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Notes and Comments

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Appellate Division, Second Department, Clarifies Rule of Law to Set Aside Post-Nuptial Agreement

In a recent case decided by the Appellate Division, Second Department, *Petracca v. Petracca*,[1] the court explored the means by which it would determine whether to set aside a post-nuptial agreement. The facts should be explored at some length to understand and appreciate why the court reached its conclusion to relieve the wife from its terms.

The parties had been married for about three months when they entered into a post-nuptial agreement in March of 1966. The husband presented the agreement to the wife shortly after she had suffered a miscarriage, and the wife alleged he bullied her into signing, threatening that if she did not sign, they would never have children and the marriage would be over.

At trial, the wife testified that the parties had agreed to have children and that was an important factor in her decision to marry the husband; that she had no attorney review it; that she signed the agreement under duress within days of receiving it; that she did not understand its terms. She also stated that the agreement was inaccurate because it undervalued the husband's net worth by at least $11 million. The husband denied the truth of the wife's testimony.

The agreement, in salient part, provided that the marital residence, which was jointly owned and which was presently valued at about $8 million, would become the husband's separate property. The wife waived all interest in the husband's businesses together with any appreciation, which was valued at over $10 million, and waived her rights to his estate and her elective share, despite the fact that the husband's admitted net worth was more than $22 million.

Essentially, the wife gave up her rights to receive any property division, although the agreement did contain provisions for some maintenance, depending upon the duration of the marriage and conditioned upon the husband's visitation rights if the parties had any children.

In 2008, the wife commenced a divorce action and the husband sought a protective order, alleging their agreement barred disclosure, and the wife cross-moved to set the post-nuptial agreement aside.

The trial Judge, Jeffrey Brown of Nassau County, doubted the husband's veracity and found the wife

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credible. He held that the wife was not represented by counsel and could not properly assess the financial terms of the agreement because of the husband's inaccuracies. Significantly, he held that the agreement was "wholly unfair" and based on the totality of the evidence was unenforceable, and set aside the agreement.

The Appellate Division, in affirming the trial judge, revisited the *Christian v. Christian*[2] decision and remarked that normally a post-nuptial agreement will be enforced like other contracts, but that agreements between spouses give rise to fiduciary relationships requiring the utmost of good faith, and then quoted from *Christian* to hold:

> Accordingly, "courts have thrown their cloak of protection" over postnuptial agreements, "and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity."

The court then commented that these agreements may be set aside far more readily in equity than ordinary contracts, where the same arguments would be rejected. It then borrowed further from *Christian* and remarked:

> To warrant equity's intervention, no actual fraud need to be shown, for relief will be granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching (*Christian v. Christian*, 42 NY2d at 72-73; *see Infante v. Infante*, 76 AD3d at 1049, *O'Malley v. O'Malley*, 41 AD3d at 451; *Frank v. Frank*, 260 AD2 344, 345; *see also Levine v. Levine*, 56 NY2d at 47).

What is most interesting is that the court followed *Matter of Grief*[3] to caution that although a spouse seeking to set aside the agreement has the initial burden to do so, the burden shifts to the proponent where a fact based inequity or inequality has been shown to exist. The burden then rests on the proponent to disprove fraud or overreaching.

The Appellate court's conclusion is illuminating:

> Furthermore, inasmuch as the terms of the agreement were manifestly unfair to the plaintiff and were unfair when the agreement was executed, they give rise to an inference of overreaching (*see Christian v. Christian*, 42 NY2d at 73; *Terio v. Terio*, 150 AD2d at 675-676; *Stern v. Stern*, 62 AD2d at 700-701.

The importance of this decision is that if a case contains suffient equities that favor setting aside an agreement between spouses, the court is still prepared to do so. It in effect acknowledges its obligation to follow the ruling to the Court of Appeals in *Grief* and *Christian*, and it was prepared to follow the rulings of the trial court concerning credibility. Although there may have been some cases that have not done so, it seems equity will win out over an argument in law that there should be finality to marital agreements especially where the terms are "manifestly unfair" and there was a vast disparity in what each party received under their bargain. The court also noted that an inference of overreaching is reached when the inequity is patent, and the terms (based upon all of the cumulative facts of the case) are manifestly unfair.

Finally, the court concluded that the inference of overreaching is

> ...bolstered by the evidence submitted by the plaintiff, including her testimony, regarding the circumstances which led her to give her assent to the postnuptial agreement (*see Kabir v. Kabir*, 85 AD3d at 1127; *Cardinal v. Cardinal*, 275 AD2d at 757; *Terio v. Terio*, 150 AD2d at 676-676). The defendant's testimony which tended to show that he did not engage in overreaching raised an issue of credibility, and we decline to disturb the Supreme Court's determination with respect thereto (*see Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 NY2d 492; *Reid v. Reid*, 57 AD3d 960).

Obviously, the court was guided by the equities of the case in holding its ultimate decision to set aside the post nuptial agreement...and that appears to be a better result.

Endnotes

1. 101 AD3d 695 (2d Dep't 2012).
2. 42 NY2d 63, 72 (1977).
3. 92 NY2d 346 (1988).

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Social Security Offset: Methodology Explained Per *Wallach v. Wallach*

By Raymond S. Dietrich

Introduction

As was set forth in *Wallach v. Wallach*, New York recognizes a Social Security offset against certain federal retirement benefits.[1] Unfortunately, *Wallach* failed to explain the methodology used to calculate one. This article examines the methods used in other jurisdictions, and details how an offset is calculated and under what set of facts it can be applied.

In New York, you will likely encounter the issue when the participant spouse is a federal employee covered by the "old" Civil Service Retirement System ("CSRS"). New federal employees, however, are covered under the Federal Employee Retirement System ("FERS") or the new CSRS; unlike the "old" CSRS, both of those plans pay into the Social Security trust. Therefore, Social Security offset is slowly becoming less of an issue, at least in New York.

I. Background

In *Wallach*, the husband was a participant in the "old" CSRS. Participants in the "old" CSRS do not contribute to Social Security. Therefore, the husband contended that the marital interest in his plan should be reduced by that amount that he would have contributed to Social Security were he not a federal employee. The Appellate Court agreed.

II. Statement of the Case

Holding: A portion of the participant's federal retirement is not assignable to his former spouse since it is equivalent to Social Security, and is therefore his separate property.

Facts and Procedural History: The husband was an employee of the federal government. During the marriage, the husband accrued retirement benefits, at least in part, under the "old" CSRS. The trial court awarded the wife an interest in the CSRS plan, without making any adjustment for benefits received in lieu of Social Security. The Appellate Court reversed the trial court for failing to reduce the husband's pension by the value equivalent of a Social Security benefit.

III. Analysis

Most jurisdictions regard a Social Security offset as an equitable remedy of the court.[2] A Social Security offset enables a participant spouse to receive credit for contributions made into a retirement plan in lieu of receiving Social Security benefits. Under federal and New York State law, Social Security benefits cannot be assigned to a former spouse in a divorce action.[3] Therefore, a portion of the accrued benefit, or offset, constitutes a Social Security benefit that the participant spouse is entitled to as his or her separate property.

A. Triggering the Offset

The offset is triggered when the participant spouse has accrued benefits under a pension plan that does *not contribute to Social Security* while the non-participant spouse has accrued a Social Security benefit during the marriage. Importantly, the accrued Social Security benefit of the non-participant spouse has likely been funded with marital funds. Therefore, an equitable response is required to put the parties on equal footing. Note, however, that an offset may be inappropriate if the non-participant spouse has not accrued a Social Security benefit during the marriage.[4]

In New York, an offset will likely arise when the participant spouse has accrued benefits during the marriage under the federal retirement system, specifically the "old" CSRS; or the participant spouse has accrued benefits under a state system that does not contribute to Social Security. Like the "old" CSRS plan, some state plans do not contribute to Social Security. For example, the five public retirement plans of the State of Ohio do not contribute to Social Security. In contrast, the New York State & Local Retirement System ("NYSLRS") does contribute to Social Security. Therefore, a Social Security offset does not apply to NYSLRS.

Prior to 1984 there was only one retirement system for federal employees: "old" CSRS. Congress created the Federal Employee Retirement System ("FERS") on January 1, 1987. FERS employees are covered by Social Security. The Social Security laws were also changed in 1983 when Congress created the Social Security Federal Insurance Contributions Act ("FICA"). As a general rule, CSRS employee's hired after December 31, 1983 will be covered by Social Security ("New CSRS"); there is an exception for rehires. Members under the new CSRS plan contribute .8% of their salary into the plan, and 6.2% Social Security Old Age, Survivor and Disability Insurance (OASDI) taxes. Technically, the new CSRS is referred to as the CSRS Offset since an employee's benefit is reduced at age 62 by his or her Social Security benefit. NYSLRS has a similar offset at age 62. To avoid confusion, the CSRS Offset plan is being referred to as the new CSRS in this article.

B. Methodology: Jurisdictional Survey

Social Security benefits are not assignable to a former spouse in a divorce action. Therefore, a divorce court must

offset the Social Security benefits *indirectly*. Jurisdictions across the country have calculated or factored a Social Security offset using the following three (3) methodologies:

1. Hypothetical Social Security Benefit;
2. Actual Social Security Benefit Offset;
3. Generalized Offset Approach.

Below is a summary of each methodology with supporting case law.

