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# Family Law Review

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# Notes and Comments

**Elliot D. Samuelson, Editor**

## Stipulations in Open Court—A Dangerous Practice

We noted with interest a short recent decision in the Appellate Division, entitled *Toussaint v. Toussaint*,[1] that highlights the dangers of entering into oral stipulations of settlement in open court. Consider the following hypothetical scenario which most certainly is experienced by matrimonial practitioners with frequent regularity.

You and your client have been engaged in a protracted litigation for divorce involving issues of equitable distribution, maintenance, child support, custody, visitation and the like. Numerous temporary applications have been made to the court resulting in *pendente lite* orders affecting the parties and their children. Following sixteen months of tortuous litigation, the case is set down for trial. You and your adversary continue to negotiate in an earnest effort to resolve the matter without proceeding to trial. The parties are concerned about the attendant costs that will be incurred, which will include testimony of forensic experts and numerous other witnesses, as well as the introduction of countless financial exhibits. There is great pressure on the parties and their attorneys to fashion a reasonable settlement and avoid a trial. Your case is marked ready at 9:30 a.m. but the presiding judge informs counsel that other matters require his attention and urges the attorneys and their clients to utilize this time in an effort to reach an amicable resolution. Extensive negotiations begin and the parties with their attorneys attempt to narrow the issues and reach a mutual accommodation. The court breaks for lunch and admonishes the parties and counsel to continue their efforts to settle the case.

Following the luncheon recess, the trial judge becomes involved with an emergency *writ of habeas corpus* and is unavailable until 3:30 p.m. to proceed with the trial. Settlement negotiations continue at a feverish pitch. Finally, at 4:00 p.m. the court advises the parties that, unless they can reach a settlement and spread a stipulation on the record by 4:30 p.m., he wants the trial to begin and a witness called before the court recesses for the day.

The amount of child support has been sharply contested. Great pains were taken to advise the clients concerning the Child Support Standards Act (CSSA), and to make an arithmetical computation of the presumptive amounts. The husband has agreed to pay an amount that exceeds the guidelines.

The issues are narrowed and a global settlement is now within reach. All concerned believe it would be in their best interests to conclude the matter and not proceed to trial. Finally, the case is resolved and a settlement obtained. The attorneys—feeling that to leave the courthouse without spreading a stipulation of settlement on the record would be inadvisable (because the parties might well harden their positions and lose the settlement

## Inside

that was so very difficult to negotiate and reach)—opt to dictate an oral stipulation.

After a brief discussion and comparison of notes made detailing the terms of settlement, including the child support computations, the attorneys advise the court that they are ready to dictate the provisions on the record with the judge at the bench overseeing the matter. The court questions counsel about certain of the provisions spread on the record, including the child support amounts, and then, when the stipulation is complete, allocutes each of the parties. The provisions of the stipulation are "So Ordered" by the judge. Upon leaving the courtroom, copies of the stipulation are ordered by each counsel. A week thereafter, the transcript is obtained and a judgment of divorce is submitted to the court by the wife's attorney.

During this short time span, the husband becomes disenchanted with the settlement and looks for a way to set it aside. He meets with his counsel and, for the first time, it is noted that both attorneys, and apparently the court, overlooked the need to set forth the terms of the Child Support Standards Act, as well as the statutory presumptive amounts required and the reason for the upward deviation. The husband's counsel, upon receipt of the proposed divorce judgment, moves to set aside the entire stipulation on the ground that the Child Support Standards Act's provisions were not included in the oral stipulation before the court. The wife's counsel objects, noting that not only was the Child Support Standards Act disclosed to both of the parties, and the husband was aware that he agreed to pay more than the minimal statutory amounts but, of more importance, the calculations were made by each of the attorneys. Counsel then urges the court to deny the motion and conduct a hearing to ascertain the truth of such allegations. Dismissing such arguments, the lower court grants the husband's motion and sets aside the entire stipulation of settlement made in open court. The wife appeals, and reasons that the failure to set forth the provisions of the Child Support Standards Act and the deviation agreed to by the parties should not be the basis to vacate the entire stipulation of settlement, nor the child support provision. Moreover, it is urged that a hearing was necessary to determine whether the parties were aware of the provisions of the Child Support Standards Act and actually made the calculations pursuant to the statute before the child support provisions were modified. Here it is important to note that the child was to receive a sum *in excess* of the statutory requirement.

In *Toussaint*, *supra*, which had similar facts, the court applied the rule of strict construction, and tersely noted that the lower court ". . . properly determined that, since the stipulation failed to comply with Domestic Relations Laws Section 240 (1-b)(h), those provisions of the stipulation relating to child support were invalid . . ." and then commented that the remedy was to vacate only the child support provisions and not the entire stipulation.

Although the court, in *Toussaint v. Toussaint, supra,* cited cases it recently decided concerning this very issue[2] that a hearing be held before a provision for child support can be set aside, it nevertheless concluded that the lower court's determination dismissing the provisions for child support was correct, and held that the balance of the in-court stipulation must be upheld. It is remarkable that the Appellate Division cited its decisions in *Sloam* and *Maser, supra,* both of which held that, in such circumstances, a hearing was required to determine the intention of the parties and that the stipulations should *not* be vacated unless it was determined that the statutory requirements were not known to the litigants.

Parenthetically, we note it is very difficult to determine the thinking of an appellate court when a Memorandum Decision is rendered without fully setting forth the facts upon which it is based, with the result that the doctrine of *stare decisis* cannot be applied by the lower courts, especially when most marital appeals are so very fact-specific.

*Toussaint* apparently reverses the court's prior holdings to the contrary and ignores the fact that the child would actually benefit financially if the stipulation were upheld. Instead, it places the law in a state of confusion and uncertainty. Nonetheless, one thing remains certain . . . and that is that in-court settlement stipulations should be avoided, even at the risk of losing the settlement. To do so because of the pressures of the court to complete the matter will surely lead to unwanted results. In *Toussaint*, it appears that not only the attorneys, but the presiding judge as well, made a harmless oversight and the husband agreed to pay more than the CSSA guidelines. The child will ultimately be the only party harmed if, upon *remittitur*, the award is less than the father agreed to pay.

The CSSA provisions should not be permitted to be used as a sword by a disgruntled litigant. It was intended as a shield to protect children from meager awards and should remain that way. Only then will the safeguards to children required by enactment of the Child Support Standards Act be implemented.

## Endnotes

1. __ AD2d __, N.Y.L.J., March 22, 2000, at 34, col. 1. (2d Dep't March 13, 2000).
2. *Sloam v. Sloam,* 185 AD2d 451, 586 NYS2d 651 (2d Dep't 1992), and *Maser v. Maser*, 226 AD2d 684, 641 NYS2d 714 (2d Dep't 1996).

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# Who Decides Who Decides: Child Custody Jurisdiction

By Sandra W. Jacobson

The definition of jurisdiction in *Black's Law Dictionary* fills almost two fine-print pages. I submit that that in itself demonstrates that Courts and the Bar do not really know what jurisdiction means.

In child custody jurisdiction, the first determination to be made is who has the ultimate power to make a determination. The issue is not what is in the best interests of the child, but what court is to decide what is in the best interests of the child.

New York adopted its version of the Uniform Child Custody Jurisdiction Act (UCCJA) in 1977.[1]

On December 28, 1980, the Parental Kidnaping Prevention Act (PKPA) was signed into law. Interestingly, the PKPA was not a separate act. Section 6 of Public Law 96-611 provides that §§ 6 through 10 of the Act might be cited as the Parental Kidnaping Prevention Act of 1980. The rest of the statute covered Medicare, Medicaid, Child Support and so forth.

The PKPA paralleled the UCCJA in many aspects, but differed from it in several important ones. For example, child protection and similar proceedings are custody proceedings under the PKPA, but are excluded from the UCCJA. A sister state's decisions on custody and visitation are to be accorded full faith and credit under the PKPA, not just comity as under the UCCJA.

On July 1, 1988, another layer was added when the United States adopted the Hague Convention on the Civil Aspects of International Child Abduction frequently referred to as the Hague Convention on Child Custody Jurisdiction.[2] The Convention is a treaty of the United States within the meaning of article 2 of the Constitution and is, therefore, the supreme law of the land.[3]

For a thorough analysis of the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA) the reader is referred to those who are far more expert in this field than I.[4] Insofar as this article is concerned, the UCCJEA was intended in part to bring state statutes into conformity not only with the PKPA but also with the Violence Against Women Act. Moreover, the UCCJEA specifically refers to custody decisions of signatories to the Hague Convention which was not in effect in the United States when the UCCJA and PKPA were enacted.

While temporarily dead in New York, it is hoped that when the UCCJEA is uniformly adopted, it will result in fewer conflicts between jurisdictions. Unfortunately, there will still be no mechanism for resolving those conflicts which do arise.

In *In Re Sayeh R*,[5] we were left with conflicting custody decisions in New York and Florida although, as a dissenting opinion pointed out, the Court of Appeal's decision was based upon a definition of "custody proceedings" in the UCCJA which was overridden by a different definition in the PKPA.

In *Thompson v. Thompson*,[6] the United States Supreme Court held that the PKPA did not provide a federal cause of action to determine which of two states's conflicting custody decision was right and entitled to full faith and credit.

It is not only Cuba and Florida which are contesting international custody jurisdiction. *Blondin v. Dubois*[7] has created enough of a fuss between France and the United States to make the daily newspapers.

Merlyne Dubois, who claimed a history of domestic violence, left Felix Blondin in Paris, taking their two children to the United States. This was done without Blondin's knowledge and by Dubois forging Blondin's signature to obtain passports for the children. Upon discovering the children missing, Blondin obtained a preliminary order from a French Court directing that the children not leave the Paris Metropolitan Area without Blondin's permission. When Blondin eventually learned where the children were, he brought a petition pursuant to the Hague Convention in the Unites States District Court, Southern District of New York, seeking the children's return to France. The District Court[8] found that there was clear and convincing evidence that there was a "grave risk" that returning the children to France would expose them to "physical or psychological harm," an exception under article 13 b of the Convention.

The Second Circuit Court of Appeals[9] held that the Convention required a more complete analysis of the full panoply of arrangements which might be made to allow the children to return to France from which they had been wrongfully abducted in order to allow the French Courts an opportunity to adjudicate custody. On remand, Judge Chin decided that a return to France, even in the mother's temporary custody with financial support from Blondin and the availability of French social services, would expose the children to a "grave risk" of "psychological" harm.

This decision was made despite the United States' government's submission of a Statement of Interest urging the children's return to France and the threat of the French Minister of Justice to seek extradition of Dubois if she did not voluntarily return. The Court's decision appears to have been based primarily on the testimony of Dr. Albert J. Solnit[10] that the return to France would "almost certainly" trigger a recurrence of the traumatic stress disorder he testified the daughter had suffered in France.

Judge Chin stated that the "guidance from the Court of Appeals suggests that it is leaning toward the extremely narrow concept of the Article 13 b exception." Judge Chin's opinion was that "[t]hese interpretations of Article 13 b are, in my view, unduly narrow." Since the interpretations Judge Chin found too narrow were those of France, the United States State Department and the Court of Appeals, Second Circuit, we may expect further proceedings in this case.[11]

## Endnotes

1. Domestic Relations Law Article 5-A; §§ 75-a to 75-z.
2. International Child Abduction Remedies Act, 102 Stat 437(1988) (codified at 42 U.S.C. 11601(2)(a)(1988).
3. U.S. Const. Art IV.
4. For example, Barbara Ellen Handschu, Uniform Child Custody Jurisdiction and Enforcement Act, NYLJ, October 4, 1999, p. 1, col. 1.
5. 91 NY2d 377 (1977).
6. 484 US 174 (1988).
7. NYLJ February 3, 2000.
8. 19 F. Supp 123 (SDNY 1998) Chin, D.J.
9. 189 F3d 240 (2d Ce 1996).
10. Dr. Solnit is best known as a co-author of Goldstein, Freud and Solnit, Beyond the Best Interests of the Child.
11. The tone of the dispute may be ascertained from a quotation in the opinion from a letter of Veronique Chaveau, presented by the United States as an expert in French and international law. "Chaveau wondered if I view the French as 'uncivilized monkeys or responsible partners to an international convention.'"

