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Notes and Comments

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The *Grunfeld* Dilemma

When the Bar learned that the Court of Appeals had accepted the *Grunfeld* appeal, many scholars believed that a definitive decision would be rendered that would not only rectify the double or triple dipping problem, but might explore whether *O'Brien* was still good law. Many believed that, unless *O'Brien* was overruled, the doctrine of enhanced earnings had to be extended to all non-degree and unlicensed exceptional wage earners to insure that the constitutional provision of equal protection under the law would not be violated.

With such thoughts on many persons' minds, the decision in *Grunfeld* by our high court was a great disappointment. Unfortunately, rather than seizing the opportunity to qualify existing law, the court limited its exploration to the formulas used in both the lower and appellate court and the *McSparron* rule, but never resolved the nagging question of whether a professional, as opposed to a business wage earner, should be saddled with financial obligations based upon his earnings, rather than economic reality. The court never discussed why the legal fiction of imputing professional enhanced earnings should be retained, even though it appears that New York is among a distinct minority that does so, and even though the value ascribed by court decisions have really ignored "the value to holder" in favor of a fair market value determination. But more on that later.

Initially, the Court of Appeals limited the issue to whether the equitable distribution award of one-half of the value of Mr. Grunfeld's law license and a maintenance award to his wife was based upon the same projected (not actual) earnings, recalling *McSparron*'s admonition that forbids double counting of income.

Before discussing the court's lengthy explanations for its holding, the facts should be briefly explored. The Grunfelds were married for 20 years before their separation. The husband was a practicing attorney who, at the time of the parties' separation, earned $1.2 million a year from the practice of law. The trial court valued both Mr. Grunfeld's license and interest in his law practice in determining equitable distribution, and directed maintenance of $15,000 a month to be reduced to $8,500 monthly after the marital residence had been sold. Despite Mr. Grunfeld's admonitions that his practice had declined between the date of commencement and the date of trial, it was valued as of the date of com-

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mencement. The practice was valued, using the "excess earnings" method.

In analyzing the issues presented in *Grunfeld*, one cannot resist the parenthetic observation that a professional license is nontransferable, and has no "value to holder." Even if it was otherwise, who would be willing to purchase it for any sum?

The Court of Appeals, in discussing the lower court's procedure in arriving at its computations, approved of it in part, noting that it used different components of *future* income to arrive at its result. Interestingly, the lower court, mindful of the *McSparron* admonition, and in an effort to avoid a double counting of the same income stream, *excluded the license from the marital assets* in determining the distributive award and gave one-half of the remainder to the wife. It is significant that the wife received one-half of all other marital assets that included various investment accounts which were income producing. On appeal, the Appellate Division reversed. It held that one-half of the value of the license should also have been distributed to the wife, and added that the reduced maintenance award directed by the lower court should begin after the payment of her distributive award, not the sale of the marital residence. In addition, it added that statutory interest on the unpaid distributive award should be paid.

The Court of Appeals modified the Appellate Division's decision because, in its opinion, the appellate court double counted Mr. Grunfeld's income when it ordered that the wife should receive both undiminished maintenance and a distributive award of the full value of the husband's law license.

It is clear to this commentator that the Appellate Division was really guilty of triple dipping. Components of the only available income stream, Mr. Grunfeld's law practice income, were clearly used in all three valuations, *i.e.*, the license, the practice and the award of maintenance. To do so leads to the inevitable conclusion that patent unfairness is being perpetuated against the professional wage earner. This is true especially when one observes that a business person's income is only counted once, usually in determining maintenance. That income normally has nothing to do with the value of a business and, of course, the business person has no license to value.

There were a number of explanations in the Court of Appeals' decision which are difficult to comprehend and, at times, mystifying. For example, the Court of Appeals cited *O'Brien* for the proposition that an award of maintenance may be made if warranted, but never discussed what circumstances "warrant" such an award or under what circumstances an award may be omitted. It then reviewed *McSparron* and noted that a license, even when a practice is valued, still retains a distinct value which, at times, may be "nominal." (Nominal is defined in the *American Heritage Dictionary* as "insignificantly small; trifling; a nominal sum;" and nominal value is defined as something other than market value.) The problem with the high court's explanations is that it does not give factual predicates or examples of how they can be implemented. Unless the circumstances under which such results are reached are fully explored, no guidance is given to the bench and bar to support these abstract propositions of law. In that vein, consider the court's recital from the *McSparron* holding that, ". . . care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets that are derived from the license such as the licensed spouse's professional practice" and that courts must be "meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses." Yet, it appears that the Court of Appeals did precisely what *McSparron* sought to prevent. Certainly, Mr. Grunfeld's 20-year-old license should have but a nominal value, especially when his law practice was determined to have a substantial value.

In light of these observations, do you think that the Court of Appeals correctly applied their own formula to *Grunfeld*? We think not. Curiously, it did explain that the trial court also committed error in double counting Mr. Grunfeld's income stream and in failing to comply with the *McSparron* ruling, noting that the lower court should have either reduced " . . . the income available to make maintenance payments for the marital assets available for distribution, or some combination of the two." It then added, "once a court awards a specific stream of income into an asset, that income may no longer be calculated into the income formula and payout." Despite this admonition, the high court suggested that Mr. Grunfeld's *investment income* should also be counted in determining maintenance, even though one-half of the assets providing investment income were awarded to the wife. It seems more logical and, indeed, fairer not to award maintenance if the entire income stream was considered in valuing the license and practice, especially where the wife receives one-half of the investment assets that produce additional income. But, the court goes on to say that there is a way to accomplish just that, explaining, ". . .where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award (does that mean the value of the license or the license and the practice?), based on that same income." Again, what income are we talking about?

If you are confused, you have a right to be. One cannot help recalling some of the cogent holdings by a former member of the court, Judge Benjamin Cardozo, who could in a few words encapsulate the essence of a case. "Danger invites rescue"—three words from *Wagner v. International Railway Company* that have become landmark law. It is hoped that the next decision by New York's highest court will clarify what *Grunfeld* has beclouded.

The true meaning of *Grunfeld* continues to be the subject of great debate. This uncertainty will cause far more cases to reach the appellate courts. Perhaps the time has now come to hold that licenses indeed merge with practices and thus place professionals in *parri passu* with business owners in order to avoid a constitutional attack based on failure to accord "equal protection of law" to all spouses going through divorce. We urge our readers to advance such argument in the trial court to preserve it for appellate review.

Finally, now that the matter has been returned to the Supreme Court for additional findings, we are certain that it will be revisited by the Court of Appeals before it is laid to rest . . . and it deserves a decent burial!

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Grunfeld Revisited: . . . Again

By Stuart A. Gellman

On May 11, 2000, the Court of Appeals rendered its long-awaited decision in *Grunfeld v. Grunfeld*.[1] Offered here is an analysis of that decision and some guidance as to how the legal practitioner should proceed in the future when faced with similar circumstances.

Grunfeld generally deals with the problem of how much should be distributed to a non-titled spouse that represents their share of:

A. Their spouse's professional license that was acquired, at least in part, during the course of the marriage; and/or

B. A professional practice in existence as of the date of commencement of the matrimonial action which utilized the fruits of that license (and which included a valuation for goodwill); and/or

C. An award of maintenance.

In reality, whenever at least two of the three issues are extant, the tenets of *Grunfeld* are to be considered, *i.e.*, how monies are to be paid to a non-titled spouse when those payments find their source to be the same stream of income. This is what we refer to as double and, in some instances, even triple dipping.

Facts and History

Let us briefly set forth the facts existent in *Grunfeld* and its predecessor name at the trial level, *Rochelle G. v. Harold M. G.*[2] A recitation of all the facts and the myriad of issues before the Trial Court is not the purpose of this article. Therefore, the underlying methodologies propounded to the Trial Court by each of the several experts will not be analyzed. Indeed, as will be seen shortly, they never were an issue either at the Appellate Division or at the Court of Appeals. Here, we will deal only with those facts and issues of concern which led to the May 11, 2000 decision.

Mr. Grunfeld had completed one-half of his law school education prior to his marriage and the remainder thereafter. At the date of commencement of the matrimonial action, he was the managing partner of his own law firm, earning approximately $2 million per year. His income since the date of commencement and immediately prior to the date of trial was approximately $1.2 million per year.

Before setting forth the history of the case at the Trial and Appellate levels, we must first revisit the dictates of the Court of Appeals in *McSparron v. McSparron*.[3] There, the court held that a professional license secured during the course of the marriage, even though exploited for some time, retained a residual value subject to equitable distribution and did not merge with any career. The court cautioned that care must be taken to ensure that the value assigned to that license does not overlap with any other marital assets derived from that license, *i.e.*, a professional practice, and that courts in addition must carefully avoid awards of maintenance when premised upon the identical earnings associated with the valuation of that license.

Synopsis of Trial Court and Appellate Division Decisions

Returning now to the legal history associated with *Grunfeld*, the Trial Court, Justice Friedman presiding, made a determination as to the value of Mr. Grunfeld's professional practice as well as the residual value of his license to practice law. The court further provided that Mrs. Grunfeld be given an award of maintenance. However, in recognizing the admonitions of *McSparron*, the court concluded that, since the amount of its maintenance award exceeded that of Mrs. Grunfeld's pro rata share of Mr. Grunfeld's license valuation, in an attempt to avoid the double-dipping problem, it left the maintenance award intact and gave Mrs. Grunfeld no portion of the license valuation.

At the Appellate Division level, there was no challenge to the methodologies relied upon by the experts at the Trial Court level as to either the professional practice or license. Mrs. Grunfeld's primary objection was the failure of the Trial Court to award her any portion of the value of her husband's professional license. Citing the differences between maintenance and a distributive award, the Appellate Division concluded that Mrs. Grunfeld was in fact entitled to 50% of the value of the defendant's law license and increased the distributive award accordingly. As to maintenance, it not only retained the amount awarded by Justice Friedman, but actually increased it with no corresponding adjustment for any "double-dipping." Its basis for this conclusion was the fact that Mr. Grunfeld's future earnings were substantial, and that he possessed other assets and income which could be utilized to pay at least a portion of the maintenance. However, no specifics of that analysis were provided.[4]

Synopsis of Court of Appeals Decision

Judge Levine, in speaking for a unanimous Court of Appeals, contrasted passive income producing property with that of the professional license. The latter has no existence separate from the projected earnings from which it is derived. Therefore, to the extent the same stream of earnings utilized to value the license also forms the basis of an award of maintenance, the licensed spouse is in essence being charged twice with sharing the same income with the non-licensed spouse. In essence, then, once a court converts a specific stream of earnings into an asset, that income can no longer be calculated into the maintenance formula and payout.