1. Hypothetical Social Security Benefit: Under this method, an indirect offset is calculated through the creation of a "Hypothetical Social Security benefit." The "Hypothetical Social Security benefit" requires an actuarial calculation. See Section C below for an example calculation. A majority of jurisdictions use this methodology.[5]
2. Actual Social Security Benefit Offset: A participant's pension may be offset by the present value of the actual Social Security benefit received by the nonparticipant spouse. A minority of states use this method because it is close to being prohibited by the anti-alienation provision of the Social Security Act.[6]
3. Generalized Offset Approach: Some states take a generalized approach when considering Social Security benefits. No actuarial calculation is performed. Rather, the court considers the discrepancy between the parties as only a *factor* in arriving at an equitable distribution.[7]

C. Methodology: Computational Exercise

Under the Hypothetical Social Security Method, you must first calculate a hypothetical Social Security benefit based on the actual wages of the target plan (e.g., "old" CSRS). To do so, a complete salary history is required. Next, a *present value* is placed on the accrued benefit of both the hypothetical Social Security benefit and the target plan. The *present value* of any stream of income can be an issue in and of itself. Unsurprisingly, some "experts" will choose a present value methodology that will favor their client. Thus, they will offer a low or high present value depending on the side they represent.[8] For credibility reasons, this author uses the same methodology irrespective of the side represented.[9] Currently this author uses the methodology prescribed by the amendment to ERISA by the 2006 Pension Protection Act ("PPA"). The PPA recently displaced the GATT Methodology, which used the 30-Year T-Bill as its discount rate. The PPA prescribes a mix of corporate bond yields referred to as segment rates. The discount rate is the most influential subjective factor when calculating a plan's present value.

Next, the percentage of the Hypothetical Social Security Benefit is calculated, as compared to the present value of the target plan, and adjusted if needed by the marital share factor. The resulting percentage is then subtracted from the marital share percentage interest and multiplied by the award percentage (usually 50%). The resulting percentage is the marital interest in the target plan, after offset.

Example Calculation

Present Values: "Old" CSRS: $1,634,254.00 Hyp. SS: $170, 940.00

170, 940.00/1,634,254.00 = 10.50% x .779 (marital share) = 8.18%

77.9% - 8.18% = 69.72% X .50 = 34.86%

Conclusion

Of the three methodologies, the Hypothetical Social Security Benefit is preferred. The method is accurate, it does not violate the Social Security laws of anti-alienation, and it is accepted by a majority of jurisdictions. As the "old" CSRS plan is being replaced by new CSRS and FERS employees, the Social Security offset issue in New York will slowly disappear.

Endnotes

1. *Wallach v. Wallach*, 37 AD3d 707 (2d Dep't 2007).
2. S*ee* Dietrich, *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney*, § 12 (2011 ed., Matthew Bender).
3. 42 USC § 407(a); *see* also *Principe v. Principe*, 644 N.Y.S.2d 1005 (2d Dep't 1996).
4. *McClain v. McClain*, 693 A.2d 1355 (Pa. Super. Ct. 1997).
5. *See Kelly v. Kelly*, 9 P.3d 1046 (Ariz. 2000); *see also Kohler v. Kohler*, 118 P.3d 621 (Ariz. Ct. App. 2005); *see also Cornbleth v. Cornbleth*, 580 A.2d 369 (Pa. Super. Ct. 1990).
6. *See Harshbarger v. Harshbarger*, 814 N.E.2d 105 (Ohio App. 2004); *see also Luna v. Luna*, 608 P.2d 57 (Ariz. Ct. App. 1979) (declining to recognize an actual Social Security offset since the methodology would defeat the anti-alienation provision of the Social Security Act).
7. *See Webster v. Webster*, 716 N.W.2d 47, 55 (Neb. 2006) (implying that a "generalized" approach may be appropriate while at the same time prohibiting a "direct" offset of Social Security benefits); *see also Neville v. Neville*, 791 N.E.2d 434 (Ohio 2003). The Ohio legislature, however, recently displaced *Neville* by amending Ohio Revised Code § 3105.171.
8. For further discussion of present value analysis, s*ee* Dietrich, *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney*, § 14 (2011 ed., Matthew Bender).
9. ERISA specifies minimum present value computations for plan funding under § 205(g)(3).

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Hidden Money in Military Divorce Cases

By Mark E. Sullivan

Editor's Note: This excellent Questions and Answers article should help any Family Law attorney to handle a military client.

Q I'm representing Mrs. Roberts, the wife of Army Colonel Bill Roberts, in her divorce case. What are some of the overlooked sources of money and benefits?

A When representing the nonmilitary spouse, the accrued leave of the servicemember (SM) is a valuable but often overlooked part of marital property division. Each person in military service on active duty accrues thirty days of paid leave per year, regardless of rank. This leave is worth what its equivalent would be at the monthly pay rate of the SM, and one can calculate this easily by using the pay tables available at the Defense Finance and Accounting Service (DFAS) website, www.dfas.mil.

Thus, if Col. Roberts's gross pay is $6,600 per month and he has forty-five days of accrued leave at the point of evaluation according to state law (i.e., date of separation, date of filing, date of divorce), his accrued leave would be worth about $9,900 (45/30 x $6,600), which represents gross pay before tax and other withholdings. Counsel for Mrs. Roberts should advocate use of the gross pay figure, whereas opposing counsel should use after-tax computations for the pay and eliminate any non-pay entitlements.

Counsel for the SM sometimes will attempt to confuse the issue by pointing out that the nonmilitary spouse cannot be awarded military leave. This argument misses the point. The issue is not who can use military leave but whether, under applicable state law, assets such as "vacation time" and "sick leave" are marital or community property if it is acquired during the marriage.

If the individual will not voluntarily produce his monthly Leave and Earnings Statement (LES), counsel may resort to formal discovery procedures if the matter is in litigation. In addition, the DFAS office in Cleveland will honor a request for documents so long as it is in the form of a court order or a subpoena signed by a judge.

Sometimes the attorney for the retiree will disavow any knowledge of the existence of the LES, or the SM will claim that it was lost, misplaced, or "floated away in that big flood last month." All SM's are eligible for a free "myPay" account at the DFAS website. This secure website is found at https://mypay.dfas.mil. Once there, it is a simple matter for the member to obtain his current LES; he just enters his "LogIn ID" and password, and then goes to the screen for current pay information. Sometimes a judge, when frustrated with the refusal of a SM or his attorney to produce an LES, will issue an order requiring both attorneys and the SM to use a computer to access the current or past LES from the myPay website.

DFAS even has a way that a third party can be given access to the secure website to view, but not to change, the SM's pay information. Here's what the DFAS website says:

> ***What is a restricted access Personal Identification Number (PIN)?***
> *You now have the ability to establish a Restricted Access PIN. The Restricted Access PIN may be given to others along with your Social Security Number to view your pay or tax statements without allowing them to create any pay changes. You may establish a restricted access PIN by clicking on the Personal Setting Page, and selecting the Restricted Access PIN option. You may delete the restricted access PIN at any time. If the user suspends their restricted access PIN you must reset the PIN and provide that new PIN number to the user.*

Q What else can we do for the non-military spouse?

A Even with a short marriage of, say, five years, the pension share is worth something. Don't waive it without getting a trade. Assume that the husband is a Sergeant First Class John Doe, in the pay grade of E-7, with 20 years of service, who will get an estimated $1,600 a month retired pay if he retires at the 20-year mark, which many servicemembers do. If there were only five years of marriage, his ex-wife would get 50% of 5/20 of $1,600, or $200 a month. If she is 40 when he retires and he were to live another 35 years, this would be worth $2,400 a year, or $84,000 (and this ignores all cost-of-living adjustments). That's a lot of money!

The lesson? If you want a pension waiver, you have to ask for it and pay for it. If your client is asked to waive military pension division, make sure she or he does it for a reasonable, fair trade—don't just give it away if the period of marriage is short. Look at the facts and calculate the numbers. Even if you trade the pension waiver for a washer, dryer and TV, you're doing better than just giving it away.

Q What about reenlistment bonuses and other special pay?

A "Reenlistment bonuses can be big money, especially when you consider the impact of signing reenlistment papers in a combat zone," according to Stephen T. Lynch, a Coast Guard legal assistance attorney in Cleveland. Lynch notes:

> For military members who are 1) about to get divorced, and 2) about to reenlist, counsel should be sensitive to the timing of both events, and the potential impact of one on the other. Many enlisted personnel are eligible for a reenlistment bonus. For example, assume that Petty Officer Jake Jones (PO2) is a Navy Seal Independent Duty Corpsman. He would be eligible for a reenlistment bonus totaling as much as $75,000—which will come free of state and federal income taxes if reenlistment occurs in a combat zone. There are obvious advantages for this sailor if he were to obtain a divorce prior to signing the reenlistment papers, and obvious advantages to Mrs. Jones if she were to delay the divorce until after Jake reenlisted and received his bonus. How much of the bonus, if any, would accrue to Mrs. Jones is a matter of state law and artful negotiation. However, if counsel for Mrs. Jones is unaware of the pending bonus and the timing implications, then counsel surely will fail to assert Mrs. Jones' interest in a sizeable payment that can be made in a lump sum and just might serve as a ready source for alimony, child support, and the payment of pending bills (such as mortgages, car payments, and attorney fees). Information about reenlistment bonuses may be found at: http://usmilitary.about.com/od/enlistmentbonuses/l/bl01bonus.htm.

Q Is there anything else for the spouse who is not in the military?

A Yes, and it has to do with insurance. Many military members, including Guard and Reserve, choose USAA for their insurance needs. A little known fact about USAA is that members have a Subscriber's Account (formerly called a "Subscriber Savings Account") which contains moneys contributed through premiums for property and casualty insurance (such as car insurance) and distributed from time to time to the subscribers. These periodic distributions amount to a refund of money not needed for operating reserves and they come as a credit on the quarterly or yearly premium, thus saving money for the customer. If one of the parties will be retaining USAA membership and benefits, including the balance in the Subscriber's Account, then it makes sense to ask how much is in the Account and allocate the sum to that party, even though it is money which can't be spent at present. The USAA pamphlet on this states (using *SSA* for "Subscriber Savings Account"):

> An SSA is not a bank account. A member cannot make withdrawals from, or deposits to, an SSA. Since SSA funds are an integral part of USAA's capital structure, they remain with the association as long as the member has at least one P&C [property and casualty] policy. If a member terminates all P&C policies, the balance of the SSA is paid out approximately six months later.

