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Notes and Comments

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Fault Divorce: A New York Disgrace

As we begin the year 2006, New York remains the only state in the Union to require fault to obtain a divorce. In doing so, couples going through divorce litigation must expend needless additional dollars and endure needless emotional trauma in order to satisfy the antiquated divorce statute that requires adultery, cruelty, or abandonment to end their relationship and start life afresh. The shame of such result, apart from the emotional and pecuniary impact, is that litigants feel compelled to commit perjury to obtain a divorce on " constructive abandonment" even if they agree not to contest grounds.

Although the courts have attempted to deal with the challenges of the statute when fault is used as a litigation ploy by a husband or wife to gain an economic benefit, the most recent decisions unearthed in New York still require severity in the allegations of a complaint pleading a cause of action for cruel and inhuman treatment, in order to be successful. The cases, over and over again, recite the repetitive rubric, that "mere incompatibility" is insufficient to prevail, especially in a marriage of long duration. Does such determination meet the needs of the hundreds of families that find themselves residents in homes where dead marriages exist? Should these New York citizens be forced to flee the jurisdiction and obtain jurisdiction in New Jersey or Connecticut to obtain a divorce and disrupt their lives because the legislature and the courts continue to be obtuse concerning the needs of families in today's society? When I use the term families, it includes the children (who are subjected to the daily strife engendered by a failed marriage), as well as the parents who can no longer maintain a harmonious home environment, filled with love and caring for the needs of one another.

Before addressing these questions, a review of some of the recent decisions in determining cruel and inhuman litigation is important. Moreover, in doing so, it will become quite clear that the need for reform is urgently needed . . . not in a month or a year, but tomorrow! The reality is that dead marriages need to be buried, with or without a proper funeral, and people freed from the chains of marriage enslavement. It is a colossal bemusement why New York remains the only state in America that insists that its residents burn money and endure psychological trauma to become free at last.

Interestingly, some legal scholars have agreed that New York's divorce laws might even offend the United States Constitution. In one such discourse[1] the author argued that New York's requirement that fault be

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proven in order for a person to obtain a divorce impinges upon a citizen's constitutional rights as guaranteed by the Fourteenth Amendment of the Constitution of the United States. By denying a person's ability to divorce another, the court encroaches upon a person's constitutional right to associate (and disassociate) with others of his or her own choice, the right to privacy and the right to be free from arbitrary governmental intrusion, citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Zablocki v. Redhail*, 434 U.S. 374 (1978); and *Boddie v. Connecticut*, 401 U.S. 371 (1971).

After the divorce reform bill was passed, and the grounds for divorce enlarged from adultery as the sole ground to include cruel and inhuman treatment, the equitable distribution statute was still years away.[2] Accordingly, when the divorce reform act went into effect, the law still required that a "guilty" wife would forfeit her entitlement to alimony. It was no wonder at that time that the courts sought to require an extremely high burden of proof in marriages of long duration, to protect women from essentially becoming public charges. The earliest case decided by the Court of Appeals was *Hessen v. Hessen*,[3] where the court articulated the standards to apply in the trial courts in determining whether a divorce based upon cruelty should be granted. The Hessens were married for 25 years, and the high court concluded that the marriage must be deemed one of long duration requiring a high degree of proof to be actionable. By contrast, the court recognized that in marriages of short duration, perhaps several years, a far lesser burden was indicated. The problem with this rule is that neither *Hessen* nor any other case has defined short-term or long-term marriages in arithmetic terms, leaving the bench and bar to speculate on the sustainable parameters in each instance.

Brady v. Brady[4] followed on the heels of *Hessen*, and once again gave the Court of Appeals the opportunity to right the wrong created by the *Hessen* rule, or at least to explain in far more detail its holding. Characteristically, the high court evaded the issue even though the Equitable Distribution Law had been enacted, and fault could no longer be a basis for denying support or a property division to a spouse found guilty of cruelty, adultery, or other articulated fault grounds.

Unfortunately, courts have uniformly denied divorce based upon cruel and inhuman treatment, especially where the marriage is of long duration, because the party seeking the divorce failed to convince the courts that the allegations rise above mere incompatibility or proof of an unpleasant or "dead" marriage. Some of the results are remarkable. *See Palin v. Palin*, 213 A.D.2d 707 (2d Dep't 1995) (verbal abusive, threats, adultery and one incident of physical assault did not constitute cruelty); *Johnson v. Johnson*, 103 A.D.2d 820 (2d Dep't 1984) (frequent absences from the martial home and two assaults in a 29-year marriage did not constitute cruelty); *Shortis v. Shortis*, 274 A.D.2d 880 (3d Dep't 2000) (threat to slit the husband's throat and attempt to choke the husband did not constitute cruelty); *Newkirk v. Newkirk*, 212 A.D.2d 951 (3d Dep't 1995) (disparagement in public and private, along with cold and indifferent personal and sexual relations, did not constitute cruelty); *Breckinridge v. Breckinridge*, 103 A.D.2d 900 (3d Dep't 1984) (beating the family dog, nearly causing an accident by driving too close to a tractor trailer to scare the wife, uncommunicativeness, excessive criticism, lack of attentiveness and embarrassment did not constitute cruelty); *Passantino v. Passantino*, 87 A.D.2d 973 (4th Dep't 1982) (throwing dishes at the husband, pulling his hair and destroying his clothing did not constitute cruelty where court deemed the husband to have provoked such behavior); *Fuld v. Fuld*, N.Y. L.J., Dec. 12, 1995, at 32, col. 3 (Sup. Ct., Nassau County, O'Brien, J.) (otherwise unreported) (no cruelty in a 45-year marriage where the parties did not speak in three years, lived in separate areas of the house, husband told the wife to "drop dead" and kept the television very loud despite her terminal illness).

Notwithstanding the injustices being heaped upon persons seeking to make a new and better life for themselves and their children, the courts continued to apply rather conservative views and denied divorces because, in their words, a marriage cannot be terminated simply because one party chooses to do so, or for mere incompatibility or lack of vitality. Realizing this quandary, at least two justices have recently refused to be handcuffed to award a divorce where the basic comforts of marriage were absent. In that regard, Justice Anthony Falanga, in *C.P. v. G.P.*,[5] ruled that a viable cause of action for divorce could be framed by pleading, "An almost total, willful refusal by the husband to engage in any social intercourse with the wife for a continuous period of more than ten years . . ." In an intelligent and courageous decision, Justice Falanga reasoned that even though the parties had been married for 33 years, and that a cruelty divorce might be questioned under existing case law, the very core of their marriage had been vitiated by the husband's conduct in refusing to engage in any social interaction for many years. He found that the essence of an abandonment was reflected by the refusal of one spouse ". . . to fulfill the basic obligations springing from the marital contract."

Justice Falanga continued to explain:

> *[T]he very core of a marriage is the concept of a 'relationship.'* A defendant spouse who has completely refused to engage in any form of social interaction with the plaintiff spouse, for more than one year prior to the commencement of an

> action of divorce pursuant to DRL 170(2), without cause or condonation, has unquestionably failed to fulfill a basic obligation arising from the marital contract, thereby abandoning the plaintiff, no less than if the defendant had physically abandoned the plaintiff or unjustifiably refused to engage in sexual relations (emphasis supplied).

Justice Falanga's decision in Nassau County was recently followed by another Supreme Court Justice in Queens County, Hon. Sidney Strauss, in *Michaelessi v. Michaelessi*.[6] Acknowledging the holding in *C.P. v. G.P.*, the court reasoned that:

> A marriage in which one spouse refuses to engage in any social interaction, despite repeated requests, is just as much a "desertion or abandonment" of a "basic obligation springing from the marital contract" as one in which there are no sexual relations.

These decisions should be required reading for all of the judges in New York who handle divorce matters. They must permit litigants to liberally amend their pleadings or to conform the pleadings to the proof at trial, in all dead marriage situations which are brought on cruelty or abandonment, since it seems likely that the legislature will again fail to act. Anyone going through the divorce process in this state is well advised to find out the names of their state senators and assemblymen who are responsible, by their inaction, for permitting this statute to remain the last archaic remnant of fault divorce in this country.

The recent report of the Miller Commission compels a similar conclusion.

Endnotes

1. Rhona Bork, Note: Taking Fault With New York's Fault-Based Divorce: Is The Law Constitutional?, 16 St. John's J.L. Comm. 165 (2002).
2. July 19, 1980.
3. 33 N.Y.2d 406 (1974).
4. 64 N.Y.2d 339 (1985).
5. 6 Misc. 3d 1034(A), 2005 N.Y. Slip Op. 50293(U).
6. 10 Misc. 3d 1067(A), 2005 N.Y. Slip Op. 52182(U).

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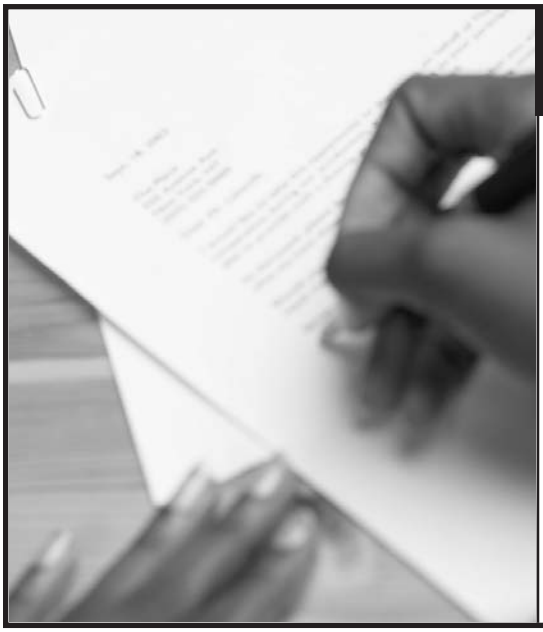

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Neglect of "Necessaries"

By Donald M. Sukloff

The doctrine of "necessaries" although still the law in New York State[1] is perhaps not utilized as it should be. Consider these scenarios:

1. **Husband abandons wife. Wife petitions Family Court and receives award of child support and spousal support retroactive to date of filing. What about the substantial living expenses from the date of the abandonment to the date of filing?**

2. **Husband abandons wife. Wife sues for divorce. She obtains *pendente lite* order for support and maintenance retroactive to date of commencement, but not for expenditures before the action.**

   As to the Family Court proceeding, the wife should institute a plenary action for necessaries which would include reasonable attorney's fees. In the Supreme Court action, if the complaint did not already add a cause of action for necessaries, a motion to add a cause of action should be made, and if unsuccessful, a plenary action can be undertaken.*

   In *Cohen v. Cohen*,[2] the trial Judge denied an effort to amend the complaint to include an action for necessaries. The wife thereafter at the trial Judge's suggestion brought a plenary action to repay loans from her father for legal services and expert witnesses, and recovered. In *Ruben v. Ruben*,[3] a cause of action in the divorce action for necessaries incurred prior to the commencement of the matrimonial action and for child support was permitted.

* But beware of *Lopez v. Lopez*, 203 A.D.2d 99 (1st Dep't 1994), holding failure to appeal the denial defeats the plenary action.

3. **Mother has Family Court order of child support. Child moves in with father. Father petitions for elimination of child support and perhaps an award of child support. Mother seeks child support to the date of filing of the father's petition. What recourse has the father?**

   In *Weyl v. Weyl*,[4] a separation agreement obligated the husband to make payments for the support and maintenance of his wife and children for a period of 17 years in lieu of any property claims and which payments would continue without modification notwithstanding a remarriage or a change of residence of one of the children or emancipation. The children moved in with the father. The Family Court refused to reduce the child support by reason of the change of custody, but the parties did agree to a reduction by reason of the father's reduced income which reduction was without prejudice. The former wife then sued the husband for the difference between the reduced amount and the amount called for under the separation agreement. In this action the husband sought a set-off (counterclaim) of over $11,500 for reimbursement of necessaries provided for the children after they moved in with him. The court, although granting a summary judgment to the wife for the contractual difference, noted that the wife continued her parental duty to support the children as well and that she was obligated for reimbursement of the necessaries incurred after the move. The former wife obtained summary judgment for $28,000 and the now custodial parent received an award of $11,500 against that for necessaries.

4. **Attorney's fees are denied *pendente lite*. Litigation goes on for a year and then action is dismissed. What about attorney's fees?**

   In *Fernandes v. Rucker*,[5] the attorney successfully brought a suit against the husband for legal fees after the action was dismissed for reasons beyond the attorney's control. In *D'Agostino v. Genovese*,[6] the wife obtained an interim award of attorney's fees in the pending matrimonial action which award was vacated on appeal as an abuse of discretion because the wife had sufficient funds. The matrimonial litigation continued for 7 years and then was dismissed. The wife's attorney brought an action for necessaries against the husband and the court held that the interim decision did not preclude this action, and that the attorney may seek his fees by way of this plenary action. (It may now be possible to seek attorney's fees in the dismissed action. See *O'Shea v. O'Shea*[7].)

5. **Attorney provides long-term competent services in wife's visitation petition in Family Court. Judge has no jurisdiction to award attorney's fees. What remedy?**

   In *Alter & Alter v. Friedman*,[8] the Family Court declined to award attorney's fees to the wife's

counsel for lack of authority. The wife's attorney then brought an action against the husband for these services which was allowed. Thus in a Family Court proceeding for visitation that has not been referred by Supreme Court and where the court has no authority to award attorney's fees, the attorney can seek attorney's fees by way of necessaries in a separate plenary action.

6. **Wife is treated by psychiatrist. Husband notifies the doctor after charges of $600 he won't be responsible. Wife continues for $23,000 worth of services. Is the husband off the hook?**

   In *Holtzman v. Stutz*,[9] the husband notified the wife's psychiatrist after she incurred services totaling $640 that he would not be responsible for any further services. The wife continued services to the extent of another $23,000. The psychiatrist sued for necessaries and the court held that although there would be no entitlement to recovery for breach of contract in view of the notice, recovery was, however, permitted on the basis of necessaries furnished to the wife.

7. **Wife obtains modest *pendente lite* support award. Her needs mandate spending more than awarded, claiming they are necessaries to their standard of living. Can she recover?**

   In *Gulin v. Cassese*,[10] a mother sought recovery of loans to her plaintiff daughter for support during the pendency of a proceeding where there was a support order. Summary judgment was granted on appeal against the recovery since the support order fixes the obligation. There can be no claim for necessaries after the date of commencement where the *pendente lite* order fixes support retroactive to then.[11]

8. **Wife properly claims necessaries in her divorce action and introduces an itemized list of expenditures placed in evidence subject to cross-examination that she would testify to if asked. Is this enough?**

   In *Zarenda v. Zarenda*,[12] the court recognized a claim for necessaries which are expended by a party before the issuance of a *pendente lite* order. The court, however, pointed out that the claim must be established by competent proof. A mere typewritten list was held insufficient to show necessaries or even if the purchases were bonafide (*Accord Schoenfeld v. Schoenfeld*[13]). In *DiBella v. DiBella*,[14] the wife's proof failed because she did not establish that the husband did not compensate her when he left her substantial amounts of cash and paid for various family needs after he abandoned her. In *Schneider v. Schneider*,[15] an award was granted for necessaries expended by the wife prior to the order granting *pendente lite* relief. The court held that she had sufficiently described and produced adequate documents on each item claimed, which included items spent on insurance premiums on the husband's life and interest on loans she was required to incur when the husband was not supporting her. Also in *Erdheim v. Erdheim*,[16] testimony established that the items claimed were necessary for the support and maintenance of the family in accordance with their previous lifestyle by way of cancelled checks documenting the expenditures and the nature of the purchases. The claim for expenditures is not a budgetary item, but requires proof that the actual expenditures had been incurred and paid.[17]

9. **Mother has order of child support. Child attends college and father refuses additional contributions. Child is now 21. Mother's attorney advises her she cannot recover in Family Court or in the previous divorce action.**

   This is short-sighted advice. As shown in the above cases, the mother may, under the proper circumstances, bring a plenary action for contributions to the educational expenses as necessaries up to age 21.

10. **Husband and wife separate. Each earn about the same. Wife sues for necessaries for children and herself.**

    Because of a parity of income, the wife must pay her own necessaries. As to the proven expenditures for the children or items deemed necessaries, the parents should share equally less a credit to the father for necessaries for the children he has paid.[18]

Procedure

There are basically two procedures where a recovery for necessaries are sought. One is an independent lawsuit showing the relationship as husband and wife, and the spouse's expenditures for necessaries. The pleadings must allege the other spouse's failure, though able, to contribute sufficient monies to maintain their standard of living, and that the expenditures were made with the expectation of reimbursement. The second type of procedure is the addition of a separate cause of action within the matrimonial action itself showing a failure by the spouse to supply sufficient necessaries for the other spouse to maintain the household and children in accordance with the standard of living previously enjoyed and the other spouse's ability.

The pleadings should specify the amount and the expectation of reimbursement.

The basic issue in these actions is to determine whether the items claimed and paid were indeed necessaries, and whether the proof has been adequate. It is clear that one person's luxuries are another person's necessities, and that the definition of necessaries is not necessarily limited to food, shelter, clothing, utilities, and health-related expenses, but depends in large part on the scale and standard of living enjoyed by the parties. Therefore what is proved to be a necessary requires showing the lifestyle of the claimant through the ability of an alert attorney.