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# REQUEST FOR ARTICLES

The *Family Law Review* welcomes the submission of articles of timely interest to members, in addition to comments and suggestions for future issues. Please send to:

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# Judicial Alchemy: Turning Losses into Marital Assets

By Robert Z. Dobrish and Lydia A. Milone

New York courts continue to recognize that "all is fair [game] in love [wars]"—and all means *all.* Well established throughout the state are the precepts that licenses,[1] advanced degrees[2] and celebrity status[3] are marital assets subject to equitable distribution. That licenses no longer merge into practices further expands the concept of marital property.[4] Included among these non-traditional marital property concepts is the attainment of a professional distinction, such as membership in a professional society, which results in enhanced earnings.[5] It has also been held that season hockey tickets[6] and lottery tickets[7] are marital property subject to equitable distribution.

The right to purchase an apartment under a cooperative offering plan is yet another instance of this ever-expanding concept of marital property.[8] Also held to be marital property is the lower than fair market value price at which a lessor of a rent-stabilized apartment can purchase that apartment even after the initial offering plan and original insiders offering price have both expired.[9]

The First Department has been particularly expansive in its construction of what constitutes marital property. Last year, the First Department held that a husband's certification as a certified financial analyst, which he obtained during the marriage, was marital property subject to equitable distribution even though the certification was not a prerequisite for employment or advancement.[10]

A recent pronouncement favoring a generous construction of the term "marital property" once again emanated from the First Department when, following its reasoning in *Murtha*,[11] it determined that enhanced earning capacity is subject to equitable distribution regardless of whether the career in question requires a license.[12] Before the First Department decided that issue in *Hougie*,[13] the Fourth Department had already held that a party's enhanced earning capacity alone is *not* subject to distribution if it does not result from a professional degree or license obtained during the marriage.[14] The Fourth Department found that the absence of any license or degree placed the case beyond the scope of *O'Brien* and its progeny. The court further found that the husband's enhanced earnings from his "banking career" were not a marital asset as his was not "a unique career" as was that of the opera singer who had achieved fame and fortune rising to the top of her art in *Elkus v. Elkus*.[15]

The Appellate Division, First Department, continues to broadly interpret the term "marital property." In *Finkelstein v. Finkelstein*,[16] that court has now spoken on the question of whether a capital loss carryforward is a marital asset subject to equitable distribution. Until this recent decision, the only case law on this issue was a Third Department decision which held that "this tax circumstance is not the type of 'property' addressed in Domestic Relations Law § 236(B)."[17] No doubt much to the joy of many a soon-to-be-divorced taxpayer (or at least to the joy of half of them), the First Department disagreed. In a case of first impression in that Department, the Appellate Division unanimously affirmed the trial court's decision which, among other things, distributed to the wife a portion of the husband's capital loss carryforward.[18]

*"Well established throughout the state are the precepts that licenses, advanced degrees and celebrity status are marital assets subject to equitable distribution."*

To take a step back, a capital loss is, in simple terms, the loss on a sale of stock, or some other capital asset, which exceeds the gains for a given year.[19] The loss can be "carried forward" indefinitely to be applied in future years. It can be deducted only to the extent of capital gains in any given year. In addition, any capital loss not previously deducted can also be applied against other income up to $3,000.[20] In this era of electronic day trading where everyone attempts to beat the market, capital losses from prior years can be valuable in the future because they shelter gain and income. For example, the huge gains one may make on *tech* stocks are sheltered, to some extent, by the losses on less stellar stock purchases.

In *Finkelstein*,[21] the husband earned his livelihood during the marriage by trading penny stocks. He traded accounts for various family members, including the UGMA[22] accounts he had established for the parties' children, and IRAs and other stock accounts owned by each of the parties. His income consisted of the commissions earned on all of the stocks he traded plus the gains on the stocks in the non-IRA accounts owned by the parties. In order to maximize the income earned

and simultaneously minimize the tax bite attributable to capital gain, the ability to offset capital gains against capital losses was an essential component of this family's financial plan.

In affirming the trial court's conclusion that the capital loss carryforward was a distributable marital asset, the appellate court noted that marital property is not "a traditional property concept." In support of this premise, the appellate court cited the landmark case of *O'Brien v. O'Brien*[23] as broadly construing the term "marital property" to consist of "things of value arising out of the marital relationship," and one of its progeny, *Elkus v. Elkus*.[24]

In attempting to reconcile the divergence between the First and Third Departments, it must be pointed out that the Third Department appears to have approached the issue as a "tax consequence," one of the statutory factors to be considered in awarding equitable distribution.[25] The *Cerretani* decision provides little guidance in this respect except to state that tax consequences are to be considered only as a consequence of the property distribution in a case.[26] In any event, the Third Department specifically indicated that it decided this issue "[w]ithout determining whether [the capital loss carryforward] is marital property subject to equitable distribution."[27]

*"These writers posit that, if and when the time comes, this state's highest court will affirm the First Department and thereby add yet another spoke to the broad umbrella opened as a result of its historic* O'Brien *decision."*

It remains to be seen whether the issue of a capital loss carryforward constituting marital property finds it way to the Court of Appeals by reason of the split in the First and Third Departments. These writers posit that, if and when the time comes, this state's highest court will affirm the First Department and thereby add yet another spoke to the broad umbrella opened as a result of its historic *O'Brien* decision. Expanding the scope of marital property to include the capital loss carryforward is consistent with the legislative intent of the Equitable Distribution Law and reflects the financial plan and economic reality for spouses who file jointly during the marriage.

While it is certainly true that the present value of past tax losses to be used in the future is somewhat ephemeral, the speculative nature of this asset ought not bar its designation as marital property. The fact that a surgeon, or an attorney, might become disabled and thereby earn nowhere near the sums projected in valuing his or her license and practice has not dissuaded the courts from including these assets in the marital estate. The fact that celebrity status can fade, or that an opera singer could lose the use of his or her voice, did not cause the court to exclude these assets from marital property. It should follow then that no impediment exists simply because, where spouses file their tax returns as married filing separately, a capital loss carryforward is available only to the taxpayer to whom it is attributable.[28] Likewise, no bar ought arise because a capital loss carryforward cannot be sold or divided in kind or may not be used at all in the future as a result of a change in the tax laws or because there is no gain or income against which to allocate the loss carryforward. The operative legal principle is the value of the capital loss carryforward somewhere between the date of commencement of the action and the date of trial.[29]

A question arises as to the result which should be reached where the parties file separately throughout the marriage. One can argue that, even under those circumstances, the tax savings inure to the benefit of the economic partnership and therefore ought to be distributed as marital property. Should a different result obtain where the capital loss carryforward emanates from separate property? Questions then arise as to active versus passive management of the asset.[30] It can be argued that, even if a separate asset gives rise to the loss and there was no active management of that asset, the tax savings argument applies nonetheless.

Where a cash payment is awarded in lieu of a capital loss carryforward that the non-titled spouse no longer qualifies to use under the Internal Revenue Code and accompanying regulations,[31] and there is no pool of money from which to make such a payment—unlike *Finkelstein*—does the court unfairly burden a spouse as a result of what some see as a fiction created by *O'Brien* because hard cases make bad law? These writers believe that, until and unless the legislature acts to, in effect, repeal *O'Brien* and the courts follow suit in their determinations, this question must, and should, be answered in the negative.

If this trend of broad construction continues, we will likely see additional non-traditional assets fall within the penumbra created by *O'Brien*, which might one day include such assets as the use of a website or an e-mail address, subscriptions to the opera, ballet or the theater, and the right to use a vacation home or a timeshare.

## Appendix

The *Finkelstein* decision is important for several other reasons. It affirmed the award of a cash payment to a party where that party could no longer avail herself of the capital loss carryforward because the time had expired for filing amended joint income tax returns. In her decision, the trial Justice found that the wife had credibly testified that, once she realized the husband had filed incomplete tax returns for a number of years during the marriage,[32] she refused to file jointly with him for fear of exposure to liability and loss of her innocent spouse status. In addition to affirming the trial court's award of a cash payment for the loss carryforward,[33] the appellate court also affirmed the determination that the wife's actions in filing separately did not constitute marital waste under the circumstances.

*". . . Finkelstein . . . appears to have consequences more far-reaching than either party might have contemplated when they embarked upon this tortuous litigation."*

The trial court's decision is also noteworthy because, on appeal, its award of lifetime maintenance was upheld in this 22-year marriage. This award of non-durational maintenance was significant in several respects. Firstly, the decision after trial indicates that this 49-year-old wife had a Master's degree in education, a second Master's degree from New York University in science and biology, and was about to receive her M.B.A. from Baruch College, C.U.N.Y. Although the wife had forfeited her career as a high school biology teacher after the birth of their first child,[34] throughout the marriage she assisted the husband with voluminous paperwork and record keeping associated with his stock trading activities. This was in addition to many indirect contributions by the wife.

Even in light of the wife's considerable higher education, the trial court noted that her age and prolonged absence from the work force would negatively impact her future earning capability. Notwithstanding the considerable distributive award she received, the trial court also awarded lifetime maintenance in the sum of $5,000 per month. The appellate court specifically noted that the wife's ability to become self-supporting did not intrinsically bar lifetime maintenance and "did not obviate the need for the court to consider the pre-divorce standard of living."

Secondly, the appellate court also affirmed the award of child support despite the substantial value of the child's UGMA account. Just as importantly, the First Department held it was a proper exercise of discretion not to have given the husband a reduction in child support once he was also required to pay for college expenses. The basis for the trial court's finding was that "the parties never used nor intended to use the child's resources" to pay for his college expenses.

A final important aspect of the appellate decision is its affirmance of the child support award even though neither the specific calculation nor the amount of income imputed to both parties were set forth in the trial court's decision. The appellate court noted that "the underlying basis for the court's conclusion is apparent from the record."

In one sentence devoid of any detail, the appellate court found that the award of counsel fees was "a proper exercise of discretion." One must read the trial court's treatment of this issue to appreciate the magnitude of the counsel fee award ($285,000) which constituted 75% of the wife's counsel fees billed through the time of the post-trial counsel fees submission to the trial court. The husband's chicanery and machinations make for interesting reading. The trial court based the counsel fee award on the "intransigent, unreasonable and baseless positions" which necessitated an inordinately long trial and made discovery "prolonged and difficult." The trial court also noted that the testimony offered by the husband's experts to support some of these positions "lacked credibility and were based on poor analysis."

## Conclusion

On balance, *Finkelstein* is a case rich in possibilities for the family law practitioner. It appears to have consequences more far-reaching than either party might have contemplated when they embarked upon this tortuous litigation.

## Endnotes

1. *O'Brien v. O'Brien*, 66 NY2d 575 (1983), *on remand,* 120 AD2d 656, 502 NYS2d 250 (2d Dep't 1986).
2. *McGowan v. McGowan*, 142 AD2d 355, 535 NYS2d 990 (2d Dep't 1988); *DiCaprio v. DiCaprio,* 162 AD2d 944, 556 NYS2d 1011 (4th Dep't 1990) [Master's degree].
3. *Elkus v. Elkus,* 169 AD2d 134, 572 NYS2d 901 (1st Dep't 1991), *appeal dismissed,* 79 NY2d 851 (1992).
4. *McSparron v. McSparron*, 87 NY2d 275 (1995), *mot. dismissed,* 88 NY2d 916 (1996).
5. *McAlpine v. McAlpine*, 176 AD2d 285, 574 NYS2d 385 (2d Dep't 1991).
6. *Dobbs v. Dobbs,* NYLJ, Feb. 6, 1999, at 26, col. 1.
7. *Campbell v. Campbell,* 213 AD2d 1027, 624 NYS2d 493 (4th Dep't 1995).
8. *Jeruchimowitz v. Jeruchimowitz,* 128 Misc. 2d 888, 491 NYS2d 576 (Sup. Ct. 1985).