An example of a Subscriber's Account Annual Statement for 2008 from USAA is at "Appendix A" at the end of this article.

Q How can we save some money for Col. Roberts?

A You can save money for Col. Roberts in several ways in negotiations over his pension or, if your trial judge allows it, in the courtroom. The first one to use a *set dollar amount* in specifying the pension share for his wife upon divorce. This means that the spousal entitlement is calculated (usually with 50% of the marital share as the model) and then converted in today's dollars to a specific monetary amount, such as: "Mrs. Roberts shall receive $495 a month from the disposable retired pay of Col. Roberts, the defendant." This method of dividing the pension, if accepted by the other side, means that all future increases in Col. Roberts' pay belong to him and, upon retirement, the cost-of-living adjustments (COLAs) which are applied to retired pay go solely to him. She receives none of these benefits. The COLA, when applied solely to Col. Roberts' pension, will roughly double its value over twenty years.

Another option, if the first won't work, is freezing the benefit for Mrs. Roberts at the rank and years of service of her husband at divorce or separation, whichever is used under state law for the point of evaluation of marital assets. In this way, we will be fixing his rank at the date of separation or divorce. That will mean that we're dividing the pension of a colonel right now, not a two-star general, which he might be at the time of retirement.

Col. Roberts will also want to try to keep the denominator of the marital fraction as the total years of creditable military service, not the years up to the date of separation or divorce. In doing this, we are creating a marital fraction that is constantly shrinking in absolute value, not one that, in fairness, should be fixed as of the latter date.

A third step would be to state that we are dividing the retired pay of a colonel with a certain number of credit-

able years of service, fixing the years of service at the date of divorce or separation. The years of creditable service would usually be stated in even numbers, so we could say "a colonel over 20" or "a sergeant over 16" to show how many years of service at that rank. This likewise keeps the divisible pay down; we are fixing the benefit to be divided at the time of divorce or separation.

Finally, we would want to fix the pay tables involved as of the date of the separation or divorce, whichever is appropriate under state law. In doing this, we insulate Mrs. Roberts from any future congressional pay raises; all of these accrue solely to the benefit of Col. Roberts.

If we specify these in the pension division clause for Col. Roberts, it could mean a savings of tens or hundreds of thousands of dollars for him, in comparison to using his final rank upon retirement, and the pay tables that would apply when he retires.

Q What about military medical care—is there some money to be saved there? Is Mrs. Roberts eligible for that after divorce?

A Yes, if the marriage and the military career were long enough. There must be 20 years of military service concurrent with 20 years of marriage to get full military medical benefits. This means medical insurance coverage through TRICARE, the military equivalent of Blue Cross, and some free medical care at military medical treatment facilities.

Pub. L. 98-525, the Department of Defense Authorization Act of 1985, expanded the medical (and other) privileges set out in Pub. L. 97-252 to extend certain rights and benefits to unremarried former spouses of military members. If the former spouse was married to a member or former member for at least 20 years during which he or she performed at least 20 years of creditable service (also called "20/20/20" spouses, which refers to 20 years of service, 20 years of marriage, and 20 years of overlap), then the former spouse is entitled to full military medical care, including TRICARE, if not enrolled in an employer-sponsored health plan. He or she is also entitled to commissary and exchange privileges.[1]

If the former spouse was married to a member or former member for at least 20 years during which the member or former member performed at least 15 years of creditable service (also called "20/20/15" spouses, for 20 years of service, 20 years of marriage and 15 years of overlap), and the former spouse is not enrolled in an employer-sponsored health plan, then the length of time that the former spouse is entitled to full military medical care, including TRICARE, depends upon the date of the divorce, dissolution or annulment, as set out below. No other benefits or privileges are available for this spouse.

If the date of the final decree of divorce, dissolution or annulment of marriage was before April 1, 1985, then the former spouse is authorized full military medical care for life, so long as he or she does not remarry. If the decree date is on or after April 1, 1985, then the former spouse is entitled to full military medical care, including TRICARE, for a period of one year from the date of divorce, dissolution or annulment.

If the former spouse for some reason loses eligibility to medical care, he or she may purchase a "conversion health policy"[2] under the Department of Defense Continued Health Care Benefit Program (CHCBP), a health insurance plan negotiated between the Secretary of Defense and a private insurer, within the 60-day period beginning on the later of the date that the former spouse ceases to meet the requirements for being considered a dependent or such other date as the Secretary of Defense may prescribe.

Upon purchase of this policy, the former spouse is entitled, upon request, to medical care until the date that is 36 months after (1) the date on which the final decree of divorce, dissolution or annulment occurs or (2) the date the one-year extension of dependency under 10 U.S.C. 1072(a) (for 20/20/15 spouses with divorce decrees on or after April 1, 1985) expires, whichever is later.[3] Premiums must be paid three months in advance; rates are set for two rate groups, individual and group, by the Assistant Secretary of Defense (Health Affairs). CHCBP is *not* part of TRICARE. For further information on this program, contact a military medical treatment facility health benefits advisor, or contact the CHCBP Administrator, P.O. Box 1608, Rockville, MD 20849-1608 (1-800-809-6119).

A former spouse may also obtain indefinite medical coverage through CHCBP (under 10 U.S. Code 1078a) if she or he meets certain conditions. The former spouse:

- Must be entitled to a share of the servicemember's pension or SBP coverage;
- May not be remarried if below age 55;
- Must pay quarterly advance premiums; and
- Must meet certain deadlines for initial application.

Details regarding application for this "CHCBP-indefinite" coverage may be found at www.tricare.mil/chcbp/default.cfm. The coverage is the same as that for federal employees, and the cost is the sum of the following: premium for a federal employee, plus premium paid by the federal agency, plus 10%. This amounts to less than $350 per month as of 2008. There is an article explaining this coverage in the Summer 2008 issue of *Roll Call* (the newsletter of the Military Committee, ABA Family Law Section) at www.abanet.org/family/military.

A former spouse who qualifies for any of these benefits may apply for an ID card at any military ID card facility. He or she will be required to complete DD Form 1172, "Application for Uniformed Services Identification

and Privilege Card." The former spouse should be sure to take along a current and valid picture ID card (such as a driver's license), a copy of the marriage certificate, the court decree, a statement of the member's service (if available) and a statement that he or she has not remarried and is not participating in an employer-sponsored health care plan.

It is important to remember that *these are statutory entitlements*; they belong to the nonmilitary spouse if she or he meets the requirements of federal law set out herein. They are not terms that may be given or withheld by the military member, and thus they should not be part of the "give and take" of pension and property negotiations since the military member has no control over these spousal benefits.

Q You said that military medical benefits depend on the date of divorce. What if my client has all the other requirements but is just 6 months short of 20 years of marriage?

A Since 20-20-20 medical coverage depends not on the date of separation or the date of filing, you might need to postpone the divorce for 6 months. This may not be easy, but if you look hard enough you might be able to find something that you can contest, that the other side did wrong in the pleadings, or that you can at least question through discovery. I had a case several years ago where there was a question about the domicile of the SM—he was the one filing for divorce. We were desperate to delay the granting of a divorce. I started with a set of interrogatories and document requests related to domicile, which of course is an essential jurisdictional element in divorce. The plaintiff got so busy fighting off my discovery requests and my motions to compel that he went through two separate civilian lawyers before the court finally granted him a divorce. That was a year and a half after he'd filed!

Q Are there any retirement benefits in the military similar to a 401(k) plan?

A Yes. In addition to the military pension, which is a defined benefit plan that has existed all along, we now have another retirement benefit. This is the Thrift Savings Plan, or TSP. It's a voluntary defined contribution plan, it can be divided, and it's basically the same as the federal civil service TSP. Contributions are sheltered from taxes and are allowed to grow in a number of different funds selected by the servicemember.

Q Are there any resources which can help attorneys understand the military TSP and how to divide it?

A Yes. There's a booklet available on-line. Go to www.tsp.gov and click on *Military—Forms and Publications*, then click on *Publications*, then on *Booklets*, then on *Court Orders*. It's quite helpful and has sample clauses that'll make your work a lot easier and your TSP division order "rejection-proof."

Endnotes

1. 10 U.S.C. § 1062.
2. 10 U.S.C. § 1086(a).
3. 10 U.S.C. § 1078a(g)(1)(c).

Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina and is the author of THE MILITARY DIVORCE HANDBOOK (Am. Bar Assn., 2nd Ed. 2011) and many internet resources on military family law issues. A Fellow of the American Academy of Matrimonial Lawyers, Mr. Sullivan has been a board-certified specialist in family law since 1989. He works with attorneys nationwide as a consultant on military divorce issues and to draft military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

Appendix A

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Dear

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We wish you the very best this holiday season and in the year to come.

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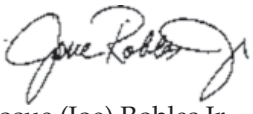

Josue (Joe) Robles Jr.
Maj. General, USA (Ret.)
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College Expenses: Modest Proposals

By Robert J. Jenkins

Recent news reports tell us education debt now exceeds credit card debt. The extension of six-figure student and parent-plus credit recalls the subprime mortgage crisis, with the cruel twist of virtually no bankruptcy relief. This presents a timely opportunity to reconsider historic family law jurisprudence directing trial courts to reduce basic child support by a "credit" for certain college expenses and the new suggestion that a "SUNY cap" should be the default judicial template in allocating college costs. The prior contributions of James A. Montagnino[1] and Benjamin E. Schub[2] are gratefully acknowledged.

First, while acknowledging that this proposal is contrary to established case law, it is submitted that the concept of a room and board "credit" against payments due for current child support is not in accordance with either the letter or spirit of the Child Support Standards Act[3] (CSSA) and is out of touch with the temporal reality of today's college experience, which in turn leads to unnecessary litigation. Instead, any such "credit" should be made a part of the allocation of the college costs "add-on," thus leaving current care payments intact.