Conclusion

Necessaries can be obtained in the matrimonial action, even though incurred before the action, provided a proper cause of action is added to the complaint.* The allegations must allege (a) a failure and refusal to supply adequate funds to maintain the family in accordance with their station in life, (b) the spouse's ability to provide such support, (c) that because of the denial the spouse was forced to spend monies from her own resources and/or borrowing and/or incurring debts, etc., and (d) that the spouse did so with the expectation of reimbursement. If there is no pending matrimonial action, a plenary suit for these necessaries can prevail.

It is not uncommon for a parent to be paying child support after the child has changed residences. In that event, a legitimate counterclaim or set-off can be obtained for necessaries spent after the child changed residences. It is recommended that each case be explored to determine the wisdom of adding a cause of action for necessaries or commencing a plenary suit. Overlooked is the remedy of obtaining attorney's fees by way of a plenary action where the Family Court does not have jurisdiction to award attorney's fees, such as in a visitation proceeding. However, once the *pendente lite* order is fixed and so long as it remains fixed, there can be no additional claims related to necessaries prior to trial. Finally, it is essential that documentary proof show the actual expenditures and that the expenditures were for necessaries based on the lifestyle of the parties.

With these resources in mind, the claim for necessaries should not be so often overlooked.

*Need not add cause of action for attorney's fees rendered before date of commencement because DRL § 237 deleted "during the pendency" of the action. *O'Shea v. 0'Shea*, 93 N.Y.2d 187 (1999). Decision probably would have been unnecessary had there been a separate cause of action for necessaries.

Endnotes

1. *Lichtman v. Grossbard*, 73 N.Y.2d 792, 795 (1988).
2. 104 A.D.2d 841 (2d Dep't 1984), *appeal denied,* 64 N.Y.2d 773.
3. 275 A.D.2d 404 (2d Dep't 2000).
4. 111 A.D.2d 511 (3d Dep't 1985).
5. 186 A.D.2d 171 (2d Dep't 1992).
6. 190 A.D.2d 773 (2d Dep't 1993).
7. 93 N.Y.2d 187 (1999).
8. 210 A.D.2d 105 (1st Dep't 1994).
9. 125 A.D.2d 640 (2d Dep't 1986).
10. 197 A.D.2d 608 (2d Dep't 1993).
11. *Scalchunes v. Scalchunes*, 134 A.D.2d 337 (2d Dep't 1987).
12. 237 A.D.2d 351 (2d Dep't 1997).
13. 168 A.D.2d 674 (2d Dep't 1990).
14. 140 A.D.2d 292 (2d Dep't 1988).
15. 156 A.D.2d 439 (2d Dep't 1989).
16. 119 A.D.2d 623 (2d Dep't 1986), *appeal denied,* 68 N.Y.2d 607 (1986).
17. *Richter v. Richter*, 131 A.D.2d 453 (2d Dep't 1987).
18. *Altman v. Altman*, 136 Misc. 2d 320 (S. Ct., Kings Co. 1987).

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"Involuntary Servitude" and the Matrimonial Attorney

By Lee Rosenberg

"Involuntary servitude" has been defined as "a condition of enforced compulsory service of one to another,"[1] where law or force "compels performance or a continuation of the service."[2] It is a "condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury or by the use or threat of coercion through law or the legal process."[3] Involuntary servitude was abolished along with slavery under the Thirteenth Amendment of the United States Constitution.[4] With no attempt at flippancy, the concept, however, appears to be alive and well in the practice of matrimonial law some 141 years after the passage of the Thirteenth Amendment. This occurs when trial courts refuse to permit counsel to withdraw from representation for non-payment of duly earned fees thereby forcing counsel to continue to provide services to the client, in effect, for free and with no ability to disengage from that representation.

Most recently, two decisions have been rendered on the issue of withdrawal for non-payment. One, on the appellate level in *Winters v. Winters*[5] granted withdrawal and one, on the trial level in *J.H.W. v. J.H.W.*[6] denied withdrawal. The decisions underscore a common dichotomy between trial and appellate views.[7] In *Winters,* the Second Department reversed the court below and recognized the attorney's right to withdraw where the client was more than $15,000 in arrears, citing among other cases to its 1987 decision in *Kay v. Kay*.[8] In *J.H.W.*, the Supreme Court also cited *Kay*, finding it inapplicable due to the granting of interim counsel fees in the instant matter, although the outstanding arrears totaled $126,830.67. The court suggested that moving counsel should instead move again for additional fees which would be warranted and further based the denial of relief (notwithstanding the economic burden to counsel) because the sole basis of the application was non-payment of fees deemed not to be "deliberate" and the client had no apparent ability to pay. The court also found that granting the application at that juncture would cause delay in the resolution of the case. Counsel is then left to perform additional work to secure some undetermined amount of additional counsel fees from the adverse spouse while already being owed over $126,000 and is forced to continue representation through trial.

The practice of matrimonial law in the State of New York is scrutinized and regulated perhaps greater than any other statewide field of law. Is this a solely subjective point of view? I think not. An entire section of "Matrimonial Rules" has been promulgated.[9] There is a specific disciplinary rule solely governing the sexual conduct of matrimonial attorneys.[10] The disciplinary rules also prohibit the matrimonial attorney from being retained on a contingent basis.[11] Most recently, the Miller Commission issued an extensive report on the state of matrimonial practice and procedure offering commentaries and many exemplary recommendations on how to correct the present ills of the system.[12] As practitioners in this field, we are well aware of the problems facing courts and litigants. We are cognizant of and subject to the emotional and psychological issues of our clients, more so than in other areas of practice. We are also subject to the pressures of litigation enhanced by those issues and to the pressures of being businesspeople in a profession rampant with stress.

"The practice of matrimonial law in the State of New York is scrutinized and regulated perhaps greater than any other statewide field of law."

The right to regulate the practice of law is clear.[13] The right of two parties, however, to freely enter into a contract which is not illegal or against public policy is fundamental.[14] The law has historically provided rights and remedies to those who are aggrieved by others who are in breach of those validly executed contracts. The special circumstances created by the emotional and psychological ramifications of divorce and custody litigation in particular gives the courts an understandable pause for concern. This author believes that most matrimonial attorneys share these concerns for our clients and their children and often seem to care far more for them and their plight than they do for us. That having been said, many courts feel that those of us who practice in this field do so with an implicit, if not explicit relinquishment of our right to extricate ourselves from our retainer agreements even when our client is in clear breach of his or her contract to pay for our professional services.

Under the Matrimonial Rules, the attorney must first provide a Statement of Client's Rights and Responsibilities[15] and must do so at the initial consultation and in advance of entering into the retainer agreement.[16] The Statement gives the potential client information as to what is entailed in the attorney-client relationship as well as what must and must not be in the retainer

agreement. The retainer itself must, under the Rules, contain thirteen (13) specific elements, the bulk of which relate to compensation.[17] In particular, item 12 requires the retainer agreement to set forth "(u)nder which circumstances the attorney might seek to withdraw from the case for non-payment of fees . . ." This item must also be reflected in the Statement of Client's Rights and Responsibilities. Given the mandatory inclusion of this provision in both the Statement *and* the retainer, it would seem incongruous that an attorney and client can properly define these circumstances in writing, yet have a court ignore the client's clear breach of those agreed terms. Failure to uphold a clear and unambiguous agreement in this regard then forces the attorney to work without compensation; potentially with no way to collect a properly earned fee or to secure payment going forward. The attorney remains locked into representation without the ability to withdraw from this involuntary servitude (barring some other conflict with the client which is more palatable to the court[18]) and left to bear the burdens of the practice, including the very real financial burdens, without commensurate compensation. Is anything less than involuntary servitude then created?

The ability of an attorney to withdraw from a case is governed by DR 2-110 which differentiates between mandatory withdrawal[19] and permissive withdrawal.[20] Mandatory withdrawal provisions *require* counsel to withdraw under the enumerated conditions, but may still call for court approval "if required by its rules." Permissive withdrawal gives counsel the *option* to withdraw, but also calls for court permission to do so, again, only *if* the rules of the tribunal requires such permission. DR 2-110(c)(1)(vi) specifically provides for permissive withdrawal if the client "(d)eliberately disregards an agreement or obligation to the lawyer as to expenses and fees." "Deliberate," however, does not appear to require malice, merely a repudiation of a reasonable fee arrangement[21] or refusal to pay reasonable fees.[22] New York State Bar Association Ethics Opinion 598[23] in fact indicates that a client's inability to pay *does not* necessarily constitute a non-deliberate act. The Opinion states,

> If the requirement of DR 2-110(C)(1)(f) that the client act "deliberately" in refusing to pay were construed to apply only to a purposeful and intentional choice on the client's part, the several competing factors implicated by a client's inability to pay would in effect be automatically resolved against withdrawal; in particular, the reasonableness of the attorney's expectation of and entitlement to payment for services would be eliminated as a consideration in determining the appropriateness of withdrawal. This interpretation would likely give rise to disputes concerning the extent to which the client is in fact unable to pay and the priorities by which the client manages the expenditure of limited resources. *Accordingly, we reject this interpretation*. We believe that a client "deliberately disregards an agreement or obligation" to pay legal fees whenever the failure is conscious rather than inadvertent, and is not de minimus in either amount or duration. A client's knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify the lawyer's withdrawal from employment under DR 2-110(C)(1)(F) or, where a tribunal's permission is required, application to the tribunal for permission to withdraw. This would be so *even where the failure results from inability to pay*. (emphasis added)

I submit that the Matrimonial Rules, by requiring written specification of the circumstances an attorney might elect to withdraw for non-payment of fees, provide tacit approval and imprimatur for permissive withdrawal so long as the terms themselves are not contractually improper. That the issue is one of fees as opposed, for example, to the client insisting that the lawyer "pursue a course of conduct which is illegal or prohibited under the disciplinary rules"[24] does not relegate the fee issue to a lesser position nor should it require greater scrutiny by the court. The Rule does not provide a gradation in this regard. In addition, the permissive withdrawal provisions of DR 2-110(c) do distinguish between permissive withdrawal for disregard of the fee agreement from permissive withdrawal which can be accomplished "without additional adverse effect on the interests of the client, making the client's interests irrelevant in the case of the fee issue, by the Rule's use of the disjunctive."[25] Also of note is that the required retainer provision at item 11 (which immediately precedes the item addressing non-payment) references court approval (for obtaining a security interest) while item 12 does not, nor does it reference DR 2-110. Several Appellate decisions, including *Winters*, recognize the right to withdraw for non-payment, separate and apart from the issue of other conflicts.[26] Trial courts, however, often faced with imminent trials and litigants who themselves have changed counsel on multiple occasions, frequently have different perspectives.

While the courts and the "system" itself must strike a balance between the plight of the litigants, the caseloads of an overwhelmed judiciary and the constitu-

tional rights of counsel, the appropriate call for increased and frequent interim fee awards[27] does not alter the short shrift given to the matrimonial attorney who must toil in unpaid servitude. The Disciplinary Rules have eliminated a contingency fee as a means of payment in matrimonial cases and the Matrimonial Rules have restricted the ability to obtain a security interest to secure the fee. Charging and retaining liens, as well as fee dispute arbitration, are only of use (and not always) once counsel is no longer of record. Hope that an adverse spouse complies with counsel fee awards does not alter the contractual obligations between attorney and client which is invariably spelled out in great detail in the retainer agreement. The ability to withdraw is the only remedy available to minimize the attorney's continued financial loss.

"The needs of the client and the desires of the system to clear its calendars should not permit involuntary servitude to be imposed upon the Matrimonial Bar."

The vast majority of seasoned matrimonial attorneys conduct themselves professionally and care deeply about their clients and the services they render. Many continue to represent clients, who become indebted to them, out of sheer belief in the client's cause and in consideration of their circumstances. This, however, is and should remain, a voluntary act of counsel. The needs of the client and the desires of the system to clear its calendars should not permit involuntary servitude to be imposed upon the Matrimonial Bar. There must be a better way. Requiring the client to abide by the same rules promulgated to protect *them* and be bound by their contractual obligations is only equitable and does not seem too much to ask.

Endnotes

1. *Hodges v. United States*, 203 U.S. 1 (1906).
2. *Clyatt v. United States*, 197 U.S. 207 (1905); *United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964).
3. *United States v. Kominski*, 487 U.S. 931 (1988).
4. Ratified in 1865, the Amendment itself provides an exception for criminal conviction. Exceptions have also been made in instances of military and jury service (*see Butler v. Perry*. 240 U.S. 328 (1916)).
5. __ A.D.2d __, (2d Dep't 2006), 2006 N.Y. Slip Op. 00350.
6. N.Y. L.J., Feb. 10, 2006, at 21, col. 3 (Sup Ct., NY County, Lobis, J.).
7. Interestingly, although the client in *Winters* did not oppose the application to withdraw, the trial court nevertheless denied counsel relief.
8. 245 A.D.2d 549 (2d Dep't 1987).
9. 22 N.Y.C.R.R. pt. 1400.
10. 22 N.Y.C.R.R. 1200.29-a.
11. DR 2-106(c)(2).
12. The Report, issued on February 6, 2006, may be viewed online at www.courts.state.ny.us/reports/matrimonialcommission report.
13. Judiciary Law 90; *Gair v. Peck*, 6 N.Y.2d 97 (1959); *People ex rel. Karlin v. Culkin*, 248 N.Y. 465 (1928).
14. United States Constitution, art. I, § 10., cl. 1.
15. 22 N.Y.C.R.R. 1400.2.
16. 22 N.Y.C.R.R. 1400.2 and DR 2-106(f).
17. 22 N.Y.C.R.R. 1400.3.
18. *J.H.W. v. J.H.W.*, *supra* note 6; *Klein v. Klein*, N.Y. L.J., Jan. 24, 2005, at 21, col. 3 (Sup Ct., Nassau County, Falanga, J.); *Frevola v. Frevola*, 260 A.D.2d 480 (2d Dep't 1999); *Cashden v. Cashden*, 243 A.D.2d 598 (2d Dep't 1997).
19. DR 2-110(b).
20. DR 2-110(c).
21. *Holmes v. Y.J.A. Realty Corp*., 128 A.D.2d 482 (1st Dep't 1987).
22. *Galvano v. Galvano*, 193 A.D.2d 779 (2d Dep't 1993).
23. N.Y. State Bar Assn. Comm. on Prof. Ethics Op. 598 [1989]; 1989 WL 252367.
24. DR 2-110(c)(1)(iii).
25. Counsel must, of course, attempt to avoid foreseeable prejudice to the rights of the client as defined in DR 2-110 (a)(2).
26. *Winters v. Winters*, __ A.D.2d __, (2d Dep't 2006), 2006 N.Y. Slip Op. 00350; *Kay v. Kay*, 245 A.D.2d 549 (2d Dep't 1987); *Galvano v. Galvano*, 193 A.D.2d 779 (2d Dep't 1993); Stephen *Eldridge Realty Corp v. Green*, 174 A.D.2d 564 (2d Dep't 1991); *Holmes v. Y.J.A. Realty Corp*., 128 A.D.2d 482 (1st Dep't 1987).
27. *Frankel v. Frankel*, 2 N.Y.3d 601 (2004).

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Father? What Father?[1] Parental Alienation and Its Effect on Children

By Chaim Steinberger

Part One

Preface

There is no doubt that every child needs "frequent and regular" contact with both parents to develop in a psychologically healthy manner.[2] A custodial parent is, therefore, obligated by law to ensure the continued relationship between the child and the non-custodial parent.[3] The Appellate Division, Second Department, explained why frequent contact is needed between them:

> Only [with frequent contact] may a non-custodial parent provide his child with the guidance and counsel youngsters require in their formative years. Only then may he be an available source of comfort and solace in times of his child's need. Only then may he share in the joy of watching his offspring grow to maturity and adulthood. . . . Indeed, so jealously do the courts guard the relationship between a non-custodial parent and his child that any interference with it by the custodial parent has been said to be "an act so inconsistent with the best interests of the children as to, per se, raise a strong probability that the [offending party] is unfit to act as custodial parent."
>
> . . . The decision to bear children, [moreover], entails serious obligations and among them is the duty to protect the child's relationship with both parents even in the event of a divorce. Hence, a custodial parent may be properly called upon to make certain sacrifices to ensure the right of the child to the benefits of visitation with the non-custodial parent. The search, therefore, is for a reasonable accommodation of the rights and needs of all concerned, with appropriate consideration given to the good faith of the parties in respecting each other's parental rights.[4]

Nevertheless, a twelve-year study commissioned by the Family Law Section of the American Bar Association of over 1,000 divorces found that "parental alienation," the programming of a child against the other parent, occurs regularly, sixty percent (60%) of the time, and sporadically another twenty percent.[5]

"[A] twelve-year study commissioned by the Family Law Section of the American Bar Association of over 1,000 divorces found that 'parental alienation,' the programming of a child against the other parent, occurs regularly, sixty percent (60%) of the time, and sporadically another twenty percent."