What the court did not do is reconcile the differences between the upstate and downstate Appellate Divisions as to how to avoid double counting. In fact, it specifically left intact those differences and gave Trial Courts authority to reduce either the distributive award to non-titled spouses based upon their share of the license by the amount of maintenance or to reduce the maintenance award itself.

In the instant case, since the Appellate Division acknowledged that Mr. Grunfeld's additional assets or source of income could only be expected to support a *portion* of the maintenance, there was then at least some portion of maintenance based upon the same stream of income that was utilized to value the license and, to that extent, there was a double counting.

The court was faced with an additional hurdle that prevented it from disposing of the case entirely by reinstating the Trial Court's decision. In reviewing Justice Friedman's decision, the court noted that he did not expressly explain how he took into account the defendant's income from outside sources in determining that portion of the license distribution which was to be reduced. Putting it differently, if the maintenance which was calculated and ultimately used to reduce the value of Mrs. Grunfeld's interest in the professional license was based upon *all* sources of Mr. Grunfeld's income, that was incorrect because the share of maintenance based upon his unearned income should not have been deducted from the license value. That income was not a duplication of the income used to calculate the value of the professional license. Therefore, the Court of Appeals had to remit the case to the Supreme Court to recalculate the appropriate reduction of Mr. Grunfeld's share of the distributive award based upon the professional license itself. Unfortunately, the remand is further complicated by the fact that Justice Friedman has passed away, and a new Justice, having no exposure to the original testimony, will have to resolve this issue.

Analysis, Observations and Recommendations

1. Parenthetically, it is this author's opinion that *Grunfeld* may well have been decided differently if the entire case had been tried post-*McSparron.* Recall if you will that the original trial was held with proof provided for the valuation of the professional practice only. It was probably conceded by all parties that the license had "merged" into the practice. Had *McSparron* not come down when it did, the court probably would have determined a value for the professional practice and provided a distributive award to Mrs. Grunfeld based upon that valuation, as well as providing her with an award of maintenance.

   After the initial trial was completed, but prior to the court's rendering its decision, the Court of Appeals rendered *its* decision in *McSparron*. This forced the trial court to reopen the case and new testimony was given by new experts as to the value of the license. It is suggested that these new experts were limited in their testimony because of the testimony previously given regarding the professional practice. Had the same experts been utilized to give testimony regarding the practice and license, the case may well have been much more in sync with its respective components.

   It is respectfully suggested then that Justice Friedman had his mind made up at the conclusion of the first trial. This conclusion is based upon the fact that he would have given Mrs. Grunfeld a distributive award based upon her share of the professional practice only (no license valuation) and an award of maintenance. When all was said and done, including the additional testimony that was given as to the valuation of the license, that is still all that he did. Remember that after valuing the professional license, he concluded that his award of maintenance exceeded Mrs. Grunfeld's share of that license and, therefore, gave her no portion of that asset at all. This avoided, to his way of thinking, the double dipping problem.

2. Let's all say this together . . . "*O'Brien* is not going away." Many practitioners thought that the Court of Appeals, when agreeing to review the Appellate Division decision in *McSparron*, would at least restrict *O'Brien* to its unique circumstances, considering all the problems and confusion that its progeny caused the legal community. However, they not only reinforced *O'Brien* with bell-ringing authority, but actually

extended its application. *Grunfeld* was just another step in that same direction. To ultimately dilute the impact of large license-enhanced earnings valuations, it will take no less than courts who will accept alternative methodologies from experts, or, legislative action.

3. Trial attorneys attempting to secure awards of maintenance in addition to a distributive award based upon the existence of a professional license and/or practice must be meticulous in providing to the court a complete calculation of income from all other sources that may be utilized by the court to be a basis for the maintenance award. Let us consider an example in this regard.

   Assume a situation similar to *Grunfeld*. An individual secured his or her license to practice law during the course of the marriage, and, additionally, at the date of commencement of the action, was a partner in a professional legal practice. Let us assume that as of the date of commencement, the actual income was $350,000, reasonable compensation to replace that individual was $150,000 and a college graduate with a Bachelor's Degree only would be earning $50,000.

   Traditionally, the stream of income between $50,000 and $150,000 would be utilized to value the professional license and the stream of income between $150,000 and $350,000 to value the goodwill associated with the professional practice. That would mean that maintenance could only be based upon the following:

   A. The first $50,000 of income, as that income would not have been considered in either the valuation of the practice or license; and

   B. All other income such as dividends, interest, income from businesses other than the practice of law and distributions from limited partnerships. These additional sources of income must now be delineated with particularity.

4. Although the components of legal decisions sometimes make sense when dealt with individually, taken as a whole, they may well violate the basic tenets of economic reality. This was profoundly and ably set forth by Elliott Samuelson in his response to the Appellate Division decision in *Grunfeld*[5] where he was able to demonstrate that, if Mr. Grunfeld complied with the total obligations as propounded by the Appellate Division, he would have to pay to Mrs. Grunfeld a sum of money actually in excess of that which he was making.

   This being said, it is recommended to all trial attorneys to have their experts provide a cash flow analysis to the court based upon various assumptions to show what could or should be provided for in its decision. Even if the court adopts a position different from any of the scenarios presented, it still would have been provided with a useful format which it could use to avoid the cash problems associated with the Appellate Division decision.

5. Although the court made no reconciliation between the upstate and downstate Appellate Division positions as to how double dipping might be avoided, it is respectfully suggested that, however maintenance is ultimately treated by the court, it *must* be impacted by taxes. To do otherwise would compare the proverbial apple to the orange.

   Distributive awards based upon a value of a professional license (and perhaps a professional practice as well, depending on how it was valued) have already been tax impacted. If maintenance is to be calculated on the same stream of income as that of the license or practice, before any deduction can be made, maintenance should first be reduced to an after-tax figure as well. Judge Saxe, whose decision in *Grunfeld* at the Appellate Division level was modified on other grounds, was quite aware of this problem, and expressed it well:

   > Moreover, the recipient of spousal maintenance bears the obligation to pay taxes on that income (unless provision is made to the contrary), whereas receipt of a distributive award is not considered income for taxation purposes. . . . Since the dollar value assigned to defendant's law license was computed based upon projected after-tax earnings, a distribution of that asset would already have been tax impacted. To substitute an award of maintenance for a distribution of that asset, which maintenance is then subject to income tax, is tantamount to making plaintiff the victim of double taxation.[6]

   Judge Levine, in speaking for the Court of Appeals, stated that:

> More significantly for the case at hand, M*cSparron* also cautioned lower courts to 'be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses.' To allow such duplication would, in effect, result in inequitable rather than equitable distribution.[7]

It is respectfully suggested that to reduce a distributive award by maintenance, or vice versa, without first tax impacting the maintenance, would result in an equally inequitable rather than equitable distribution.

6. The last observation of this author is actually the simplest and most overlooked portion of *Grunfeld*, and that deals with the valuation methodologies presented by the experts at the trial level. Justice Friedman observed, at the trial court level:

> The court notes that *McSparron* several times reminds trial courts that valuation is to be done in an individualized fashion so as to conform to the facts in each case. The court decides this case based upon the proof submitted and does not necessarily imply that other valuation techniques would not be appropriate in other cases.[8]

The Court of Appeals also made it a point to state: "Because the parties have not challenged the Trial Court's methodology for doing so on this appeal, no issues related to the valuation of the practice or the license are before us."[9]

Taking these comments collectively, as well as all the knowledge we have garnered from the three decisions rendered in *Grunfeld* as to when and how deductions should be made to avoid double counting, this author cannot emphasize more strongly the need of having your respective valuation experts expand their bounds of creativity. The emphasis here is to secure "equitable" distribution. Different sets of facts may require different methodologies in order to obtain that result. With the parameters given us, your experts cannot and should not feel limited by those expert opinions propounded by others in the past. There are several methodologies available which could provide us all with better avenues of exploration. Each situation should be guided, but not bound, by the past so as to produce results that are more in keeping with the concept of economic reality. The failure of the Court of Appeals to reconcile the upstate and downstate versions as to the handling of double-dipping may well afford both the practitioner and the courts with an expanded flexibility within which to exercise both legal advocacy as well as equitable distribution.

Endnotes

1. N.Y.L.J., May 12, 2000, p. 27, at col. 3.
2. 639 N.Y.S.2d 632 (Sup. Ct., N.Y. Co. 1996).
3. 639 N.Y.S.2d 265 (Ct. App.-1995).
4. *Grunfeld v. Grunfeld*, 688 N.Y.S.2d 77 (A.D. 1 Dept.-1999).
5. *Family Law Review*, Vol. 31, No. 1, March 1999, p. 1.
6. *Grunfeld v. Grunfeld*, 688 N.Y.S.2d 77 at p. 84.
7. N.Y.L.J., May 12, 2000, p. 27, at col. 6.
8. 639 N.Y.S.2d 632 at p. 635.
9. N.Y.L.J., May 12, 2000, p. 27, at col. 6.

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ERISA Revisited: Plan? What Plan?

By Sandra W. Jacobson

Whenever we think that we as matrimonial lawyers understand pension law, we read the latest case and find that we are still without a clue.

The Plaintiffs in *Edelman v. Smith Barney*[1] were the sons by a prior marriage of a decedent with a retirement plan, the nature of which was in question. Their claim was disputed by the decedent's widow. The widow and decedent were married from 1977 to 1989 and remarried on May 26, 1994.

Twice before the remarriage, decedent designated defendant as the sole beneficiary of the plan. On September 14, 1994, after the remarriage, decedent executed a change of beneficiary form, naming plaintiffs and defendant as equal beneficiaries. In 1996, decedent made still another change, omitting defendant as a beneficiary of the plan.

Decedent had established a No-Frills Keogh Plan which was administered by Smith Barney. In 1993, Smith Barney merged with Shearson Lehman Hutton to create Smith Barney Shearson Inc. Decedent executed an adoption agreement and a Smith Barney Shearson Retirement Plan Document. Plaintiffs argued that the new plan was something other than a No-Frills Keogh Plan. The Court held to the contrary and granted summary judgment to the widow since she had not consented to the September 1994 or April 1996 beneficiaries change.

Israel Aircraft Industries International, Inc. v. Beca[2] was an interpleader action. The second wife of decedent had received one-half of the decedent employee's pension benefits. The deceased's two daughters of a prior marriage and the widow lay claim to the balance. In 1985, the decedent executed a beneficiary designation naming his daughters as beneficiaries. In 1988, he married his now widow. At his death, he had a vested retirement benefit under the Plan but no benefits had been paid.

The Plan Administrator determined that, pursuant to the plan, the widow's portion was approximately one-half of the benefits, calculated as if decedent had begun to receive his benefits at his date of death and had elected the 50% Contingency Annuity option. Since the Plan gave the Plan Administrator the duty and power to construe the plan and made such determinations binding on the parties, the standard of review was whether the determination of the Plan administrator had been arbitrary and capricious. Further, the Court held, even on a *de novo* review standard, the determination of the Plan Administrator was in accord with the Plan.