Second, while acknowledging New York courts' varieties of "credit" law, it is submitted that there should be no credit for "room" and that any "credits" for board be based upon a factual analysis of what costs are actually saved by a custodial parent whose child attends a "sleep away" school. The author is mindful that there is a range of case law, from "dollar for dollar" credit for room and board charges,[4] to no credit at all,[5] to a credit for a proportionate share of the child's college meal plan.[6]

Lastly, as to the so-called "SUNY cap" most recently discussed in the well-researched and reasoned decision of Hon. Matthew F. Cooper, Supreme Court, New York County in *Pamela T. v. Marc B.*,[7] recently affirmed by the Appellate Division, First Department in *Pamela B. Tishman v. Marc Bogatin*,[8] it is submitted that there should be no such thing as a "SUNY cap" on parental contribution under any circumstances. Further, courts should not countenance any other college bill "sticker shock" inspired shortcuts designed to avoid the difficult financial analysis actually required of litigants, their children, attorneys and the courts.

I. The "Credit" Against Basic Child Support and the CSSA

The concept of applying a "credit" for college room and board payments against basic child support came into existence before the enactment of the CSSA.[9] Following its adoption, the terms and spirit of the CSSA should have signaled the death of the judicially created "credit" which would serve to reduce the basic percentage-based child support amount. The CSSA dictates clear directions to courts based upon the legislative schedule of importance: basic child support based upon a percentage of income (17%, 25%, etc.); mandatory add-ons in order of importance (child care, health insurance and expenses); and discretionary add-ons (certain child care and education expenses). There is no provision for any reduction of basic support apart from the more recent legislative provision for sharing costs of children's health insurance.[10] In fact, this specific provision for credit against basic child support for health insurance costs supports the idea that no other reductions are permitted under the CSSA.[11] The key to the spirit and discipline of the CSSA is the establishment of basic support obligations and add-ons to these obligations.

With respect to the issue of the education add-on, New York Domestic Relations Law § 240 mandates:

> Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent will pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.[12]

The terms of the CSSA discretionary add-on for education do not contain any language or reasonable interpretation supporting a backwards "credit" against basic child support.[13] Ignoring this legislative direction leads to very real problems and those very real problems lead parties back to court.

By way of example, assume a judgment of divorce directs the non-custodial parent to pay 75% of college expenses and reduces that parent's basic support obligation by $10,000.00 per year, representing the "credit" for room and board. Assume further that there is continuing acrimony between the parties, and while the child attends his or her first semester of college, he or she contracts mononucleosis on break and does not return to school for the spring semester. As a result, the custodial parent asks the non-custodial parent to resume the full basic child support and obtains a negative albeit abbreviated response, compelling the custodial parent to return to court for relief. This is time-consuming, expensive and unnecessary.

While it is understood that some opting out or separation agreements contain "a flow chart"-like provisions attempting to foresee each possible outcome, is it realistic to expect a court to anticipate each possible permutation, and in turn draw out, semester by semester, a variety of schedules of payments to coincide with such various

possibilities? No. However, there is a method that is in accordance with the CSSA and which will further the goal of meaningful and direct judicial decision making.

The "credit" against basic support should be abandoned so that current care basic support is maintained. If any consideration is to be given to the actual overlap between basic support and college costs, such consideration should be given as part of the determination of the parents' college cost contribution for each semester the child is enrolled. Such an approach leaves each issue separate and the parties' relative obligations clearer. Why is this so important? Because the end of the scenario proposed above taken to its many logical conclusions may result in the interruption of the child's education, in many cases for greater than a single semester, awaiting a decision from the court which could have, through the application of this proposal, been avoided.

As established by the College Board's statistics, many if not most of your clients' children will not obtain a bachelor's degree in four years. The 2012 College Handbook, published by the College Board, as early as page *two* of over two thousand pages, sounds an ominous chord. The Handbook lists among its key comparative facts:

> Percentage of students who graduate within six years (most students take more than four years to earn a bachelor's degree).[14]

This is the point where you should feel the generational culture shock start to set in. It gets worse. Virtually all colleges' graduation fall well below 70%, which should serve as a gentle reminder that nearly a third of college freshmen fail to obtain a bachelor's degree in SIX years. Imagine if the standard of measurement was four years! These facts should compel us all to abandon the concept of reduction of basic child support when a child attends college away from home. If we are going to adjust for any *proven* overlap between contribution for room and board and basic support, let it be made part of the education add on set forth in the CSSA and not as a credit against basic child support.

There is a further reason to abandon the credit against basic support. Precious few parents and children have the ready cash available, either from current income, planned savings or inheritance, to pay college expenses on a pay-as-you-go basis, regardless of whether the school is private or public. Most parents, as do their children, take on debt by way of parent plus-loans or mortgages or loans from retirement assets, which are paid over time, well after the child has (hopefully) graduated. Why then, if parents amortize their college contribution over time, should non-custodial parents receive an immediate cash "credit" reduction in basic support? They should not.

II. "Room and Board" v. "Shelter and Food"

All of the above being said, case law does in fact support the concept of a "credit" against basic support obligations. Regardless, whether the overlapping expense is considered in determining a parent's college contribution over and above basic child support or as a credit against current care child support payments, it should reflect economic reality as opposed to some form of a blind "dollar for dollar" reduction.

What is the actual cost to provide room and board for a child at home? Using available (2010) United States Department of Agriculture statistics,[15] for a single parent earning less than $57,600 per year the twelve-month-at-home room cost for an only child 17-years-old is $3,612.00 and board cost is $2,825.00, for a total of $6,437.00. (Compare that with average college room and board costs from the College Board Handbook of approximately $11,000 per *nine*-month school year.)

The reality is that room and board at college is not equivalent to the food and shelter provided at home. At home the labor is unpaid, there is no paid security force on premises nor are there other paid services, both labor and management, to administer both hotel and restaurant services for residents.

Initially, it should be now be settled fact that the custodial parent's "sleepaway school" savings in shelter costs is *de minimis* to the point of laughter. The only provable savings is for board and comes only from not having to feed the child each day for nine months. So, based upon the USDA statistics, for the nine months per year when the child is away at school, the parent saves at-home food costs of $235.00 per month, or $2,115.00 for the school year.

The savings are even less, due to economies of scale, when there other children in the household. When there are two children in the household the total at home board cost for the 17-year-old is $2,124.00 per year or $177.00 per month and $1,636.00 per year or $136.33 per month when there are three children in the home, resulting in nine-month school year savings of only $1,593.00 and $1,227.00, respectively.

Do these modest savings warrant substantial "room and board" credits? No. Is there a really a "dollar for dollar" credit due? No. Never has been.

The overlapping board/food "credit" against a parent's college contribution should be calculated by first determining the actual food and groceries savings enjoyed by the custodial parent. Because basic child support includes food and groceries, and because the parties share that cost as a proportion of their combined incomes, each should share the custodial parent's savings in the same proportion, to be applied as a credit against the non-custodial parent's contribution to the college bill, either as a lower percentage share of the college costs or as a reduction from the parent's annual college contribution cap.

The Appellate Division, Fourth Department's decision in *Pistilli v. Pistilli*[16] comes close by crediting the non-custodial parent with a *proportionate* share of the child's college meal plan. However, it does not consider the actual saving the custodial parent enjoys while the child is at

school. The cost of a meal plan provided for by the college simply does not correspond to the cost of groceries purchased at home.

III. There Is No Reason to Create a "SUNY Cap" or Any Other Shortcuts

We have all heard from the appellate and trial bench, both formally and informally, and colleagues and commentators that there is or should be a "SUNY cap" on parental contribution to college expenses. We have all also heard about different informal "theories" of allocation of obligation for college expenses, the "one third father, one third mother, one third child" theory, the blind proportionate sharing theory, sometimes only after the child has taken out every loan available. In *Pamela B. v. Marc B.*, a decision worth reading and re-reading, the Hon. Matthew Cooper directly addressed the history of "SUNY cap" cases, eviscerating their precedential value.[17] In his decision, Justice Cooper held that courts are not in the business of determining which colleges are better than others, but rather, the real issue is which school is best suited for the child "in the ways that matter most to that particular child."[18] Applying this standard, Justice Cooper found ample justification in the record to support the child's choice of a private rather than a public school dismissing payor's contention that he could only afford to pay for a SUNY education, determining that the payor was capable of contributing 40% of the costs of the private college expenses.

Among its many important points, the crux of *Pamela T. v. Marc B.* is that each decision and agreement must be based upon its own merits and not on shortcuts. None of the shortcuts comes to terms with the actual obligation of counsel and the courts: to determine each parent's and each child's abilities and resources to contribute to the costs of college education. Any decision or agreement should be determined not by an artificial standard such as the cost of a public college education, but by what annual contribution each party and each child is capable of, and should be based upon ability, earnings and resources, including appropriate debt incursion.

The real cost of college is tuition and that cost, for private institutions, has risen and risen to the point of absurdity. Tuition is much more than salaries of professors and structures; it includes administration costs and not just celebrity coaches. Many of the "high end" labor costs are based upon a celestial marketplace, where top administrative and faculty positions command high six to seven figure compensation packages. These astronomical costs are borne by your clients and their children.

This reality has resulted in most of SUNY schools accepting incoming freshmen with SAT scores comparable with and in some cases higher than most mid-level small liberal arts colleges in the state. Competition has increased for SUNY schools, and when the SUNY tuition is one-fifth to one-seventh that of private schools, there should be no wonder.

However, this should not be the unsaid basis for a court to limit parental contribution to a "SUNY cap" or some other shortcut without regard to the actual financial ability of a parent or the child's reasoned choice of school. Further, there are only so many spaces at SUNY schools, thus rendering the "SUNY cap" impractical.

The "SUNY cap" and other shortcuts are simply improper reflex responses to college bill "sticker shock " utilized to replace what should be a reasoned analysis of the contribution a parent can actually afford to send a child to school. In the end, what counsel and courts should do is determine what each party is capable of providing and then setting their respective "cap" at that amount rather than on some artificial and meaningless construct.