9. *Chew v. Chew*, 157 Misc. 2d 322, 596 NYS2d 950 (Sup. Ct. 1992). The court sought to prevent a possible windfall to the husband, who apparently continued to lease and to occupy the rent stabilized apartment. Due to the wife's direct contributions to the rent and renovation of the apartment and her indirect contributions as homemaker, wife and in sharing some child care responsibilities for the husband's children of a prior marriage, the court directed that if the husband exercised his right to purchase the apartment within five years of the court's determination and then sells at a profit, the net proceeds would be divided equally between the parties.
10. *Murtha v. Murtha*, ___ AD2d ___, 694 NYS2d 382 (1st Dep't 1999).
11. *Id.*
12. *Hougie v. Hougie*, 261 AD2d 161, 689 NYS2d 490 (1st Dep't 1999); *but see West v. West*, 213 AD2d 1025, 625 NYS2d 116 (4th Dep't 1995). For a recent illuminating article on this issue, *see* Myrna Felder, *Hougie v. Hougie and Enhanced Earning Capacity*, NYLJ, Feb. 14, 2000, at 3.
13. *Hougie*, *supra* note 12.
14. *West v. West*, *supra* note 12.
15. *West*, 625 NYS2d at 17.
16. *Finkelstein v. Finkelstein*, NYLJ, Jan. 18, 2000 at 27, col 1.
17. *Cerretani v. Cerretani*, 221 AD2d 814, 817, 634 NYS2d 228, 231 (3d Dep't 1995).
18. Hon. Jacqueline W. Silbermann rendered a 39-page decision after trial. Curiously, the trial court decision was not published in the *New York Law Journal*. A copy of that decision, edited for publication, appears as the Appendix to this article, beginning on page 9. With all due respect, this came as somewhat of a surprise to these authors because of the potential import of distributing the capital loss carryforward in light of existing appellate authority to the contrary, even though such authority was merely persuasive and not binding. The trial court decision is also significant in that it addresses several other important issues mentioned later in this article. Now that the trial court's decision has been unanimously affirmed, family law practitioners can avail themselves of that previously unpublished determination and the reasoning behind it.
19. *See* I.R.C. § 1211(b) (2000).
20. *Id.*
21. *Finkelstein*, *supra*, note 16.
22. Uniform Gift to Minors Act, NY EPTL §§ 7-6.1 *et seq.* (McKinney 1999).
23. *See supra* note 1.
24. *See supra* note 3.
25. NY DRL § 236(B)(5)(d)(10) (McKinney 1999).
26. *Cerretani*, 221 AD2d at 817.
27. *Id.* at 816-817.
28. IRC Reg. No. 1.1212-1(c) (2000).
29. *See Wegman v. Wegman*, 123 AD2d 220, 509 NYS2d 342 (2d Dep't 1986), *amended*, 512 NYS2d 410 (1987); *see also Greenwald v. Greenwald*, 164 AD2d 706, 565 NYS2d 494 (1st Dep't 1991), *appeal denied*, 78 NY2d 855 (1991).
30. *See Hartog v. Hartog*, 85 NY2d 36 (1995).
31. At the time of trial, the time to file a joint amended tax return had already expired for one of the years in question. The wife could therefore no longer avail herself of the joint loss carryforward. Furthermore, the very real fear that she could lose her innocent spouse status by filing joint amended returns was validated by the trial court's finding of no marital waste as a result of her refusal to file jointly in the first instance.
32. The trial court decision indicates that the husband had failed to file Schedule Ds with the joint tax returns for a number of years even though he had, or could ascertain, the information necessary to do so.
33. The appellate court unanimously modified the sum awarded by the trial court for the capital loss carryforward, reducing it based upon testimony in the record.
34. The marriage produced three children, two of whom became emancipated before trial.

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# APPENDIX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

———————————————————————————————X

ELLEN FINKELSTEIN, : Index No. 308285/94

Plaintiff, : **DECISION AFTER TRIAL**

-against-:

BARRY FINKELSTEIN, :

Defendant. :

———————————————————————————————X

Jacqueline W. Silbermann, J.:

* * *

This was a bitterly contested divorce action. The trial commenced with the Husband through his former counsel alleging his incompetence to prepare for and participate in trial. This was done through the testimony of a psychiatrist who had seen the Husband for only five sessions; four of which were shortly after the death of his mother. After the completion of that testimony the court found there was insufficient evidence to find the Husband incompetent to proceed to trial. After that decision was rendered the Husband who had not been present in court during the doctor's testimony appeared and fully participated in his own defense thus setting the tone for the rest of trial.

* * *

## FINDINGS OF FACT

* * *

The parties were married in a civil ceremony on December 29, 1971 and in a religious ceremony on January 29, 1972. At the time of the marriage the Wife was twenty-three years of age and the Husband was twenty-seven. There are three children of the marriage [two of whom became emancipated during the pendency of this action].

At the time of the marriage, the Wife had completed a Master's degree in education . . . and was employed as a high school biology teacher . . . earning approximately $13,500 per year. She [obtained] a second Master's degree . . . in science and biology . . . in 1975. She has since the commencement of this action begun studies . . . for an M.B.A.

The Husband received a B.A. . . . in 1966 and an M.B.A. in 1969. . . . At the time of the marriage, he was a fifty per-cent partner in a brokerage firm he had established. . . .

Just prior to their marriage each had been living at home with their respective parents. They began their married life in a four room apartment on the third floor of a walk-up building near the husband's parents. In 1975 the parties purchased a four bedroom, single family residence in Jamaica Estates, New York for $106,000. They made a down payment of $74,000 and assumed an existing mortgage of $32,000. This remained the family's residence throughout the marriage and is the home in which the wife presently resides.

## QUESTIONS PRESENTED

This appears to be a very simple case with little valuation problems as all of the assets are brokerage accounts except for the marital home. Yet, the court is called upon to resolve a few unusual issues to wit: what is the appropriate allocation of a credit for the capital loss carryforward; whether the post-commencement appreciation of defendant's stock account at Bishop Rosen is marital property; whether the Wife wastefully dissipated marital assets by changing the penny stocks for treasury bills and blue chip type stocks; whether the Husband's trading activities constitute a business; and whether the Wife is guilty of economic fault due to removing her Husband as account executive on her accounts.

* * *

**15. Bishop Rosen Account #045-804177-39**

This IRA account in the Husband's name is concededly marital property. The sole issue before the court relating to this account is which date of valuation to use, to wit, date of commencement or date of trial for valuing this asset which is beyond peradventure the parties' most valuable asset.

In deciding this issue, it is most important to turn to the Husband's own testimony. Throughout the trial the Husband alleged that due to the Wife's actions in removing her account and others from his control, he no longer was able to be a "market maker" and that he had to "pull in his horns." It was his testimony that her actions left him unable to meet an alleged capital requirement to act as a "market maker" and that he was rendered incapable of researching new stocks. Thus, he stated that the positions taken on stocks in his account were acquired in 1994; that it takes him many years to acquire positions; and that basically the seed of all investment positions in that account were at least partially planted prior to 1994.

It is also relevant to note that since the commencement date there has been a minimal level of activity in the account. Indeed, even the sales can hardly be called an active transaction since the positions were as stated acquired prior to commencement and any purchases based on his testimony would have had to have been based on research done prior to the summer of 1994.

It is also true that in the years since the parties' separation the stock market has experienced an almost unparalleled rise as indicated by virtually all stock indices. For this reason, it would be most inequitable to suggest that because of few sales and purchases in the account the court is required to find this to be an active asset and accordingly that it must be valued as of the date of commencement. As the court stated in *Cohn v. Cohn*, 155 A.D.2d 412, 413 (2d Dep't 1989): "It is well established that the trial courts possess the discretion to select valuation dates for the parties' marital assets which are appropriate and fair under the particular facts and circumstances presented (citations omitted)".

Thus, based on the bulk of his testimony and positions taken in earlier testimony prior to the adjournment of the trial on financial issues, the court finds that it is equitable to value this asset as of date of trial at $8,636,477.70

* * *

**22. Capital Loss Carryforward**

During the marriage the parties accrued a large loss carryforward.

During the years 1987 and 1989 through 1994 the parties filed incomplete personal income tax returns due to the fact that the Schedule D was not included. . . .

* * *

The Wife was concerned by this failure to prepare the Schedule D and begged her Husband to complete the returns many times prior to their separation to no avail. His testimony that he had completed 90% of the work required to file the forms were unbelievable especially in view of the fact that to date he has yet to file the Schedule D's.

The Wife's accountant testified that based upon the cost bases information he was able to garner, he determined that as of the end of the tax year, 1992, the parties had a loss carryforward in the sum of $827,140.

The Husband argues that the Wife's refusal to file a joint tax return with him in 1994, thus allocating the loss carryforward between them, should preclude her from sharing in this asset.

Clearly, based on the credible testimony of the Wife adduced at trial as to the facts of this particular case and the fact that she would be exposed to liability and the loss of innocent spouse status by signing a joint return, the Wife should suffer no negative consequences for completing and filing individual tax returns after the parties were separated. Based on her credible testimony as to his threats as well as his actions since the commencement of the action, her fear of filing a joint return was justifiable.

The Husband's other arguments against sharing the loss carryforward with the wife are without merit. The court finds the loss carryforward of $827,140 to be marital property subject to distribution as hereinafter set forth.

**Equitable Distribution of Marital Property**

The court is mandated to consider the thirteen factors set forth in Domestic Relations Law § 236(B)(5)(d) in determining the distributive award.

* * *

**8. Future Financial Circumstances of the Wife**

The Wife is forty-nine years old and will be embarking on a new career after having left the work force at the time of the birth of her first child in 1973. She will fortunately be in a position to do this since she returned to school during the pendency of this litigation. Despite the fact that this court personally believes at fifty she is still a young person, her age clearly will present difficulties in her search for employment as will

the fact that she has not been employed outside the home for over twenty years. It is, however, likely considering her demonstrated perseverance and intelligence that she can be expected to eventually earn about thirty-five thousand dollars a year. This sum is substantially less than what is needed to maintain the lifestyle she enjoyed prior to the divorce.

The Husband has demonstrated an ability to earn substantial sums as a professional stock trader. He, unlike his Wife, who has demonstrated courage and good faith in an attempt to make a new life for herself and her family, has merely bemoaned his fate. His claims that he can no longer be a "market maker" or earn money as a trader were unproven and indeed credibly controverted. Moreover, the Husband's financial future is further enhanced by what is undoubtedly a large inheritance from his mother. One can assume the estate was large in part due to the magnitude of the so-called "loans" the Husband received from his mother and also because of his failure to rebut a presumption of the estate's magnitude by producing the documents demanded during the course of the litigation. Indeed, it appears he chose to be precluded by court order rather than produce the documents demanded.

* * *

**11. The Wasteful Dissipation of Assets**

The Husband has taken, unreasonable at best and dishonest at worst, positions which have served to substantially increase the costs of this litigation. Illustrative of this was the charade used in an attempt to delay the beginning of this trial. This factor will be taken into consideration more fully in the counsel fee portion of this decision.

Throughout this case it was the Husband's claim that the Wife dissipated marital assets by giving her stock account to Bishop Rosen and allowing Isaac Schlesinger to trade the volatile penny stocks that were in this account for more secure blue chip stocks and Treasury Bills. It is his position that the manner in which the stocks were sold resulted in far less being received for them than he could have gotten. The Wife credibly testified that throughout the marriage her Husband told her how volatile and treacherous these penny stocks could be and that they required constant watching. Indeed, he would say he couldn't go on vacations or be away from a telephone due to their volatility. Her testimony revealed that her intent in liquidating the prior holdings was to place the money in safer investments thereby preserving these assets for herself and their children. The sales of these stocks was accomplished by Bishop Rosen, the very company the Husband had been working with. The sale was done openly and with the benefit of an experienced broker. Thus, there was no concealment, a factor which mitigates against her actions being classified as wasteful dissipation. *Lenczycki v. Lenczycki,* 152 A.D.2d 621 (2d Dep't 1989). The fact that in hindsight one can now see that more money would now be in those accounts had the stock not been sold cannot be used to argue that the acts were wasteful dissipation. *Willis v. Willis,* 107 A.D.2d 867 (3d Dep't 1985).