Kopec v. Kopec[3] is a classic example of how to leave a spouse without funds and without practical recourse. The husband had rolled over all of his pension rights under a one person plan into an IRA. The IRS made assessments against the husband for tax deficiencies in excess of $1 million and levied on his assets including the IRA. The wife sought to vacate the levy as to one-half of the proceeds on the ground that she was entitled to those funds under ERISA as her potential survivorship benefits of the plan.

The Court noted that ERISA requires a pension to provide an annuity for a surviving spouse, that the spousal annuity can only be waived by the spouse, and that the wife had not waived her rights.

> The question before this Court, which appears to be one of first impression, is whether she therefore has an ownership interest in the funds that were distributed in full to her husband without her waiver of her interest in them.
>
> The Court's research has not revealed any cases in which a court has suggested that a distribution of pension benefits prior to a valid spousal waiver creates an ownership interest in the spouse to some of the distributed monies. On these facts, courts have routinely held that, despite the plan's wrongful distribution, it is still required to pay survivor benefits to the spouse if her husband predeceases her. . .
>
> Thus, on the instant motion, if the Plaintiff is to establish that she has an existing ownership right in the levied funds, this right must arise as an automatic consequence of the distribution to Donald as a plan participant. The Court has not unearthed any authority for the proposition that a wrongful payment of funds to one beneficiary creates an ownership right to those funds in the proper recipient. Indeed, cases like Rice, Long, and Davis cited above, which authorize the wronged spouse to sue the plan for a declaration that her right to benefits still exists, imply the contrary. If a spouse could automatically claim an ownership right to half the monies that were distributed to her husband, allowing her to also obtain a

declaration that the pension plan must honor her survivor benefit would constitute a double recovery for her.

In fact, the Court is not convinced that a wronged beneficiary has any cause of action, at least under ERISA, against her participant husband. While 29 U.S.C. §1132(a)(1)(b) authorizes suits "by a beneficiary to recover benefits due to him under the terms of his plan," the Second Circuit has suggested that "in a recovery of benefits claim [under §1132(a)(1)(b)], only the plan and the administrators and trustees of the plan in their capacity as such may be held liable. . ."

For these reasons, the Court concludes that the payment of funds to Donald does not also create an ownership interest in Helen for the value of her survivorship interest. . .

The court is aware that the DAK plan may no longer exist. *However, as the question before the Court is a legal one, the particular facts of this case do not affect the analysis*. (Emphasis added).

Endnotes

1. United States District Court, Southern District of New York, (Motley, J), N.Y.L.J., July 6, 1999, p. 36, col. 4.
2. United States District Court, Southern District of New York, (Peck, J), N.Y.L.J., April 26, 2000, p. 34, col. 4.
3. United States District Court, Southern District of New York (Spatt, J), N.Y.L.J., October 28, 1999, p. 37, col. 1.

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So What's a Grandparent to Do?

By Hon. W. Dennis Duggan

OK, you have some spare time on your hands and you are looking for a challenge. You've climbed Mt. Everest, alone, without oxygen; you can solve Rubik's Cube blindfolded; you've run the Boston Marathon in under 2 hours, 30 minutes five times; you've solved Fermat's Last Theorem on your Palm Pilot in just 14 steps; you're a scratch golfer and you've beaten Tiger Woods in a skins game 6 and 5 (well, ok, that part's a lie, it was only 3 and 2) What worlds have you left to conquer? Just one. Before you die you are going to read all the majority, concurring and dissenting opinions of a decision of the Supreme Court of the United States and understand the holding. I know what you're thinking. You can't travel faster than the speed of light, you can't build a perpetual motion machine and no one has completely understood a holding of the Supreme Court since John Marshall retired. But you think you've got game and you only live once. So, here is your question for $1 million. Remember you have all of your lifelines. (1) You can call Professor Siegel; (2) you can ask to have three of the four answers removed; or (3) you can call on a panel made up of retired Court of Claims Judges.

The Supreme Court of the United States in *Troxel v. Granville* held:

1. That grandparents can only see their grandkids if they agree to pay off all of their children's student loans.
2. That grandparents can only see their grandkids if both parents are convicted drug dealers and DSS is about to put the kids up for adoption.
3. That grandparents can only see their grandkids when the parents want to go to Aruba and need a babysitter.
4. That grandparents can only see their grandkids when there has been an unreasonable and unanticipated change in circumstances that attenuates the taint and which circumstances show that conditions exist which equity would see fit to intervene to establish that it would be in the best interest of the child if the totality of the circumstances show that diligent efforts would not prevent the circumstances from being otherwise.

This is an open book quiz so let's take a look at what the Supreme Court did in *Troxel*. The majority opinion, written by Justice O'Connor, was joined by Renquist, Ginsburg and Breyer. Thomas and Souter concurred in separate opinions. Stevens, Scalia and Kennedy dissented in separate opinions. So, we have six separate opinions, three on each side, to guide us through this turning of "fresh furrows in the 'treacherous field' of substantive due process," as Justice Souter describes it.

The laws of the State of Washington permit "[a]ny person to petition a superior court for visitation rights at any time" and authorize that court to grant such visitation rights whenever "visitation may serve the best interest of the child." This is the "breathtakingly broad" statute that came up for review in *Troxel*. (Compare this to New York's guardianship statute which allows any person to apply for guardianship and has only a "promote the interest of the child" standard.[1] The Washington Supreme Court knocked down the statute, 5-4, on federal constitutional grounds. It held the law to be infirm because it did not require a showing of harm to the child if visits were not granted, and it allowed any person to apply for visitation at any time based only on a best interest showing. For these two reasons, the court held that the law swept too broadly.

The Supreme Court, by Justice O'Connor, held that the Washington law, as applied to the mother, violated her due process rights to make decisions concerning the care, custody and control of her daughters. The statute fails, according to O'Connor, because it permits a judge to substitute his or her determination of what is in a child's best interest for that of a fit parent without according any special weight to the parent's judgment. In fact, O'Connor notes that the Washington trial court shifted the burden of proof to the parent by presuming that grandparent visits were in the best interest of the child and then requiring the parent to come forward with established objections to the visits.

Justice Souter, concurring, basically asked: "Why are we hearing this case?" The Washington Supreme Court held that the law was facially (not "as applied") unconstitutional because it swept too broadly in allowing any person at any time to apply for visits. End of story.

Justice Thomas, concurring primarily on *stare decises* grounds, held that child rearing is a fundamental right. However, he alluded to the judicial power grab effectuated by the invention of "substantive due process" and its weak foundation in the text of the Constitution. His main problem was that no Justice articulated the appropriate standard of review. He would apply strict scrutiny to infringement of fundamental rights.

Justice Stevens, in dissent, also asked; "Why are we deciding this case?" "[T]here was no pressing need to review a State Supreme Court decision that merely requires the legislature to draft a better statute." But since the case is there, he thinks Justice O'Connor's "as applied" analysis is "untenable." "We are thus presented with the unconstrued terms of a state statute and a State Supreme Court Opinion that, in my view, significantly misstates the effect of the Federal Constitution on any construction of that statute." Stevens goes on to ask what of the "child's liberty interests in preserving established familial or familial-like bonds?" "We should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a person other than a parent."

Justice Scalia, in dissent, holds that the rights of parents to direct the upbringing of their children is among the "unalienable Rights" proclaimed in the Declaration of Independence. That right, he also states, is one retained by the people and protected from disparagement by the Ninth Amendment. But, he goes on to say that the Constitution gives him, as a judge, no power to "deny legal effect to laws that (in [his] view) infringe upon what is (in [his] view) unenummerated rights"

Justice Kennedy, in dissent, would remand the case because he finds error in the Washington Supreme Court's conclusion that the best interest of the child standard is never appropriate in third-party visitation cases. "States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interest standard can be employed by their domestic relations courts in some circumstances."

As can be seen from the above summary, getting five votes together to obtain a majority often results in a mushy decision. At the same time, the more perceptive and cogent points often come from the dissent. What of New York's law? DRL § 72 grants automatic standing to a grandparent if one or both of the parents has died. This part of the statute is problematical under *Troxel.* The second part of that section grants standing to grandparents "where circumstances show that conditions exist which equity would see fit to intervene." Bad grammar aside, the Court of Appeals decision in *Emanuel S. v. Joseph E.*[2] probably saves the statute from a successful *Troxel* challenge. Without referring at all to the circuitous language of the statute or its possible legislative origins (probably because no one knows what they are, the Bill Jacket being singularly unrevealing) the Court of Appeals, in *Emanuel S.* divined the following: 1. the trial court must examine all relevant facts; 2. the nature and basis of the parent's objections to visitation must be considered; 3. the nature and extent of the grandparent-grandchild relationship must be examined; 4. the grandparents must establish a sufficient existing relationship with the grandchild or show sufficient efforts to establish a relationship. If a grandparent can meet this test he or she has standing and the court proceeds to a best interest analysis.

The problems facing an appellate court in giving meaning to a vague piece of legislation are apparent. In the evolving and fluid area of what constitutes a "family," defining how to distribute the relative rights and responsibilities of members of that "family," whomever they may be, is much better placed with the legislature. For example, what of the child's rights? Are sibling visitation rights stronger than grandparent-grandchild visitation rights? What of the ten-year stepfather? What of the gay couple who together have raised one of the couple's biological children for several years? What of the grandmother who has raised a child for several years but then returns custody to a parent? What of a foster parent who has cared for a child for all of his or her life and then the child is returned to a parent?

Under the current state of the law in New York's non-parental visitation law, most or all of the examples given above would have unhappy endings for "non-biological parents." The courts are ill-equipped to deal with the multitude of situations that can arise without and are in need of better guidance from the legislature, especially in the area of the rights of the child. On the subject of judges wading into this area of family law, Justice Scalia observed in *Troxel*: "I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantage of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removed by the people."

Endnotes

1. SCPA § 1701.
2. 78 N.Y.2d 178.

W. Dennis Duggan is a Family Court Judge in Albany County, having been elected to the Bench in 1993. He serves, from time to time, as an Acting Supreme Court Justice. Judge Duggan lectures frequently and has authored many articles on family law and practice.

Nursing Home Spousal Support Cases: Do Hard Cases Always Make Bad Law?

By Daniel McLane

Maturing adults are often faced with debilitating health-related problems associated with aging. The toll these problems take are particularly devastating for married couples—especially when one spouse becomes incapacitated and must enter a nursing home. The spouse remaining in the community—who is often referred to as the "community spouse"—may be confronted with significant health and financial problems himself or herself.[1] Ultimately, nursing home cases involve the marriage of Elder and Family Law Practice. As such, they require expertise in two divergent fields not normally associated with each other.