New York courts have in the past "zealously protected" the non-custodial parent's visitation rights against interference by the custodial parent.[6] Custodial parents seeking to exclude the other parent have, therefore, taken to socially and psychologically turning the child away from the other parent so that the child, and not the custodial parent, refuses the visitation. This type of "alienation" has been characterized by the Second Department as a "subtle and insidious" form of visitation interference that may cause even "greater and more permanent damage to the emotional psyche of a child" than the garden variety visitation interference.[7]

This article will summarize the leading literature in the field of alienation. Part One will review the different techniques employed by alienating parents to marginalize and exclude the other parent from their children's lives. It will set out the most common symptoms of alienation so that the reader will be more attuned to recognize and deal with potential alienation, and counsel clients who are effected by it. Finally, it will describe the profound and enduring devastating psychological, emotional and social consequences alienation has on its primary victims—the children.

Part Two of the article will appear in a subsequent issue and describe the effective treatments for alienation, and how New York courts have traditionally and recently dealt with the issue. Because alienation has such profound inter-generational consequences, judges and lawyers must be ever-vigilant to detect and deal with alienation, no matter the guise by which it is concealed.

Parental Alienation

Parental alienation is the turning of a child against a parent by the other parent.[8] It is a form of social and psychological brainwashing and is accomplished by one parent, the "alienating" parent, indoctrinating the child against the other, "target," parent.[9] Over time, it destroys the bonds of love between the parent and child.[10] When successful, it is so effective that the children themselves become unwitting accomplices and turn against the target parent.[11] The children then further vilify the target parent on their own, even without the further urging of the alienating parent.[12] When a child becomes an unwitting ally to the alienating parent, the child is said by some to have become a victim of Parental Alienation Syndrome ("PAS").[13] Psychologist Dr. Ira Turkat of the University of Florida College of Medicine, summarizes it this way:

> In a nutshell, PAS occurs when one parent campaigns successfully to manipulate his or her children to despise the other parent despite the absence of legitimate reasons for the children to harbor such animosity. The effort to poison the relationship between the offspring and the targeted parent may be extensive and at times, relentless.[14]

In *J.F. v. L.F.*, 181 Misc. 2d 722, 694 N.Y.S.2d 592 (Family Court, Westchester Co. 1999), Judge Edlitz characterized Parental Alienation Syndrome this way:

> Parental Alienation Syndrome occurs when one parent uses his/her influence with his/her child to undermine the relationship between the child and the other parent. It typically arises when the parents are engaged in divorce proceedings or a custody dispute. (*See, People v. Loomis*, 172 Misc. 2d 265, 267.) . . . [It is described] as a disturbance in which children are not merely systematically and consciously "brainwashed" but are also subconsciously and unconsciously "programmed" by one parent against the other.[15]

Dr. Janet Johnston described the historical recognition of this phenomenon:

> The phenomenon of a child's strident rejection of one parent, generally accompanied by strong resistance or refusal to visit or have anything to do with that parent, was first recognized by Wallerstein and Kelly (1976, 1980) in their seminal study on children of divorce. They described it as an "unholy alliance" between an angry parent and an older child or adolescent. Later, [Dr. Richard] Gardner (1987, 1998) coined the label "parental alienation syndrome" (PAS) to describe a diagnosable disorder in a child in the context of a custody dispute, and it is this entity which has generated both enthusiastic endorsement and strong negative response.[16]

The touchstone of Parental Alienation Syndrome is where a child's anger or animosity is disproportionate with the reasons given by the child for that anger or animosity. Dr. Gardner's formulation of PAS includes several components:

> The first is a child who exhibits excessive hatred of a target parent (an animosity that often extends to the parent's extended family), makes weak, frivolous and absurd complaints, justifies the stance by quoting "borrowed scenarios," and lacks any ambivalence or guilt towards the hated parent. The second component is a vindictive parent who is involved in consciously or unconsciously brainwashing the child into this indoctrinated stance; and third, are false allegations of abuse that are generated by the alienating parent and child.[17]

Dr. Johnston herself, however, suggested a slightly different focus when analyzing children who are estranged from the non-custodial parent.

Dr. Johnston's Formulation

Dr. Janet R. Johnston was part of a task force convened to study the problem of children who were alienated from one of their divorcing parents.[18] She presented her article at the International Conference on Supervised Visitation.[19]

Dr. Johnston disagreed to some extent with Dr. Gardner. She believed that the focal point of the inquiry should be the child and not the alienating parent.[20] Her formulation, therefore, is simpler: "An alienated child is defined as one who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent."[21]

> Although there may be a "kernel of truth" to the child's complaints and allegations about the rejected parent, the child's grossly negative views and feelings are significantly distorted and

> exaggerated reactions. Thus, this unusual development is a pathological response. It is a severe distortion on the child's part of the previous parent-child relationship. These youngsters go far beyond an alignment in the intensity, breadth, and ferocity of their behaviors toward the parent they are rejecting. They are responding to complex and frightening dynamics within the divorce process itself, to an array of parental behaviors, and as a result of their own early developmental vulnerabilities which have rendered them susceptible. While the profound alienation from a parent more often occurs in high conflict custody disputes, it is believed to be an infrequent occurrence among the larger population of divorcing children.[22]

The success of the alienation *programme* is determined by the personalities and vulnerabilities of the child and the length and intensity of the indoctrination.[23] "[T]he intensity and longevity of the alienating processes, when combined with other important parent and child variables . . . might create exponentially unbearable pressures on the child, resulting in alienation from a parent."[24]

Methods of Alienation

Alienating parents employ many different techniques to program their children away from the target parent. Many of them are apparent. Others, though insidious, are just as pernicious. Some methods are intentional, deliberate and willful, while others might even be utilized subconsciously by the alienating parent.

One of the "basic techniques" alienating parents use is to send the message, either overtly or subtly, that the target parent is insignificant or irrelevant to the child.[25] This may be done by ignoring the target parent at social functions and elsewhere, or by denying or refusing to acknowledge his existence.[26] By choosing to "never talk about the other parent," a subtle message is sent that the other parent is insignificant.[27]

The target parent's insignificance can also be signaled by using body language to show that he is unworthy or insignificant.[28] The alienating parent might avoid eye contact with the target, use a hand gesture that is dismissive or indicates negativity, look away when he is present, or, when the child raises the other parent in conversation, abruptly terminate the conversation.[29] Children are attuned to these subtle signals and interestingly enough, often adopt them and "mirror [these] physical pattern[s] in counseling or other evaluation sessions."[30]

Another common technique is the destruction or desecration of photographs of the target, or otherwise not permitting the child to keep such photographs or mementos of the other parent.[31]

The alienating parent may exclude the target parent by not relaying messages that are sent by the target to the children.[32] They might "forget" telephone messages left for the children or "lose" the letters or postcards sent them.[33] She might also "forget" to relay holiday greetings or even lie and tell the children, "Your father hasn't called."[34] In addition to excluding the target, the alienating parent often intends to make the children feel unwanted so that they develop hostile and distant feelings towards the target.[35]

Another insidious but powerful method of excluding the target is for the alienating parent to refuse to acknowledge any positive experiences the children have with him.[36] By not responding "to the excitement and joy" the children express about the other parent and acting indifferently to their excitement, the alienating parent effectively marginalizes the target. "This 'ho-hum' approach has the effect of numbing the children from sharing [their positive] experiences with the programming parent."[37]

Ironically, when the children later learn to suppress their happiness and joy, the alienating parent then claims that the children are "sad" when they return from being with the target:

> Interestingly, the programmer may then claim that the children are not benefitting from contact with the other parent because "they are gloomy when they return." The gloom may be a result of the children giving the brainwashing parent what he or she wants—an unhappy child. This accounts for the opposing views divorced parents hold concerning the time the children spend with the other. One parent says, "I think they had a great time." The other says (sarcastically), "Sure they did." It is [also] common to find children expressing guilt about enjoying the target parent as a result of this nonsupport from the programming/brainwashing parent.[38]

A parent may also subtly, yet powerfully, attack the target by attacking his family, career, living arrangements, travel, activities, associates or any other circumstance identified with him.[39] Attacking the target indirectly in this way also provides the alienating parent with "cover" to deny the attack.[40] The child may also be

forced to take sides in the battle between the parents as issues are raised and discussed with the child that should only be discussed with the other parent.[41] Children understand the undercurrents of parents' statements. A child, therefore, is likely to understand the statement, "Our summer vacation would really be fun if we had more time," to mean that the target parent is preventing the child from having a fun vacation with her.[42]

Another method routinely used by alienating parents is to manipulate or rearrange the child's time schedules so that the child "does not have time" to see the other parent.[43] "The manipulation of time becomes the *prime weapon* in the hands of the alienator, who uses it to structure, occupy, and usurp the child's time in order to prevent 'contaminating' contact with the lost parent."[44] This elimination of or decrease in contact, prevents the target parent from maintaining his bond with the child:

> Situations in which contact between the non-custodial parent and the child is diminished enhance the viability of successful programming. If a child does not have much contact with one parent, he or she is not afforded the experiences needed to contradict the programme. . . . [Deprogramming] can best be done through increased experience and physical contact between the target and child.[45]

An alienating parent may also exclude the target parent by failing to inform him of important events in the child's life:

> Not informing the other parent of school dates, plays, conferences, ceremonies, awards, sporting events, and the like is a way of signifying to the children that the other parent lacks importance. . . .
>
> Children are deeply affected by the presence or absence of parents at educational, social and religious functions. After a time, they develop the veneer of an "I don't care" attitude. After interviewing 200 children between the ages of four and eighteen years on this issue, it was noted that virtually every child desired both parents to be present at as many of these functions as possible. Children would say, "Even if my dad can't make it, my mother should have told him." . . . Clearly, children are often aware that one parent does not participate in social functions due to the aggressive nature of the other parent. Children know this, even in cases where they say that the aggressive parent is positive and constructive in other ways.
>
> In more extreme cases, the brainwashing parent actually obstructs the flow of information to the target parent by not supplying schools with his or her proper name and address. One of the most common problems in custody-conflicted families is that the mother places the stepfather on the educational records as the father of record. In a review of our cases, we found that mothers were five times more likely to participate in this behavior than fathers. Fathers did not appear to have the same social need to present the stepmother as the mother, whereas mothers had a very strong need to present stepfathers as "the" father. As part of this pattern, mothers seem less comfortable in attending social functions when the birth father is present. Fathers on the other hand, seem to have a greater sense of comfort in attending social functions when the birth mother *is* present.[46]

Denigration may be used by making moral judgments against the target parent's values, lifestyle, choice of friends, career or financial or relational successes or failures in life.[47] These criticisms are often:

> insidious, occurring over a period of time with different degrees of intensity but always powerful. Like the wearing away of a stone constantly assaulted by waves, the child's perception of the target parent changes from its original, more positive, view finally conforming to the programming parent's opinions and sentiments.
>
> In such cases, the effect is almost irreversible. These children are no longer able to accept both parents as equally good. . . . These beliefs become so ingrained that the parent who created them no longer has to promote the desired perceptions. They have been given life within the child's own mind. So much so, that the parent may honestly report that he or she is not actively doing anything by word or deed to thwart the target parent's relationship with the child.[48]

Even without deliberately intending to interfere with the other parent's relationship, a parent whose view of the other is "colored," might naturally "selectively perceive and distort" the child's relationship with the non-custodial parent.[49] Because the parent's view of the child's interaction with the other parent is distorted, the parent may unintentionally distort the child's view:

> [I]t is common for the couple's expressed disappointments with each other to be mirrored in their concerns for how the other parent will treat the child. For example, if a woman has experienced her ex-spouse as emotionally neglectful, she expects him to be neglectful of her child. If the child then comes back upset or depressed after spending time with his dad, the mother attributes the difficulty solely to the father's lack of care. At the same time, other, more positive aspects of the father-child relationship are ignored or denied (i.e., the fact that this father and child have a lot of fun together and that the child feels a painful loss each time they part). In responding sympathetically to her child on his return home, the mother incorrectly interprets and then amplifies the child's sadness and anxiety. As a result, the child's emerging reality testing about his own feelings and ideas are ever so slightly and insidiously distorted. Furthermore, the mother's own anxiety and distress about her child's sadness are intensified because she is not able to communicate and clarify with her ex-husband about why the child might be upset. She is left feeling helpless about protecting her child.[50]

An alienating parent may also attempt to characterize normal differences with the target parent as "good vs. bad" or "right vs. wrong."[51] Doing so places the children in the middle of the battle and requires them to choose sides in their parents' conflict.[52]

A parent might also constantly evoke and remind the child of a relatively insignificant early traumatic incident.[53] Though the incident may have occurred, it would otherwise likely have been forgotten or not have a strong impact on the child.[54] By constantly evoking and emphasizing the incident, the parent imbues it with greater significance and uses it to a tactical advantage to create "a family legend that can contribute to child alienation [and] estrangement."[55] "In these cases, there is a mix of realistic and unrealistic fear, anger and avoidance that needs to be distinguished."[56] "Sometimes, earlier disciplinary interactions involving angry or confrontative (but not abusive) behaviors by the rejected parent are repackaged as confirmation of violence toward the child."[57]

An alienating parent might become "emotionally abandoning, rejecting, or even vengeful" to a child who expresses his or "her own individual needs" (who "individuates") or who expresses a desire "to move toward the other parent."[58]

> When 5-year-old Sally expressed a wish to call her father on the phone and tell him how she learned to jump rope that day, her mother withdrew into sullen anger. Inexplicably to Sally, her mother was "too tired" to read her [the] usual bedtime story that evening.[59]

After a while, however, the child figures out that contact with the target parent produces this reaction with the custodial parent.[60] Doctors Johnston and Roseby point out that in such cases, because "the punishing message is typically unspoken [it] is . . . impossible to be spoken about, which makes it even more pernicious" and difficult to detect.[61]

> Sometimes, when a child shares stories of happy times with the other parent, the discussions will be met with anger and negativity or apathy. Although initially the reaction is confusing, a child soon absorbs the message: "I don't like it when I hear that you love your mother, or enjoy your time with her. I don't like you for loving her."
>
> After the rule within the message is learned, it becomes too risky [for the child] to share any more positive or happy scenarios. Herein lies the beginning of the programmer's power. The child knows that he or she is not likely to lose the nonprogramming parent's love, because no matter what, it has been proved to be unconditional. However, the child has observed and has been the recipient of the conditional love of the programmer and must move to cement that love through abject compliance—even to his or her own detriment.[62]

"Sometimes the mere presence of the child, or the child's physical resemblance to the ex-spouse, produces a toxic, phobic reaction in the [alienating] parent."[63] Similarly, if the child acts like the target parent, the custodial parent may feel "resentment, even rage, toward the child, who at that moment is undifferentiated from the hated or feared ex-partner."[64]

Children learn early on to avoid negative consequences.[65] They also avoid situations which might be somewhat similar, even if only in their minds, to those that gave rise to the negative consequences.[66] Thus, "[a] youngster who associates his father's arrival to pick him up for visits with another parental fight [may become] immobilized when his father calls him on the phone."[67]

Similarly, a child who constantly hears disparaging remarks about a parent, may lose confidence in and love for that parent and feel intolerably confused:

> Extremely negative views of the rejected parent may be freely, angrily and repeatedly expressed to the child by the [parent with whom the child is "aligned":] "She never wanted you," "I was your *real* parent," "You call me if your dad touches you anywhere," "I'm sure he'll be late as usual." The effect of the continued drumbeat of negative evaluation of the parent is to erode the child's confidence in and love for the rejected parent and to create intolerable confusion. These evaluations might also be expressed indirectly, covertly, or unconsciously and might include innuendoes of sexual or child abuse or implications that the parent is dangerous in other ways. Whether such parents are aware of the negative impact on the child, these behaviors of the aligned parent (and his or her supporters) constitute *emotional abuse* of the child.[68]

Alienating parents may also conceal their manipulations by claiming to permit the child to decide whether the visitation should occur. Of course the alienating parent has already, consciously or subconsciously, indicated to the child what the "correct" choice should be:

> Visitation with a targeted parent is often sabotaged with subtle PAS programming. For example, a child in a PAS environment becomes attuned to the alienating parent's desire for the child to despise the other parent. To secure acceptance, the child may make statements that suggest an uncertainty about visiting with the targeted parent or a lack of desire to do so; the alienator may then act in a "neutral" manner by instructing the child to believe that it is the child's decision whether or not to visit with the other parent. This "neutrality maneuver" serves to further alienate the targeted parent by "passively" discouraging the child from participating in visitation. Under these circumstances, the child is likely to learn quickly to avoid open expressions of interest in visiting the "hated" parent.[69]

Children at different ages may have different motivations for refusing visitation with the non-custodial parent.[70] "For example, a four-year old might resist visitation because of difficulty separating from a primary caretaker, [w]hereas a seven-year old who refuses to visit his other parent may fear retaliation and abandonment by the aligned parent, [and] a preadolescent might be choosing a stance that looks like alienation as a way of coping with an unbearable loyalty conflict in a chronically conflicted divorce."[71]