Additionally, it cannot be said that the Wife's refusal to sign joint tax returns was a form of economic fault or wasteful dissipation. Learning that the Husband had filed incomplete returns in prior years justified her concerns relevant to filing a joint return and sacrificing her innocent spouse status. Indeed, the fact that to the date the trial was concluded, the Husband had not yet filed amended tax returns lends further credence to her reasoning.

* * *

The premise of the equitable distribution law as it has been written and interpreted by the courts of this state is that the marriage is an economic partnership. (*O'Brien v. O'Brien,* 66 N.Y.2d 476 (1985)). The success of this partnership depends not only on the contributions of the wage earner spouse but on various contributions made by the non-titled spouse. In *Price v. Price,* 69 N.Y.2d 813 (1986), the Court of Appeals recognized this concept stating: "The Equitable Distribution Law reflects an awareness that the economic success of the partnership depends not only upon the respective financial contributions of the partners, but also on a wide range of non-remunerated services to the joint enterprise, such as homemaking, raising children, and providing emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home."

As this court wrote in *Greenwald v. Greenwald,* N.Y.L.J., 6/6/90, p. 22, col. 5: "Although it is true that under New York Law at the present time, equitable distribution is not necessarily synonymous with equal distribution. Nevertheless, the legislative history bespeaks an intent that the courts direct an equal distribution unless the circumstances of an individual case clearly require an unequal distribution. More often than not, equal distribution should be and is the rule."

The court in *Conner v. Conner*, 97 A.D.2d 88 (2d Dep't 1983) voices its opinion stating: "According to the Assembly memorandum in support of the new law [1]c *Zett-Kaufman - Kraut,* N.Y.1 Div. Prac., Appendix B p. 8): 'The basic premise for the marital property and alimony (now maintenance) reforms of this legislation (§ 236) is that modern marriage should be viewed as a partnership of co-equals. Upon the dissolution of a marriage, there should be an equitable distribution of all family

assets accumulated during the marriage and maintenance should rest on the economic basis of reasonable needs and the ability to pay. From this point of view, the contributions of each partner to the marriage should ordinarily be regarded as equal and there should be an equal division of family assets, unless such a division would be inequitable under the circumstances of the particular case. (Emphasis supplied) Id. 96.' "

In the case at bar the parties were married for over twenty-two years at the time this action was commenced. It is impossible in a marriage of long duration such as this to allocate in minute detail contributions to the marital assets between the two parties. The Wife sacrificed career potential and had primary responsibility for child care and homemaking chores. The Husband was the primary "bread winner" but was assisted in this endeavor by the Wife.

Accordingly, the judgment settled herein should result in a 50-50 distribution of all the assets. The Wife should retain the marital residence on her side of the equation. The miscellaneous stocks should be divided 50-50 in kind.

**Maintenance**

In deciding the Wife's request for maintenance the court has considered the following factors as enumerated in Domestic Relations Law Section § 236 B(6)(a):

* * *

**3. The Present and Future Earning of the Parties**

The Husband has demonstrated an ability to earn money through investments. The Wife has by dint of perseverance and hard work in obtaining additional education placed herself in a position to gain employment. However, due to her age and long history of not being employed outside the home it will likely be difficult for her to get a job. Nevertheless, it can be expected that in the future she will be able to earn up to about $35,000 per year.

* * *

Since the parties' separation the Husband has neither contributed to the Wife's support by making payments to her directly nor has he paid any third parties on her behalf.

"A time limitation on maintenance should be imposed only to obtain training to become financial independent [citation omitted] or to allow such spouse to restore . . . her earning power to a previous level." *Zelnick v. Zelnick*, 169 A.D.2d 317 (1st Dep't 1991). In this case, the Wife has already undertaken such education and will soon receive her degree. The Court of Appeals has held that the ability of a spouse to be self-supporting "in no way obviates the need for the court to consider the pre-divorce standard of living; and (2) certainly does not create a per se bar to lifetime maintenance. *Hartog v. Hartog*, 85 N.Y.2d 36 (1995); see also, *Summer v. Summer*, 85 N.Y.2d 1014, recons. denied, 86 N.Y.2d 886 (1995).

Likewise, given plaintiff's age and the disparity in the parties' income-earning ability, an award of lifetime maintenance is appropriate. *Rosenkrantz v. Rosenkrantz*, 184 A.D.2d 478, (1st Dep't 1992); see also, *Delaney v. Delaney*, 111 A.D.2d 111 (1st Dep't), modified on other grounds, 114 A.D.2d 312 (1985); see also, *Brownstein v. Brownstein*, 167 A.D.2d 127, (2d Dep't 1990) appeal denied, 77 N.Y.2d 806 (1991); *Reingold v. Reingold*, 143 A.D.2d 126 (2d Dep't 1988), appeal dismissed, 73 N.Y.2d 851 (1988).

Moreover in this case, it appears the Husband will have additional resources provided by his mother's estate.

For all these reasons, the Wife is awarded non-durational maintenance of $5,000 per month.

**Child Support**

This court pursuant to Domestic Relations Law § 240 (1-b) had considered to calculations delineated in Domestic Relations Law § 240 (1-b)(c) as well as the factors set forth in Domestic Relations Law § 240 (1-b)(f) which permit a deviation from the calculation set forth in Domestic Relations Law § 240 (1-b)(3).

The Wife has not been employed outside the home since the birth of the parties' first child. It stated before she is currently completing studies for a degree which she hopes will lead to gainful employment. The Husband has a demonstrable capacity to earn significant sums from his investment activities and has recently inherited substantial funds from his mother.

Although the three children have substantial UGMA accounts it is clear that while the parties were married none of these monies were utilized for the children's school or other expenses. The facts in this case simply belie the Husband's testimony to the contrary. Moreover, since there is clearly no need to require the children to diminish their assets a court should not require them to do so. *Malamut v. Malamut*, 133 A.D.2d 101 (2d Dep't 1987).

As a result of his own doing the Husband has no relationship with his sons nor has be made any monetary contribution to their support since on or about September 1994. It appears except for an award herein for the one child who is still a minor, the Husband is unlikely to make any contribution to their support either financial or otherwise.

The Wife, however, has continued to provide a home for all three children and to pay for their education and other expenses.

Based on these facts, the court awards the Wife $2,835 for basic child support of the parties' son Brian. Additionally, the Husband is to pay 65% of all college fees including room, board, tuition, school fees, and books and 65% of all unreimbursed medical expenses including dental and psychiatric or psychologist fees.

* * *

**Counsel Fees and Expert Fees**

Domestic Relations Law § 237 specifically authorizes the court to award counsel fees and expert fees including appraisal fees, actuary fees and investigative fees. In exercising its discretion to award counsel fees, the court as required considered and reviewed the relative financial circumstances of both parties, together with all other circumstances of the case including the "relative merits of the parties' positions." *DeCabrera v. Cabrera-Rosete,* 70 N.Y.2d 879 (1978). The court has clearly enunciated the law of the State of New York which holds that indigency is not a prerequisite to an award of counsel fees pursuant to Domestic Relations Law § 237. In considering an application for an award of counsel fees the court is obligated to consider the "equities and circumstances" of the case before it. *Basile v. Basile,* 122 A.D.2d 759. Moreover, the Appellate Division, Second Department reversed a lower court's decision stating: "we conclude that the court improperly denied the plaintiff Wife's application for counsel fees on the ground that, after the marital assets were distributed, she would have sufficient funds to meet this obligation. (*See* Domestic Relations Law §237)" *Hachett v. Hachett,* 147 A.D.2d 611, 613 (2d Dep't 1989).

Similarly, in *Brancoveanu v. Brancoveanu*, 177 A.D.2d 614 (2d Dep't 1991), the court held that in determining a counsel fee award, the court should review not only the financial circumstances of the parties, but all relevant circumstances, including the relative merit of the parties' claims. In *Koerner v. Koerner,* 170 A.D.2d 297 (1st Dep't 1991), it was found that the plaintiff will have assets as a result of the equitable distribution does not act as bar to the court awarding counsel fees.

Moreover, the fact that the plaintiff in this case has already paid most of her counsel fees, to wit $344,543.08 of a total of $379,588.93 billed through March 2, 1998 does not prevent the court from awarding her counsel fees. *Ross v. Ross,* 90 A.D.2d 541 (2d Dep't 1982). *Goldstein v. Goldstein,* 133 A.D.2d 739 (2d Dep't 1986).

In the instant case this court, after trial, has found many of the positions taken by the Husband which unduly prolonged this litigation and prevented any possibility of settlement proved to be unreasonable, meritless and most importantly often based on untruthful testimony.

Although prior to this court receiving the case for trial, it is alleged that discovery was stonewalled by the Husband, this court will only refer herein to matters this court witnessed commencing the summer of 1997 when this case was referred for trial. In this connection, delays by the Husband in the production of documents continued while the case was on trial and at its conclusion. This gives credence to the Wife's counsel's contention concerning the earlier discovery problems which this court did not witness.

On the very first day of the trial the Husband, through counsel, attempted to be declared incompetent to proceed to trial. This sham was proved spurious not only by the Wife's counsel's excellent cross-examination of the doctor who testified as to the incompetency claim but by the Husband himself. Once this court determined there was insufficient basis to find out the Husband could not assist counsel and proceed to trial, he appeared in court and from that time on fully and coherently participated in the trial. Thus proving that the claim was an utter sham.

The Husband's claim of a loan of $400,000 from his mother required much time and proved to be as much of a sham as the claim of incompetence. The Wife credibly testified that $400,000 from his mother's account was deposited into their joint account when the Husband took great exception to his mother's new will which divided the estate equally between their children and his brother. He thought he should get a larger share having managed her account and earning much of the money. For this reason she testified the Husband's mother wrote him a check for $400,000 for services he rendered to her. Her testimony is bolstered by the handwritten notes in evidence (Ex. 37) and his credibility is seriously impeached by his explanation of those notes as given on pages 1779-1792 of the transcript.

The Husband's testimony that he borrowed this money to buy stocks is belied by the fact that at the time of the alleged loan, there were marital assets in excess of $4,000,000 and the fact that the money was never utilized to purchase stocks.

* * *

The Husband caused the Wife to incur extra legal fees to refute testimony *** by [one of his experts] on a theory developed at trial that the Husband's trading activities were a business. It is clear that this theory was one which was newly developed because the net worth statements make no reference to a business and the parties' joint returns make no reference to Schedule E, busi-

ness income. Moreover, during pre-trial no claim of a business was made such that appraisals could be exchanged or so the court might appoint a neutral appraisal. The testimony also does not comport with the holding in *Higgins v. Comm'r Internal Revenue,* 312 U.S. 212 (1941) which held: "A taxpayer's management of this own investments is not a trade or business even if the taxpayer engages in investment management activities on a full-time basis. However, a taxpayer who actively trades in corporate stocks may be conducting a trade or business when the accumulation of investment income by the taxpayer is not a primary objective."

The Wife was also caused to expend substantial sums for counsel to refute spurious claims of economic fault. She, out of fear of her Husband's vindictiveness and his failure at times to monitor their highly volatile accounts removed him as account executive from accounts in her name and their sons' UGMA accounts. The facts at trial revealed she was justified in her fears. She credibly testified that after an argument with Seth, during the Jewish holidays in 1992, in the heat of anger the Husband removed all funds from Seth's account. Her testimony was supported by the testimony of their son Seth and by the evidence of the transaction. His testimony explaining this act as an attempt to test "Mazel" was truly bizarre and contrived.

