Jamie Rosner
Hon. Conrad D. Singer
Harvey Sorid

Eleventh District
Esther Chyzyk Bernheim
Lee Chabin
Alex Thanh Chung
Emily T. Clarke
Maricel Gonzalez
David Gorelick
David M. Gross
Akram M. Louis
Loris Philmore Primus
Fenisha Ozella Williams

Twelfth District
Hon. La Tia W. Martin

ThirteenthDistrict
Charles D. Parisi

Out-of-State
Bobbi Borsellino
Trevor Cardo
Kassandra Danielle Friedman
Catherine Mildred Hannan
Meghan Hook
Tyresse Horne
Marissa O'Loughlin
Carly Rabner
Amanda Rieben
Joanna Michelle Rotenberg
Jeremy A. Welfer

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar. Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word (pdfs are NOT acceptable), along with a hard copy, to Lee Rosenberg, Editor-in-Chief, at the address indicated above.

The *Family Law Review* is published for members of the Family Law Section of the New York State Bar Association. The opinions expressed herein are those of the authors only, and not those of the Section Officers or Directors.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

ISSN 0149-1431 (print) ISSN 1933-8430 (online)

FAMILY LAW REVIEW

FAMILY LAW SECTION OFFICERS

From the NYSBA Book Store >

Contract Doctrine and Marital Agreements in New York, Third Edition

Reorganized, revised and expanded, the new third edition of *Contract Doctrine and Marital Agreements in New York* is a unique and invaluable reference for members of both the bench and the bar. This two-volume work addresses virtually every potential issue that might arise in a matrimonial contract and contains a cohesive and comprehensive compilation of governing law and arguments as to both settled and unsettled issues of law.

The author facilitates an understanding of the complex principles and issues surrounding the application of contract doctrine to the matrimonial context and provides enlightening analysis of how courts have interpreted often-used contractual language.

His expert insights and easy-to-read writing style, along with finding aids such as the detailed table of contents, table of authorities, and index, make this the perfect "must read" for the busy judge or family law practitioner.

"Mr. Scheinberg's analysis is scholarly, his guidance is practical, and his personal commentary interesting. I enthusiastically recommend this reference work to all who practice, or intend to practice, in the area of matrimonial and family law."

Hon. Justice Sondra Miller
Chair, Miller Matrimonial Commission

". . .this treatise is a work of vast scope and stands both as a piece of superb legal scholarship and as an invaluable resource for lawyers."

Allan E. Mayefsky, Esq.
President Emeritus, American Academy of Matrimonial Lawyers

"Mr. Scheinberg's work is a sorely needed, comprehensive, cutting-edge integration of square peg Contract Law into the round hole of legal equities pertaining to families."

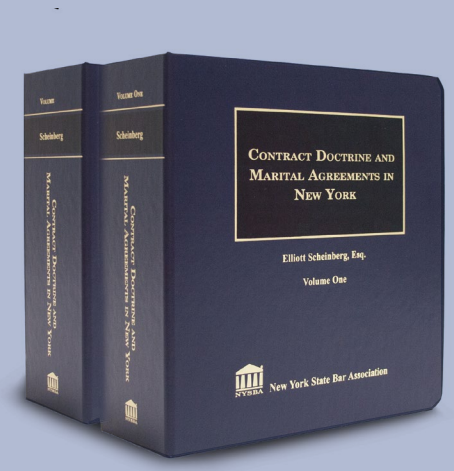
Patrick O'Reilly, Esq.
President Emeritus, American Academy of Matrimonial Lawyers
Adjunct Professor of Law, SUNY Buffalo

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB8530N

NEW EDITION!



AUTHOR

Elliott Scheinberg, Esq.
Attorney at Law
Staten Island, NY

PRODUCT INFO AND PRICES

41596 | 2016 | 2,280 pp. 2 vols. loose leaf

$245 Nonmembers
$185 Members

51596 | supplement for past purchasers | loose leaf

$190 Nonmembers
$130 Members

$5.95 shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be based on destination and added to your order. Prices do not include applicable sales tax.

NYSBA

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

NEW YORK STATE BAR ASSOCIATION

ANNUAL MEETING 2017

JANUARY 23–27, 2017

NEW YORK CITY

New York Hilton Midtown

FAMILY LAW SECTION PROGRAM | January 26, 2017
Matrimonial Law Update: 2016 in Review | **2 – 4:50 p.m.**

Reception/Awards Luncheon | 12 – 2 p.m.
Section Chair's Reception* | 5:30 – 7:30 p.m. | New York Athletic Club

* Preregistration required for Section Chair's Reception.

REGISTER NOW! www.nysba.org/am2017