Endnotes

1. Montagnino, *Crediting College Expenses Against Child Support*, 227 NYLJ March 18, 2002 at p. 23.
2. Schub, *Revisiting the Crediting of College Expenses Against Child Support*, 235 NYLJ April 6, 2006 at p. 10.
3. New York Domestic Relations Law § 240 (McKinney 2010).
4. *See, e.g., Ataande v. Ataande*, 77 AD3d 742 (2d Dep't 2010).
5. *See, e.g., Rath v. Melens*, 15 AD3d 837 (4th Dep't 2005); *Burns v. Burns*, 233 AD2d 852 (4th Dep't 1996).
6. *See, e.g., Pistilli v. Pistilli*, 53 AD3d 1138 (4th Dep't 2008).
7. *Pamela T. v. Marc B.*, 33 Misc3d 1001 (Sup. Ct., N.Y. Co. 2011).
8. *Pamela B. Tishman v. Marc Bogatin*, 94 A.D.3d 621 (1st Dep't 2012)
9. *See, e.g., Guiry v. Guiry*, 159 AD2d 556 (2d Dep't 1990); *Healy v. Healy*, 190 AD2d 965 (3d Dep't 1993), each cited with approval by the Appellate Division, Third Department in *Haessly v. Haessly,* 203 AD2d 700 (3d Dep't 1994), post adoption by New York of the Child Support Standards Act.
10. New York Domestic Relations Law § 240 (1-b)(c)(5)(ii) (McKinney 2010).
11. *See People v. Barnhurst*, 101 Misc.2d 684 (N.Y. Crim. Ct. 1979): AWhere the legislature has listed specific items in a statute, it is the general rule that the express mention of one thing implies the exclusion of other similar things [*expressio unis est exclusio alterius*]...,"; *see also*, New York Statutes § 74 (McKinney 1971, 2012 Pocket Part].
12. New York Domestic Relations Law § 240 (1-b)(c)(7).
13. However, there is virtually no legislative history in support of or in opposition to this proposal, save the bill jacket, which contains the 1987 report of the NY Commission on Child Support, which noted at page 29, par. 12, that education costs are to be determined *after* basic support is calculated (emphasis supplied).
14. 2012 College Handbook; The College Board.
15. http://www.cnpp.usda.gov/expenditureson children byfamilies. htm. This an interactive site and was very helpful.
16. *Pistilli v. Pistilli*, *supra* at 1139-1140.
17. *Pamela T. v. Marc B.*, *supra*.
18. *Pamela T. v. Marc B.*, *supra* at 1012.

Robert J. Jenkins, Esq., was an original Family Court Hearing Examiner from 1985-1999, then a Court Attorney Referee in a Supreme Court Dedicated Matrimonial Part, retiring in 2010. He maintains a consulting practice in Syracuse, NY. He can be reached at RJJenkinsEsq@gmail.com. He also thanks Hon. Brian F. DeJoseph, JSC., E. Scott Brown, Esq. and Andrew T. Wolfe, Esq. for their help and advice.

From Divorce to Jail: Do Not Pass Go, Do Not Collect $200

By Robert H. Moses

Approximately 51% of marriages in the United States end in divorce, but few practically end with a prison sentence. Imagine that you are in court and your client has just been sentenced to three (3) months in jail. You watch helplessly as your client is handcuffed and escorted out of the courtroom by the County Sheriff and armed court officers. This may be an average day in the life of a criminal defense attorney, but for a matrimonial attorney, you are most likely swimming in unfamiliar waters. Unfortunately, the CPLR does not contain answers to questions such as, "what are inmate visitation hours?" or, "what is permissible to bring an inmate?" As matrimonial attorneys, we should all be familiar with how to generally counsel a client from a place where the rules are so unclearly defined and yet so rigidly enforced. This article aims to illuminate some of the obstacles a matrimonial and family law attorney can expect to face when your client is sentenced and incarcerated.[1]

Initial Confusion and Uncertainty

So how might a party in a divorce action wind up in jail? One of the more common ways would be if the party was found in contempt for willful nonpayment of court-ordered support. If your client is found in contempt and is granted a two-day window to purge the contempt or face incarceration, unless the client can afford to purge the contempt, he/she should plan in advance to get his/her affairs in order. As your client's legal counsel, still fighting to keep your client out of jail, rest assured that you will have a busy few days.[2] While your client may be under the impression that you will save him/her from jail, if your client does not, or cannot purge the contempt, most likely he/she will be sentenced, stripped of everything but the clothing on his/her back, and if the case is pending in New York County, he/she will be welcomed into the general population of the Manhattan Detention Center ("MDC," aptly coined "the Tombs").

The sadness and concern for your client may become refocused within the first 72 hours when you receive a call from your client begging you to "get me out of here." Unfortunately, and putting aside the logistics of how your client can get an early release, if your client does not prepare properly, his/her problems will be compounded. Your client should definitely take his/her prescription medication with him/her on the day of possible incarceration, as efforts to visit and get your client medication can prove to be a bigger challenge than expected. Unsurprisingly, the penal system seems to be generally unsympathetic to inmates and difficult to navigate for those stationed on the outside, especially if you are unfamiliar with the system. Your first instinct may be to consult the Department of Corrections ("DOC") website, which, upon first glance, appears to be an excellent resource. However, after making your first trip to the MDC, you would quickly realize that the website can be misleading and out-of-date. For example, while it clearly indicates "attorneys who possess a Unified Court System Attorney Secure Pass no longer need to obtain a separate DOC attorney pass to gain admission to Department facilities," this information is incorrect.[3] The same webpage advises that a DOC attorney pass is obtained by submitting, in person, a completed application.

"You watch helplessly as your client is handcuffed and escorted out of the courtroom by the County Sheriff and armed court officers. This may be an average day in the life of a criminal defense attorney, but for a matrimonial attorney, you are most likely swimming in unfamiliar waters."

Navigating the Visitation and Communication Process

Since regular inmate visitation hours are three times a week, you may at first believe it is not worth the trip to Queens to obtain the DOC attorney pass during the somewhat inconvenient hours of operation (Tuesday, Thursday, and Friday, 8:30 a.m. to 12:30 p.m.). However, after dispatching a paralegal to visit your client during regular visitation hours (and learning it can take several hours of waiting each time you want to visit an inmate), you may have a change of heart. To visit an inmate at a minimum security jail, all visitors must walk through two metal detectors and a trace portal machine that detects drugs and explosive fluids, and wait on six different lines that move at glacial speeds to be inspected by five different guards or personnel who gradually strip you of your belongings in stages. Much like an inmate, you are given a card to carry with you through each entry phase so that

guards can monitor your whereabouts at all times. The list of contraband items is extensive and non-negotiable: your cellphone is taken at the entrance, you are required to leave the rest of your belongings in a separate locker upon entry, and you are only permitted to wear one layer of clothing, leaving all belts, jewelry, and even hair elastics at the door. After no less than ninety minutes of searches (on a good day, if the line is long it could take up to three hours), which include a very thorough "pat down,"[4] your meeting finally occurs in a large, heavily guarded room with all of the other inmate visitations. You can then spend only one hour with an inmate, during which time you cannot leave your seat, use the restroom, or even cross your legs.

"As our client continued to rely on our counsel,…we had a novel experience trying to coach a middle-aged, upper-class, Ivy League graduate on how to endure three months behind bars."

Alternatively, if you prefer to be in a private room with your client with little interruption, save the walk through a metal detector and locking up your coat and wallet, the New York Department of Corrections Attorney Visit Pass is the way to go. The only headache is getting the pass, which requires a visit, in person, to the Department of Corrections in Elmhurst, Queens. You'll need your Attorney Secure Pass, Driver's License, a piece of your firm's letterhead, and $5.00. Alternatively, a paralegal can apply for a photo identification pass by undergoing the same process with the additional step of getting reviewed by the Department's Investigation Division. Despite the hassle, it's well worth the trip to Queens if you intend to visit your client more than once.

The DOC attorney pass is particularly useful if you need to contact your client, as inmates cannot receive incoming calls. For outgoing calls, each cellblock contains one phone and inmates have only 21 minutes to speak before their call is disconnected. Communicating with your client involves ensuring there are funds in the inmate's commissary account, as local calls cost $.10 a minute, while long distance calls cost $.50.[5]

The Physical and Mental Toll on Your Client

You may encounter similar difficulties ensuring that your client receives his/her medications once the inmate intake process has been completed. While your client's doctors can fill out the requisite Correctional Health Office ("CHO") forms, you may be unable to fax the CHO forms because neither of the two fax numbers, nor the contact number given by the CHO, generally work. Thus, it is a must to locate and speak to the Correctional Health Service Mental Health Coordinator. Now, it is not to say that your client will not have access to a psychologist and medical doctor who can prescribe him/her medications, but do not expect much follow-up. We had a client who did not receive critical medication until his seventh day of incarceration.

As our office had minimal experience with incarcerated clients, we referred our client at the time to a criminal defense attorney, who was presumably well-versed at preparing clients for "life on the inside." As our client continued to rely on our counsel despite the recommendation, we had a novel experience trying to coach a middle-aged, upper-class, Ivy League graduate on how to endure three months behind bars. After only one week the physical and mental toll on our former client was evident: he had bags under his eyes, lost a visible amount of weight and clearly had not shaved since he had entered. As the MDC does not provide clothing for the inmates, our client had been wearing the same clothes he wore to court the day he was incarcerated. We later learned that freezing cellblocks, constant noise, and random cellblock raids make even sleeping difficult, yet our client found that the most difficult part of his day was surviving the boredom. Due to overcrowding, not every inmate is permitted daily time outdoors, and the library offers exclusively legal literature. It is common knowledge that inmates literally walk in slow, concentric circles on the roof of the MDC to pass the time.