* * *

The Wife's explanation for removing approximately half ($664,000) of the funds in the parties' bank accounts in the summer of 1994 was credible and reasonable under the facts of the case. She was understandably concerned seeing missing checks and remembering her Husband's threats that he would deny her access to monies. Indeed, this action by her prevented him from accomplishing his effort to withdraw $976,000 from the joint accounts.

The claim that these acts deprived him of the ability to be a "market maker" were unsupported by any other facts in the case. His claim that one needs $5,000,000 to be a "market maker" was not supported by any documentation, or by the testimony of any of the other witnesses.

The Husband also claimed to have millions of dollars at the time of the marriage. This claim was made without any documentary support such as bank or brokerage account statements. Indeed, the evidence illustrates his half interest in Amswiss held at the time of the marriage consisted of an investment of only $20,000 and years later when the company was dissolved he received only $1,000,000.

The cumulative result of all this incredible testimony and the taking of these unsupportable positions was the necessity of a lengthy trial which was even longer because of the Husband's inability to answer the questions posed without launching into a prolonged and irresponsive stream of consciousness answers. This was true on both direct and cross-examination.

Accordingly, the court finds as a result of the Husband's intransigent, unreasonable and baseless positions, a trial of inordinate length was required and discovery proceedings were prolonged and difficult. The experts presented to support some of the position offered testimony that lacked credibility and were based on poor analysis. These invalid and unsupported contentions continued to the very end and required the Wife's counsel to expend numerous extra hours on discovery and in preparing for cross-examination. Based on all the foregoing, the court grants Wife's request for counsel fees to the extent of directing the Husband to pay the Wife the sum of $285,000 as and for his share of the Wife's counsel fees.

* * *

# The Innocent Spouse Rule; Or Where Ignorance Is Bliss, 'Tis Folly to Be Wise

By Sandra W. Jacobson

If we at the Matrimonial Bar have learned anything in the past two decades, it is that those among us who cried "The Feds are coming" were prescient Paul Reveres and not the hysterical Chicken Littles we all laughingly assumed they were.

An attorney who practices family law knowing only state law is a malpractice action looking to happen. We are all aware that our child support standards were fashioned under the command of the federal government. The fairly Draconian collection devices in place were mandated by the federal government. To cross state borders to escape them is a federal crime.

*"An attorney who practices family law knowing only state law is a malpractice action looking to happen."*

Domestic violence is now an interstate issue. Our child custody jurisdiction law is being changed to conform to the Federal Parental Kidnaping Prevention Act which, in any event, must prevail under the Supremacy Clause.

Our carefully worded agreements and judgments can be ignored by the Bankruptcy Court whose classifications can, in turn, be ignored by our State Courts. Our all-encompassing waivers of retirement benefits in prenuptial agreements are nullities, if those benefits are governed by ERISA. And now, our discovery and trial tactics must be tailored to allow our clients to escape future tax liability.

Let the reader beware. Only one aspect of the "innocent spouse" rule will be considered in the article.

Prior to 1984, it was almost impossible to qualify as an innocent spouse. Not only were there numerical or percentage standards for understatement of income or overstatement of deductions but the spouse had to establish that he, or more probably she, had no actual or constructive knowledge of the inaccuracy and that it would be inequitable to hold that spouse liable.

The 1984 amendments lowered the amount and percentage requirements but retained the requirement for proving innocence and the burden of proof on the taxpayer. "Equity," as interpreted, meant no benefit was received by the "innocent" spouse.

Any matrimonial attorney knows that if these standards are rigidly applied, almost nobody could qualify, at least as to substantial understatement of income. The most "innocent" housewife usually knows what it costs to maintain the parties' standard of living. As to benefit, assuming the money was spent on the couple, both spouses received a benefit from the erroneous tax item.

All this was changed by the revisions made to I.R.C. § 6015 by § 3201 of the 1998 Act. In an article in *The New York Times* on December 29, 1999, it was stated that the Internal Revenue Service expected some 5,000 applications as a result of these changes. It received more than 40,000 and had to take agents off enforcement to handle the load.

Under the 1998 law, a spouse has one of three elections.[1] She may file for "innocent spouse" status. If she does, she must establish that she did not know and had no reason to know of the understatement of taxes and that, taking into account all the facts and circumstances, it would be inequitable to hold her liable.[2]

There is a second election available.[3] If the spouse is no longer married or is legally separated or has not been a member of the same household for twelve months, she may elect a limited liability. The tax items giving use to the deficiency are allocable to the spouse to whom they are attributable. Most important, the IRS must demonstrate that the electing spouse had actual knowledge that an item on the return was inaccurate to hold her liable. That she had reason to question or should have known does not destroy this election. Moreover, even if she had actual knowledge, if she can show that she signed the return under duress (which, presumably, could include a court ordering her to sign) she still has the separate allocation option open to her.

If relief is not available under the "innocent spouse" election or the separate allocation election, relief may be available if, taking all facts and circumstances, it would be inequitable to hold that spouse liable for the deficiency.[4]

Where does that leave the matrimonial practitioner? If it is the government's burden to prove actual knowledge of a deficiency, we do not want to carry the gov-

ernment's burden for it. Which of us has not been told by a client that there were always large sums of cash in the house? Which of us has not received a shopping bag of papers which show, *inter alia*, accounts not listed on a net worth statement or the numbers on bearer bonds or credit card statements demonstrating large expenditures? One the one hand, we want to demonstrate that there is income for giving or denying maintenance and assets to divide; on the other, we do not want to show that, at the time she signed the returns, she knew that they were untrue.

Perhaps, as the song goes, she found them all in a little tin box.

## Endnotes

1. I.R.C. § 6015(a)(1).
2. I.R.C. § 6015(b)(1).
3. I.R.C. § 6015(a)(2).
4. I.R.C. § 6015(F).

Sandra W. Jacobson, a sole practitioner in New York City, is a Fellow of the American Academy of Matrimonial Lawyers and of the International Academy of Matrimonial Lawyers, and is a member of the Executive Committee of the Family Law Section, New York State Bar Association.

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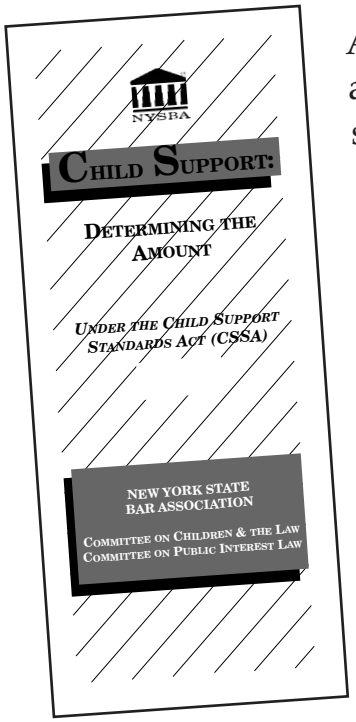


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# Selected Cases

Editor's Note: It is our intention to publish cases of general interest to our readers which may not have been published in another source and will enhance the practitioner's ability to present proof to the courts in equitable distribution and other matters. The correct citations to refer to in cases that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, *e.g.*, Spring 2000) New York State Bar Association

We invite our readers and members of the bench to submit to us any decision which may not have been published elsewhere.

## *In re the Adoption of Those Children by Alicia B. and Richard C. B. Whose First Names are: Corey,[1] Steven and John*, Family Court, Greene County (Pulver, George J., Jr., December, 1999)
## By Alicia B. and Richard C. B., Petitioners

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### I. Factual Background

The children involved in this case are Corey (DOB: 5/22/95), Steven (DOB: 7/5/96), and John (DOB: 1/31/98). Corey and Steven are biological brothers who were adjudicated neglected by their mother and father by this Court's Orders entered May 8, 1998 and September 4, 1998 respectively [*see*, Court's Trial Exhibits 1 and 2]. In December 1998, these two children were adjudicated permanently neglected by their mother [*see*, Court's Trial Exhibit 3] and, in February 1999, were declared abandoned by their father [*see*, Court's Trial Exhibit 4]. Accordingly, the rights of the biological parents of Corey and Steven were terminated and guardianship and custody rights were committed to the Commissioner of the Greene County Department of Social Services (hereinafter referred to as DSS) [*see*, *id.*].

John is the younger biological brother of three children (Debbie, Shannon and Larry) the three of whom were adjudicated neglected by the persons legally responsible for them by this Court's Order entered February 20, 1997 [*see*, Court's Trial Exhibit 5]. After placing Debbie, Shannon and Larry in the custody of DSS for a period of one year [*see*, Court's Trial Exhibit 6], and after failed attempts at reunification of the family, judicial surrenders of these three children were accepted by this Court in late April 1999 [*see*, Court's Trial Exhibits 7, 8, 9]. This Court takes judicial notice of the fact that Debbie, Shannon and Larry were thereafter adopted by the foster parents with whom they had previously been placed: the H.s.

However, during the time period when DSS was still attempting to reunite the family of Debbie, Shannon and Larry, John was born. This Court Ordered a removal of John from his parents pursuant to Family Court Act § 1024 [*see*, Court's Trial Exhibit 10]. Thereafter, a full hearing pursuant to Family Court Act § 1028 was conducted, after which the Court found that the return of John to his parents pending the determination of the abuse/neglect petition would present an imminent risk to John's life and/or health [*see*, Court's Trial Exhibit 11]; a motion for the Court to reconsider this Decision and Order was rejected. By Decision and Order of this Court entered October 5, 1998, John was adjudicated a neglected child and placed in the custody of DSS for a period of one year [*see*, Court's Trial Exhibit 12]. In March and April 1999, John's father and mother, respectively, executed judicial surrenders of their parental rights and this Court vested guardianship and custody rights of John with DSS [*see*, Court's Trial Exhibit 13].

A fourth sibling of John, a younger brother named Jerry, presently resides with his biological mother in Albany County under the supervision of the Albany DSS and other authorized agencies. Although Jerry was placed in petitioners' foster home for a short time, he was later removed and returned to his biological mother. John has no contact with this sibling.

Petitioners Alicia B. and Richard C. B. met in early 1992 and have been happily married since September 1993. In November 1996, they bought a four bedroom home located on approximately an acre and a half of land in anticipation of raising a family. Unable to conceive biological children, but desirous of having children in their lives, petitioners satisfied the rigorous requirements and became certified as adoptive foster parents[2] on October 14, 1997. That same day, DSS placed Corey and Steven in petitioners' home. At that time, Corey was 28 months old and Steven was 15 months years old. Thereafter, on March 6, 1998, DSS

placed five-week-old John in petitioners' home. Since the time of their placements, the three children have lived every day of their lives in petitioners' home and under their care. The children, now ages 4 ½, 3 ½, and almost 2 years old, know each other as brothers and recognize petitioners as "mommy" and "daddy." Petitioners now wish to legally formalize their familial situation by Court approved agency adoption of Corey, Steven, and John as their sons.[3]

## II. The Constitutional Challenge

In February 1999, the Adoption and Safe Families Act (hereinafter referred to as ASFA) became effective. ASFA requires a Court to deny all applications of prospective adoptive parents whose criminal history reveals a felony conviction for, *inter alia*, a crime involving violence other than physical assault or battery (*see*, Social Services Law § 378-a[2][e][1]).[4] Furthermore, Social Services Law § 378-a(2)(h) mandates that, upon revelation of a conviction for any of the crimes set forth in Social Services Law § 378-a(2)(e)(1), the authorized agency must remove any foster children residing in the home of the foster parent or prospective adoptive parent.

Petitioners' agency adoption applications are subject to the rules set forth in Social Services Law § 378-a(2)(e)(1) and (2)(h) because of Richard C. B.'s June 1985 conviction of the violent felony of armed robbery. Therefore, in anticipation of this Court's denial of their agency adoption applications, and the mandated removal of the children from their foster home by DSS, petitioners filed against DSS for custody and temporary guardianship of the children. Such petition was granted by Order of this Court entered November 29, 1999 and is presently in effect. DSS immediately decertified petitioners as foster adoptive parents and closed its active files on petitioners and the three children. Thereafter, petitioners requested a plenary hearing and sought Court rulings: (1) that the irrebuttable presumption of Social Services Law § 378-A(2)(e)(1)(a) violates both state and federal constitutional due process requirements; (2) vacating the Order granting temporary guardianship and custody of the children to petitioners and re-vesting guardianship and custody in DSS; (3) restoring petitioners to their status as certified foster adoptive parents retroactive to December 6, 1999 and Ordering payment of subsidies retroactive to such date; and (4) approving petitioners' applications for the agency adoptions of the three minor children with the first names Corey, Steven and John.