"Anxious, fearful, and passive children lack the resiliency to withstand the intense pressures of the custody battle and the aligned parents' alienating behaviors. It might be psychologically easier for them to choose a side to avoid crippling anxiety. Children with poor reality testing are more likely to be vulnerable."[72] "In addition, poor self-esteem makes children especially susceptible to promises of enduring love, especially when a parent has been rejecting and ambivalent toward the child."[73] Children who are insightful, clear thinking, and morally developed can often maintain a greater balance through the high-conflict divorce.[74] "Although pressured by alienating processes and parents, they can analyze their parents' behaviors and the nature of their parent-child relationships and, despite their anger and sadness . . . stay connected to each parent."[75]

Several factors increase the vulnerability of children to alienation. "Those children who are very dependent on the aligned parent, either emotionally or physically, are . . . more likely to respond to alienating processes and behaviors. Some of these youngsters have a history of being conditionally loved and erratically rejected by the aligned parent, and the child's complete rejection of the other parent might offer a long-sought opportunity to achieve total acceptance and unconditional love."[76]

"Most often, aligned parents' behaviors reflect several organizing beliefs that might not be consciously spiteful and vindictive but nevertheless are potentially very damaging to the child's relationship with the other parent. As a consequence of their own deep psychological issues, the aligned parent can harbor deep distrust and fear of the ex-spouse and be absolutely convinced that he or she is at best irrelevant and at worst a pernicious influence on the child. Consequently, a first major organizing belief is that their child does not need the other parent in their lives. Although aligned parents might insist that the child is free to visit, the rejected

parent's attempts to visit or contact their child frequently are seen as harassment. Phone calls, messages, and/or letters often are not passed on to the child. Information about school, medical, athletic, or special events are not provided to the rejected parent, in effect completely shutting that parent out of the child's life. In the most extreme cases, all references to the rejected parent are removed from the residence, including pictures (which might be torn apart in front of the child to exclude that parent). In such situations, most children quickly learn not to speak of the rejected parent. In response to requests for access by the rejected parent, the aligned parent strongly supports their angry child's `right to make their own decision' about whether they will visit.'"[77]

"[A] brainwasher [who] knows that the target parent is a homebody and that the child enjoys activities, [may] go out of the way to plan exciting adventures both on their time and during the time when the child is with the target parent. Rather than protecting the parent-child relationship and encouraging contact, the brainwasher makes sure that the child hears a detailed accounting of what he or she missed out on. If these scenarios recur, most children come to resent the `sacrifice' they are making by spending time with the target parent. . . . The result is a child who no longer desires to have continuing contact with a parent unless entertainment is promised."[78]

A brainwashing parent may also induce fear and anxiety in a child by raising questions about any one of the child's many "root . . . childhood fears."[79] Children are very concerned for their safety and security and fear that they will not be taken care of.[80] By implying that the target parent will not care about or protect a child, the alienating parent can create "disequilibrium between the [target] parent and child."[81]

A brainwashing parent may also attempt to "elevate" a new spouse to replace the child's biological parent.[82] One such parent, "threw a glass of water in the child's face whenever she refused to call the stepparent 'Daddy.'"[83]

Doctors Kelly and Johnston point out that "there is often significant pathology and anger in the parent encouraging the alienation of the child."[84] An average parent, unencumbered with emotional shortcomings, would "seek different avenues and more rational means of protecting their child," "[e]ven where there [has been a] history of child abuse," rather than alienating the child from that parent.[85] Other doctors have similarly observed that the typical alienating parent has a personality disorder.[86] "[T]he alienating parent is one who uses denial to cope with emotional pain, lacks a capacity for intimacy, is overly suspicious and distrustful, has a strong sense of entitlement, and has little anxiety or self-insight."[87]

Symptoms of Alienation

A child does not naturally cut off contact from a parent who displays love and affection for the child. Thus, when a child avoids contact with a parent, the reason for it must be understood.

The greatest indicator of alienation is an adversity by a child to a parent that is disproportionate to the reasons given by the child for it.[88] Thus, the first question to ask when confronted with a possible alienation situation is whether the child's claimed reasons for not seeing the parent can reasonably justify the break-off of contact between them. If the reasons cannot justify the lack of contact, there is a significant likelihood that alienation has occurred.

Another indicator of alienation is a child who shows affection to the target parent when the other parent is absent, but acts indifferently or defiantly to the target when in the presence of the other parent.[89] Such an "inconsistent `chameleon' quality is a diagnostic hallmark of [alienation]."[90]

Confusion or ideas that are inconsistent with the child's observations are also common indicators of alienation,[91] as is a child who has repeatedly received negative information about the non-custodial parent.[92] A child who portrays a parent as "immoral, cheap, irresponsible or unloving, or uses any other globally negative descriptive terminology" has likely been subjected to alienation.[93] Similarly, "collusion or [a] one-sided alliance" by the child with one parent is a signal of potential alienation.[94]

> The child who works simultaneously with one parent and against the other is typically operating in collusion with the brainwasher and will be unable to maintain a positive relationship with the target parent. These children closely identify with the brainwasher and behave like a spy or conduit of information. They view the broken family in terms of "us" versus "him or her." The more entrenched the identification, the less able the child is to accept positive gestures or sentiments from the target parent. Perceiving the target parent as acting against "us," any positive features that the target parent possesses are reinterpreted as intended to inflict hurt. The most benign deed, such as giving the child a present, is analyzed for scurrilous motives and becomes a "buy-off" or prompts a statement such as, "Big deal—where's the support check?"[95]

Other symptoms which might indicate alienation include an unnatural rigidity within a child or a maturity level "that noticeably veers away from the familiar for that particular child."[96] Similarly, a child who "sits in lofty moral judgment of a parent has usually been programmed to believe that [the target] parent is leading an immoral life."[97] A child who responds to parental discipline by threatening, "If you—scream/punish/hit/give me a curfew/make me sit here and do homework/make me do housework/cook/take away my car—I'll tell Mom [or the judge]" has most likely been similarly programmed.[98] Confusing the child as to a birth parent's importance *vis à vis* a stepparent or significant other, can signal a "programme" and an attempt to "elevate" a new family to replace the old.[99]

Target parents are often criticized no matter what they do.[100] "Even though the brainwasher may be doing the same thing with the child as the target parent, . . . the target parent's behavior . . . is [often portrayed as] fraught with foreboding problems for the child's future."[101]

Though parents frequently "report that a child is afraid to go off with the other parent . . . some fears have no connection to reality and are irrational fears that evolve from programming and brainwashing or from the emotional atmosphere created by a fearful parent."[102]

Effects of Alienation

The estrangement of a child from one of its parents may be cataclysmic to the child's long-term development and well being. It is likely to have catastrophic consequences for that child throughout the child's life and, as will be shown, is likely to effect future generations as well.

A Child's General Need for Both Parents and the Anguish of War

Every child needs both parents to develop properly.[103] That is because throughout our lives we subconsciously base all of our expectations and model all of our relationships on the relationships we had with both of our parents.[104] The elimination of a parent from a child's life, therefore, has life-long consequences for the child.[105] "For those children who remain with the alienating parent and lose contact with the targeted parent, the losses are enormous."[106]

Even when there is no alienation, psychologists have noted that long, intense divorce battles cause severe psychological problems for children.[107] "[M]arital and divorce conflict that focuses on the child, and high intensity and overtly hostile marital conflict, are well established predictors of psychological adjustment problems in children."[108]

> Children are more at risk to be pulled into the high-conflict divorce as major players and Greek chorus. . . . The intensity of the conflict, its continued burdensome presence for one or more years, the polarization of extended family and larger community, and the failure of parents to address their children's needs combine to create intolerable anguish, tension and anger for children. One psychological resolution for the child is to diminish the feeling of being torn apart by rejecting the "bad" parent and ceasing all contact.[109]

"In situations where parents are litigating custody, children who are aware of the battle are almost always caught up in the escalation, and feel powerless to hinder it. One day they tell Mom what she wants to hear; the next day they do the same with Dad. Most children do not want to make . . . custody decisions, intuitively understanding that to do so could carry the burden of dreadful rejection of one parent or the other."[110]

"The loss [to a child of the relationship with a parent] cannot be undone. Childhood cannot be recaptured. Gone forever is that sense of history, intimacy, lost input of values and morals, self-awareness through knowing one's beginnings, love, contact with extended family, and much more. Virtually no child possesses the ability to protect him- or herself against such an undignified and total loss."[111]

Children deprived of a parent may, as a result, suffer loss, guilt, confusion, fear, powerlessness, identity crisis, anger, withdrawal, anxiety, a retreat into a fantasy world, hopelessness, inadequacy, fears, phobias, depression, suicidal ideation, sleeping and eating disorders, academic problems, withdrawal from one or both parents, drug abuse, peer group problems, obsessive-compulsive behavior, motor tension (tics, fidgeting or restlessness), psychosomatic disorders, damaged sexual identity and other problems.[112] Some children will "act in" rather than act out and, internalizing their emotions, "develop psychogenic constipation, headaches or stomachaches or suffer from emotional withdrawal, experience academic or social problems at school, or become severely depressed."[113]

Anxiety

By inculcating a message that children are not permitted to love both parents, alienating parents make children feel anxious each time "they wish to express love to the target parent. They might feel anxiety over the smallest gesture, such as making a Father's Day card in school but not being able to present it to the [other] parent."[114]

Hiding Affection

A child who senses that a parent disapproves of the other, might show affection to the target parent only when alone with him or her.[115] When the other parent is present the child may act indifferently or even in a hostile manner to the target parent.[116] Thrust into this "who[m] do I betray?" situation "creates the passageway for the possibility of actual delusional thinking" by the child.[117]

> Leaving a child in this pathological environment is most damaging and, under these circumstances, a child may many times become anxious, isolated and depressed. In time, if proper intervention is not forthcoming, the child develops a deep and profound sense of self-hatred and shame for condemning the other parent. These children tend to become despondent, withdrawn, and develop psychopathic manipulative characteristics which may be carried into adulthood.[118]

Making Sense of the World

One of the core concerns for children, generally, is to learn to determine what is true and what is false.[119] "Ordinarily, children use their parents as [a] social reference for what is safe and trustworthy."[120] Children whose parents are battling however, "have the profound dilemma of making sense out of vastly contradictory views communicated through the hostility, fear and distrust of their opposing parents (Who is safe? Who is dangerous? Whom can you trust?)."[121] This leaves them confused and anxious and prevents their normal development.[122]

Moreover, by necessity these children must stay attuned to the "emotional states and needs of their custodial parent."[123] Imparting such great importance to a parent's emotional needs reduces the children's sense of self-importance in relation to others.[124]

Lack of External Resources

Children may "withdraw into themselves as they are forced to close off from the target parent."[125] They may also retreat into their own secret fantasy world in a desperate effort to maintain the much-needed contact with the rejected parent.[126] As a result, youngsters who have survived their parents' intense battles:

> are likely to be hypervigilant and distrusting of others, and do not expect the world to be a cooperative or protective place. Unlike typically developing children, who tend to turn to others, especially adults for their needs, these children turn inward, unto themselves, to figure out how to solve problems and interpret social reality. Unfortunately, their inner resources are likely to be meager, because these children defend against the double-binding inconsistency of their most significant relationships by avoiding complexity, ambiguity, and spontaneity. . . . The bind is that, as children turn inward, they must rely on an increasingly impoverished and distorted understanding of the nature of reality. Paradoxically, their path to safety leads them further and further away from new self-realizing possibilities.[127]

Self-Blame

Children typically feel responsible for their parents' disputes and divorce.[128] Yet they feel powerless to do anything about it.[129] These contradictory feelings of super-importance but inadequacy and powerlessness can be psychologically devastating to children:

> "If I were dead, they wouldn't need to fight anymore" is a tragically self-blaming, depressive fantasy that is not uncommon. Feelings of great power and importance are juxtaposed, therefore, with paradoxical feelings of being overwhelmingly inadequate in the face of the parents' intractable anger. Hence the child's sense of agency, competence, or power is undermined. It follows that these children often have trouble directly asserting their own needs and wishes. Instead, they are likely to maintain an underlying oppositional and alienated stance masked by a compliant eagerness to please others. This facade can be maintained only until the children become overwhelmed by their own neediness, at which time they regress or explode into irritable-distressed or demanding-aggressive behavior.[130]

Identification with the Rejected Parent

All children contain characteristics of each of their parents. A child who rejects a parent, therefore, necessarily has to reject and loathe that part of him- or herself that is similar to the rejected parent.[131] Such a child is necessarily "vulnerable to self-loathing, self-rejection, and confusion regarding sex-role identification."[132] The more the child resembles the rejected parent, the more the self-loathing is intensified.[133]

Additionally, a child who sees one parent rejected by the other, likely fears being rejected him- or herself—for possessing the same characteristics as the rejected

parent.[134] "Sensing that the programmer/brainwasher detests the other parent, the child fears that she or he may be similarly detestable."[135] "This scenario is especially difficult for those children who do not spend much time with the target parent whom they may be most like. Isolated from the target, these children can suffer through childhood or adolescence with lonely feelings of rejection over nothing within their power to control."[136]

> The mere witnessing of one parent's antipathy toward the other can ultimately lead to self-repudiation by biological association. It is through mothers and fathers that boys and girls form masculine and feminine identities. Children should feel as though they are accepted and valued by both the same- and opposite-sex parents. Parents can only provide this integration of personality to their children by actively participating in their upbringing. Without self-acceptance derived from parental acceptance of the child, personality conflicts and social-adjustment disorders often arise, persisting into adulthood.[137]

Hopelessness and Inadequacy

In other ways, too, the alienated child is made to feel hopeless and inadequate:

> Inability to cope with such emotionally overwhelming situations often induce feelings of powerlessness, hopelessness, and inadequacy that can spill over into other areas of life. If a child has the desire to enjoy a positive relationship with a target parent and there is ongoing programming and brainwashing, what is the child learning? One lesson is that those who supposedly are there to love and protect the child are not fulfilling those responsibilities and that they are unresponsive to the child's needs.
>
> Confusion is compounded when these children observe peers with separated or divorced parents who work cooperatively and in a mutually respectful manner in their children's best interests. [As o]ne nine-year-old enviously asked during a home visit on a custody case, "Why can't my mom and dad just work things out on the phone like my stepsisters' parents instead of just yelling at each other and hanging up?"[138]

Rigid View of the World

In order to remain aligned with one parent and to reject the other, the child must believe that one is "pure" and "good" while the other is "evil" and "bad."[139] Such a rigid view of the world is unrealistic and prevents the child from accepting the good and bad, the pure and evil, within him- or herself.[140] Children must learn to acknowledge, tolerate and integrate "the `bad' parent with the `good' into a more realistic view of each parent (whole object representation) and, at the same time, form a cohesive, integrated sense of the `good' and the `bad' in him- or herself (self-constancy)."[141] This "is made extremely difficult" when the child has been alienated from one of its parents.[142]

> When children maintain this kind of rigid separation between good and bad, they are bound to strive for an impossible perfection in themselves and other people. Each failure represents an intolerable fall from grace. This most fundamental failure (i.e., to achieve self- and object constancy) is reflected in the pervasive absence of basic trust that testing reveals in these children. It is not difficult to imagine that these polarized shifts from perfectly good to perfectly bad make trusting oneself or others, from moment to moment, a virtually impossible task.[143]

Although the child seems to function well enough in certain situations, this merely masks the deep psychological, tumultuous issues percolating within them:

> It is important to note that some alienated children—although they present as very angry, distraught, and obsessively fixated on the hated parent in the therapist's or evaluator's office—appear to function adequately in other settings removed from the custody battle. They might retain their school performance, might continue to excel in musical or athletic activities, and at least superficially seem reasonably well adjusted. A closer look at their interpersonal relationships, however, often reveals difficulties. Alienated children's black-and-white, often harshly strident views and feelings are usually reflected in dealings with their peers as well as those in authority. However, it is in the rejected parents' home that the child's behavior is severely problematic and disturbed. They might destroy property; act in obnoxious, even bizarre ways; and treat

these parents in public with obvious loathing, scorn, and verbal abuse.[144]

Repression

To cope with their parents' ongoing conflict, children may repress their own emotions.[145] Such repression inhibits the child's capacity to perceive, understand and tolerate his or her own feelings.[146] It also inhibits the child's ability to empathize with the feelings of others. This further inhibits the child's social development and "disrupts the achievement of empathy [which is] the basis for interpersonal morality."[147]

Parental Dependency

To alleviate the feeling of loss caused by the breakup of the marriage, a parent might cling dependently to the child.[148] The child, sensing the parent's emotional need, might in turn cling to that parent and avoid visitation with the other parent.[149] When the child leaves for visitation, the parent may experience a renewed threat of abandonment by the child.[150] This provokes "intense anxiety and covert hostility toward the child."[151] "Not surprisingly, these children themselves then become ambivalent about separating [from the custodial parent]. Alternatively, some children . . . react as if the parent's very survival depends on their constant vigilance and caretaking."[152] Neither of these reactions are healthy for the child.[153]

Secondary Rejection(s)

Years later, when an alienated child ultimately realizes that he or she has been the victim of alienation and brainwashing and has lost out on so many years of joyful experiences that could not be shared with the alienated parent, the child will likely feel anger and alienation towards the programming or brainwashing parent.[154] As the child pulls away from that parent, it experiences a secondary loss from the alienation[155]—the loss of the alienating parent as well.[156]