Planning Ahead

Based on my experience with a former client who was incarcerated following a contempt hearing, I recommend the following:

1. Of course, advise your client to do everything he/she can to avoid a contempt finding. While your client may believe he/she can handle incarceration, undoubtedly within a week he/she will want to vacate his/her new home immediately. My experiences led me to the conclusion that in a standard matrimonial case, your client is not prepared for jail, no matter how tough he/she may believe he/she is. Chances are the accommodations in any of the correctional facilities will come as a greater shock to your client than expected. In most cases, jail is not a good option, but as it is usually unavoidable, advise your client as much as possible about what to expect.

2. Use the Department of Corrections website, http://www.nyc.gov/ html/doc/html/home/home.shtml, for any questions; however, confirm the information posted on the website with a call to the DOC Information Line, (718) 546-1500. Beware that the website, while informative, is often out-of-date and therefore can be misleading.

3. Acquire a DOC attorney pass. Yes, it takes the better part of a morning to secure, but it will ultimately save you time in the visitation process if you plan on visiting your client more than once.

The DOC attorney pass also allows you to sit with your client in a private room and bring writing material into the meeting. You can even request to have an inmate produced to a court facility for a meeting.

4. Encourage your client to plan ahead, well before any contempt hearing. The client must get his/her affairs in order, including coordinating bill payments, long-term care for any pets, etc. The client must ensure that he/she has enough required prescription medications and coordinate with the mental health coordinator at the correctional facility. Your client should wear comfortable clothing upon entry, memorize telephone numbers and get information in advance about where to tell potential visitors to go and what to expect. Invariably, expect your client to contact you from jail by phone (calls are limited to 21 minutes) as he/she will not have access to e-mail. Your staff can be a huge help here, as chances are, you are out of the office working on other cases when your jailed client calls, and his/her call may be the only refuge he/she has throughout the day.

If there is ever a time during your career that you feel like more of a therapist than an attorney, you will notice it here. Just remember, it's better than being in the Tombs!

Endnotes

1. This article will not address the issue of whether incarceration is warranted or effective at producing the desired result of compliance with court orders against non-compliant clients (or clients who may be too ill to warrant such harsh punishment).
2. This time may be spent collecting transcripts and having them "so-ordered," preparing, serving and filing the Notice of Entry, the Notice of Appeal, the Stay Application and an interim Stay Application, and then filing it in the Appellate Division.
3. Certainly the Court officials at the MDC interpret it differently, and depending on who is on duty, it is better to have the MDC pass.
4. After proceeding through several metal detectors and a trace portal machine that detects explosive fluids and drugs, you are quarantined by a same-gendered guard in a small room and asked to reveal the bottom of your feet and the inside of your mouth and shoes. You are then asked to reveal and shake the inner lining of your brazier (for women) and the inner lining of your pants.
5. An inmate's commissary can be replenished over the phone, internet or in person through J-pay, Western Union Bank, or EZ Card. Be aware that each transaction comes with a hefty fee from the institution.

Robert H. Moses is a partner at Moses & Ziegelman, LLP with offices in Manhattan. He is a Fellow of the American Academy of Matrimonial Lawyers and has been selected for inclusion in Best Lawyers in America and as a New York "superlawyer" in family law. He may be reached by email at moses@mzllp.com. He would like to thank Melisa Brower, his paralegal and future attorney, for assisting with this article.

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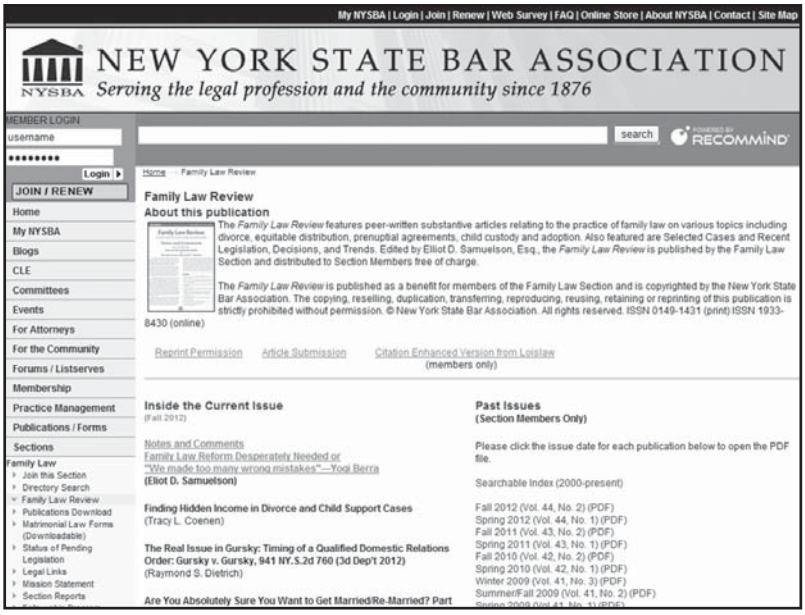

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Recent Legislation, Decisions and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages or civil unions

Since my last column, no new states have approved same-sex marriage. Nine states currently permit same-sex marriage, including Washington, Maine, Maryland, New York (as of July 24, 2011 when it passed the Marriage Equality Act) (new DRL § 210-a, 210-b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia.

Two states officially pledge to honor out-of-state same-sex marriages: New Mexico and Rhode Island. Eleven foreign countries also grant full marriage rights: Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, Spain, South Africa, Sweden, as well as Mexico City, Mexico

Civil unions are recognized in the following states: Delaware, Hawaii, Illinois, New Jersey, and Rhode Island. On March 12, 2013, Colorado joined these states and legalized civil unions for same-sex couples.

Federal Action on Same-Sex Marriage

My column has followed several same-sex marriage cases that were poised for consideration by the U.S. Supreme Court. On March 26 and March 27, 2013, respectively, the Supreme Court heard two of these same-sex marriage cases: the California Proposition 8 case *Hollingsworth v. Schwarzenegger*, where the Ninth Circuit held that Proposition 8 allowing citizens to vote on banning same-sex marriage is unconstitutional, and *Windsor v. United States*, where the U.S. District Court of the Southern District of New York ruled that the Defense of Marriage Act (DOMA), Section 3, which defines "marriage" as a legal union between a man and a woman, is unconstitutional. There is much anticipation that this landmark issue will change the national landscape on marriage. From a New York perspective, it is troubling that while same-sex marriage is recognized by the State, it is not recognized by the federal government, and legally married same-sex couples do not have the same rights as their heterosexual counterparts. The *Windsor* case is a good example of that, where the surviving spouse of a same-sex marriage was not required to pay state estate taxes but because their marriage was not recognized by the federal government, was forced to pay federal estate taxes of more than $300,000, until the Ninth Circuit held otherwise.

Recent Legislation

As a reminder, as of January 31, 2012, the combined parental income to be used for purposes of the CSSA changed from $130,000 to $136,000 in accordance with Social Services Law 111-i(2)(b) in consideration of the Consumer Price Index. In addition, the threshold amount for temporary maintenance is now $524,000 rather than $500,000.

Family Court Act §§ 439(a) and 454, amended effective January 1, 2013

Support magistrates are now empowered to hear, determine and grant relief with respect to the suspension of licenses as a result of the failure to pay child support.

Judiciary Law § 475-a amended, effective October 22, 2012

New York law is well settled that an attorney may attach a charging lien to settlement proceeds resulting from a court or other proceeding. The law is now expanded to include settlements in arbitration, mediation, and other forms of alternative dispute resolution.

NY Secure Ammunition and Firearms Enforcement (SAFE) Act of 2013, effective 1/15/13: Family Court Act §§ 842-a, 846-a and Domestic Relations Law §§ 240(3)(h), 252(9) amended; Family Court Act §§ 446-a, 552, 656-a, 780-a, 1056-a added, all effective January 15, 2013

New York is the first state in the nation to pass stricter gun control laws after the Newton, CT massacre. Amendments were made to the Family Court Act and Domestic Relations Law to provide that the court shall, as opposed to may, make a determination regarding the suspension/revocation of a firearm license, ineligibility to receive a firearm license, and surrender of firearms upon the issuance of an order of protection, temporary order of protection or violation of such order.

Court of Appeals Round-up

Grucci v. Grucci, 981 NE2d 248, 20 NY3d 893, 957 NYS2d 652 (2012)

The Court of Appeals affirmed the trial court's order dismissing the ex-husband's action seeking to recover damages against his ex-wife for malicious prosecution of a proceeding brought against him in criminal court for violating an order of protection. After trial, the jury concluded that since the ex-wife did not prosecute the criminal action, the first element of a cause of action for malicious prosecution (i.e., that the defendant commenced or continued a criminal proceeding against the plaintiff) was not satisfied and the case was dismissed. On appeal,

the ex-husband claimed that the trial judge made critical evidentiary errors warranting reversal and a new trial, including his failure to admit into evidence when his brother was testifying an audiotaped conversation between the brother and the ex-wife to show the ex-wife's state of mind that she was not fearful of the ex-husband (and hence, lied to the police about her claims of harassment). The Court of Appeals held that the trial court was within its discretion and that the evidence supported the jury's verdict that the ex-wife did not initiate the contempt proceeding. The high court also determined that the audiotape was inadmissible because there was no attempt to offer proof about who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody during the nearly nine years that elapsed between when the conversation allegedly took place, and the trial. Merely stating that the audiotape was a fair and accurate representation of the conversation was not enough. Judge Pigott dissented, and believed that failure to admit the audiotape into evidence was reversible error.