## III. The Plenary Hearing

After reviewing the submitted papers, and hearing oral argument on the matter, the Court scheduled the requested plenary hearing for December 17, 1999. On such date, the hearing ensued with Jerry Stanzione, Esq., of Lewis & Stanzione representing the petitioners, James C. Steenbergh, Esq. representing the Greene County Department of Social Services, and Robin DePuy-Shanley, Esq., appearing as Law Guardian for the three children whose first names are Corey, Steven and John. The Office of the Attorney General, although on notice of the constitutional challenge to ASFA (*see*, CPLR 1012[b]), declined to intervene at this time.

Petitioner Richard C. B. is a 36-year-old husband and foster father who has been either gainfully employed or in school since his release from prison in December 1989; his criminal history was fully disclosed when petitioners applied for certification as adoptive foster parents and was not viewed by DSS to be any reason to prevent placement of foster children in his home [*see*, Respondent's Trial Exhibits A, B]. The facts and circumstances of Richard's felony conviction are as follows: in June 1985, at the age of 21 he was convicted in the State of New Jersey by a plea of guilty to the crime of armed robbery and was sentenced to a determinate sentence of four years' State incarceration [Petitioners' Trial Exhibit B].

Admittedly engaged in a life of alcohol and drugs at the time, on the date in question Richard and one of his friends had approached a car driven by people that they knew. Poking his head in the car, Richard's friend asked the occupants if they had any drugs. When they answered "no," the friend brandished a knife after which he and Richard took certain drugs (i.e., "speed") from the occupants of the car. During the incident, Richard possessed a knife but did not brandish the weapon. Although the specifics of how the police were led to him are unknown by Richard, he was eventually arrested for the crime and pleaded guilty.

While in prison, Richard did "a lot of soul searching," decided that "this wasn't the life [he] wanted" and "decided to make changes." He attended alcoholics anonymous classes, narcotics anonymous classes, availed himself of mental health services, completed college courses, and worked. In December 1989, due to his good behavior, Richard was released from prison almost one year early and immediately moved to New York. Since that time, he has been on parole under New York supervision with no reported problems. Richard's parole officer, William Splain, writes that Richard "has made a very significant turn around in his lifestyle from one involved in larcenous, assaultive and alcohol related behavior to one of a homeowner, responsible parent and good husband" [Petitioners' Trial Exhibit 4]. According to Splain, Richard's "exemplary adjustment over a long term suggest his suitability for [parole] discharge consideration" but notes that New Jersey officials are the only ones who have the authority to initiate early termination of parole [*id*.]. As it stands now, Richard is due to complete his parole supervision in early 2000.

Initially, Richard worked as a laborer in a lumber yard in Saugherties, New York ultimately becoming the head sawyer in charge of personnel. This job was sea-

sonal, however, and therefore Richard went to Columbia Greene Community College and participated in a BOCES program to obtain his degree in welding. Although this is a two-year program, Richard accelerated the program, thereby completing it in one year. Richard was recognized by one of his teachers as having special skills and was recommended, and hired, for the position of substitute teacher in welding, automotive, and construction [Petitioners' Trial Exhibit 9]. Such teacher also recommended Richard for a welding position at a company called W.B. McGuire where Richard first worked as a welder fabricator and, after only two years with the company, became fabrication shop supervisor of the second shift (supervising approximately 50 employees).

In August 1998, Richard took a position at St. Lawrence Cement in Catskill, New York which afforded him more money, more stability, and hours which allow him to spend more time with the children. The General Manager and Human Resource Manager of St. Lawrence Cement relay that Richard is one of their best employees at the Catskill facility with no behavioral, attendance or interpersonal skill shortcomings. Deadlines are always met and the quality of his work is superb. He works well with others and gets along with peers, supervisors, and management. In fact, Richard is presently being considered for promotion to a supervisory level [*see*, Petitioners' Trial Exhibits 2A, 2B]. Presently, Richard's income supports the family since, when Corey and Steven were placed in their home, petitioners decided that Alicia should stay at home full-time. It is clear to the Court that Richard takes this role as the family breadwinner very seriously.

The psychological/social evaluation of Reinaldo Cardona, CSW-R, who has worked with the B. family unit since Corey was placed in their home was admitted into evidence [*see*, Petitioners' Trial Exhibit 3]. This evaluation notes that when his work schedule permitted, Richard participated in meetings to develop strategies for Corey's inappropriate and destructive behaviors (i.e., banging his head, spitting at people, using foul language, and biting) which was the result of his having suffered abuse/neglect [*see*, *id*.]. Cardona has observed both petitioners appropriately discipline Corey and notes that petitioners' attitude and behavior in the community clearly reflects positive family values [*id*.]. Cardona also notes that "Corey has made tremendous progress while in this home" [*id*.] and gives his professional opinion, without reservation, that Richard has been completely rehabilitated and is a productive member of society working to support his family and affectionately caring for and playing with his children and serving as an excellent role model for the boys of how to be hard working, gentle and caring human beings. [*id*.]

Behavior specialist and children's mental health advocate Mary Magee Quinn, Ph.D., who is also a member of Alicia's extended family, notes that Corey and Steven lived with a number of families before being placed with petitioners, and that, at the time of their placement with petitioners, they had social, behavioral and language development delays; similarly, John was behind in his physical development at the time of his placement with petitioners [*see*, Petitioners' Trial Exhibit 5]. Dr. Quinn fears that, if removed from petitioners' home, all of the children would not continue to grow and prosper as they have while with petitioners and would miss not only the love and care which petitioners give them, but also the love of an extended family network including a great-grandmother, great aunts and uncles, grandparents, and aunts and uncles [*id*.].

Child psychologist David A. Nevin, Ph.D. opines that the boys are bonded to petitioners as their psychological parents and that removal of the boys from petitioners' home will damage the boys and destroy the parental bonding which has developed [*see*, Petitioners' Trial Exhibit 6]. Holly L. Pavlin, PHN, infant child health assessment program coordinator for Greene County Public Health Nursing Service who was involved with petitioners since July 1998, notes that the children "had obviously been stimulated positively, and played with, read to, and encouraged to use language skills [by petitioners]" [Petitioners' Trial Exhibit 7].

Sheron Regan, Greene County DSS supervisor of Child Protective Services testified that it was her professional opinion, based on her 29 years of work experience at DSS, that it is in the children's best interests to remain in petitioners' home and to be adopted by petitioners. Ms. Regan, who is also a neighbor of petitioners but did not know them until they applied to become foster parents, testified that Corey and Steven have shown a marked improvement since being placed in petitioners' home. For example, Corey was thought to be hyperactive and had temper tantrums; upon Alicia's reporting to the pediatrician that he "shakes" up to ten times a day he was diagnosed with epilepsy and is now stabilized with medication. According to Ms. Regan, the children are very bonded to petitioners and it would be "extremely traumatic" for the children if they were removed from petitioners' home.

Particularly poignant was Alicia's answer to the Law Guardian's inquiry as to whether the boys have exhibited any concern about being removed from the home. Alicia testified that, when John's brother Jerry was taken out of placement in the B. home and given back to his biological mother, Corey wanted to know why petitioners had "gotten rid of him," asking Alicia "was it because he was bad or cried too much?" When Corey, Steven, and John were freed for adoption, and before petitioners learned of ASFA and its potential implications for them, they told the children "over and over again" that they would always be their mommy and daddy no matter if the children misbehaved etc.

DSS Caseworker Erica Valenti was involved in the attempted reunification of John with his biological par-

ents and, hence, from the period of March 1998 through March 1999 had interaction with petitioners on an almost daily basis. According to her, Corey, Steven and John "know that they're safe" with petitioners. Ms. Valenti's 5 ½ month old son is cared for by Alicia Monday through Friday while Ms. Valenti is working. Testifying that she "sees a lot in this job," Valenti noted that she felt 100% better when Alicia and Richard said that they would provide child care for her son.

With full knowledge of Richard's criminal conviction, DSS certified petitioners as adoptive foster parents and has had no problems; indeed, petitioners were recognized with a certificate of appreciation for their outstanding service as foster parents signed by the Director of Social Services and the Commissioner of Social Services [Petitioners' Trial Exhibit 1].

According to Richard C. B., the difference between him at age 21 when he committed his crime and him now is "night and day." He regrets very much what he did and who he hurt. He has been a sober alcoholic for ten years and has not used any controlled substances since his felony conviction. He reads to the children, takes Corey and Steven to karate lessons, and includes the boys in whatever he is doing around the house whether it is raking leaves or changing the oil in his car. He takes the children to medical appointments, on one occasion holding Corey on his lap for two hours while tests were performed to diagnose/treat his epilepsy. In all respects, he considers the children to be his sons.

Law Guardian Robin DePuy-Shanley, Esq. "wholeheartedly" supports the proposed adoptions as being in the children's best interests, testifying that she has had contact with petitioners since John was placed with them and as recently as March 1999.[5] She notes the remarkable fact that petitioners have forged a bond with the H.s in order to allow John to develop relationships with three of his biological siblings: Debbie, Shannon, and Larry (for whom Shanley has always been the Law Guardian). Observing a joint visit between petitioners and the H.s, amassing seven children under the age of six, Shanley testified regarding the happy, congenial atmosphere wherein everyone's needs were provided for. She described Corey and Steven climbing on Richard without any inhibitions and stated: "They're a family. They're completely comfortable. It's clear they love them."

In addition to all of the aforementioned testimony adduced, this Court has a unique perspective on this case due to its involvement in all of the cases of Corey, Steven, John, as well as John's biological siblings Debbie, Shannon, and Larry who were eventually adopted by the H.s. This Court knows full well from whence Corey, Steven and John came and how lucky they are to have found stability and unconditional love in petitioners' home. Particularly remarkable are petitioners' selfless efforts to allow John contact with his biological siblings Debbie, Shannon, and Larry whom Corey and Steven know as their "cousins." This sibling visitation was facilitated, and indeed initiated, by foster parents who truly understand what is best for a child and are willing to do what it takes to obtain that regardless of the hard work. These are the actions of parents.

It is absolutely clear to this Court that Richard has fully rehabilitated himself from his long ago life of crime and is a positive role model for Corey, Steven, and John all of whom view him as "daddy." It is equally clear that petitioners are the best thing that ever happened to Corey, Steven, and John and that it is in the children's best interests to become petitioners' legal sons through adoption.

## IV. Constitutional Analysis

This Court finds that Corey, Steven, and John have a constitutionally protected right, as foster children, to procedural due process which protects them from arbitrary State decisions which significantly impact their custody and welfare (*see*, *In re Adoption of Jonee*, ___ Misc. 2d ___, ___, 695 NYS2d 920, 925) and which could indiscriminately force them to lose yet another family relationship (*see*, *id.*, at 925, citing *Moore v. City of E. Cleveland, Ohio*, 431 US 494; *Sinhogar v. Parry*, 53 NY2d 424). Application of the irrebuttable presumption delineated in Social Services Law § 378-a(2)(e)(1) in this case would require this Court to deny petitioners' agency adoption petitions and DSS to remove the three children from petitioners' home (*see*, Social Services Law § 378-a[2][h]). This would deprive the three boys of the only loving family relationship which they have been raised in throughout their young lives.

It is this Court's finding that the irrebuttable, *per se* statutory presumption that: (1) petitioners are unfit to raise Corey, Steven, and John and (2) it is in these children's best interests to be removed from the only stable home that they have ever known fails to satisfy state and federal due process requirements and is therefore declared and found to be unconstitutional. The way that ASFA has been enacted prevents any person from ever attempting to rebut the previously mentioned presumptions; this is what renders the statutory provision unconstitutional.