But that is not the sole extent of the harm to the alienated children. Alienated children are generally also angry with the target parent for "giving up" and not fighting harder to maintain a relationship with them.[157] That is because children attribute greater control and power to their parents.[158]

Because children need to feel protected, they must believe that their parents are omnipotent and powerful.[159] Thus, children believe their alienated parent could break through and see them if only the parent had tried harder.[160] When the parent becomes completely alienated, the child will likely blame him.[161]

Though a child may never actually verbalize these feelings, in the child's "inner, secret world" the child "fervently hopes" that the target parent will "be strong, brave, able to intuit their unspoken secret wishes," and continue to fight to see them until they are successful.[162] Children expect:

> that the target will know how to rescue them from the programmer/brainwasher and not give up. Target parents almost always express surprise upon hearing that their children want them to be strong and not submit or back away from litigation. Some of these children may seem overtly allied with the programmer but covertly wish the programmer's power be toppled. These children are fake conformers who appear to be programmed as a survival technique.
>
> Too many parents retreat from pursuing increased time or joint or primary custody due to the mistaken perception that taking action could damage or permanently effect an already conflicted and confused child. Such parents often censor themselves, recoil, or back off after having been given advice that the cards are stacked against them in a no-win situation. Some parents find their finances depleted and, subsequently, are forced to give up. Others fear that litigation may cause more harm than good. Not having access to a crystal ball, they do not trust the wisdom of the legal system due to "horror stories" they may have collected about parents losing time or custody just seeking modification. And still others are unwilling to legally pursue their children due to apprehension of potentially serious emotional and economic assault to themselves, their remarriage, and/or their new family. The target parent's reaction to the programmer/brainwasher and to the child is clearly a *key* variable in the success or failure of the programme.[163]

Counter Rejection

As a defensive mechanism, a parent who is rejected by his or her children, will often "counter-reject" the children as well.[164]

> When rejected parents feel that they are being abusively treated by an alienated child who is refusing all efforts to reconnect, they can become highly affronted and offended by the lack of respect and ingratitude afforded them. Hurt and humiliated, some rejected

> parents react to the child's alienation with their own rejection. Their anger might also stem from sheer frustration and lack of patience or might arise from retaliatory needs to treat the child in the same manner in which they have been treated. The counterrejection is felt by the child, and reinforced by the aligned parent, as confirmation of the rejected parent's lack of interest and love, which often leads to intensified condemnation of the "bad" parent.[165]

Guilt

Guilt is another feature "that indelibly colors a child's social-emotional life. Feelings of guilt can emanate from complying with the programme and acting against the target parent."[166]

> Although they understand the manipulations, most children are not polemically secure enough to successfully deter a brainwashing parent. Unless the parent senses that he or she is losing the child emotionally or through the court's decision to modify custody, he or she will continue to apply pressure on the child. Children who understand and comply with the brainwasher's desires pay the price through developing guilt. They are in conflict because they do not necessarily believe what they are being told. However, they feel compelled to think, feel, or behave in ways that go against their own set of values and will comply nevertheless.
>
> Children may have feelings of guilt . . . for not revealing their true (good) feelings toward a parent; for shunning or rejecting a parent at an event, in public, at pickup time, or when alone with that parent; . . . or for punishing a parent by being verbally or physically abusive. Often, children come to believe the target parent may be angry or hate them due to behavior they know is wrong but they still engage in.
>
> This sense of estrangement propels them deeper into the brainwasher's camp. This scenario is problematic for such children because, nowhere, can they be true to their hearts. The brainwasher's love and understanding is questionable, and the target parent may have become distanced. A child caught in this bind does not ordinarily possess the skills (or bravery) necessary to confront the brainwasher and to assert himself or herself. Feelings of guilt for having "hurt" the target make it difficult to approach that parent. The target parent may have simultaneously been programmed to believe that the child is rejecting and unloving, so that reaching out is obstructed. The child and target parent become polarized, which was exactly the brainwasher's goal. So, brainwashers can successfully implement and carry to fruition their goals even when a child understands what is transpiring.[167]

Even if the alienated parent has not actually counter-rejected the child, the child usually assumes that the parent has done so.[168] "A child who loses contact with a target parent resulting from pressure or through compliance usually fears that the target parent has become angry. Almost every child with whom [Dr. Clawar has] spoken—those who testified in court or those who did not have the strength or the skills to overcome the programme—believed that the target parent was angry with them beyond reprieve."[169]

Confusion

The fight for the "minds and bodies" of the children throw the children into turmoil and confusion.[170] "Loyalty conflicts are common and usually fraught with confusion."[171] This is especially true when the child is "fed untrue stories about a target parent that runs counter to [the child's own experiences with that parent,—the child's] observational data."[172]

Confusion and anxiety are increased when a child perceives the target parent to be good and loving, but constantly receives the message that the target is bad.[173] The child is further confused by wondering why he or she is not permitted to love both parents freely.[174] Similarly, when a child hears that the parent claims to permit the child to visit with the other parent, but observes the parent's body language and actions that belie that permission, the child can become "profoundly confused."[175]

The degree of damage ultimately suffered by a child is directly related to "the length of time in which the assault continues unharnessed," in its intensity and severity.[176]

Inter-Generational Effect

Equally distressing as the effects alienation has upon its child-victims is the effect it will likely have upon future generations.[177] Children who are alienated from a parent have a higher likelihood of becoming alienators themselves, thereby perpetuating the negative effects onto future generations as well.[178]

> [C]hildren who were raised by a programmer/brainwasher and who were significantly deprived of a target parent may learn to be proprietary and self-righteous rather than to share the children after their own divorces. Further, they are likely to repeat their parents' behaviors and patterns in times of family crises and are resistant to input and change. One possible reason for this behavior is that, as children, these parents repressed their emotional reaction to their own parents' divorce. The past is visited upon the present when repressed feelings of anger, loneliness, resentment, abandonment, and other conflicts are repeated in an attempt to achieve a belated mastery. Repetition compulsions in adulthood often are derivatives of intrapsychic injuries and disappointments experienced in childhood.[179]

Conclusion

The severe effects alienation has upon children should compel judges and lawyers to be ever-vigilant in preventing its continuation. Part Two of this article will explore the treatments that have been effective in dealing with alienation, and the ways in which the courts in New York State have dealt with this issue.

Endnotes

1. Although alienation might be employed by either parent, because it is more likely to be employed by mothers than by fathers, [*see* Clawar & Rivlin, Id., Ch. VII, (*The Female Factor: Why Women Programme More Than Men*)], and because mothers are more likely to obtain custody than fathers (*see* Brandes, 4 Law and the Family New York §§ 1:2 and 1:3), for ease of reading, this article will at times refer to the target parent in the masculine gender and the alienating parent in the feminine.
2. *Daghir v. Daghir*, 82 A.D.2d 191, 193 (2d Dep't, 1981), *aff'd*, 56 N.Y.2d 938 (1982).
3. *Id.*, 82 A.D.2d at 195.
4. *Id.*, 82 A.D.2d at 193–195 (citations omitted).
5. Stanley S. Clawar & Brynne V. Rivlin, *Children Held Hostage: Dealing with Programmed and Brainwashed Children*, American Bar Association Section of Family Law (1991), Table 17 at 180.
6. Joel R. Brandes, 4 *Law and the Family, New York, Child Custody* § 1:27 at 121 (2d ed., 1997).
7. *Young v. Young*, 212 A.D.2d 114, 122 (2d Dep't, 1995).
8. Ira Turkat, *Parental Alienation Syndrome: A Review of Critical Issues*, 18 Journal of the American Academy of Matrimonial Lawyers 131, 132 (2002), *available at* http://www.aaml.org/Journal/18-1/MAT109.pdf.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* Parental alienation as a "syndrome" continues to be a highly controversial topic. *Compare*, *People v. Fortin*, 289 A.D.2d 590 (2d Dep't 2001) (holding that the defendant in that criminal action did not meet his burden of proving the Syndrome's general acceptance in the scientific community), *with Zafran v. Zafran*, 191 Misc. 2d 60 (Sup Ct., Nassau Co. 2002) (permitting "*Frye* " hearing to determine admissibility of the Parental Alienation Syndrome theory). This article addresses the phenomena of parental alienation and the harm it inflicts upon children, without taking any position on whether parental alienation is, or can become, a "syndrome." Any references to a "syndrome" or PAS within this article is merely to integrate the verbatim quotations of other authors.
14. *Id.*, at 133 (footnotes omitted).
15. *J.F. v. L.F.*, 181 Misc. 2d 722 (Fam. Ct., Westchester Co. 1999) (citations and quotations omitted).
16. Janet Johnston, *Rethinking Parental Alienation and Redesigning Parent-Child Access Services for Children Who Resist or Refuse Visitation* (2001) (hereinafter "Rethinking"), *available at* www.ifp_bayern.de/-cms/BU_Johnston.pdf; Joan B. Kelly & Janet R. Johnston, *The Alienated Child, A Reformulation of Parental Alienation Syndrome*, 30 Family Court Review 249 (2001) (hereinafter "Reformulation").
17. *Johnston, Rethinking, Id.* at 1.
18. *Id.* at n.1.
19. *Id.*
20. *Id.* at 1.
21. *Johnston, Rethinking, Id.* at 3; *Kelly & Johnston, Reformulation, Id.* at 251.
22. *Johnston, Rethinking, Id.* at 4; *Kelly & Johnston, Reformulation, Id.* at 254.
23. *Kelly & Johnston, Reformulation, Id.* at 255.
24. *Id.*
25. *Clawar & Rivlin, Id.* at 15.
26. *Clawar & Rivlin, Id.* at 15.
27. *Id.*
28. *Clawar & Rivlin, Id.* at 16.
29. *Id.*
30. *Id.*
31. *Clawar & Rivlin, Id.* at 16.
32. *Clawar & Rivlin, Id.* at 16–17.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 17.
37. *Id.* at 17–18.
38. *Id.*
39. *Id.* at 18–19.
40. *Id.*
41. *Id.* at 20.
42. *Id.*
43. *Id.* at 21.
44. Elizabeth M. Ellis, *Divorce Wars, Interventions with Families in Conflict*, American Psychological Association 224 (2000) (*quoting* Cartwright) (emphasis added).
45. *Clawar & Rivlin, Id.* at 24–25.

46. *Id.* at 21–22 (emphasis in original).
47. *Id.* at 24.
48. *Id.* at 24–25.
49. Janet Johnston & Vivienne Roseby, *In the Name of the Child, A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce*, at 47 (The Free Press, 1997).
50. *Johnston & Roseby, Id.* at 48.
51. Michael R. Walsh & J. Michael Bone, *Parental Alienation Syndrome: An Age-old Custody Problem*, 71 Fla. Bar J. 93 (1997).
52. *Id.*
53. *Johnston, Rethinking, Id.* at 5.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Kelly & Johnston, Reformulation, Id.* at 258.
58. *Johnston & Roseby, Name of the Child, Id.* at 50.
59. *Johnston & Roseby, Id.* at 50.
60. *Id.*
61. *Id.*
62. *Clawar & Rivlin, Id.* at 75 & 26.
63. *Johnston & Roseby, Name of the Child, Id.* at 50.
64. *Id.*
65. *Id.* at 60.
66. *Id.*
67. *Id.*
68. *Kelly & Johnston, Reformulation, Id.* at 257 (emphasis added).
69. *Turkat, Id.* at 138.
70. *Johnston, Rethinking, Id.* at 10.
71. *Johnston, Rethinking*, at 10–11.
72. *Kelly & Johnston, Reformulation, Id.* at 261.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Kelly & Johnston, Reformulation, Id.* at 262; *Clawar & Rivlin, Id.* at 74–75.
77. *Kelly & Johnston, Reformulation, Id.* at 257.
78. *Clawar & Rivlin, Id.* at 74.
79. *Id.* at 80.
80. *Id.*
81. *Id.*
82. *Id.* at 84.
83. *Id.*
84. *Kelly & Johnston, Reformulation, Id.* at 258.
85. *Id.*
86. *Ellis, Id.* at 220.
87. *Id.*
88. *Johnston, Rethinking, Id.* at 1; *Turkat, Id.* at 134.
89. *Walsh & Bone, Id.*
90. *Id.*
91. *Clawar & Rivlin, Id.* at 70.
92. *Id.* at 71.
93. *Id.* at 72.
94. *Id.* at 72.
95. *Id.* at 72–73.
96. *Id.* at 75–76.
97. *Id.* at 76.
98. *Id.* at 92.
99. *Id.* at 84.
100. *Id.* at 76.
101. *Id.*
102. *Id.* at 78.
103. *Id.* at 74 & 104.
104. *Id.* at 104 (*citing* John Bowlby, *Separation, Anxiety and Anger*); *Johnston & Roseby, Name of the Child, Id.* at 68–69.
105. *Clawar & Rivlin, Id.*
106. *Ellis, Id.* at 226.
107. *Kelly & Johnston, Reformulation, Id.* n.1 at 264 (*citing* eight different studies on the subject).
108. *Id.*
109. *Kelly & Johnston, Reformulation, Id.* at 256.
110. *Clawar & Rivlin, Id.* at 107.
111. *Id.* at 105.
112. *Id.* at 129, 105–28.
113. *Id.* at 94.
114. *Id.* at 113.
115. *Walsh & Bone, Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Johnston & Roseby, Name of the Child, Id.* at 54.
120. *Id.*
121. *Id.* at 54–55.
122. *Id.*
123. *Johnston & Roseby, Id.* at 55–56.
124. *Id.* at 56.
125. *Clawar & Rivlin, Id.* at 112.
126. *Id.* at 113–14.
127. *Johnston & Roseby, Name of the Child, Id.* at 55.
128. *Id.* at 56.
129. *Id.*
130. *Id.*
131. *Id.* at 56–57.
132. *Clawar & Rivlin, Id.* at 111.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 114.
139. *Johnston & Roseby, Id.* at 56–57.
140. *Id.*
141. *Id.*
142. *Id.*

143. *Id.* at 57.
144. *Kelly & Johnston, Reformulation, Id.* at 263.
145. *Johnston & Roseby, Name of the Child, Id.* at 67.
146. *Id.*
147. *Id.*
148. *Id.* at 51.
149. *Id.*
150. *Id.*
151. *Id.* at 52.
152. *Id.*
153. *Id.*
154. *Clawar & Rivlin, Id.* at 105.
155. *Id.*
156. *Id.* at 105–06.
157. *Id.* at 112.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Kelly & Johnston, Reformulation, Id.* at 259.
165. *Id.*
166. *Clawar & Rivlin, Id.* at 106.
167. *Id.* at 84–85.
168. *Id.* at 106.
169. *Id.*
170. *Id.* at 107.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 112–13.
175. *Johnston & Roseby, Id.* at 51.
176. *Clawar & Rivlin, Id.* at 104; nn. 21, 22, 106 & 107, *Id.*
177. *Clawar & Rivlin, Id.* at 114–15.
178. *Id.* at 115.
179. *Id.* at 115 (*citing* Otto Fenichel, *The Psychoanalytic Theory of Neurosis* (New York: W.W. Norton & Co., 1945) at 540 and 405).

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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 2006) 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.

Janet A.E. v. Antonio B., Family Court, Ulster County, (Nussbaum, Steven, October 18, 2005).

For Respondent/Objectant: *Pro Se*

For Petitioner: Francis T. Murray
County Attorney
(Lara M. Quintiliani,
of Counsel)

NUSSBAUM, S., J: Respondent Antonio B. [Objectant or Respondent] has filed objections to an order of support on consent signed by the Support Magistrate on August 4, 2005, and entered on August 8. The order provides that Objectant is to pay child support in the amount of $25 for the support of his daughter, Alexandra E. (d/o/b 12/15/97). It also provides that retroactive child support for the period of November 16, 2004 to August 4, 2005, is set at $500. The order was entered in connection with a Uniform Interstate Support Act [UIFSA] paternity proceeding commenced by Janet E. Mr. B. is currently incarcerated at Shawangunk Correctional Facility, serving the eighth year of a sentence of twenty-eight and one-half years to life. He was convicted of murder in the second degree based upon depraved indifference to life, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree.

By letter to this Court dated November 26, 2004, Mr. B. requested that the necessary paternity tests be done before he was produced from prison. A genetic marking test was ordered, and the results indicated Objectant is the biological father of the child within 99.99 percent of reasonable certainty.

On August 4, 2005, a hearing was scheduled. Present were counsel from the County Attorney's Office and Mr. B. Objectant, after being advised of his right to counsel, waived the same and admitted to paternity. With regards to setting an order of support, the Magistrate stated:

> [b]ased on your circumstances, Mr. B., the law would have me enter what has been called a minimum order of support. It would say that you would have the obligation to pay $25.00 for the support of Alexandra but that your debt can never accumulate to any larger than $500.00. The end result of all that is that you will owe $500 when you finally get out of the correctional institute that you're in. Do you understand all that? Do you have any questions about that? Do you have any objections to that?

Mr. B. responded that he had no choice as he was in prison. The Support Magistrate then stated, "Unless there is an objection I will order all that." Objectant replied, "If you want me to pay $25 a month, I will pay $25 a month."