Other Cases of Interest

Child support

Emancipation

***Weinheimer v. Weinheimer*, 100 AD3d 1565, 954 NYS2d 796 (4th Dep't 2012)**

The plaintiff wife was not entitled to award of child support where the parties' only unemancipated child was 17 years old, attending community college and did not live at home. The daughter worked part-time while attending college and her tuition was paid by student loans. Although the daughter would return home for holidays, she remained in her apartment during summer and worked full-time. The plaintiff failed to allege that the daughter's reasonable needs were not being met and evidence demonstrated that daughter, with little financial assistance from both parents, was living on her own and her bills were being paid while she attended college

Custody and visitation

Hague Convention

***Squicciarini v. Oreiro*, 99 AD3d 605, 953 NYS2d 182 (1st Dep't 2012)**

Plaintiff-father filed a petition against the defendant-mother seeking an order directing the defendant, pursuant to Article 3 of the Hague Convention and the International Child Abduction Remedies Act 42 USC 11601, et seq. to present the parties' two minor children so that they could be returned to Rome, their "habitual residence." The order granting the father's petition was affirmed. The father established by a preponderance of the evidence that the children were wrongfully removed, while the mother failed to prove by the required clear and convincing evidence that the children will face a grave risk of harm if they are returned to Italy and failed to show that she suffered any verbal or physical abuse.

Modification of custody

***Burrell v. Burrell*, 101 AD3d 1193, 954 NYS2d 713 (3d Dep't 2012)**

Petitioner-father brought a proceeding seeking to modify a previous custody order where the parties had joint legal custody, but the father had sole physical custody and the respondent mother had visitation. The parties' child is bi-polar, with ADHD and oppositional defiant disorder, and the mother was unable to control her son's violent episodes during visitation, often cutting the visitation short and asking the father to pick up the child early, and on one occasion the child was injured by the mother's husband using excessive force when attempting to restrain the child. A change in custody to the father and supervised visitation to the mother to two hours per week was warranted as a result of the mother's inability or unwillingness to properly and safely care for the child.

***Doroski v. Ashton*, 99 AD3d 902, 952 NYS2d 259 (2d Dep't 2012)**

The court below's modification of an order of sole custody from the mother to the father based on the mother's parental alienation was upheld. Parental alienation of child from other parent is so inconsistent with child's best interests, it raises strong probability, per se, that offending party is unfit to act as custodial parent. The appellate court failed to state any facts that support parental alienation.

Jurisdiction

***Romero v. Ramirez*, 100 AD3d 909, 955 NYS2d 353 (2d Dep't 2012)**

The father's motion for custody of the child based on the mother's default in appearance was upheld on appeal. The mother claimed she was not served with process in Ecuador in accordance with the Inter-American Convention on Letters Rogatory 28 USC 1781. The father's motion was affirmed on appeal. Contrary to the mother's contention, the Convention permits alternative forms of service, including procedures under state law. Here, the mother's bare denial of service did not rebut the presumption of service established by the process server's affidavit.

Relocation

***Tsui v. Tsui*, 99 AD3d 793, 951 NYS2d 882 (2d Dep't 2012)**

The mother's motion to relocate to Texas was upheld on appeal based on her claim of economic necessity. The mother demonstrated that she could not meet her family's living expenses in New York because the father did not make regular child support payments, and her parent would allow her and the children to live in their home rent free, provide child care and give financial assistance.

Discovery

***Singh v. Finneran*, 100 AD3d 735, 953 NYS2d 683 (2d Dep't 2012)**

While this action involves a personal injury matter, the issue of discovery after a note of issue is filed is pertinent to matrimonial practice. The defendant timely moved post-note of issue for summary judgment. In opposition, the plaintiff submitted the affidavit of a previously undisclosed eyewitness. Following the denial of his motion for summary judgment, the defendant served deposition subpoenas on three nonparty witnesses. The plaintiff then moved to quash the subpoenas, which in effect was a motion for a protective order. The order granting the plaintiff's motion for a protective order was affirmed because the defendant failed to comply with 22 NYCRR 202.21(e), moving to vacate the note of issue within 20 days of its service on the ground that the case was not ready for trial; or 22 NYCRR 202.21(d), moving for permission to conduct post-note of issue discovery on the ground that "unusual or unanticipated circumstances" developed since the filing of the note of issue.

Equitable distribution

***Nederlander v. Nederlander*, 102 AD3d 416, 958 NYS2d 45 (1st Dep't 2013)**

The plaintiff-wife moved for an order compelling the defendant-husband to refinance the marital residence in order to avoid foreclosure pending equitable distribution. In opposition, the defendant contended that his income was insufficient to do so. The court granted the wife's motion and ordered the husband to pay 50% of the balances owed on the subject mortgages if he cannot refinance them. The First Department affirmed. The court properly imputed millions of dollars in income to the husband from his family's business, which were either gifts or benefits from the business to pay for his living expenses, and which was consistent with his net worth statement which reported $6.5 million in loans from his family that he has not paid back. Further, the order did not constitute an improper prejudgment equitable distribution of marital property since the court did not distribute the asset but rather prevented the wasteful dissipation of marital property

Personal injury awards

***Burnett v. Burnett*, 101 AD3d 1417, 956 NYS2d 655 (3d Dep't 2012)**

In this action for divorce, the plaintiff-wife sought an equitable apportionment of, the remaining portion of a $1 million personal injury settlement arising out of the defendant-husband's injuries in a work-related accident, and $297,000 in a legal malpractice settlement that arose from the underlying lawsuit. The $1 million net recovery was made payable jointly to the parties in settlement of their personal injury and derivative loss of consortium claims, without any breakdown, which was deposited into a joint investment account. The legal malpractice net recovery was made payable to the defendant, which he kept in his own account, although the settlement included an unspecified amount for plaintiff's underlying derivative loss of consortium claim. The defendant became an addicted gambler and wasted most of the settlement, leaving a balance of only $140,000 in the joint account. The judgment awarding the plaintiff title to the marital residence, the remaining balance of the joint account established from the primary settlement, and household furnishings and farm equipment, was affirmed. Although compensation for personal injuries constitutes separate property, the defendant did not rebut the presumption that the parties considered the $1 million settlement as marital property by creating a joint investment account with the proceeds

Pensions

***Johnson v. Johnson*, 99 AD3d 765, 952 NYS2d 243 (2d Dep't 2012)**

The court below erred in directing the plaintiff-wife to select a pension option which would provide the defendant with a pre-retirement death benefit since the parties' stipulation of settlement did not provide for such a benefit.

The defendant-husband's award to 50% of the appreciation of the marital residence, which was plaintiff-wife's separate property, was affirmed on appeal where the record established that the appreciation in value of the marital residence was attributable to the parties' joint efforts. Also, the award to the defendant of 50% of the plaintiff's rental income from the marital residence apartment was also upheld on appeal. Although the income was initially the plaintiff's separate property, it became marital property subject to equitable distribution because the funds were traced to a certificate of deposit naming defendant as beneficiary and describing the proceeds as "joint money from the rental of the apartment."

Grounds

The no-fault statute, DRL 170(7), effective October 12, 2010, has created divergent opinions on whether and to what extent "no fault" requires factual allegations and a trial. In my previous columns, I contrasted the "trial" opinion of the Dutchess County Supreme Court in *Schiffer v. Schiffer*, 33 Misc3d 795, 930 NYS2d 827 (Dutchess County Sup Ct 2011) (Wood, J.), with the "no trial" opinions of the Nassau County Supreme Court in *Vahey v. Vahey*, 35 Misc3d 691, 940 NYS2d 824 (Nassau County Sup Ct 2012), (Palmeri, J) and *A.C. v. D.R.*, 32 Misc 293, 927 NYS2d 496 (Nassau Co. Sup Ct 2011) (Falanga, J)

The Third Department, in *dicta*, opined that "no fault" means "no trial," in *Rinzler v. Rinzler*, 97 AD3d 215, 947 NYS2d 844 (3d Dep't 2012). Recently, though, the Fourth Department definitively stated that "no fault" means "no trial" in *Palermo v. Palermo*, 100 AD3d 1453, 953 NYS2d 533 (4th Dep't 2012), *lv app den*, 103 AD3d 1193, 959 NYS2d 85 (2013), which affirmed the court below's deci-

sion in 35 Misc3d 1211(A), 950 NYS2d 724, (N.Y. Co. 2011) (Dollinger, J).

Maintenance

Woodford v. Woodford, 100 AD3d 875, 955 NYS2d 355 (2d Dep't 2012)

In a motion for *pendente lite* support, the court below improperly directed the husband to pay temporary maintenance and 100% of the carrying charges for the marital residence. The order was remitted for recalculation of temporary maintenance. Pursuant to DRL 236(B)(5-a) carrying charges for the marital residence must be considered as part of the calculation of temporary maintenance.

Termination of maintenance

Preston E. v. Marieke B., 37 Misc3d 1201(A) (Westchester Co Sup Ct 2012) (Colangelo, J)

The plaintiff-ex-husband moved to terminate his maintenance obligation to the defendant-ex-wife, and recoup amounts previously paid, on the ground that she is cohabiting with another person, in violation of their stipulation of settlement, which provided for a cessation of maintenance upon the wife's "cohabiting with an unrelated adult person, whether or not they hold themselves out as husband and wife, for a cumulative period of 30 days." The plaintiff's motion to terminate maintenance payments going forward was granted since the defendant admitted to cohabiting. However, the motion to recoup maintenance amounts previously paid was denied because it is against public policy given the presumption that the funds have already been used to support the recipient spouse. The ex-wife's cross-motion to grant her an upward modification of child support if her maintenance is terminated was denied. The stipulation did not provide that if her maintenance terminates, child support would be increased to recoup the loss. Rather, the ex-wife had the burden of proving that the children's needs could not be met, which she failed to do.