All of the evidence in this case demonstrates that Corey, Steven, and John have thrived under petitioners' care, that petitioners have exceptional parenting skills, that the five view themselves, and others view them, as a family unit. Richard's felony conviction is far removed in time and, indeed, Richard is a successfully rehabilitated person who is a productive, law abiding member of society.

There is no overriding state interest for establishing and enforcing an ASFA procedure which would result in an outcome that is contrary to the best interest of Corey, Steven, and John (*see*, *In re the Adoption of Jonee*, *supra*, at 925). Surely these three children are entitled to their day in Court—to an individualized hearing where

evidence could be adduced before a Court which would then render its determination as to whether the proposed adoption is in the children's best interest. To rule otherwise is to make a felony conviction the dispositive factor in all proposed adoptions regardless of whether the proposed adoption is in the child's best interest.

The case may be rare when it is in the child's best interest for such a proposed adoption to be accepted by a Court, however, allowing a Court to make an individualized determination rather than dismissing the adoption petition outright would better serve ASFA's stated purpose of preserving the health and safety of children in foster care (*see*, *id.*, at 925, citing Governor's Approval Memorandum, No. 1, Ch. 7, reprinted in New York Legislative Digest 1999, January 6-August 18, Vol. III). Certainly, a case by case Court determination would satisfy due process (*see*, *id.*, at 925 citing *Cleveland Board of Education v. LaFleur*, 414 US 632, 643).

## V. Conclusions of Law

Accordingly, after conducting an *in camera* review of the foster care and adoption files of the children and petitioners, and after considering all of the evidence adduced at the plenary hearing, and noting that the Greene County Department of Social Services as well as the children's Law Guardian support the proposed adoptions by petitioners as in the children's best interests, NOW, after having given consideration to all of the facts and circumstances in this matter, and noting this Court's particular knowledge of the children's histories and how much they have benefited from their placement in petitioners' home, it is hereby

**ORDERED** that Social Services Law § 378-A(2)(e)(1)(a) is declared unconstitutional, as violative of both federal and state due process requirements for the reasons outlined above; and it is further

**ORDERED** that, it being in the best interests of Corey, Steven, and John for petitioners' adoption applications to be granted, the Chief Clerk of the Family Court is directed to calendar the petitions for finalization as soon as soon as they are complete; and it is further

**ORDERED** that, retroactive to December 6, 1999, petitioners be reinstated as certified adoptive foster parents entitled to both prospective and retroactive subsidies; and it is further

**ORDERED** that the motion to vacate this Court's Order which granted petitioners' temporary legal guardianship and custody of Corey, Steven, and John is hereby GRANTED and such Order is hereby VACATED; and it is further

**ORDERED** that legal guardianship and custody of Corey, Steven, and John is hereby vested in DSS; and it is further

**ORDERED** that placement of Corey, Steven, and John in petitioners' home be continued until further Order of this Court; and it is further

**ORDERED** that DSS shall make the necessary arrangements to retrieve the six files relative to this case which were previously produced for an *in camera* review.

The foregoing constitutes the Decision and Order of this Court.

**PURSUANT TO FAMILY COURT ACT SECTION 1113, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A PARTY OR THE LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIEST.**

## Endnotes

1. Certain names have been changed for the purpose of publication.
2. Adoptive foster parents are distinguishable from foster parents who are not certified to adopt. The latter type of foster parents provide foster care for children on a short term basis; they may have 30 children come and go in one year. Persons who are eligible and willing to adopt foster children, however, may be certified by DSS as adoptive foster parents. These parents typically have children placed with them on a more long term basis. If DSS is unable to achieve its primary goal of family reunification, its secondary goal is for the adoptive foster parents to adopt the children.
3. The significance of the adoptions being "agency" adoptions is that two of the children, Corey and Steven, qualify as "special needs children" thereby entitling petitioners to a monthly stipend which they would not receive through a nonagency/private adoption.
4. The relevant portion of ASFA provides that:

   > Notwithstanding any other provision of law to the contrary, an application for certification or approval of a prospective foster parent or prospective adoptive parent shall be denied where a criminal history reveals a conviction for: (A) a felony conviction at any time involving: (i) child abuse or neglect; (ii) spousal abuse; (iii) a crime against a child, including child pornography; or (iv) a crime involving violence, including rape, sexual assault, or homicide, other than a crime involving physical assault or battery.

5. Corey and Steven were represented by another Law Guardian in their neglect proceedings but, in the interest of consolidating matters, after John was placed in petitioners' home Ms. Shanley was appointed as Law Guardian for all three children.

# Recent Decisions, Legislation and Trends

By Joel R. Brandes and Bari B. Brandes

## Agreements—Construction

***SU v. SU*, ___AD2d___, 702 NYS2d 455, 2000 WL 85030 (N.Y.A.D. 3d Dep't).**

In *SU v. SU supra*, plaintiff and defendant entered into a written separation agreement which survived the parties' March 1995 judgment of divorce and provided that defendant would pay plaintiff maintenance in the amount of $2,000 per month "until such time as [plaintiff] begins to receive payments from [defendant's] pension from the State University of New York—Binghamton, at which time monthly support will be terminated." Supreme Court issued a qualified domestic relations order (QDRO) in August 1995 transferring 50% of defendant's pension to plaintiff. Although plaintiff apparently was entitled to withdraw such funds from her account at any time, there was no indication in the record that she had done so.

Defendant continued to make the required maintenance payments until January 1996. In or about September 1997, plaintiff commenced an action seeking to enforce the monthly maintenance obligation set forth in the parties' separation agreement. Defendant answered and counterclaimed for 14 months of what he deemed to be "unnecessary" maintenance payments, contending that his obligation ceased once plaintiff obtained access to her share of his pension. Plaintiff thereafter moved for summary judgment and Supreme Court granted the motion, finding that defendant's obligation to pay maintenance under the separation agreement terminated upon his retirement or plaintiff's withdrawal of the pension funds awarded, whichever occurred first.

The Appellate Division affirmed. The parties' dispute distilled to whether the separation agreement provided for the termination of defendant's maintenance obligation once plaintiff became eligible to receive her share of defendant's pension or, rather, whether that obligation continued until such time as plaintiff actually received the funds in question. It held that where, as here, the separation agreement at issue survives the judgment of divorce, the agreement remains a valid and enforceable contract subject to the basic principles of contract interpretation. In this regard, it noted that it is well settled that whether a writing is ambiguous is a question of law for the court to resolve in the first instance and that the writing must be read as a whole to determine its purpose and intent. Applying these principles, the Appellate Division concluded, contrary to the Supreme Court, that the separation agreement was not ambiguous with respect to defendant's maintenance obligation. The quoted portion of the separation agreement did not, as defendant contended, tie his maintenance obligation to plaintiff's eligibility to receive her share of his pension. The agreement specified that such payments will continue "until such time as she begins to receive payments from [defendant's] pension." Any uncertainty as to the meaning of the phrase "begins to receive payments" was resolved by reference to paragraph 10(B) of the separation agreement, which provided, in pertinent part, as follows:

> [Defendant] agrees to select the 50% [j]oint [s]urvivor option or its equivalent and to execute forthwith all documents and do all things necessary in order to effectuate such option being implemented with respect to his pension funds * * *. [Plaintiff] will obtain a [QDRO] at the time of the filing of a [d]ivorce between the parties in the form necessary to direct the relevant entities * * * to pay [plaintiff] her equitable share of [defendant's] pensions upon his retirement.

Thus, reading the agreement as a whole, it was apparent that the parties contemplated the issuance of a QDRO from the outset and, had they wished to tie defendant's maintenance obligation to the issuance of the QDRO and plaintiff's resulting eligibility to receive the funds in question, they plainly could have done so.

## Custody—Parental Alienation

***Karen B. v. Clyde M.*, 151 Misc. 2d 794, 574 NYS2d 267, *aff'd*, 197 AD2d 753, 602 NYS2d 709 (3d Dept, 1999).**

In *In re Karen B. v. Clyde M.*, *supra*, the parties originally had a joint and split custodial arrangement and a comprehensive visitation arrangement. In September of 1990, the mother filed a petition to modify, requesting that she "retain all custody and visitation to be supervised, if at all." She alleged a change of circumstances, in that "Mandi had disclosed sexual advances and behavior problems because of concerns. Also it is not good for her physical, emotional and social well being to go back and forth between parents. Social Services is currently investigating." As a result of her allegations, the court entered a temporary order requiring the father's visitations with Mandi to be supervised. According to the mother, in September 1990, Mandi disclosed to her certain sexual abuse perpetrated on Mandi

by her father. He allegedly put his finger in her "peer." When she said that it hurt, he told her that he could do what he wanted. She also claimed that her Daddy's "dinkie" got bigger and "stuff came out." The mother reported this to a friend of hers, employed by Community Maternity Services, who went to her home and investigated. The child and mother were interviewed by a child sexual abuse therapist specializing in 2½-to-18-year-old victims. The mother repeated all of the allegations to the therapist, and additionally stated that on September 9, Mandi had told her that the respondent has put his "peer" on her "peer" and that he had put his hand under the covers of the bed and touched her buns stating, "You know, like you take your temperature." The expert observed no outward signs of emotion when the mother spoke to her and found that the mother seemed to be repeating the story by rote, and that she couldn't respond to questions without starting from the beginning and completing the entire story. The expert concluded that there was no information which would indicate that Mandi had been sexually abused by her father.

The court held that a parent who denigrates the other by casting the false aspersion of child sex abuse, and involving the child as an instrument to achieve his or her selfish purpose, is not fit to continue in the role of a parent. It found that it would be in Mandi's best interests that custody be awarded to her father. It stated, "As the court has no assurance that the mother will not continue to 'brainwash' or 'program' Mandi, petitioner shall have no visitation nor contact with her daughter."

The Third Department affirmed. It noted that the Family Court found that petitioner had programmed Mandi to make the sexual abuse allegations in order to obtain sole custody and deny access to respondent. It held that the fact that Family Court made reference to a book regarding parental alienation syndrome, which was neither entered into evidence nor referred to by any witness, was not a ground for reversal, especially in light of all the testimony elicited at the hearing.

### *In re JF v. LF* 694 NYS2d 592, 1999 N.Y. Slip Op. 99408.

In *In re JF v. LF*, *supra,* the Family Court became the first New York court to discuss Parental Alienation Syndrome at length in a custody decision. It pointed out that the theory is controversial, and noted that according to one of the expert witnesses who testified, the syndrome is not approved as a term by the American Psychiatric Society, and it is not in DSM-IV as a psychiatric diagnosis.

Parenthetically, we note that the DSM-IV,[1] which was published in 1994, cautions that ". . . DSM-IV reflects a consensus about the classification and diagnosis of mental disorders derived at the time of its initial publication. New knowledge . . . will undoubtedly lead to the identification of new disorders."

The Family Court acknowledged that New York cases have not discussed PAS as a theory, but have discussed the issue in terms of whether the child has been programmed to disfavor the noncustodial parent, thus warranting a change in custody.

The Court observed the children and found them to be both highly intelligent and articulate. Yet, when discussing their father and his family, they presented themselves "at times in a surreal way with a pseudo-maturity which is unnatural and, even, strange." They seemed like "little adults." The court found that the children's opinions about their father were unrealistic and cruel. They spoke about and to him in a way which seemed to be malicious. Both children used identical language in dismissing the happy times they spent with their father as evidenced in a videotape and picture album as "Kodak moments." They denied anything positive in their relationship with their father to an unnatural extreme. The court concluded that nothing in the father's behavior warranted that treatment.

Three expert witnesses testified that the children were aligned in an unhealthy manner with the mother and her family. One expert testified that the

> . . . [M]other has clearly won the war over the children's minds and hearts and the father is generally helpless to offset that. Children, likewise, are deeply attached in a symbiotic fashion with their mother . . . Father is painted in a highly derogatory and negative fashion, way out of proportion to any possible deficiencies that he may have. This is clearly a borderline mental device within the mother's psychology which has been clearly duplicated in the children. The overall prognosis for any major change in their attitude would appear to be quite limited at this time, even with expert psychiatric assistance.