Nursing home cases before Family Court Hearing Examiners are particularly interesting because they involve a form of "role reversal" from the perspective of the Department of Social Services (DSS or "the Department"). Most experienced Family Court practitioners are familiar with the Department's role in child support cases. Typically, the Department receives an assignment of child support rights from a custodian on public assistance. The Department litigates support matters as a "petitioner" in order to recoup Aid for Dependent Children allocations. In nursing home cases, the community spouse sues the institutionalized spouse and the Department for reasonable and appropriate spousal support. It is important to note that DSS may also proceed against the community spouse for recovery of Medicaid funds either in the Supreme Court or Family Court.[2]

Nursing home cases involve the interplay of two statutory schemes. Social Service Law 366-c provides for the financial needs of a community spouse when her partner is institutionalized and receiving Medicaid. Section 412 of the Family Court Act permits a spouse to seek appropriate support from a spouse from whom he or she is separated. The community spouse can either seek a fair hearing through the administrative law process or she can seek a spousal support order in the Family Court.[3]

The Community Spouse petition proceeds like an ordinary Article 4 case. The petitioner files a petition with the Family Court. The case is first calendared for preliminary conference and if appropriate, the Hearing Examiner may grant the petitioner a temporary support order. The case is adjourned for a hearing. The institutionalized spouse is typically represented by a Law Guardian, and usually does not appear in court.[4]

New York State statutory and case law permits a community spouse a sufficient, but not an excessive amount of income. The minimum monthly maintenance needs allowance (MMNA) establishes a level of support due the community spouse.[5] The intent of this standard was "to end the pauperization of the community spouse by assuring that the community spouse has a sufficient, but not excessive, amount of income and resources available, while the institutionalized spouse is in a nursing home at Medicaid expense."[6] Social Service Law § 366-C contemplates that an increase is available only to alleviate a true financial hardship that is thrust upon the community spouse by circumstances over which he or she has no control.[7]

The leading interpretation of the "exceptional circumstances" standard is contained in *Gomprecht v. Gomprecht*.[8] In *Gomprecht*, the Court of Appeals reversed the determination of the Appellate Division and Family Court in awarding support to a petitioner and the case was remanded to the Family Court for further proceedings. The Court of Appeals specifically noted that the respondent had transferred nearly all of his assets, totaling well over $1 million, to the petitioner prior to his institutionalization. The petitioner had owned two residences; an apartment in Manhattan and a home in East Hampton, as well as several bank accounts and investments, all of which were transferred to the petitioner. As a consequence, the Court of Appeals noted that the Petitioner "essentially sought to maintain her prior lifestyle and have the public subsidize it."

As in ordinary support hearings, the petitioner is required to prepare a notarized financial disclosure affidavit or net worth statement.[9] The petitioner's net worth statement is particularly crucial, as this document and its supporting materials form the basis for the petitioner's case. The petitioner must then justify his or her expenses beyond the minimum monthly maintenance needs allowance must be justified as "necessaries." The financial demands faced by the community spouse must be compelled by circumstances over which that spouse has no control and must represent "extraordinary circumstances."

It is important for a pleading seeking spousal support to emphasize those extraordinary circumstances for which the petitioner intends to seek relief. As a practical matter, the community spouse is elderly and may be confronted by medical and other conditions which qualify as "extraordinary." For example, the petitioner may require the services of a home health care aide. The cost of these services may qualify as an extraordinary or exceptional expense.[10]

A petitioner's home may have to undergo substantial modifications and repairs to make it handicapped accessible. The community spouse may be seriously ill or facing health problems. The community spouse may even have an obligation to support school-age children. The petitioner may seek spousal support to make unavoidable and necessary repairs upon the homestead.

In deciding nursing home cases, the court must balance the legitimate needs of the petitioner against the need to protect and preserve the public purse. Petitioners must be treated with compassion and sensitivity; yet they should not be entitled to windfall entitlements. Perhaps the most difficult and troubling aspect of these cases is the fact that the petitioners are often trying to maintain their dignity and former lifestyles. Balancing individual need against the public bank account is perhaps one of the more troubling aspects of this litigation.

Endnotes

1. Community spouse cases involve intricate Medicaid issues. Medicaid is a medical assistance program established by title XIX of the Social Security Act (42 USC 1396, *et seq*.). Medicaid is implemented in New York Law by Article 5, title 11 of the Social Services Law, and is jointly funded by the federal and state government. New York's Medicaid Plan must conform with federal statutory standards in order for the state to receive federal program funding. In 1988, Congress enacted the Medicare Catastrophic Coverage Act (MCCA) (42 USC 1396r-5) to address a perceived flaw in the Medicaid program. The MCCA sought to end the pauperization of the community spouse by assuring that he or she has a sufficient—but not excessive—amount of income and resources to lie comfortably when the other spouse is institutionalized. *See Golf v. New York State Department of Social Services*, 1988 WL 151293 (Court of Appeals 1998).
2. Social Service Law 366(3)(a) provides that if a responsible relative with sufficient income and resources to provide medical assistance refuse to do so, the furnish of such assistance by DSS "shall create an implied contract with such relative, and the cost thereof may be recovered from such relative in accordance with title six of article three and other applicable provisions of the Law." *Commissioner of the Department of Social Services of the City of New York v. Spellman*, 243 A.D.2d 45, 672 N.Y.S.2d 298 (1st Dep't 1998). DSS may also proceed against the Community Spouse in Family Court under an Article 4 proceeding.
3. The right to seek a fair hearing is contained in Social Service Law 366-c(8)(a).
4. In most ordinary cases, the law guardian for the institutionalized spouse meets with his client prior to a hearing. The institutionalized spouse usually does not oppose the community spouse's petition. The litigation is primarily between the Petitioner and the Department of Social Services.
5. For 1999 the Minimum Monthly Maintenance Needs Allowance is $2,049. *See* 18 N.Y.C.R.R. 360-4.10(8) "Minimum monthly maintenance needs allowances means an amount equal to $1,500 to be increased annually by the same percentage as the percentage increase in the consumer price index."
6. *In re Schachner v. Perales*, 85 N.Y.2d 316, 323, 624 N.Y.S.2d 558 (1995).
7. *Id.* at 325.
8. 86 N.Y. 47, 629 N.Y.S.2d 190 (1995).
9. FCA 424-a. As in ordinary DSS cases, the Department is under no statutory obligation to tender disclosure.
10. *White v. White*, 229 A.D.2d 296, 656 N.Y.S.2d 697 (3rd Dep't 1997).

Daniel S. McLane is a Deputy County Attorney assigned to the Family Court Bureau of the Nassau County Family Court and an adjunct professor of Business Law at the New York Institute of Technology. McLane is also a graduate of the Fordham Law School and SUNY/Stony Brook (*cum laude)* The opinions expressed in this article are the author's own and do not represent those of the County of Nassau, the Nassau County Department of Social Services, or the Office of the County Attorney of Nassau.

Selected Cases

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

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

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

Nicole J. v. Wilfrid H., Family Court, Queens County (Blaustein, J.M., February 21, 2000)

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Attorney for Respondent: Curt Arnel, Esq.
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This action for paternity and support was commenced by the filing of a petition on June 9, 1999. On the initial return date of July 13, 1999 Petitioner appeared (with her parents as observers) and Respondent appeared with counsel. Respondent requested genetic marker tests. Those tests were ordered, and Respondent was directed to bear the cost. On the return date of October 5, 1999 Petitioner appeared represented by counsel, and Respondent appeared with counsel. After allocution of Respondent in the presence of his attorney, Respondent admitted paternity. An Order of Filiation was entered for the child Scott J., date of birth May 12, 1987. A temporary order was entered and the matter adjourned for final disposition to November 30, 1999.

On the adjourned date, Petitioner appeared with her attorney, and Respondent appeared with new counsel. The matter was adjourned for possible resolution, and was marked final for January 19, 2000. The court then received a motion returnable on January 18, 2000 to compel Respondent to produce various documents. The motion was granted, and Respondent was directed to comply with the production of documents between the return date of the motion and the time set for hearing on January 19. On the hearing date the parties initially indicated that they had a private agreement for support, but that claim was rescinded prior to entry of an Order. This hearing ensued.

The following documents were entered into evidence: Petitioner's 1998 W-2s (two), her financial disclosure affidavit (over objection of Respondent, the objection being that said document was hearsay and not admissible), three bills (for tuition, camp, and transportation) for the child, and three recent pay stubs; by Respondent, his financial disclosure affidavit, his 1999 W-2, and his 1998 tax information. Petitioner testified that the child attends private school at a cost of $1920 per year, the child's summer camp cost is $1005 and the child has transportation expenses for camp of $210 for the summer. Her testimony was that the child has attended private school since 1st grade, and the child is now in seventh grade. She conceded that she did not discuss any of the child's needs (private school, camp, or camp transportation) with Respondent, claiming that she was rebuffed when she made an attempt to do so. When questioned by Respondent, Petitioner indicated that she is married and her husband works. She claimed that she does not know how much her husband earns. She pays $975 per month for mortgage/fees on the co-op and $658 per month for the car note on her 1999 Acura, and car insurance. Her husband pays between $125 -$140 for the phone $75 per month long distance phone service, $67 for cable, $140 per week for groceries. Her husband has his own car and pays for his car expenses. Petitioner also indicated that she paid for the child's tuition, uniforms and clothing, camp and transportation for the child, medical and life insurance for the child and the child's medical expenses. Petitioner is a registered nurse, employed by Interfaith Medical Center. Her pay stub for the pay period ending 12/25/99 indicated year to date gross of $76,642. She is paid on a bi-weekly basis. Her first pay stub for 2000 indicates that she was paid $3,154 gross, reflective of an increment which she received in November 1999, $82,004 annualized. A review of her financial disclosure affidavit indicates that she took out a car loan of $30,000 in September 1999, a personal loan of $33,000 in September 1998, and she owes Fleet Bank Visa $9,630.

Respondent is a medical doctor, employed by St. Mary's Hospital. In addition, he has a part-time medical practice in Brooklyn. He admitted that he owns his own home with his wife who is a physician's assistant. Respondent's 1999 W-2 demonstrates income from St. Mary's of $12l,5l6.49 as medicare wages, with deductions for social security of $4,501, medicare of $1,762, and New York City tax of $50l. His 1998 individual tax return indicates profit from his part time medical practice of $29,316 after business expenses. Respondent acknowledged that he has funds in an account in Smith-Barney.