Mr. B. sets forth three objections to the order of the Support Magistrate. The first objection is that the order inaccurately states that he is unemployed and "possessed of sufficient means and able to earn such means to provide support to his child in the form of financial payments." He asserts that he is not employed in the traditional sense of the word, being barred by New York State from pursuing work release or seeking gainful employment because of his violent felony conviction. According to Respondent, his lack of income is unavoidable.

His second objection is premised on the purported negative impact the $25 per month award of child support will have on his daughter, the mother, and himself. It is his belief that because he cannot pay the child support ordered, "his daughter and her mother . . . may become hurt and confused because it appears as if the father was found capable of paying the support and simply opted not to." The child will be led to believe he refuses to support her. Were the child support amount reduced to zero, according to Objectant, the mother and child's "unrealistic expectations" would be eliminated.

According to Respondent, he also will be negatively impacted by the order because were he labeled a "dead beat dad," he would be irreparably harmed and unfairly subjected "to bias and possible prejudice in any future criminal proceedings such as parole." Although he is in prison for at least another twenty years and will

not be released until his daughter will be over the age of twenty-one, he claims that the "dead beat dad" label would undermine his rehabilitation goals, preventing any possible tangible child support in the future.

His final objection is premised on the argument that since he will not be out of prison until his daughter is well past her majority, her need for support will have passed and the order is, therefore, merely punitive. Mr. B. argues that, since he is unable to pay, a support order serves no legitimate purpose.

Objectant requests that his order be reduced to no child support until such time as he is able to pay support. In the alternative, he seeks a stipulation from the Court that any arrears of unpaid child support be capped at $500 pursuant to FCA § 13(1)(g). In the event that there are any future hearings or proceedings, he requests that he be provided counsel.

The County Attorney, in opposition to the Objections, argues that the use of the term "unemployed" in the Order is appropriate as it describes his uncontested working status and was important to recite in the order so as to justify the below poverty order being signed and entered. It is further argued that the Objectant's claim that he would be labeled a "dead beat dad" is irrelevant to this Court's determination. In addition, Mr. B. agreed to the order, and it should not be set aside. The County Attorney asserts that the inability of the Objectant to make payments is the result of his own wrongdoing. Accordingly, it is argued, the Objections should be denied.

Discussion

The issue essentially raised on Objections in this matter is whether it is appropriate to establish an initial child support order for an individual already incarcerated and serving a sentence of twenty-eight and one-half years to life. All appeals by the father of his criminal conviction appear to have been decided and, in all likelihood, he will not be released from prison, if at all, until his child is well into her majority. Based upon the information provided, it appears that he committed the felony and was arrested shortly before the child's birth. Mr. B. had already served seven years of his sentence at the time the paternity proceeding in issue was commenced. Objectant does not contest his paternity, but rather his obligation to pay child support of $25 a month.

Most of the published case law in New York concerning the obligation of an incarcerated parent to pay child support arises in the context of the filing of a downward modification petition. In those instances a support order was entered prior to the criminal sentence and incarceration of the payer, and that parent was seeking to change an existing support order or to justify a failure to pay previously court-ordered support. *Knights v. Knights*, 71 N.Y.2d 865, 522 N.E.2d 1045, 527 N.Y.S.2d 748 (1988) (incarceration does not justify downward modification of child support); *Commissioner of Soc. Servs. v. Darryl B.*, 306 A.D.2d 54, 759 N.Y.S.2d 676 (1st Dep't 2003); *Furman v. Barnes*, 293 A.D.2d 781, 739 N.Y.S.2d 655 (3d Dep't 2002) (Support Magistrate's summary dismissal of father's petition seeking downward modification of child support due to long-term incarceration upheld); *Ontario Dep't. of Soc. Servs. v. Jackson*, 212 A.D.2d 1056, 624 N.Y.S.2d 1011 (4th Dep't 1995). *See also Grettler v. Grettler*, 12 A.D.3d 602, 786 N.Y.S.2d 540 (2d Dep't 2004) (loss of employment due to arrest was no excuse for failure to pay ordered child support). The rationale is that a downward modification of child support is inappropriate since the non-custodial parent's incarceration and loss of employment was the result of his or her wrongful conduct.

An initial order of child support is being sought in this case, however, after the Respondent has already been in prison for several years and will remain there for at least another twenty years, if not the remainder of his life. During the hearing before the Support Magistrate, Mr. B. indicated that he had no assets and no income. There was no evidence as to his pre-incarceration employment history or income. Given the seriousness of the crimes of which he was convicted, Objectant currently is not eligible for work release.

In *Winn v. Baker*, 2 A.D.3d 1169, 768 N.Y.S.2d 708 (3d Dep't 2003), the petitioner was granted an order of child support against a respondent who was incarcerated at the time of the support hearing. He was convicted of felony driving while intoxicated. The ordered payment of $82 weekly was based upon income imputed to the respondent based upon his salary or income prior to his arrest. In affirming the payment, the Appellate Division definitely stated that, "New York courts will not countenance a reduced child support award where a parent's financial hardship results from his or her own intentional and wrong conduct resulting in incarceration." *Id. at* 1170, 768 N.Y.S.2d at 709, *citing to Knights v. Knights, supra,* 71 N.Y.2d 865, 522 N.E.2d 1045, 527 N.Y.S.2d 748 (1988).

In the within case, however, the Respondent had been incarcerated for over seven years at the time the proceeding was commenced. On the other hand, in *Winn*, the non-custodial parent's incarceration appears to have been a recent event, a conclusion based upon employment earning records from the prior year being introduced into evidence. As noted by one New York court, while there is discretion to impute income to a parent, including imputing income based upon a party's prior employment history, "the exercise of that discretion 'must have some basis in law and fact.'" *Cat-*

taraugus County Comm. of Soc. Servs. v. Bund, 259 A.D.2d 973, 687 N.Y.S.2d 512 (4th Dep't 1999). The Supreme Court of Nebraska, in *Z.P. v. Porter*, 259 Neb. 366, 374, 610 N.W.2d 23, 29 (2000), found that before relying on earning capacity to set an initial child support order for an incarcerated parent, evidence should be presented showing that the incarcerated parent was capable of realizing such capacity through reasonable effort. The court held, therefore, that in the absence of prison wages, non-wage income or assets, the minimum amount of child support should be awarded. *Id. at* 374, 610 N.W.2d at 374. The record of this proceeding before the Support Magistrate provides no indication as to the Objectant's pre-incarceration income or as to his educational or occupational background. With no recent income history, the Support Magistrate set a support order of $25 a month in accordance with the provisions of FCA § 413(1)(g) and no objection was raised by the County Attorney or Mr. B. at that time.

With regards to Objectant's claim that he is entitled to a support order of zero dollars, this Court finds no reason to treat this father any differently than a non-custodial parent who has a higher income imputed after he or she, voluntarily and without need, resigns from jobs, changes occupations or moves to a new relocation but then is unable to find employment paying the same wages. *See, e.g., Doscher v. Doscher,* 54 N.Y.2d 655, 425 N.E.2d 896, 442 N.Y.S.2d 507 (1981), *affirming*, 80 A.D.2d 945, 438 N.Y.S.2d 28 (3d Dep't 1981) (income imputed after voluntary change of occupation resulting in lesser income); *Brefka v. Dobies,* 271 A.D.2d 876, 706 N.Y.S.2d 524 (3d Dep't), *appeal denied,* 95 N.Y.2d 759, 737 N.E.2d 951, 714 N.Y.S.2d 709 (2000) (voluntary resignation from job does not entitle parent to downward modification of temporary support order); *Susan M . v. Louis N.*, 206 A.D.2d 612, 614 N.Y.S.2d 584 (3d Dep't 1994) (mother's avoidance of employment commensurate with her ability appropriately considered in establishing child support obligation); *Bouchard v. Bouchard*, 263 A.D.2d 775, 693 N.Y.S.2d 714 (3d Dep't 1999) (relocation by choice to another county and inability to find employment in same field at same salary resulted in imputation of income based upon earlier higher salary). *See also Crosby v. Hickey,* 289 A.D.2d 1013, 734 N.Y.S.2d 786 (4th Dep't 2001) (mother who voluntarily left last employment not entitled to reduction in child support); *Gaudio v. Gaudio*, 280 A.D.2d 600, 720 N.Y.S.2d 799 (2d Dep't 2001) (father's loss of employment due to his "own substantial misconduct" does not constitute grounds for downward modification); *Johnson v. Junjulas*, 215 A.D.2d 559, 626 N.Y.S.2d 857 (2d Dep't 1995) (father's financial hardships arising from loss of driver's license due to own wrongful conduct insufficient justification for lower child support obligation). Mr. B.'s incarceration certainly was a foreseeable result of committing a felony. To grant him a child support order requiring him to pay zero dollars a month would have the effect of rewarding him for his very serious criminal activities, an unjust result under the circumstances of this case.

Although it has been held in *Commissioner of Soc. Servs. v. E.H.*, 194 Misc. 2d 515, 755 N.Y.S.2d 793 (Fam. Ct., Orange Co. 2003) that the Support Magistrate might issue an order containing a support obligation of zero dollars when a parent is incarcerated pursuant to *Rose v. Moody*, 83 N.Y.2d 65, 607 N.Y.S.2d 906, 629 N.E.2d 378 (1993), this Court is of the opinion that under the circumstances of this case it would be contrary to the strong public policy of this State. *See Winn v. Baker*, *supra*, 2 A.D.3d at 1170, 768 N.Y.S.2d at 709. Mr. B. should be mandated to reimburse the mother if and when he is released from prison for at least a very small portion of the sums that have been and will be expended for their daughter's support. In the event that he is able to participate in work release programs, receives an inheritance, or for some other reason obtains any assets or income while in prison, these resources should be available to support his child. At the hearing Objectant raised no issue and presented no evidence that demonstrated that he, but for his incarceration for second degree murder, could not work because of a disability not the result of his own wrongful conduct. Further, because the Respondent raised no objections to the amount of the support order when he appeared before the Support Magistrate, despite being given ample opportunity to do so, he is bound by the agreed-upon amount. *Steuben Cnty. Dept. of Soc. Servs. v. Bartholomew*, 2 A.D.3d 1434, 768 N.Y.S.2d 908 (4th Dep't 2003); *Oropallo v. Tecler*, 263 A.D.2d 716, 693 N.Y.S.2d 705 (3d Dep't 1999). *See also Proulx v. Ardito*, 289 A.D.2d 581, 735 N.Y.S.2d 789 (2d Dep't 2001) (order on consent is not subject to review by Objections unless it contains a provision not agreed upon).

The father's argument that the order should not provide that he is unemployed and that he has the ability to be employed, is without merit. As noted above, Mr. B. is unemployed due solely to his own actions. His incarceration is the foreseeable result of committing a murder and felony. Had Mr. B. not committed a crime, his employment options would not have been limited. He has the physical ability to work but cannot do so now because of his illegal conduct. The provisions of the order indicating he is unemployed and capable of working are, therefore, appropriate. He still has an obligation to provide financial support for his child. *See, e.g., Szigyarto v. Szigyarto*, 64 N.Y.2d 275, 475 N.E.2d 777, 486 N.Y.S.2d 164 (1985); *Phelps v. La Point*, 284 A.D.2d 605, 725 N.Y.S.2d 461 (3d Dep't 2001).

The Court does find that there was an error in the order as written. Pursuant to FCA § 413(1)(g), "[w]here the non-custodial parent's income is less than or equal

to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue." There is, in New York, case law holding that it is inappropriate to apply this accrual cap when a parent's financial hardship is the result of his or her incarceration. *Onondaga Dep't of Soc. Servs. v. Timothy S.*, 294 A.D.2d 27, 741 N.Y.S.2d 622 (4th Dep't 2002). As noted by one court:

> [a] literal application of the support arrears cap provision contained in section 413(1)(g) of the Family Court Act would result in a cap on child support arrears at $500 whenever a respondent's income fell below the poverty level—for whatever reason. The irrationality of this approach is that it lumps together those parents who have a just reason for their low earnings with those who do not. Such indiscriminate application of the support cap offends a sense of fundamental fairness and is contrary to the overall intent of the statute and legislative intent . . . .

Sutkowy v. Comm. of Soc. Servs., 196 Misc. 2d 1005, 1008, 763 N.Y.S.2d 920, 922 (Fam. Ct., Onondaga Co. 2003). After holding that, "the support arrears cap provision must be applied with regard to the facts and circumstances of the individual case," *id.*, the Family Court found that because the father's financial hardship was due to his own actions in failing "to conduct a meaningful search for employment or to participate in training or educational opportunities to make himself more employable," *id. at* 196 Misc. 2d at 1009, 763 N.Y.S.2d at 923, the accrual cap should not be applied. Because the parties to this matter consented to the imposition of the cap on the accrual of arrears, however, it will not be disturbed.

The order incorrectly provides that retroactive child support for the period of November 16, 2004 to August 4, 2005 is set at $500. With a support order of $25 a month, that calculation clearly is in error. Additionally, the order fails to recite that so long as Mr. B. is incarcerated and his income is less than the poverty income guideline amounts for a single person as reported by the federal Department of Health and Human Services, the accrual of arrears on his child support obligation is capped at $500. Since the Support Magistrate, on the record, indicated that the order would provide such a cap during the Objectant's period of incarceration, and as no objection was raised by either party, this provision should be included in the order on consent.

With respect to the other contentions set forth in the Objections, there is no basis to sustain them. As noted previously, Objectant agreed to the support order despite being given several opportunities to object by the Support Magistrate. He, unlike the father in *Commissioner of Soc. Servs. v. E.H., supra*, 194 Misc. 2d 515, 755 N.Y.S.2d 793, was given the opportunity to appear before the court and be heard. Further, Objections are the equivalent of an appellate review, and this Court is not to consider matters which were not brought before the Support Magistrate or preserved by proper objection. *Redmond v. Easy*, 18 A.D.3d 283, 794 N.Y.S.2d 643 (1st Dep't 2005), *Green v. Wron*, 151 Misc. 2d 9, 571 N.Y.S.2d 193 (Fam. Ct., NY Co. 1991). *See also Gaudette v. Gaudette*, 234 A.D.2d 619, 650 N.Y.S.2d 880 (3d Dep't 1996), *appeal dismissed*, 89 N.Y.2d 1023, 679 N.E.2d 1074, 657 N.Y.S.2d 594 (1997) (matters not preserved for review by proper objection are inappropriate for appellate review).

The Court will note, however, that it does not accept the Objectant's argument that the award of child support should be set aside because of the unrealized expectations and emotional distress it will cause the mother and child. Any possible issues the child may have concerning her father's failure to pay support will, with all certainty, not be because he did not abide by an order to pay support in the amount of $25 a month. Rather, if there are any emotional consequences she suffers as a result of her father's actions, it is more likely to arise from the fact that he is serving a very long and potentially lifetime prison sentence because of his conviction of murder.

The argument that the order requiring the Objectant to pay child support is punitive also is unpersuasive. It is the strong public policy of this state that minor children are to receive adequate financial support from their parents. *B. v. N.*, 57 N.Y.2d 427, 430, 442 N.E.2d 1248, 1249, 456 N.Y.S.2d 737, 738 (1982); *Schaschlo v. Taishoff*, 2 N.Y.2d 408, 141 N.E.2d 562; 161 N.Y.S.2d 48 (1957); *Priolo v. Priolo*, 211 A.D.2d 627, 621 N.Y.S.2d 367 (2d Dep't), *appeal denied*, 86 N.Y.2d 705, 651 N.E.2d 597, 632 N.Y.S.2d 498 (1995). This is to insure that children have the financial resources available to provide for their necessities, not to punish parents. Alexandra's needs are not any less because her father is incarcerated. The mother requires assistance to insure that the child's needs are met. If Mr. B. is unable to pay the child support now because he is incarcerated, he should pay the arrearages when released from prison, even if his child is over twenty-one years old. It is not punitive to require Mr. B. to meet this important obligation if he is ever in the position to do so. The award of child support is not a fine or financial penalty imposed because he committed a crime. Rather the $25 a month he has been ordered to pay is to fulfill his obligation to sup-

port his daughter. The Court must balance the rights of parents convicted of crimes against those of a child who requires support despite the circumstances of her father. Clearly, the welfare and best interests of the parties' daughter takes precedence, and the Objectant is obligated to pay child support. Moreover, it is unlikely that the Respondent's failure to pay child support while incarcerated will affect any future prospect of parole since the inability to pay child support because of incarceration is a defense to a willful finding in child support enforcement proceedings. *See Alvarado v. Dungee*, 128 A.D.2d 519, 512 N.Y.S.2d 543 (2d Dep't 1987).

In light of the above, it is unnecessary for there to be any further hearing with regards to this matter or to appoint counsel for Mr. B. This matter is remanded to the Support Magistrate solely for the purpose of correcting the order of support in accordance with this decision and order.

This shall constitute the decision and order of this Court.

* * *

Theresa O. v. Arthur P. and Maria P., Family Court, Ulster County, (Mizel, Marianne O., January 27, 2006)

For Petitioner: *Pro Se*

For Respondents: Colette VanDerbeck, Esq.