The court-appointed psychologist concluded that the PAS was "clear" and "definite" with both children.

The father's expert submitted a report to the Court, in which he stated that the alienation from the father was probably the most severe case of alienation he had ever witnessed as a child psychiatrist.

The Court accepted the testimony of the mental health professionals to the extent that they indicated that the mother alienated the children from the father. It found that the children would have no relationship with the father if left in the custody of their mother, and that they would continue to be psychologically damaged if they remained living with her. Their negative view of their father was out of all proportion to reality. The court found that the mother had succeeded in causing parental alienation of the children from their father, such that they not only wished to cease having frequent and regular visitation, but actually desired to have nothing to do with him. It awarded sole custody to him and suspended her right to visitation.

The court did not specifically base its decision on a finding of PAS. Instead, it relied on the case law, which requires the custodial parent to nurture the child's relationship with the noncustodial parent, and ensures access by the noncustodial parent,[2] pointing out that interfering with the child's "relationship with the noncustodial parent has been said to be so inconsistent with the child's best interest as to per se raise a strong probability of unfitness."[3]

***R.B. v. S.B.*, NYLJ 3-31-99. P.29, Col. 5, Sup. Ct., NY Co. (Silberman, J.).**

In *R.B. v. S.B.*, *supra,* the trial court found that, prior to their separation in October 1994, the father (R.B.) and son (A.B.) had an extremely close relationship. They spent time together playing basketball and working on A.B.'s homework. R.B. walked A.B. to school in the mornings and regularly attended school functions. In August 1994, R.B.'s relationship with A.B. deteriorated substantially. The record was replete with numerous examples of the mother's (S.B.) campaign to poison A.B.'s relationship with his father. R.B. repeatedly asked S.B. to refrain from speaking to A.B. about these issues until after A.B.'s Bar Mitzvah the following Sunday. In response, S.B. reiterated her threats involving A.B. The court concluded that A.B.'s four-year estrangement from R.B. was the result of S.B.'s vindictive and relentless decision to alienate A.B. from his father. The court found that beginning in August 1994, S.B. engaged in a campaign to poison the relationship between A.B. and R.B. and effectively alienated A.B. from R.B. for approximately four years. During the four years when A.B. would neither see nor speak to his father, S.B. repeatedly referred to R.B. in front of A.B. as ''evil," a ''thief," an ''embezzler" and a ''liar." She told R.B. he would never see his son without her supervision, and attempted to condition visitation upon increased support. She told R.B. she wanted A.B. to ''hate his f———— guts.''

The court held that S.B.'s intentional interference in R.B.'s relationship with his son, to the point where A.B. refused to see or speak to R.B. for nearly four years, was an appropriate factor for the court to consider pursuant to D.R.L. 236(B)(6)(11) in setting maintenance. It found that S.B. permanently damaged R.B.'s relationship with A.B. The court refused to order support to S.B. so that she could maintain her prior standard of living. Instead, it directed that R.B. pay to S.B. only those amounts S.B. reasonably needed to meet her daily living expenses so as not to negatively impact on A.B.'s lifestyle. The award of maintenance and child support was contingent upon S.B.'s ensuring that the visitation schedule established by the court at the conclusion of the trial was adhered to. The court directed that it would entertain a motion by R.B. to terminate maintenance and decrease or terminate child support upon a showing that S.B. interfered with the visitation established by the court in any manner.

## Divorce—Cruel and Inhuman Treatment

***Murphy v. Murphy*, AD2d, 683 NYS2d 650 (3d Dep't 1999).**

In *Murphy v. Murphy*, *supra*, the parties were married in 1950 and separated in April 1995. In March 1997, plaintiff commenced an action for a divorce upon the ground of cruel and inhuman treatment. Plaintiff and defendant were the only witnesses who testified at trial. Plaintiff offered evidence of two altercations between the parties, neither of which resulted in physical injury, arrest, an order of protection or other court action, and a claim of a course of conduct involving excessive drinking, name-calling, accusations and recriminations. Plaintiff testified that defendant's conduct "made [her] feel awful" and that she felt "down all the time" and nervous, and that she suffered from high blood pressure and arthritis. The trial court dismissed at the close of the evidence and the Appellate Division affirmed. It found that plaintiff presented no competent evidence to support a finding that defendant's conduct caused her ailments or created any actual threat to her health or safety. It stated: "Nor was there evidence that plaintiff's nervousness and dismay were so substantial as to threaten her mental well-being. Particularly in view of the length of the parties' marriage, we conclude that the trial evidence fell far short of establishing a course of conduct by defendant that was harmful to plaintiff's physical or mental health, making cohabitation unsafe or improper."

## Equitable Distribution—Enhanced Earning Capacity

***Hougie v. Hougie*, 261 AD2d 161,689 NYS2d 490 (1st Dep't, 1999).**

In *Hougie v. Hougie*, *supra,* the Appellate Division noted that whether a particular marital asset, such as

the enhanced earning capacity attributable to a given career, is subject to equitable distribution is an issue that can be decided prior to trial. It held that defendant's enhanced earning capacity as an investment banker was subject to equitable distribution regardless of whether or not such a career requires a license, and that the amount of such enhancement was therefore properly determined without regard to the existence of any such license.

## *Pendente Lite* Support—Requirements of Orders

***Yunis v. Yunis*, 94 NY2d 787, 699 NYS2d 270 (Ct. App. NY 1999).**

In *Yunis v. Yunis*, *supra*, an action for a divorce, the wife sought a *pendente lite* order of child support and maintenance. Although Supreme Court denied the wife's application for temporary maintenance, it ordered the husband to pay temporary child support and to continue to pay the mortgages, taxes and insurance on the marital residence. In the judgment of divorce, the court awarded the wife maintenance in the amount of $2,500 per month for a period of five years, retroactive to the date of her application. It denied the husband's request for full credit for the *pendente lite* payments of the mortgages, taxes and insurance against the retroactive maintenance award and determined that those payments constituted child support.

The Court of Appeals affirmed. It found that the record supported the court 's determination at the judgment settlement conference that it "took into account" whether any credits for mortgage, taxes and insurance payments were due against the award of retroactive maintenance. It held that, contrary to the husband's contentions, payments of this kind are not required by the statute to be considered temporary maintenance, and may be solely considered child support. It noted that this case did not require it to determine how the trial courts should "take into account" temporary maintenance payments in considering appropriate credits for those payments against the award of retroactive maintenance pursuant to Domestic Relations Law § 236(B)(6)(a).

However, the Court of Appeals advised the trial courts that in order

> . . . to avoid protracted or inconsistent litigation, and to allow for appropriate appellate review, trial courts should, at an appropriate stage in the proceedings, definitively indicate in their decisions the amount of pendente lite payments made toward maintenance, child support and third parties (e.g., mortgage, taxes and insurance). The courts should also indicate how the third party payments are allocated as between maintenance and child support, and the method of crediting these various payments in the calculation of the retroactive amount due for each category (Domestic Relations Law §§ 236[B][6][a] & [7][a]). Only with such record articulation can appellate courts—especially intermediate appellate courts with plenary fact, law and discretion power—exercise meaningful, consistent and fair review of such rulings.

## Stipulations—Validity

***Nordgren v. Nordgren*, ___ AD2d ___, 695 NYS2d 588 (2d Dep't,1999).**

In *Nordgren v. Nordgren*, *supra*, an action for a divorce and ancillary relief, the plaintiff wife appealed from an order of the Supreme Court which denied her motion to vacate the parties' stipulation of settlement. The Appellate Division affirmed. The plaintiff contended that the parties' stipulation had to be vacated because it was not reduced to a writing signed by the parties and acknowledged. The court noted that CPLR 2104 provides that, other than an agreement between counsel in open court, an agreement between parties or their attorneys relating to any matter in an action is not binding unless it is in a writing subscribed by the party or his or her attorney or reduced to the form of an order and entered. It found that the agreement was made in open court between counsel with the parties present. Therefore, there was no necessity that it be reduced to a writing and signed. It stated that to the extent that the plaintiff relied upon *Matisoff v. Dobi*, to support her position, "there is nothing in *Matisoff v. Dobi*, 90 N.Y.2d 127, 659 NYS2d 209, 681 N.E.2d 376, which indicates that the Court of Appeals intended to abrogate the well-settled law of Rule 2104 of the Civil Practice Law and Rules." [In *Matisoff v. Dobi*, 90 NY2d 127, 659 NYS2d 209, 681 N.E.2d 376, the Supreme Court granted a divorce, but refused to enforce an unacknowledged postnuptial agreement. The Court of Appeals reversed and remitted. It held that DRL 236[B][3] requires the invalidation of any nuptial agreement not acknowledged in the manner of a recordable deed. Recognizing that such a "bright line" rule might be produce harsh results, the Court nonetheless expressed the view that it was of paramount importance that the enforceability of nuptial agreements be consistent and predictable and, accordingly, held that the validity of such agreements

should not be made to depend upon subsequent fact-sensitive inquiries respecting the parties' original motivations or their post-contractual economic relations during marriage.]

***Charland v. Charland* 1999 WL 1126799 (N.Y.A.D. 3d Dep't).**

In *Charland v. Charland*, *supra*, immediately prior to commencement of trial in April 1997, defendant withdrew his answer, permitting plaintiff to obtain a divorce on the ground of cruel and inhuman treatment. Trial commenced as to the remaining issues, with the parties stipulating to the terms of the Family Court custody order, to child support and to the value of all marital assets and liabilities except the marital residence and defendant's corporation. Supreme Court thereafter rendered a written decision upon the issues of custody, child support, maintenance and equitable distribution. From the judgment entered thereon, defendant appealed. The Third Department rejected defendant's assertion that reversal was mandated because Supreme Court's determinations as to custody, child support and equitable distribution improperly relied on certain stipulations by the parties which did not conform to the requirement of Domestic Relations Law § 236(B)(3) in that they were not "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." It found this assertion to be without merit, stating: "The requirements of Domestic Relations Law § 236(B)(3) pertain to stipulations which effect the equitable distribution of marital property.[4] Here, the parties' stipulations related to the value of certain marital property (and debt), equitable distribution of which was determined by the court, custody and the manner in which child support was to be calculated. As such, their stipulations were not marital agreements within the meaning of Domestic Relations Law § 236(B)(3), but rather agreements by the parties, through their counsel in open court, within the purview of CPLR 2104. With respect to custody, independent of the parties' stipulation thereto, the court found that continuation of the Family Court order with respect to custody and visitation was in the best interests of the children."

## Endnotes

1. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, 1994 at p. xxiii.
2. *Daghir v. Daghir*, 82 AD2d 191, 441 NYS2d 494, *aff'd* 56 NY2d 938, 453 NYS2d 609, 439 NE2d 324.
3. *Citing, inter alia, Maloney v. Maloney*, 208 AD2d 603, 603-604, 617 NYS2d 190; *Young v. Young*, 212 AD2d 114, 115, 628 NYS2d 957; *Entwistle v. Entwistle*, *supra*.
4. *See generally*, *Matisoff v. Dobi*, 90 NY2d 127, 659 NYS2d 209, 681 NE2d 376, *lv. denied* 91 NY2d 805, 668 NYS2d 560, 691 NE2d 632.

Joel R. Brandes has law offices in Garden City and New York City. He co-authored Law and the Family, New York, Second Edition (nine volumes, West Group) and co-authors the annual supplements. He also co-authored Law and the Family New York Forms (four volumes, 1995, West Group) and writes a regular monthly column in the *New York Law Journal* entitled "Law and The Family."

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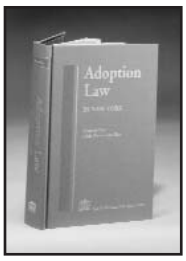


# Adoption Law in New York

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