CHILD SUPPORT ORDER

The income of the parties is determined as follows:

Petitioner (based upon Petitioner's current income as reflected in her pay stub dated January 14, 2000, which reflects her actual rate of pay and actual, current income):

Gross:	$3,l54
Social Security	$193
Medicare	$45
New York City	$109
Adjusted Gross	$2,807 biweekly

Respondent (based upon Respondent's 1999 W-2 income):

Gross:	$l2l,5l6 annually
Social Security	$4,501
Medicare	$1,762
New York City	$502
Adjusted Gross	$114,751 annually
Private practice income	$29,316 annually after business deductions
Total adjusted gross	$144,067 Application of Child Support Standards Act:

Combined parental income (adjusted gross):

Petitioner's annualized income	$72,982
Respondent's income	$144,067
Total adjusted gross	$217,049

Basic child support obligation on combined parental income up to $80,000 (F.C.A. § 413(1)(f)) (*see Cassano v. Cassano*, 85 N.Y.2d 649):

Child support percentage for one child	17%
Basic child support obligation	$13,600 annually
Parental pro rata shares:	
Petitioner	**33.6%**
Respondent	**66.4%**
Respondent's support obligation	$9,030 annually

The combined parental income is in excess of $80,000. Petitioner argues that the court should apply the holdings of *Brescia v. Fitts*, 56 N.Y.2d 132, and *Bast v. Rossoff*, 167 Misc. 2d 749, in ordering support above the $80,000 and in deviating from the guidelines to order that Respondent pay 100% of the cost for the child's schooling, 100% of the cost of the child's summer camp, and all unreimbursed medical expenses of the child. Petitioner argues that the disparity in the parties income would warrant such an award. Respondent argues that the court must consider the actual needs and expenses of the child when awarding support above $80,000 in combined parental income.

I find that the cases cited by Petitioner in support of his position have no relevance to this case, particularly since *Brescia* dealt with the modification of an existing order for support, and *Bast* is correctly cited for the applicability of the child support standards Act in shared/joint custody situations. Neither of those fact patterns have any applicability to the matter subjudice. Petitioner is instead directed to cases such as *Gluckman v. Qua*, 253 A.D.2d 267, *leave to app'l den'd* 93 N.Y.2d 814, in which it was held that "the mere fact that the children would have enjoyed an enhanced standard of living had [the relationship remained intact] does not necessarily mean that the statutory formula should be blindly applied on all income over $80,000 . . . to do so would constitute an abdication of judicial responsibility." *Id.* at 277. That court also found that "although respondent earns substantially more than petitioner . . . petitioner nevertheless has adequate financial resources at her disposal. . ." *Id.* at 271.

The needs of the child is "an appropriate factor when determining an award of child support on income in excess of $80,000 (citations omitted)" *Id.* at 272. Respondent made a cogent argument for the court to consider the needs of the child based upon three separate categorizations: What he labels "direct costs for the child" (camp, school, doctor, transportation, medical insurance, life insurance); costs for the child that are a portion of the household expenses and are paid by Petitioner's husband (local telephone, long distance service, cable television, and food), and expenses paid for by Petitioner (rent and petitioner's car expenses). Respondent argued that the child's "direct costs" are $338 per month as per testimony elicited (camp $1005 per year, $84 per month; school $1920 per year, $160 per month; $7 per month for pediatrician, $26 per month for transportation, $30 per month for medical insurance, $31 per month for life insurance); the general household expenses for a three person household total $884 per month ($140 for phone, long distance $75, $67 for cable, and groceries $140 per week or $602 per month) and the expenses paid by Petitioner for her car ($658 per month) and rent ($975) total $1,633. Respondent argues that the needs for the child, as attested to by Petitioner are $338 in "direct costs"; one-third household expenses

($884) paid by Petitioner's husband, $295 per month; and one-third household expenses of $1,633 paid by Petitioner, $545. Respondent points out that Petitioner's net income is $3,526 per month, and the expenses which she actually pays ($1,633) and the payment of "direct costs" of the child ($338 per month), total $1971, leaving her with surplus net income of $1523 per month. In addition, Respondent argues that in considering the tax consequences to the parties, the court must acknowledge that support paid by Respondent is not a tax deduction to him, while it is non-taxable income to the recipient Petitioner. Respondent also argues that Petitioner has not demonstrated or alleged that this child has any special needs. Respondent concedes that he should be held liable for contribution towards the child's private school education.

The basic child support obligation on the first $80,000 combined parental income, as indicated above, is $9,030 annually, or $752 per month. As Respondent does not contest the cost of the private school for the child or his obligation to contribute towards same, I find that his pro rata share of that expense is 66.4%, or an additional $106 per month($1920/l2=$160 x 66.4%) (F.C.A. § 413(1)(c)(7)). Respondent also does not dispute the fact that the child attends summer camp. As Petitioner is employed on a full-time basis outside of the home, this is proper expense to be allocated as and for child care. (F.C.A. § 4 13(1)(c)((4)). Respondent's pro rata share of that expense, (66.4% of $84 per month) is $56. I do not find that the Child Support Standards Act contemplates an allocation of the expense for transporting the child to summer camp. Respondent's support obligation on the first $80,000 of combined parental income is thus $914 per month ($752 + $106 + $56). I also consider the fact that among the needs claimed by Petitioner is an allocation of a portion of her $658 per month car note to the child.[1] Even considering the disparity of the parties' income, I find that consideration of the tax consequences to the parties (Petitioner will receive an additional $10,968 in tax-free income), the actual needs of the child,[2] and the fact that the child has no special needs, warrants limiting this order to the first $80,000 of combined parental income.

Order of support for one child $9l4 per month. Next payment March 9, 2000, through Support Collection Unit by Income Execution to Petitioner. Retroactive support from the date of filing, June 9, 1999 through February 9, 2000 (9 months) $8,226. SCU to credit all payments under temporary order of support and reduce retroactive support accordingly. Both Petitioner and Respondent are to provide health insurance for the child (F.C.A. § 416). Respondent is to pay 66.4% of future reasonable health care expenses for the child that are not covered by insurance.

Endnotes

1. The testimony was that Petitioner's husband also has an automobile. Thus, it cannot be inferred that only Petitioner uses her car to transport the child.
2. In no way can it be argued that a child needs a car expense of over $150 per week just for the car note and insurance.

* * *

Linda D. v. Michael D., Supreme Court, Suffolk County (Blydenburgh, Donald R., April 20, 2000)

Attorneys for Plaintiff: Doner, Hariton & Berka, LLP
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Attorney for Defendant: Pamela Philips Tucker, Esq.
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Bay Shore, NY 11706

A hearing was held on a limited issue to determine an asset for Equitable Distribution, on April 12, 2000.

The issue was whether the Defendant had an interest in Amore' Pizza that was the subject to Equitable Distribution.

The relevant facts in this matter are as follows, and are not in dispute:

1. The parties were married on June 2, 1995.
2. Defendant began working for Amore' Pizza on or about 1991.
3. In late 1995, Defendant announced he was buying into the business of Amore' Pizza and becoming a 50% partner.
4. On or about February 1996, Defendant invested at least $16,000.00 cash in repairs/renovations to Amore' Pizza, borrowed $1,500.00 from Plaintiff's uncle for new pizza ovens for Amore' Pizza and had his brothers perform about $10,000.00 in labor regarding the renovations.
5. Defendant told literally hundreds of people that he was an equal partner in Amore' Pizza.
6. Richard Graffeo, then alleged owner of Amore' Pizza heard Defendant say that he (Defendant) was an equal partner to "everyone" and allowed that belief to continue uncorrected.
7. Defendant told Plaintiff and Plaintiff's family he was an equal partner in Amore' Pizza.
8. Defendant gave free meals to his friends, Plaintiff's family and anyone he wanted.

9. Defendant is the only person in Amore' Pizza, other than alleged owner Richard Graffeo himself, who is provided with health insurance by the business. (There are other employees, but no one else receives these benefits.

10. Defendant and Richard Graffeo each have $100,000.00 Life Insurance Policies paid for by Amore' Pizza.

11. The parties separated in January, 1998.

12. The 1998 Income taxes of Defendant showed total income for Defendant to be $12,3000.00 (after 7 or 8 years of employment by Amore' Pizza) and listed Defendant's occupation as "Restaurateur." The taxes were prepared by the business' accountant and Tax preparer, Newson & Haberman of Lake Success, New York.

13. Defendant took the initiative to apply for permits and variances regarding the renovations on the restaurant.

14. 10,000 business cards and magnets were made up that listed both "Richie" (Richard Graffeo) and "Mike" (Defendant) on them and a sign hangs prominently in the Store that says Amore' Pizza, "Richie" and "Mike."

15. Defendant never asked for a return of his $16,000.00 investment, nor the payment of $10,000.00 to his brothers for labor performed, despite the total ($26,000.00) being twice his 1998 reported income and despite his father (who he alleges loaned him the $16,000.00), after losing his job, coming to Defendant and asking for some money.

There is some dispute as to whether or not the Defendant used the money remaining from the wedding gifts in addition to the $16,000.00 in funds to invest in the business, despite as to the amount of income Defendant received during the marriage and the lifestyle of the Defendant (Defendant claims his present girlfriend bought him a Waverunner Boat, and that a Corvette that he was seen driving, was his friend's car) but these facts aren't being relied upon by the Court to make this determination.

First, the Court is truck by the fact that all parties, including the Defendant and Richard Graffeo, testified that the partnership agreement contemplated a $100,000.00 investment by Defendant to become a partner ($40,000.00 cash and $60,000.00 in renovations). The renovations were completed. Amore' Pizza bought a Life Insurance Policy for both the Defendant and Richard Graffeo, each in the amount of $100,000.00.

Second, both Defendant and Richard Graffeo represented to the world that Defendant was and is an equal partner in the business.

Third, that Defendant willingly invested more than $26,000.00 in Richard Graffeo's business without benefit of a written agreement of any type and when the plan to become a partner "fell through" he never asked for a return of his investment despite the fact that it represented more than two (2) years salary as of 1998.

All indicia of ownership are present, except for a written partnership agreement. Defendant contends there has been no transfer of stock either, but the facts are that there has never been a distribution of stock even to Mr. Graffeo, and, in fact, nothing in the Corporate Outfit for "7 Cousins Food Establishment Inc." has never been filled out, (Exhibit "E") including the appointment of officers, First meeting of Directors, First meeting of Shareholders, Organization meeting, purpose of Incorporation or any reference in the Corporate Outfit of Amore' Pizza at all. Transfer of Stock in his Corporation is deemed irrelevant in the Question of ownership of Amore' Pizza, which may even have preexisted the Corporation.

The principle of Equitable Estoppel applies to the case at hand. Both Defendant and Mr. Graffeo represented in words and actions that Defendant was and is an equal partner in Amore' Pizza. He cannot now, in the middle of a divorce, contend otherwise.

The problem may be with the valuation of his interest in Amore' Pizza. The Defendant, however, has provided the Court with the relevant value of his interest for these purposes. He purchased his interest in the business after the date of marriage and prior to the separation of the parties. The agreed upon price of his purchase into this business was to be $100,000.00. The Defendant and Mr. Graffeo obtained identical life insurance policies in the amount of $100,000.00 after renovations on Amore' Pizza were complete and prior to the separation of the parties (to wit: September 8, 1997, Exhibit F). The parties separated shortly thereafter (January, 1998).