Law Guardian: Paul D. Shaheen, Esq.

MIZEL, M. O., J.: This court is presented with the unusual situation of the proposed re-adoption of a child by his biological mother. Theresa O., the biological mother of Anthony, born March 9, 1988, voluntarily surrendered her parental rights regarding Anthony on March 13, 2001.

A petition had been instituted against her by the Ulster County Department of Social Services on March 27, 1998, alleging educational and medical neglect of Anthony and her other children. Ms. O. admitted that she was aware that Anthony had been illegally absent from school on days comprising approximately 38% of the total time school was in session. She also admitted that she instructed her children not to talk with their psychiatrists at therapeutic sessions. A dispositional order was entered which placed Ms. O. under the supervision of the Department of Social Services for one year, directed that she participate in and complete specific services, and required her to ensure and encourage the children to attend school.

PINS petitions had also been filed against Anthony for the same behavior. He was placed on probation and then placed with the Department of Social Services on April 22, 1999, on disposition of a violation petition. Ms. O. continued to experience problems with Anthony's behavior and voluntarily signed a judicial surrender of her parental rights on March 13, 2001. The Department of Social Services had commenced a termination of parental rights proceeding against Anthony's biological father, alleging abandonment. Anthony's biological father also voluntarily signed a judicial surrender of his parental rights on March 13, 2001, and the termination of parental rights petition against him was dismissed. Anthony was subsequently adopted by Arthur P. and Maria P., his long-time foster parents.

Maria P. and Arthur P. filed a PINS petition against Anthony on June 29, 2004. They alleged, among other things, that Anthony left home to visit his biological mother on May 14, 2004, and had not returned home. Theresa O. filed a petition for custody on August 19, 2004, which was dismissed for lack of standing. She filed a petition on October 27, 2004, seeking to be appointed as Anthony's guardian. In her petition, she alleged that Anthony had been placed in Family House, a respite home for teenagers, by his adoptive parents, who will no longer allow him in their home. She alleged that before Anthony had gone to Family House, he had lived with her for five months. She also alleged that the Ps wish to surrender their parental rights regarding Anthony. Submitted with the guardianship petition was the Statement of Preference required from a minor over the age of 14, indicating that Anthony preferred that Theresa O. be his guardian. Temporary custody was awarded to Theresa O. under the PINS petition filed by the Ps. Temporary custody ended when the Ps withdrew the PINS petition and it was dismissed on March 22, 2005. Temporary letters of guardianship were issued to Theresa O. on July 6, 2005, and renewed on December 13, 2005. Theresa O. filed an adoption petition on December 13, 2005.

Although none of the parties to these proceedings has raised the issue, the court realized that standing could be problematic and wished to provide a decision as a record that the issue was recognized and addressed. Judge Work had dismissed with prejudice Ms. O.'s petition for custody of Anthony for lack of standing. This court finds that standing should not be a barrier to Anthony's adoption going forward.

There is a line of cases which stand for the proposition that, once a parent's rights have been terminated, that parent can have no further right to custody or visitation with the child. *See, e.g.*, *In re Adam S. v. Little Flower Children's Services*, 287 A.D.2d 723 (2d Dep't 2001); *In re Santosky v. Roach*, 161 A.D.2d 908 (3d Dep't 1990); and *In re TC v. RC*, 195 Misc. 2d 417 (Fam. Ct., Kings Co. 2003). However, those cases do not apply in the instant situation for two reasons. First, those prior

cases were custody petitions filed after termination of parental rights. The rationale for dismissal was founded on *res judicata* and collateral estoppel. The cases say that because the court has determined that the biological parent is an unfit parent, the biological parent cannot cause this issue to be revisited by filing requests for custody. However, this overlooks the reality that there is no *res judicata* in custody cases.[1] The court is not prohibited, on the presentation of an appropriately significant change in circumstances, from re-visiting the issue of custody, either between parents or between a parent and a third party (*Bennett v. Jeffreys*, 40 N.Y.2d 543 (1976)). *In re Tiffany H.*, 171 Misc. 2d 786 (Fam. Ct., Kings Co. 1996) considered the applicability of *Bennett v. Jeffreys* after the termination of parental rights and a subsequent adoption, and concluded that custody does not create a permanent parental relationship "and does not give the child the security of a permanent home" (p. 794). Ms. O. has filed a guardianship petition and an adoption petition, which would potentially create the permanency the court in *Tiffany H.* identified as lacking in a custody petition.

Second, those prior cases involve situations where the parents' rights were involuntarily terminated through the finding of permanent neglect. There has been no such determination and involuntary termination in this case. Anthony was freed for adoption by the voluntary surrender of Ms. O.'s parental rights and concurrent surrender of his father's parental rights. Although a neglect petition had been filed against Ms. O. upon Anthony's failure to attend school, that behavior continued after he had been adopted by the Ps, to the point where the Ps also filed a PINS petition against him for this same behavior. The allegations in the 1998 neglect petition were not as horrendous as in other cases this court has seen and would not have been a bar to reunification of the family at that time.

The recent enactment of Domestic Relations Law § 112-b and amendment of related statutes provides a mechanism, effective December 21, 2005, under which the court can approve and order post-adoption contact by the biological parent after a voluntary surrender if the court finds such post-adoption contact to be in the child's best interests. The Interim Report in the Ps' PINS proceeding against Anthony, prepared by the Ulster County Department of Social Services on September 23, 2004, reported that both Maria P. and Ms. O. stated that they had an oral agreement, prior to Anthony's adoption, that he would be allowed to visit with Ms. O. after the adoption. Post-adoption contact is now statutorily recognized when the parent has voluntarily surrendered the child for adoption and can be enforced where the court finds enforcement to be in the child's best interests. These amendments demonstrate that the legislative intent to sever all parental contact through adoption, cited by *In re Tiffany H.* (171 Misc. 2d 786, 791–792 (Fam. Ct., Kings Co. 1996))[2] as its rationale for denying the parent's custody petition, is no longer applicable to contact after a voluntary surrender.

Ms. O.'s petition alleges that the Ps no longer wish to continue as Anthony's parents and refuse to have him in their house. The Probation Department's pre-disposition investigation prepared November 3, 2004, on the PINS petition filed by the Ps confirms this as the Ps' position and recommends that Anthony be allowed to return to live with his mother. It cites that although Ms. O. has had problems with each of her children, her children are essentially grown. The report notes that Anthony was of an age where he could leave school but he has not chosen to do so. A Home Study, completed March 1, 2005, reported that Anthony was still in school, although his attendance could be better, and found nothing contra-indicating Anthony's continued residence with his biological mother. If Ms. O. were not interested in resuming responsibility for Anthony, he would be returned to the foster care system or he would be homeless.

Accordingly, this court determines that the prior proceedings regarding Anthony and his family do not preclude an application by his biological mother to resume a permanent parental relationship towards Anthony. Ms. O. has filed a petition to adopt Anthony. Ms. O. has submitted the necessary forms and fingerprint cards for a State Central Registry report of child maltreatment reports and for a Criminal Justice Services report of criminal activity. Provided that those reports reveal nothing additional to the facts already known to the court due to its prior involvement with the family, they should not be a bar to further prosecution of the pending petitions.

This shall constitute the decision and order in this case.

Endnotes

1. "The only absolute in the law governing custody of children is that there are no absolutes." (*Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89 (1982)).
2. The court in *Tiffany H.* cited *In re Rickey Ralph M.*, 56 N.Y.2d 77, 80 (1982) as showing this intent.

* * *

***Ulster County Department of Social Services o/b/o Ashley V., Matthew V., and Michael V. Children under the Age of Eighteen Alleged to Be Neglected by Tracy Lynn V.*, Family Court, Ulster County (Mizel, Marianne O., January 31, 2006)**

For Petitioner:	Ulster County Department of Social Services Glenn L. Decker, Commissioner by Mark Grunblatt, Esq., Staff Attorney
For Respondent:	Andrew Kossover, Esq. Ulster County Public Defender by Stephen F. Brucker, Esq. Assistant Public Defender
Attorney for Michael V.	Jason Lesko, Esq. Interested Party
Law Guardian:	Steven H. Klein, Esq.

MIZEL, M. O., J.: On December 1, 2005, the Ulster County Department of Social Services filed a petition against Tracy Lynn V. alleging that she had neglected her three children, Ashley V., born in 1998, Matthew V., born in 1996, and Michael V., born in 1994, by the infliction of excessive corporal punishment.

During the course of these proceedings, the Department of Social Services has been represented by Mark Grunblatt, Esq., Staff Attorney. Ms. V. has been represented by Stephen F. Brucker, Esq., Assistant Public Defender. The court appointed Steven H. Klein, Esq., as law guardian for the children. At the initial appearance on the petition, conducted December 14, 2005, Mr. Brucker stated that he intended to file a motion to dismiss certain allegations of the petition. For the reasons which follow, the motion is granted in part and denied in part.

The motion asks for dismissal of certain allegations in the current neglect petition on the basis of *res judicata* or collateral estoppel. Ms. V.'s attorney argues that allegations previously dismissed through court order should not be re-litigated on a new petition. The petition filed December 1, 2005, is based on incidents occurring November 17, 2005 (Paragraph 4 (1)(A)); May 2, 2005 (Paragraph 4(1)(B)); April 20, 2004 (Paragraph 4(1)(C)); and January 27, 2004 (Paragraph 4(1)(D)). The January 27, 2004, and the April 20, 2004,[1] incidents had already been the subject of a petition against Ms. V., filed May 6, 2004. That proceeding had concluded with an Order of Adjournment in Contemplation of Dismissal, signed July 28, 2004. The order provided that the case be adjourned to June 9, 2005, on specified terms and conditions, which included an order of protection prohibiting corporal punishment, "with a view to ultimate dismissal in the interests of justice." The Order of Protection also expired June 9, 2005. On May 19, 2005, the Department filed a petition alleging that Ms. V. had violated the terms and conditions of the ACD in that she had inflicted excessive corporal punishment upon Ashley on May 2, 2005. The parties appeared in court with counsel on June 8, 2005, at which time the Department withdrew its violation petition and the ACD was allowed to expire. An Order of Dismissal of the violation petition, based on its withdrawal by the Department, was signed on June 21, 2005. The dismissal was without prejudice.

The Department's opposition to the motion cites *In re Marie B.*, 62 N.Y.2d 352 (1984) for the proposition that an adjournment in contemplation of dismissal is not a determination on the merits. Department counsel argues that, since no determination on the merits of those allegations has been made (p. 359), the Department can re-plead them in the current petition. In *Marie B.*, the Court of Appeals was asked to determine the constitutionality of a statute which provided that if violation of an ACD were proven, circumstances of neglect shall be deemed to exist. The Court of Appeals determined that the parent's right to due process required that an actual hearing be held to determine whether the underlying allegations of neglect were proven and found the language deeming neglect to exist was unconstitutional (p. 358). Ms. V.'s attorney cited the same case in his motion for the proposition that, if the ACD is not restored to the calendar, the only recourse of the Department to obtain an adjudication of neglect is to file a new neglect petition:

> Finally, the Appellate Division did not abuse its discretion in dismissing the original neglect petition or the petition alleging violation of the ACD. Nothing herein precludes the agency from bringing another petition alleging any actual facts of parental neglect which would support a judicial finding hereof (p. 359).

However, *Marie B.* does not definitively settle the case presently before this court. Ambiguity arises from the failure of the Court of Appeals to specify whether this second neglect petition it contemplates is a new petition alleging the same facts as in the original neglect petition or whether the agency can only base the new neglect petition on new facts.

There is a significant difference in procedural posture between *Marie B.* and the instant case. In *Marie B.*, the Court of Appeals was considering the effect of a

violation of the ACD. In this case, the motion to dismiss asks this court to consider the effects of a completion of the ACD period and the resultant dismissal in the interests of justice. In *Marie B.*, the Court of Appeals said that a violation of an ACD does not automatically prove the underlying allegations of neglect. Because the ACD was not a determination on the merits, the court on a violation cannot deem neglect to exist, because the underlying neglect was never proven. The Court of Appeals recognizes that the allegation of violation of the terms of an ACD can be on a term which would independently constitute an allegation of neglect, or it could be a fairly innocuous provision that could not sustain a neglect petition by itself. The Court of Appeals in effect said, because it was not a determination on the merits, the ACD is equally interpretive of innocence as of guilt on the underlying allegations and, because a finding of neglect presents a significant intrusion on the parent/child relationship, the Court cannot presume that neglect exists and a statute cannot require the court to deem it exists. In *Marie B.*, the Family Court was presented with a violation petition filed during the existence of the ACD. The Court of Appeals found that ". . . there must be a formal hearing and a clear demonstration that the child in question has in fact been neglected or abused either as a result of the allegations in the neglect petition, the parent's failure to abide by the conditions of the ACD, or otherwise" (p. 359).

Here, the adjournment period has expired. The time to restore the matter to the calendar has passed; the petition has been dismissed in the interests of justice (Family Court Act § 1039(f)) and it cannot be restored (*In re Casey A. v. Glen A.*, 296 A.D.2d 572 (2d Dep't 2002)). A dismissal in the interests of justice is not equivalent to a dismissal without prejudice. "Dismissal in the interests of justice" forecloses both the petitioner from proving the truth of the allegations and the respondent from proving their falsity. Double jeopardy principles are implicated in the instant case. Ms. V. made an admission in the prosecution of the prior neglect petition. Based on that admission, this court determined that an ACD was an appropriate disposition.[2] The Department should not now be allowed to revisit those allegations, armed with that admission, and seek to modify the disposition previously ordered and completed. No compelling reason has been presented as to why those allegations should now be reopened.[3] Those allegations, Ms. V.'s admission, and the resultant disposition would be relevant on disposition if a fact-finding proves the more recent allegations, but the Department does not get a second chance to represent the January 27, 2004, and April 20, 2004, incidents.

The motion also asks that the allegation which formed the basis of the violation petition, the incident of May 2, 2005 (Paragraph 4(1)(B)), also be dismissed. Ms. V.'s attorney argued that, upon information and belief, based on his recollection of those proceedings, the violation petition was originally dismissed because further investigation found it to be meritless. However, if that had been the case, the petition should have been dismissed with prejudice. The order dismissing the violation petition stated the dismissal was without prejudice. There is nothing in the court's notes which indicate that investigation had found the allegations to be meritless. No transcript from the court appearance at which that petition was withdrawn has been presented to substantiate Ms. V.'s attorney's recollection and demonstrate that the order was incorrectly prepared. There has been no fact-finding on the merits and the dismissal without prejudice has no preclusive effect. Therefore, that allegation remains.

All attorneys agree that the alleged incident of November 17, 2005, has not previously been before this or any other court and can proceed.

Accordingly, the court dismisses the allegations contained in paragraphs 4(1)(C) and Paragraph 4(1)(D). The allegations made in Paragraphs 4(1)(A) and 4(1)(B) remain. This shall constitute the decision and order on this motion.

Endnotes

1. The original neglect petition recites an incident which occurred on April 19, 2004; the current petition recites that a CPS Hotline Report was received on April 20, 2004, regarding behavior identical to that alleged in the first petition to have occurred on April 19, 2004. Although the two petitions use different identifying dates, they are different ways of identifying the same incident.
2. Prior to accepting an admission, the court was required to tell Ms. V. that the court could enter an order of disposition for a period of up to one year (Family Court Act § 1051(f)(I)). That one-year period has now passed under the ACD.
3. *In re Loren B. v. Heather A.*, 13 A.D. 998 (3d Dep't 2004) does not compel a different result. In that case, an ACD of the abuse proceeding against the father was found not to preclude the same incidents from being litigated in a custody proceeding between the father and the aunt of the subject child. The aunt was not a party to the proceeding brought by the Department of Social Services. Also, the decision does not report whether the custody proceeding was commenced before or after the adjournment period of the ACD was completed.

Recent Decisions, Legislation and Trends

By Wendy B. Samuelson

New Legislation: 202.8(h) N.Y.C.R.R.

Effective January 17, 2006, section 202.8 of the Uniform Civil Rules for the Supreme and County Courts was amended to include a new subdivision (h) relating to motions not decided within 60 days, as follows:

> **(h) 60-Day Rule.** If 60 days have elapsed after a motion has been finally submitted or oral argument held, whichever was later, and no decision has been issued by the court, counsel for the movant shall send the court a letter alerting it to this fact with copies to all parties to the motion.

***Author's Note*:** There have been many complaints by members of the matrimonial bar that *pendente lite* support applications have not been decided within the 60-day timeframe set forth by the N.Y.C.R.R. These delays seriously prejudice children and the parents who support them, since they are without any recourse to collect support for more than two months. This new rule will be somewhat helpful towards expediting decisions, although I do not believe it provides enough "teeth" to do so.

Same-Sex Marriage Update

Same-sex Marriage Licenses in New York: Update on *Hernandez v. Robles*

As mentioned in my previous column, on February 4, 2005, New York County Supreme Court Justice Doris Ling-Cohan ruled that same-sex couples must be allowed to marry. 7 Misc. 2d 459, 794 N.Y.S.2d 579 (N.Y. County, 2005).