Stipulations

Contract interpretation

Kang v. Kim, 100 AD3d 514, 954 NYS2d 71 (1st Dep't 2012)

Plaintiff-ex-wife moved to direct the defendant-ex-husband to comply with the terms of the parties' settlement agreement that gave the plaintiff an option to buy out the defendant's share of the former marital residence, as follows: "If the parties are unable to agree as to the terms for such purchase within 30 days of the day that the Wife gave notice to the Husband [,] then the value of the Husband's interest (the buy-out price) shall be one half of the value of the apartment as determined by a Real Estate Appraisers [sic] agreed to by the parties less the outstanding amount owed upon the First Mortgage." The plaintiff claimed, and the motion court agreed, that this provision of the agreement was unambiguous and that the buyout price was one-half of the value of the apartment less the entire outstanding amount of the mortgage, whereas the husband asserted that the buyout price was half the value of the apartment less the wife's share of the mortgage, which was one-half of the outstanding amount of the mortgage, i.e. one-half of the equity in the apartment. Order granting plaintiff's motion, and denying defendant's cross-motion, was modified by denying the plaintiff's motion as well and remitting the matter for a construction of the provision by the trier of fact. The provision is ambiguous because it is reasonably susceptible of more than one meaning, plus the fact that the remainder of the agreement provided that all marital property was to be divided 50/50 and that if the premises was sold to a third party, the "net proceeds of the sale" would be divided equally.

Postnuptial agreements

Petracca v. Petracca, 101 AD3d 695, 956 NYS2d 77 (2d Dep't 2012)

In this divorce action the defendant-husband sought to enforce the parties' postnuptial agreement. In response, the plaintiff-wife moved to set it aside on grounds that the defendant "bullied" her into signing it shortly after she suffered a miscarriage at the age of 42 by threatening that he would not have children and would divorce her if she didn't sign it. She signed it days after it was presented to her, without the benefit of counsel and did not understand its terms. She waived 1) her interest in any business in which the defendant had an interest, including its appreciation during the marriage, 2) any and all rights to the defendant's estate, including her right of election, 3) her rights in the marital residence which was purchased during the marriage for $3 million and subsequently renovated at an average cost of $4 million, and 4) her rights to maintenance except for the sum of $24,000 to $36,000/year for varying lengths of time depending on the length of the marriage, despite that at the time of signing she was a housewife with no source of income. The defendant's claimed net worth of $22 million was undervalued by $11 million. The order after a hearing granting the plaintiff's motion was affirmed. Unlike ordinary business contracts, agreements between spouses involve a fiduciary relationship, and equity will intervene if the agreement is "manifestly unfair to a spouse because of the other's overreaching." Here, the court below credited the plaintiff's testimony in determining that the agreement was manifestly unfair due to the defendant's overreaching.

Prenuptial agreements

Cioffi-Petrakis v. Petrakis, 103 AD3d 766 (2d Dep't 2013)

This case has attracted wide media attention and may open a Pandora's box of litigation over prenuptial agreements. The Second Department upheld the lower court's finding that the husband fraudulently induced the wife

to enter into a prenuptial agreement and therefore set it aside. The appellate court failed to state any facts regarding the fraudulent inducement, and stated that the trial court was best able to determine the credibility of the witnesses.

A review of the lower court's decision sheds light on the facts. *E.C.-P v. P.P.*, 2011 NY Slip Op. 52221(U) (Nassau Co. Sup. Ct. 2011 (Falanga, J.) In the divorce action, the wife brought 11 causes of action seeking to set aside the parties' prenuptial agreement, including fraudulent inducement, duress and coercion and unconscionability. On the husband's motion for summary judgment, Justice Falanga dismissed all of the wife's causes of action except for fraudulent inducement and the imposition of a constructive trust on the marital residence. The court concluded that the husband's oral promises that 1) if she didn't sign the prenuptial agreement they wouldn't be getting married in a week, 2) that everything they get after the marriage would be theirs and 3) after they had a family he would tear up the agreement constituted fraud in the inducement, and the prenuptial agreement was set aside.

Approximately three years after the parties wed, and after the birth of their two sons, the parties met with their attorneys to revise the prenuptial agreement which would effectively render it null and void. However, the parties never executed a revised agreement. A few years thereafter, the wife testified that the parties executed a new deed to their marital residence placing title in their joint names, but that it was never filed by the husband. The court found that such conduct was consistent with the promises the husband had made at the time he induced her to sign the agreement.

It seems that it was the totality the circumstances that led Justice Falanga to his decision to set aside the prenuptial agreement. He starts his opinion by explaining that "[t]he opening scene in this story book romance, *sans* happy ending, finds two (2) young people who meet at a club in 1992, become attracted to one another and start dating. He is only 21 but a successful business man owning several retail tobacco stores (smoke shops). She, all of 18..." *Id.* at 13. He mentions that, while the parties were dating, the husband told the wife that she would have to become Greek Orthodox and their child would be raised in this religion. Conceding to his demands, the wife converted to the religion and also learned how to speak, read and write the Greek language. About 3 years into their relationship, the husband proposed to the Wife by placing an engagement ring under a miniature model home of the home he was going to build for them and their family on the Gold Coast of Long Island. After their engagement, they started construction on their home to which the wife testified that she "contributed her time, talents and efforts..." *Id.* at 13.

It was not until about one month prior to their planned wedding that the husband first presented the wife with a prenuptial agreement. The wife read the agreement, became upset and had an argument with the husband explaining that the agreement was not what she thought it would be and that it was so one-sided, but she agreed to have an attorney review the agreement. In the days leading up to the wedding, the parties had several conversations and the court found the wife's testimony that her fiancee told her "not to worry" and "we'll work everything out" to be convincing. *Id.* at 15. The wife signed the prenuptial agreement four days before their wedding, against her attorney's advice.

The court found that the husband "was well aware of the substantial sums of money the wife's father had already spent...on the wedding when he told his fiancee that, without a prenuptial agreement, there would be no marriage. After a six (6) year relationship, including an almost two (2) year engagement, having converted to the husband's religion and having learned how to speak, write and read his family language, and with an imminent wedding date for which her father had already spent $40,000, the wife was clearly at a crossroads... " *Id.* at 15. The court characterized the husband's actions as "blind siding the wife," and having challenged her to a "game of chicken." *Id.* at 15-16.

Author's note: Since the wife had counsel who advised against signing the agreement, or could have drafted a clause that stated that the agreement is null and void upon the birth of the first child, does the reader believe that the facts of this case constitute undue influence?

Support enforcement

***Parker v. Navarra*, 102 AD3d 935, 958 NYS2d 754 (2d Dep't 2013)**

The plaintiff-wife moved to enforce that part of the parties' separation agreement, which was incorporated, but not merged, into the judgment of divorce, to compel the defendant-husband to pay the full amount of maintenance as required by the agreement. In opposition, the defendant contended that the plaintiff was estopped from enforcing payment of the full amount of maintenance because she received, without objection, the reduced amounts that he paid. The defendant also requested a hearing on the issue in order to offer the testimony of witnesses regarding his contention that he and his former wife orally agreed to reduce his maintenance obligations. The court below's order granting plaintiff's motion without an evidentiary hearing was affirmed. The separation agreement provided that any modification had to be in writing. There was no part performance unequivocally referable to the alleged oral modification, since no consideration was given for the plaintiff to accept less. Also, plaintiff's acceptance of the reduced amount did not support estoppel, given that the agreement contained a

clause providing that any waiver of strict enforcement of a provision of the agreement did not constitute a waiver of the party's right to strictly enforce the provision waived at a later time.

Waiver

***Hannigan v. Hannigan*, 2013 NY slip op. 01531, 2013 WL 950793 (2d Dep't Mar. 13, 2013)**

The plaintiff-ex-wife moved to enforce the terms of the parties' settlement agreement that had been incorporated, but not merged, into the divorce judgment to obtain arrears in college expenses. Although the parties' agreement included a clause that the agreement could not be modified or waived unless in writing and notarized, the defendant-ex-husband argued that the plaintiff waived her right to demand that they contribute pro rata shares based upon their respective incomes because she orally agreed to pay 50/50. In response, plaintiff testified that she only agreed to pay 50% up front, and they were to "settle up" later. That part of the court below's order granting plaintiff's motion to compel the defendant to pay his pro rata share of college expenses was affirmed. As a general rule, a written agreement that prohibits an oral modification can only be changed by an executory agreement in writing pursuant to GOL 15-301(1). However, an oral modification is enforceable if the party seeking enforcement demonstrates partial performance of the oral modification, which must unequivocally be referable to the modification. Here, given that trial court credited the testimony of the wife that the parties were to "settle up," her up-front payment of 50% of the children's college expenses did not constitute a waiver of the parties' pro rata agreement because it was not unequivocally referable to the modification.

Counsel fees

In the wake of *Prichep v. Prichep*, 52 AD3d 61 (2d Dep't 2008) and the amended DRL § 237(a) and (b) and § 238, effective October 12, 2010

Each column, I continue to update the reader with large counsel fee awards in matrimonial litigation: *Culver v. Culver*, 37 Misc.3d 1231(A) (NY Co Sup Ct 2012) (Sattler, J), $53,547 counsel fee award for post-divorce judgment enforcement motion; *Lennox v. Weberman*, 103 AD3d 550 (1st Dep't 2013) award to the wife of $50,000 *pendente lite* counsel fees and $35,000 *pendente lite* expert fees, and despite her having some resources available to her, she was not required to deplete them during the dependency of the action considering the husband's availability of millions; *Tawil v. Tawil*, 100 AD3d 520, 953 NYS2d 856 (1st Dep't 2012) $25,000 *pendente lite* counsel fee award (no facts supplied by the court regarding respective income and assets of the parties.)

22 NYCRR 202.16a, subsections (b) and (c) amended, effective immediately

The new amendments make automatic temporary restraining orders a court order, punishable by contempt. Further, the amendments now demand that "*The notice shall state legibly on its face that automatic orders have been entered against the parties named in the summons or in the summons and complaint pursuant to this rule, and that failure to comply with these orders may be deemed a contempt of court.*" Before this amendment, it was unclear whether the automatic orders were punishable by contempt, since they were not a lawful mandate of the court. The new amendments resolve this question and give teeth to the automatic orders.

The practitioner is reminded that the automatic orders are binding upon the plaintiff when the summons with notice or summons and complaint are filed, and binding upon the defendant upon service of the pleadings.

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