Defendant is determined by this Court to have, for purposes of Equitable distribution, a marital asset equal to $100,000.00 and he is equitably estopped from denying he has such an interest.

The parties are directed to appear on May 17, 2000 for a status conference of all other issues of this matrimonial.

The foregoing constitutes the order of this Court.

* * *

In the Matter of the R. children Alleged to have been permanently neglected by Debbie R., Family Court, Kings County (Freeman, J., April 25, 2000)

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These petitions to terminate the parental rights of respondent Debbie R. were filed in January, 1998, more than three years after the three children had been removed from her care. (*See* N-16769-71/92) This Court ruled at an inquest held on January 12, 1999 that the children's father abandoned the three children, as that term is defined in Social Services Law Section 384-b, and his parental rights are terminated. Petitioner's case against Ms. R., alleging permanent neglect, was presented on four separate dates between May and November, 1999. After petitioner rested, a written motion to dismiss for failure to establish a prima facie case was filed by respondent. Submission of answering papers was delayed while trial transcripts were prepared for the law guardian who took over the case following the departure of her colleague. The motion to dismiss was finally "submitted" on March 29, 2000. After review of the transcripts, the exhibits, the statute and case law, this Court grants the motion and the petitions against the respondent mother are hereby dismissed. Petitioner's counsel may, if so advised, submit orders to terminate the parental rights of the father.

It is clear that "the threshold consideration in a proceeding to terminate parental rights based on permanent neglect is whether the agency discharged its statutory obligation to exercise diligent efforts to encourage and strengthen the parental relationship." *Westchester DSS v. Linda G*, 633 N.Y.S.2d 58l (2d Dept. 1995), *Matter of Sheila G*, 61 N.Y.2d 368(1984). The legislature and courts have emphasized that "as a matter of public policy . . . the State may not intervene to terminate a parent's rights when assistance in strengthening the family has not been forthcoming." *Sheila G, id.* at 385. "Diligent efforts" are "reasonable attempts . . . to assist, develop and encourage a meaningful relationship" between parent and child. Social Services Law section 384-b, subd. 7, par. [f]. In this case, petitioner asserts that throughout 1996 respondent, despite diligent efforts by the agency to encourage visitation, failed to maintain contact with her three children. The evidence falls far short.

Evidence concerning visitation in 1996 was presented primarily through petitioner's Exhibits IV (the 1996 progress notes) and V (correspondence between the agency and respondent, setting visitation schedules). (Although originally only the "highlighted" portions of Exhibit IV were offered by petitioner, at a later date, without objection by petitioner or the law guardian, the entire file was moved into evidence by respondent.) In their respective affirmations at prima facie, all three counsel attempted to tally the number of scheduled visits, canceled visits and "missed" visits in order to determine respondent mother's contacts with her children. As presented in Exhibit IV, 24 visits were scheduled, of which two (February 13 and December 3) were canceled, and one (December 17) coincided with a necessary court appearance, leaving 21 visits. According to the progress notes, respondent missed ten of these visits, and attended 11. Failure to attend nearly one half of the visits would without a doubt establish by clear and convincing evidence a prima facie case of permanent neglect based on failure to visit.

However, examination of petitioner's Exhibit V, consisting of the "scheduling" letters which were to be sent to parents every three months, reveals a discrepancy between the dates scheduled in the letters and those noted in the progress notes.

Letters in Exhibit V note visits on January 15 and January 30, 1996, from 4 pm to 6 pm. The progress notes (Exhibit IV) contain no reference to January 15 and state that on January 30 the mother arrived at 3 pm as the children were leaving the agency after a visit with their grandmother from 1 pm to 3 pm. The mother's arrival at three o'clock for a visit she had been notified would be from four o'clock til six was deemed "too late" to see the children, and the January 30 visit was counted as a "missed visit."

Further, of the 24 dates included in the progress notes, eight are different from those set in the scheduling letters. The progress notes refer to visits on February 26, March 11 and 25, April 8 and 22, May 6, and August 13 and 17th. In contrast, the letters schedule visits for February 27, March 12 and 26, April 9 and 23, May 7, and August 12 and 26th. In addition, Exhibit V contains seven dates never mentioned in the progress notes: January 15 (mentioned previously), July 29, September 19 and 26, and October 3, 17 and 24th. At this stage of the proceeding, it is not so important to deter-

mine whether Ms. R. attended only half the visits, as petitioner claims, or perhaps as many as 80%, as a re-calculation of the numbers would indicate. Rather, the threshold question is whether, on this record, petitioner has shown "diligent efforts" to assist the mother in maintaining contact with her children. Manifestly, it has not. Three caseworkers sent Ms. R. scheduling letters which gave her misinformation. It is telling that the three months during which petitioner claims Ms. R. had no visits (January to mid-May, 1996) was the period when six dates were in conflict. The agency's "efforts" concerning visitation in 1996 were counterproductive, to say the least.[1]

Turning to the "failure to plan" allegations, the court heard testimony from the caseworker that her efforts to assist the mother to enroll in and complete parenting skills consisted of an inquiry in February, 1997, to which respondent replied that she was enrolled in a class; a conversation in April, 1997 in which respondent acknowledged her failure to complete the program, referred to the program as "stupid," and said "you can keep the fucking kids;" a conversation concerning parenting skills in August, 1997, initiated not by the caseworker but by respondent's paramour: and a referral to what the caseworker described as "the next available program" in December, 1997 or possibly in January, 1998 (after the petitions to terminate parental rights were filed). The caseworker testified candidly that when she was assigned to the R. family, on October 30,1996, she had no training, and in particular, no training relating to dealing with clients who were reluctant to cooperate with or opposed to necessary services. It is axiomatic that a parent whose children have been removed needs assistance in taking the steps necessary to regain the children's custody. A motivated, energetic parent may need only occasional reminders, but the progress notes contain entries describing this mother as "passive." The Court of Appeals noted in *Sheila G* that an agency's efforts must be "affirmative, repeated, and meaningful" attempts to assist the parent in overcoming his or her handicaps. (*Sheila G, id.* at 385) In *Westchester DSS v. Linda G*, 633 N.Y.S.2d 581, 583, the appellate court was critical of the agency's efforts when "there was a period of more than a month when there was no casework activity because the caseworker was in the hospital." Here, for no reason at all, the caseworker allowed more than three months to pass without any mention of resumption of parenting skills and training. Even the caseworker conceded that she had not provided "effective casework" with respect to encouraging Ms. R. to complete parenting skills. (Transcript, 11/9/99 at 16-26).[2] The evidence presented on petitioner's direct case establishes that, far from being "diligent," these efforts were minimal.

Both petitioner and the law guardian direct the court's attention to the fact-finding of abuse made against Ms. R. concerning a fourth child not before the court. (The court took judicial notice of that case, under docket No. NA-26222/96) Plainly, Ms. R. needed services, including parenting skills. But petitioner's burden is to establish first that it met its statutory obligation to use diligent efforts to assist the parent in obtaining such services, not merely to point out her failings.

Viewing the evidence in the light most favorable to petitioner, the court concludes that petitioner has failed to demonstrate a prima facie showing of "diligent efforts" with respect to either visitation in 1996 or planning in 1997. Accordingly, the petitions to terminate Ms. R.'s parental rights are dismissed. The temporary extensions of placement granted throughout the pendency of these proceedings under dockets N- 16769-71/92 are continued only through June 8, 2000 in order to permit petitioner and the Administration for Children's Services to decide whether to file petitions to extend placement.

Counsel are to appear on May 30, 2000 for "conference" concerning the visitation petitions filed by an older sibling of these three children, under Docket Nos. V-92ll-9213/98. Petitioner is directed to submit a written report to the court on that date concerning the sibling's current involvement with the children, and the suitability of her home for visitation.

Copies of this decision and order are to be mailed to all counsel.

Endnotes

1. The discrepancies noted by the court were never mentioned by any of the experienced trial counsel, and the court fears the oversight may have been due to the tardy production of the correspondence in Exhibit V *during the trial*, rather than in response to respondent's pre-trial demand. See May 27, 1999 transcript, page 19 *et seq*. Failure to produce the documents before trial was no doubt unintentional, but the harm was substantial.
2. For the sake of clarity, the court notes that all references to transcripts refer to those prepared for the court by Supreme Typing Service. Different transcription services (Compuserve and A&E Transcription) prepared transcripts for counsel, resulting in considerable confusion. This problem relating to the use of electronic recording machines instead of stenographers will be brought to the attention of the Administrative Judge.

Recent Decisions, Legislation and Trends

By Joel R. Brandes and Bari B. Brandes

Non-Parent Visitation

Troxel v. Granville,* ___ U.S.___ ,(# 99-138), 137 Wash. 2d 1, 969 P.2d 21, *affirmed.

In *Troxel v. Granville, supra*, the United States Supreme Court held that the grandparent visitation order issued by the Washington Superior Court was an unconstitutional infringement on the mother's fundamental right to make decisions concerning the care, custody and control of her two daughters, and that the Washington statute, as applied in this case, was unconstitutional. The Supreme Court rested its decision on "the sweeping breadth" of the Washington statute and the application of its "broad, unlimited power." The Court cautioned that it did not consider the primary constitutional question passed on by the Washington Supreme Court: whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.

Tommie Granville and Brad Troxel never married but had a relationship that ended in June 1991. They had two daughters. Jennifer and Gary Troxel were Brad's parents. After Tommie and Brad separated, Brad lived with his parents and regularly brought his daughters to their home for weekend visitation. Brad committed suicide in May 1993. The Troxels continued to regularly see the girls. However, in October, 1993 Tommie Granville informed the Troxels that she wished to limit their visitation to one short visit per month.

In December 1993, the Troxels commenced an action in the Washington Superior Court to obtain visitation rights. Wash. Rev. Code, § 26.10.160(3) provides: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."

The Troxels requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville did not oppose visitation, but asked the court to order one day of visitation per month with no overnight stay. In 1995, the Superior Court entered a visitation decree ordering visitation one weekend per month, one week during the summer and four hours on both of the petitioning grandparents' birthdays.

Granville appealed, during which time she married. The Washington Court of Appeals remanded the case to the Superior Court. On remand, the Superior Court found that visitation was in the children's best interests. Approximately nine months after the remand order was entered, Granville's husband formally adopted the children.