However, on December 8, 2005, the First Department reversed by a 4-1 majority, 805 N.Y.S.2d 354 (1st Dep't 2005), ruling that state law forbidding same-sex marriage is not unconstitutional, and that the state has a legitimate and rational interest in promoting heterosexual marriage.

Lambda Legal filed an appeal to the Court of Appeals. Stay tuned for the decision.

New Jersey

In June 2005, a New Jersey appeals court ruled that the state constitution does not require the recognition of same-sex marriage. The court, in a split decision, declared that it was up to the legislature to change the marriage laws to permit same-sex marriage. Lambda Law appealed, and the New Jersey Supreme Court heard oral argument on February 15, 2006.

On January 9, 2006, New Jersey lawmakers voted to give same-sex couples the same rights as heterosexual married couples regarding inheritance, funeral arrangements and death benefits for partners of public employees.

Court of Appeals Roundup

Chen v. Fischer, 2005 N.Y. Slip Op. 9572 (December 15, 2005)

As you will recall, the Editor of this publication wrote an editorial advocating that this case should be reversed on appeal to the Court of Appeals. That was exactly what happened by a unanimous decision.

The following submitted *amici curiae* briefs on behalf of the appellant-wife: Women's Bar Association of the State of New York; Sanctuary for Families' Center for Battered Women's Legal Services; Association of the Bar of the City of New York; and the American Academy of Matrimonial Lawyers, New York Chapter.

In the underlying divorce action, the wife claimed that her husband had assaulted her as a ground for divorce. Prior to trial, the parties stipulated to the grounds for divorce, and the wife withdrew her allegations of assault. While the matrimonial action was pending, the wife brought a personal injury action on the same incident of assault. The husband moved to dismiss the personal injury action based on *res judicata*. The trial court granted the dismissal motion, finding that the allegations in the divorce action and the personal injury action were virtually identical and arose out of the same transaction or series of transactions. The appellate division affirmed.

On appeal to the Court of Appeals, the high court reversed, and held that interspousal tort actions and divorce actions do not form a convenient trial unit and the parties would not reasonably expect that the two would be tried together:

> The purposes behind the two are quite different. They seek different types of relief and require different types of proof. Moreover, a personal injury action is usually tried by a jury, in contrast to a matrimonial action, which is typically decided by a judge when the issue of fault is not contested. Further,

> personal injury attorneys are compensated by contingency fee, whereas matrimonial attorneys are prohibited from entering into fee arrangements that are contingent upon the granting of a divorce or a particular property settlement or distributive award.

In addition, the high court considered the following public policy arguments:

> To require joinder of interspousal personal injury claims with the matrimonial action would complicate and prolong the divorce proceeding. This would be contrary to the goal of expediting these proceedings and minimizing the emotional damage to the parties and their families. Delaying resolution of vital matters such as child support and custody or the distribution of assets to await the outcome of a personal injury action could result in extreme hardship and injustice to the families involved, especially for victims of domestic violence. In addition, parties should be encouraged to stipulate to, rather than litigate, the issues of fault.

At bar, the high court found that the wife withdrew her assault allegations in order to expedite the matrimonial action.

It should be noted that the court cautioned as follows:

> If a separate interspousal tort action is contemplated, however, or has been commenced, the better practice would be to include a reservation of rights in the judgment of divorce. Finally, if fault allegations are actually litigated in a matrimonial action, res judicata or some form of issue preclusion would bar a subsequent action in tort based on the same allegations.

***Author's Note*:** The high court's warning of the "better practice" appears contrary to its ruling that matrimonial litigants are free to bring interspousal personal injury actions subsequent to the divorce action, so long as fault was not litigated. Did the court merely carve out an exception for this particular litigant? The wary matrimonial practitioner should warn her client that the spouse may bring a subsequent litigation, and perhaps have the parties stipulate that a personal injury action is waived.

Agreements

***Bright v. Freeman*, __ A.D.3d __, 2005 N.Y. Slip Op. 9665; 2005 N.Y. App. Div. LEXIS 14356 (2d Dep't, December 19, 2005)**

The order of the Nassau County Supreme Court which granted the father's motion for summary judgment declaring that the child support agreement is enforceable was reversed on appeal.

The parties had two out-of-wedlock children, and entered into a child support agreement when they separated. The agreement provided for the mother to have custody of the children, with the father to pay support in the sum of $900/month for two children. Following a dispute over the validity of the child support provisions of the agreement, which was being litigated in Family Court, the father commenced this action for a pre-emptive Supreme Court judgment declaring that the agreement was valid and enforceable.

The parties' agreement properly follows the opting-out provisions of the CSSA, by including all of the mandatory language and basic child support calculations. The appellate division found that, nevertheless, the agreement is unconscionable based on the following: the father's obligation under the CSSA would have been more than $2,000 per month, and from the $900 per month he agreed to pay, the mother was compelled to spend a portion of the father's support payment for designated expenses, such as the children's camp and college expenses, as well as to contribute the sum of $200 per month for both children to their college fund accounts. In addition, the mother was required to pay all unreimbursed medical benefits and dental expenses, as well as the cost of camp, Hebrew school, and similar expenses, so long as she is employed and her health insurance continues. The agreement was to be effective only so long as the father earned $100,000 annually (net of the CSSA deductions), and provides for a reduction in his support obligation should his income diminish. However, it made no provision for an increase in his obligations should his income appreciate nor for any adjustment to his obligation in the event the mother's income drops or ceases entirely. Finally, the agreement compels the mother to reimburse the father for his visitation expenses up to $1,200 per child, per year.

Therefore, the case was remanded to the court below for a judgment declaring the CSSA provisions unconscionable and unenforceable.

***Author's Note*:** There was no mention in the facts of the case of: 1) the parties' ages, income and earning capacity; 2) if there was any consideration for the child support provisions; 3) whether the parties recited the reasons for their deviations from the CSSA guidelines; nor

4) whether either party was represented by counsel. It is therefore difficult to use this case as precedent.

Custody and Visitation

Modification of Custody

***Reichenberger v. Skalski*, __ A.D.3d __, 2005 NY Slip Op 9807, 2005 N.Y. App. Div. LEXIS 14398 (4th Dep't, December 22, 2005)**

Pursuant to the parties' New Jersey divorce judgment in 2001, which incorporated their separation agreement, the parties were granted joint custody of their then three-year-old child, with the mother having physical residential custody of the child. The father moved for a change in primary custody, alleging that he could provide a better home, decrease the child's time in day care and afford him better educational opportunities.

The father's application was denied since he failed to show "a change of circumstances reflecting a definite need for modification to ensure the best interests of the child." Although the father's school district may be superior to the child's current school, the child's kindergarten teacher testified that the child was well-adjusted, happy, and making good progress. There was no proof that the mother's home was unsafe or inadequate. Moreover, although the father remarried, and his current wife did not work and would be available for the child, thereby eliminating the time the child was currently spending in day care, the court did not find that this was a sufficient reason to change custody. Rather, the court supported this single mother's efforts as a caring parent who was actively engaged in the child's care.

Grandparent Visitation

***Deborah P. v. Kimberly B., Jr.*, __ A.D.3d __, 2005 N.Y. Slip Op. 9947; 2005 N.Y. App. Div. LEXIS 14507 (3d Dep't, December 22, 2005)**

Grandparent visitation litigation is more common when the parents are divorced or one of the parents has died. Here, the maternal grandmother applied for grandparent visitation against an intact couple. The court denied the application without a hearing, finding that the grandmother did not have standing.

The respondent-mother submitted an affidavit alleging that petitioner-maternal grandmother had abused her and her sister. However, during respondent's pregnancy with the child, the parties reconciled, and the respondent allowed petitioner to have contact with the grandchild for the first seven months of the grandchild's life. Respondent later terminated all contact with petitioner after petitioner continued to refuse to seek professional mental health treatment. Petitioner commenced this proceeding approximately one year later. The petitioner's only contact during that one-year period was a series of threatening telephone messages, claiming that she would seek an order of grandparent visitation. The grandmother submitted an affidavit denying the allegations of abuse, and the reasons for the termination of contact.

Since both of the child's parents are alive, pursuant to DRL § 72, petitioner has standing to apply for grandparent visitation only if she can establish that, "conditions exist in which equity would see fit to intervene." Factors to consider under the equitable circumstances prong are the "nature and basis of the parents' objection to visitation" and the "nature and extent of the grandparent-grandchild relationship." The court noted that it is not enough to allege love and affection for the grandchild; rather, a sufficient existing relationship must be established, or in cases where that has been frustrated, sufficient efforts to establish one. The court found that the grandmother failed to establish an existing relationship or an attempt to establish one.

***Author's Note*:** Although not set forth in the court's reasoning, it appears that the court relied on the fact that the grandmother waited over a year to bring her petition. The court's reasoning that the grandmother failed to establish an existing relationship with the grandchild appears erroneous, since the facts are undisputed that the grandmother did have such a relationship for the first seven months of the child's life. Rather, once that relationship was frustrated, the grandmother should have made conciliatory efforts or bring the petition immediately. Bottom line, self-help will not prevail.

Child Support and Maintenance

***Kristy Helen T. v. Richard F.G., Jr.*, __ A.D.3d __, 2005 N.Y. Slip Op. 10141; 2005 N.Y. App. Div. LEXIS 14823 (2d Dep't, December 27, 2005)**

In an unusual step, the appellate division held the father's appeal of the Family Court's support order in abeyance pending remittal to the Family Court to set forth the factors it considered and the reason for its support determination, since it failed to specify the sources of income imputed and the actual dollar amount assigned to each of the father's four sources of income. After the Family Court filed its report with the appellate division, the Second Department reduced the award from $289/week to $236/week.

The Family Court determined the father's total annual income for CSSA purposes to be $95,509, and found that the father had not established any expenses or losses with respect to his four income sources. The appellate division, however, determined the father's total income to be $70,367.

The appellate division specified each of the father's income sources. The father's gross income from Custom Sounds Plus was reported in his 2002 income tax returns as $59,079, and he listed $26,692 as total business expenses, which included $6,350 of depreciation expenses. The appellate division refused to subtract out the depreciation expenses from gross income, finding that it did not affect the father's disposable income or impact on his ability to pay child support. Therefore, for CSSA purposes, the father's income was determined to be $38,737. The court also included $21,750 from the father's income from Jimmy Dee Music Production & Party Design, Inc., and $9,880 from his employment with Fantasy Flash. The court did not impute any income to the father's rental income because he sustained a net loss.

***Futia v. Kaufteil*, __ A.D.3d __, 2005 N.Y. Slip Op. 10124; 2005 N.Y. App. Div. LEXIS 14859 (2d Dep't, December 27, 2005)**

The Family Court properly determined that the mother was entitled to reimbursement for 50% of the child's dental surgery expense. The parties' stipulation, which was incorporated but not merged in the divorce judgment, states that the father's obligation for such uncovered medical and dental-related costs runs during the children's "minority," which the appellate division interpreted to mean age 21. When that provision is considered in conjunction with the "child support" article of the stipulation, it evinces the parties' intent that the father's obligation to support the children—including his obligation for uncovered medical and dental-related costs—extended to age 21.

The appellate division rejected the father's argument that he should not be required to contribute to the child's dental expense because the mother did not secure his consent for the expense, in violation of the parties' joint custody provision of the agreement requiring joint decision of "all decisions regarding the children's education . . . health and welfare." The court held that the father's responsibility for dental costs is established in the "medical expenses" article of the stipulation, which does not condition responsibility for such costs upon any prior consultation or approval, and therefore the joint custody provision is not controlling.

***Milnarik v. Milnarik*, 23 A.D.3d 960, 805 N.Y.S.2d 151 (3d Dep't, November 23, 2005)**

The parties were married 12 years and had three children. For purposes of determining child support, the trial court properly imputed income to the husband of $211,300, since this was the average income earned in sales and real estate development during the marriage. However, the trial court failed to sufficiently explain the precise deductions it was applying to this figure, nor did it deduct the defendant's spousal maintenance obligation from his imputed income. Therefore, the case was remanded to the trial court for further recalculation.

In an unusual step, the appellate court instructed the trial court that child support should be based on the parties' full combined income in excess of $80,000, in light of the parties' lavish lifestyle, which included a million dollar home, a second home on an island in Lake Placid, luxury vehicles, boats, a country club membership and private schooling for their two sons. In addition, the wife's income should be set at $15,600/year, the average of her monthly income she testified to ($1,200 and $1,400 per month)

The wife's award of maintenance for five years at $3,000/month was appropriate since the parties agreed that the wife would not work once they had children, there is a great disparity in their incomes, and they enjoyed a lavish marital lifestyle.

Support Enforcement

***Castillo v. Castillo*, 23 A.D.3d 653, 804 N.Y.S.2d 421 (2d Dep't, November 28, 2005)**

The court below properly found that the father's failure to pay child support was willful, and committed him to a jail sentence for a period of six months, with his release conditioned upon his payment of the sum of $5,271.62. Pursuant to FCA 454(3)(a), the father's failure to pay child support is *prima facie* evidence of his willful violation of the court's support order, and the burden shifts to the payor to prove his inability to pay. The father's claim that he had no ability to pay support because a physical condition prevented him from working was not supported by any medical evidence.

***Linksman v. Linksman*, 23 A.D.3d 659, 804 N.Y.S.2d 265 (2d Dep't, November 28, 2005)**

The New York courts lack subject matter jurisdiction to enforce the child support provisions of the Virginia divorce decree until the decree is registered in New York.

***Author's Note*:** The matrimonial practitioner should remember to take this very simple and important step before enforcing a foreign support order, whether by motion to the court or income execution.

Discovery

Protective Order

***Obermueller v. Obermueller*, 2005 N.Y. Slip Op. 9699; 2005 N.Y. App. Div. LEXIS 14328 (2d Dep't, December 19, 2005)**

The trial court properly granted the wife a protective order against the husband's demand to submit to a

vocational assessment because the wife was age 60 and never worked outside the home during the parties' 26-year marriage. The protective order prevented the wife from unreasonable annoyance and expense.

Equitable Distribution

Separate Property Credits Towards Acquisition of Real Property

***Milnarik v. Milnarik*, 23 A.D.3d 960, 805 N.Y.S.2d 151 (3d Dep't, November 23, 2005)**

The husband was entitled to credits for his contributions of separate property to the acquisition of real property acquired during the marriage, including $120,000 of an inheritance and $10,000 from the sale of a boat and $24,000 from the sale of a home he owned prior to the marriage. The court noted that there was no evidence that any of the husband's separate property funds were ever placed in a joint account or otherwise commingled with marital funds.

Where the husband failed to show proof of the current value of an automobile (as opposed to the purchase price), he was not awarded a credit towards the wife's award of this vehicle.

Disability Pension

***Pulaski v. Pulaski*, 22 A.D.3d 820, 804 N.Y.S.2d 404 (2d Dep't, October 31, 2005)**

The denial of the husband's motion to vacate the QDRO was affirmed on appeal. The parties stipulated that the husband's pension will be equally divided via QDRO and pursuant to the *Majaukas* formula. Before entering into the stipulation, the husband applied for a disability pension with his employer, the New York City Police Department, based on a line-of-duty injury. After the divorce, he was retired on disability and his pension payments commenced. Although generally the portion of a disability pension attributable to personal injury (as opposed to deferred compensation) is considered separate property, in this case, since the husband failed to carve out such separate property in the agreement, the entire pension was subject to division.

Counsel Fees

***Winters v. Winters*, __ A.D.3d __, 807 N.Y.S.2d 302 (2d Dep't, January 17, 2006)**

Judge Bivona of the Suffolk County Supreme Court denied the husband's counsel's motion to withdraw as counsel where the client was more than $15,000 in arrears in payment of his legal fees and had not opposed the attorney's application. On appeal, the Second Department reversed, staying the action for 90 days in order to give the defendant time to secure new counsel. The appellate court held, "An attorney may be permitted to withdraw from employment where a client refuses to pay reasonable legal fees."

The Second Department cited, *inter alia*, two other matrimonial cases where the same counsel was permitted to withdraw from the case. In *Kay v. Kay*, 245 A.D.2d 549, 666 N.Y.S.2d 728 (2d Dep't 1997), it was error for the Suffolk County Supreme Court to refuse to grant the wife's counsel's motion to be relieved where the wife's application for *pendente lite* counsel fees was denied, which denial was affirmed on appeal, and the wife was in "substantial" arrears of counsel fees, having made no payments after the retainer was depleted. The court held, "There is no basis, in the case before us, to force (counsel) to continue to finance the litigation or to render gratuitous services." In *Galvano v. Galvano*, 193 A.D.2d 779, 598 N.Y.S.2d 268 (2d Dep't 1993), the Queens County Supreme Court abused its discretion by refusing to allow the wife's counsel to withdraw from the case, where the wife paid only $48,000 of $124,000 billed, and had not made any payments within the past two years of her representation, and there was a breakdown of the attorney-client relationship. The Second Department held that, "It is well settled that an attorney will be permitted to withdraw from employment where a client refuses to pay reasonable fees," and counsel "should not be forced to continue to finance the litigation or render gratuitous services."

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Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar. Authors interested in submitting an article should do so on a 3½" floppy disk (preferably in WordPerfect or Microsoft Word), which includes the word processing program and version used, along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

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