The Washington Court of Appeals reversed the Superior Court's visitation order and dismissed the Troxels' petition for visitation, holding that nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending. The Washington Supreme Court affirmed. It found that the plain language of § 26.10.160(3) gave the Troxels standing to seek visitation, irrespective of whether a custody action was pending. It agreed with the Court of Appeals' conclusion that the Troxels could not obtain visitation pursuant to § 26.10.160(3). It rested its decision on the federal Constitution, holding that § 26.10.160(3) unconstitutionally infringed on the fundamental right of parents to rear their children. The Washington Supreme Court found that the Constitution permits a state to interfere with that right only to prevent harm or potential harm to a child. Section 26.10.160(3) failed that standard because it did not require a showing of harm. And, by allowing "'any person' to petition for visitation of a child at 'any time,'" the Washington visitation statute was too broad. The Washington Supreme Court held that "[p]arents have a right to limit visitation of their children with third persons," and that between parents and judges, "the parents should be the ones to choose whether to expose their children to certain people or ideas."

The United State Supreme Court affirmed in a 4-3 opinion written by Justice O'Conner, in which the Chief Justice, Justice Ginsburg and Justice Breyer joined. It held that § 26.10.160(3), as applied here, violated the federal Constitution.

Justice O'Connor pointed out that the **Fourteenth Amendment** provides that no state shall "deprive any person of life, liberty, or property, without due process of law," and that the Court has long recognized that the Amendment's Due Process Clause, like its **Fifth Amendment** counterpart, "guarantees more than fair process." It also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." She noted that the liberty interest at issue, the interest of parents in the care, custody, and control of their children, "is perhaps the oldest of the fundamental liberty interests recognized by this Court." She

also pointed out the "extensive precedent," whereby the "the court has recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." In light of this, she concluded that "it cannot now be doubted that the Due Process Clause of the **Fourteenth Amendment** protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

The Court held that § 26.10.160(3), as applied, unconstitutionally infringed on that fundamental parental right because it was too broad. Its language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Moreover, she noted, "a parent's decision that visitation would not be in the child's best interest is accorded no deference," as § 26.10.160(3) contains no requirement that a court accord the parent's decision any weight. Instead, it places the best-interest determination solely in the hands of the judge. In effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever an affected third party files a visitation petition, based solely on the judge's determination of the child's best interests.

The Superior Court's order was not founded on any special factors that might justify State interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. The Troxels did not allege that Granville was an unfit parent. The court pointed out that this aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children, and "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to . . . question the ability of that parent to make the best decisions concerning the rearing of that parent's children. . . ."

The Court found that the problem here was when the Court intervened, it gave no weight to Granville's determination of her daughters' best interests. The Court apparently applied exactly the opposite presumption, employing a decisional framework which "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." That presumption failed to provide any protection for Granville's constitutional right to make child-rearing decisions. The Court stated that "if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination."

The Court concluded that the visitation order was an unconstitutional infringement on Granville's fundamental rights. The Superior Court failed to accord the determination of a fit custodial parent any material weight. The Due Process Clause does not permit a State to infringe on the right of parents simply because a state judge believes a "better" decision could be made.

Equitable Distribution—Professional Degrees—Maintenance Awards

***Grunfeld v. Grunfeld*, N.Y.2d , N.Y.S.2d N.Y.L.J., 6-12-2000, p. 27, col 1 (2000).**

In *McSparron v. McSparron*,[1] the Court of Appeals held that, even after a professional degree or license has been used by the licensee to establish and maintain a career, it does not "merge" with the career or ever lose its character as a separate, distributable asset. It reaffirmed the holding of *O'Brien*, under which the value of a newly earned license may be measured by simply comparing the average lifetime income of a college graduate and the average lifetime earnings of a person holding such a license, and reducing the difference to its present value. *McSparron* held that where the licensee has already embarked on his or her career and has acquired a history of actual earnings, O'Brien's theoretical valuation method must be discarded in favor of a more pragmatic and individualized analysis, based on the particular licensee's remaining professional earnings potential. In eliminating the concept of "merger," the court recognized the ongoing independent vitality that a professional license may have and focused solely on the problem of valuing that asset in a way that avoids duplicative awards. It cautioned that care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets derived from the license, such as the licensed spouse's professional practice. It emphasized that "courts must be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses."

The Court of Appeals refined its *McSparron* holding in *Grunfeld v. Grunfeld*. In *Grunfeld* the Supreme Court ordered the defendant to pay maintenance of $15,000 per month until the sale of the marital home one year after the younger child was to enter college, in 2000. Thereafter, maintenance was to be reduced to $8,500 per month. The court valued defendant's practice as of the date of commencement of the matrimonial action, using the "excess earnings" method. The court first determined the amount that defendant actually earned in excess of "reasonable compensation," which is the amount paid to an attorney of similar age and background, in the same geographic area, without any ownership interest in a law practice. After subtracting taxes and the income theoretically derived from defendant's share of the firm's tangible assets ("return on equity"), by agreement of the parties, the resulting amount was

capitalized using a multiple of three. Then, defendant's interest in the firm's tangible assets was added to the capitalized earnings to arrive at defendant's interest in his practice, which the Supreme Court found to be $2,581,760.

The Supreme Court also determined the value of defendant's license to practice law for equitable distribution purposes. It first computed the value of the "bare license," that is, the present value of the difference between the average earnings of a first-year associate at a law firm and a person holding an undergraduate degree, for the remainder of defendant's work-lifetime, with an adjustment to take into consideration the possibility of defendant's death before reaching age 65, his anticipated retirement age. Because the parties did not marry until defendant was halfway through law school, only one half of the bare license was a marital asset. Thus, its value was multiplied by a 50% "coverture fraction." Next, the court added the "enhanced earnings potential" created by the license. To avoid double counting,[2] since defendant's income in excess of "reasonable compensation" had already been considered in determining the value of defendant's interest in the practice, the court excluded that portion of defendant's future earnings from consideration. The enhanced earnings attributable to the license alone were the difference between reasonable compensation and the earnings of a first-year associate. The court calculated the present value of these earnings from the commencement date until the date of defendant's expected retirement, taking actuarial factors into account. The result was then reduced by 7%, "to reflect the premarital, separate property component of that figure." The sum of the license's bare value and enhanced earnings potential was found to be $1,547,000.

Thus, Supreme Court determined the value of both defendant's law practice and license by calculating the current worth of different components of defendant's projected future income of $1.2 million per year. To the extent that these "assets" were acquired during the marriage, they were correctly considered to be available for equitable distribution.

The Supreme Court stated that it had considered all of defendant's future income in setting the maintenance award. It noted that the methodology of determining the value of defendant's license was based on the earnings differential between reasonable compensation and the income of a non-licensed college graduate. It then explained that it would violate the *McSparron* rule against double counting to actually award one-half the value of the license, since the earnings differential upon which it was based had already been considered in fixing the award of maintenance. To avoid giving plaintiff two separate awards derived from the same stream of future income, the court excluded the license from the marital assets in determining the distributive award.

The Appellate Division modified, directing that the one-half of the value of defendant's professional license—$773,500—should also have been distributed to plaintiff. The court held that the reduction of maintenance from $15,000 to $8,500 per month should begin following full payment of the distributive award. The Appellate Division also ordered defendant to pay plaintiff interest on the unpaid balance of the distributive award at the statutory rate.

The Court of Appeals modified the order of the Appellate Division because it double counted defendant's income in ordering that plaintiff should receive both undiminished maintenance and the full distributive award of one-half the value of plaintiff's law license.

The Court of Appeals noted that, in contrast to passive income-producing marital property having a market value, the value of a professional license as an asset of the marital partnership is a form of human capital, which is dependent upon the future labor of the licensee. The asset is totally indistinguishable and has no existence separate from the projected professional earnings from which it is derived. To the extent that those same projected earnings used to value the license also form the basis of an award of maintenance, the licensed spouse is being charged twice with distribution of the same marital asset value, or with sharing the same income with the non-licensed spouse.

In *Grunfeld*, when setting the level of maintenance, Supreme Court included, as part of defendant's earning capacity, the projected earnings derived from his professional license. The court also used the same earnings attributable to the law license to determine the present value of the license as a marital asset. The Court of Appeals held that, to comply with *McSparron*, Supreme Court had to reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two. Once a court converts a specific stream of income into an asset, that income may no longer be calculated into the maintenance formula and payout. It stated that, where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income. "The necessity of this reduction was recognized in *Wadsworth v. Wadsworth* (219 A.D.2d 410). Not to do so would involve a double counting of the same income." The court noted that "one advantage of this method is that the maintenance award may be adjusted in the future if the licensed spouse's actual earnings turn out to be less than expected at the time of the divorce." It added: "This method is also consistent with our observation

that in particular cases the value of the license 'may be nominal'." It also noted that

> there may be cases where it is more equitable to avoid double counting by reducing the maintenance award (***). Where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance.

The Court of Appeals found that the Appellate Division based its ruling, in part, on the fact that "defendant's future earnings"—which only could be expected to come from his own professional endeavors—were likely "to exceed $1 million yearly." Additionally, that court apparently recognized that income from other resources could only be expected to support "a portion of the maintenance." It held that, on the face of the Appellate Division's decision, by ordering full distribution of plaintiff's share of defendant's license without any adjustment of maintenance, the court engaged in double counting of income, which was inconsistent with *McSparron*. Therefore, it remitted the matter to the Supreme Court to recalculate the required reduction in the license distributive award, in accordance with *McSparron* and its opinion.

The Court of Appeals also pointed out that courts have the discretion to value "active" assets, such as a professional practice, on the commencement date, while "passive" assets such as securities, which could change in value suddenly based on market fluctuations, may be valued at the date of trial. It noted that "Such formulations, however, may prove too rigid to be useful in particular cases. Thus, they should be regarded only as helpful guideposts and not as immutable rules of law." Here, the trial Court correctly used the active/passive distinction as a "helpful guidepost."

Uniform Rules—Amendments

22 N.Y.C.R.R. 202.16—Effective October 1, 2000

Section 202.16 of the Uniform Rules for the Supreme and County Courts, have been amended by the Chief Administrative Judge, effective October 1, 2000. Subdivision (d) was amended to correct a technical error which had described the "summons with notice" as the "summons and notice.' It now provides:

> (d) Request for Judicial Intervention. A request for judicial intervention shall be filed with the court by the plaintiff no later than 45 days from the date of service of the summons and complaint or summons [and] with notice upon the defendant, unless both parties file a notice of no necessity with the court, in which event the request for judicial intervention may be filed no later than 120 days from the date of service. of the summons and complaint or summons [and] with notice upon the defendant. Notwithstanding Section 202.6(a) of this Part, the court shall accept a request for judicial intervention that is not accompanied by other papers to be filed in court. [Effective October 1, 2000]

Section 202.16 of the Uniform Rules for the Supreme and County Courts, subdivision (f)(1) entitled Preliminary Conference, was amended to require that the following papers must be exchanged and filed no later than ten days prior to the preliminary conference, unless the court directs otherwise:

> (i) statements of net worth;
>
> (ii) all paycheck stubs for the current calendar year and the last paycheck stub for the immediately preceding calendar year;
>
> (iii) all filed state and federal income tax returns for the previous three years, including both personal returns and returns filed on behalf of any partnership or closely held corporation of which the party is a partner or shareholder;
>
> (iv) all W-2 wage and tax statements, 1099 forms, and K-1 forms for any year in the past three years in which the party did not file state and federal income tax returns;
>
> (v) all statements of accounts received during the past three years from each financial institution in which the party has maintained any account in which cash or securities are held;
>
> (vi) the statements immediately preceding and following the date of commencement of the matrimonial action pertaining to:
>
> (A) any policy of life insurance having a cash or dividend surrender value; and

(B) any deferred compensation plan of any type or nature in which the party has an interest including, but not limited to, Individual Retirement Accounts, pensions, profit-sharing plans, Keogh plans, 401(k) plans and other retirement plans.

It now provides:

(f) Preliminary Conference.

(1) In all actions or proceedings to which this section of the rules is applicable, a preliminary conference shall be ordered by the court to be held within 45 days after the action has been assigned. Such order shall set the time and date for the conference and shall specify the papers that shall be exchanged between the parties and filed with the court. These papers must be exchanged and filed no later than 10 days prior to the preliminary conference, unless the court directs otherwise. These papers shall include:

(i) statements of net worth;

(ii) all paycheck stubs for the current calendar year and the last paycheck stub for the immediately preceding calendar year;

(iii) all filed state and federal income tax returns for the previous three years, including both personal returns and returns filed on behalf of any partnership or closely held corporation of which the party is a partner or shareholder;

(iv) all W-2 wage and tax statements, 1099 forms, and K-1 forms for any year in the past three years in which the party did not file state and federal income tax returns;

(v) all statements of accounts received during the past three years from each financial institution in which the party has maintained any account in which cash or securities are held;

(vi) the statements immediately preceding and following the date of commencement of the matrimonial action pertaining to:

(A) any policy of life insurance having a cash or dividend surrender value;

and (B) any deferred compensation plan of any type or nature in which the party has an interest including, but not limited to, Individual Retirement Accounts, pensions, profit-sharing plans, Keogh plans, 401(k) plans and other retirement plans.

Both parties personally must be present in court at the time of the conference, and the judge personally shall address the parties at some time during the conference.

(2) The matters to be considered at the conference may include, among other things:

(i) applications for pendente lite relief, including interim counsel fees;

(ii) compliance with the requirement of compulsory financial disclosure, including the exchange and filing of a supplemental statement of net worth indicating material changes in any previously exchanged and filed statement of net worth;

(iii) simplification and limitation of the issues;

(iv) the establishment of a timetable for the completion of all disclosure proceedings, provided that all such procedures must be completed and the note of issue filed within six months from the commencement of the conference, unless otherwise shortened or extended by the court depending upon the circumstances of the case; and

(v) any other matters which the court shall deem appropriate.

(3) At the close of the conference, the court shall direct the parties to stipulate, in writing or on the record, as to all resolved issues, which the court then shall "so order," and as to all issues with respect to fault, custody and finance that remain unresolved. Any issues with respect to fault, custody and finance that are not specifically described in writing or on the record at that time may not be raised in the action unless good cause is shown. The court shall fix a schedule for discovery as to all unresolved issues and, in a noncomplex case, shall schedule a date

for trial not later than six months from the date of the conference. The court may appoint a law guardian for the infant children, or may direct the parties to file with the court, within 30 days of the conference, a list of suitable law guardians for selection by the court. The court also may direct that a list of expert witnesses be filed with the court within 30 days of the conference from which the court may select a neutral expert to assist the court. The court shall schedule a compliance conference unless the court dispenses with the conference based upon a stipulation of compliance filed by the parties. Unless the court excuses their presence, the parties personally must be present in court at the time of the compliance conference. If the parties are present in court, the judge personally shall address them at some time during the conference. [Effective October 1, 2000]

Section 202.16 subdivision (g)(1) entitled "Expert Witnesses" was amended to require that responses to demands for expert information pursuant to CPLR 3101(d) must be served within 20 days following service of such demands. There is no such time requirement in CPLR 3101(d) and it would appear that case law applicable to CPLR 3101(d) would still apply to applications for preclusion for failure to comply. The balance of the original rule has been renumbered as Subdivision 2. It provides:

> (g) Expert Witnesses. (1) Responses to demands for expert information pursuant to CPLR § 3101(d) shall be served within 20 days following service of such demands.
>
> (2) Each expert witness whom a party expects to call at the trial shall file with the court a written report, which shall be exchanged and filed with the court no later than 60 days before the date set for trial, and reply reports, if any, shall be exchanged and filed no later than 30 days before such date. Failure to file with the court a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial. Late retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause as authorized by CPLR § 3101(d)(1)(i). In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. In the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case. [Effective October 1, 2000]

Subdivision K of § 202.16 has been amended to mandate that hearings or trials pertaining to temporary or permanent custody or visitation must proceed from day to day to conclusion. It provides:

> (1) Hearings or trials pertaining to temporary or permanent custody or visitation shall proceed from day to day to conclusion. With respect to other issues before the court, to the extent feasible, trial should proceed from day to day to conclusion. [Effective October 1, 2000]

Section 136.3 of the Rules of the Chief Administrator of the Courts, subdivisions [c] and [d], relating to fee arbitration in domestic relations matters, have been amended to increase, from $3000 to a sum less than $6000, the threshold for disputes which must be submitted to one attorney arbitrator. It provides:

> (c) Disputes involving a sum less than $6000 shall be submitted to one attorney arbitrator. For the purposes of this Part, the term "panel" shall include a single arbitrator unless the context requires otherwise.
>
> (d) Disputes involving a sum of $6000 or more shall be submitted to a panel of three arbitrators, consisting of one attorney, one layperson, and a third panel member who shall be selected at random from a pool of arbitrators comprised of both attorneys and laypersons. The chair shall be an attorney, who shall be selected by the panel members if more than one attorney is on the panel. [Effective October 1, 2000]

Orders of Protection—DRL 240 and 252

Laws of 1999, Ch. 606, effective Nov. 1, 2000

In enacting the "Family Protection and Domestic Violence Intervention Act of 1994,"[3] the Legislature sought to ensure that victims of domestic violence

would have ready access to the justice system in order to obtain needed protection. The Act, as well as subsequent amendments, made it clear that victims would be able to obtain orders of protection, both temporary and final, in criminal, Family Court or matrimonial proceedings and that enhanced felony penalties for violations of orders of protection would apply, regardless of the type of proceeding in which the order had been issued.

In order to create uniformity three provisions of the Family Court Act have been incorporated into § 240(3) of the Domestic Relations Law.

Subdivision 3 of § 240 of the domestic relations law was amended by adding two new closing paragraphs to read as follows:

> Any party moving for a temporary order of protection pursuant to this subdivision during hours when the court is open shall be entitled to file such motion or pleading containing such prayer for emergency relief on the same day that such person first appears at such court, and a hearing on the motion or portion of the pleading requesting such emergency relief shall be held on the same day or the next day that the court is in session following the filing of such motion or pleading.
>
> Upon issuance of an order of protection or temporary order of protection or upon a violation of such order, the court may make an order in accordance with § eight hundred forty-two-a of the family court act directing the surrender of firearms, revoking or suspending a party's firearms license, and/or directing that such party be ineligible to receive a firearms license. Upon issuance of an order of protection pursuant to this section or upon a finding of a violation thereof, the court also may direct payment of restitution in an amount not to exceed ten thousand dollars in accordance with subdivision (e) of § eight hundred forty-one of such act; provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final judgment or settlement of the action.[4]

The same three provisions of the Family Court Act have been incorporated into § 252 of the Domestic Relations Law.

Section 252 of the domestic relations law was amended by adding two new subdivisions 8 and 9 to read as follows:

> 8. Any party moving for a temporary order of protection pursuant to this subdivision during hours when the court is open shall be entitled to file such motion or pleading containing such prayer for emergency relief on the same day that such person first appears at such court, and a hearing on the motion or portion of the pleading requesting such emergency relief shall be held on the same day or the next day that the court is in session following the filing of such motion or pleading.
>
> 9. Upon issuance of an order of protection or temporary order of protection or upon a violation of such order, the court may take an order in accordance with section eight hundred forty-two-a of the family court act directing the surrender of firearms, revoking or suspending a party's firearms license, and/or directing that such party be ineligible to receive a firearms license. Upon issuance of an order of protection pursuant to this section or upon a finding of a violation thereof, the court also may direct payment of restitution in an amount not to exceed ten thousand dollars in accordance with subdivision (e) of section eight hundred forty-one of such act; provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final judgement or settlement of the action.

The new paragraphs are similar to Family Court Act § 153-c. They provide that a party in need of emergency relief in the form of a temporary order of protection would be able to file a pleading or motion for that relief on the same day that the party appears in court and that a hearing thereon must be held that same day or the next day that the court is in session. It incorporates into the Domestic Relations Law provisions autho-

rizing courts, in issuing orders of protection and temporary orders of protection, to require the surrender of firearms, to direct the suspension or (in the case of final orders) revocation of firearms licenses, and to preclude a party's eligibility for a firearms license.[5] It incorporates § 841 (e) of the Family Court Act, by reference, to authorize the Supreme Court, as a condition of an order of protection in a matrimonial case, to direct payment of restitution not exceeding $10,000 so long as the injured party has not already received compensation or the restitution is not already incorporated into a final judgment or settlement of the matrimonial proceeding.

We note that § 7(b) of Article 6 of the New York State Constitution provides that the Supreme Court possesses concurrent jurisdiction with the Family Court and courts of criminal jurisdiction in all respects, thus authorizing the Supreme Court to exercise the powers enumerated in the Family Court Act and Criminal Procedure Law. However, the legislature felt the statutory fragmentation of proceedings in New York State, particularly between Family and Supreme Court, may create difficulties for domestic violence victims in obtaining full protection and relief, particularly in the context of already-pending matrimonial proceedings, and that explicit articulation of the full range of powers of the Supreme Court with respect to orders of protection in matrimonial proceedings was needed to add clarity to the statutory framework.[6]

Endnotes

1. 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995).
2. Justice Saxe of the Appellate Division explained (255 AD2d 12) that the term "double counting" is frequently used to refer to the use of the same stream of income to calculate the value of more than one asset, and that "double dipping" is sometimes used to refer to the court-ordered payment of more than one financial obligation from the same source. The potential for "double counting" arises because in determining the value of a spouse's interest in a law practice, the court takes into account not only the practice's tangible assets and liabilities, such as accounts receivable and inventory, but also the intangible value of the practice, known as its "goodwill."
3. L. 1994, cc. 222, 224.
4. Laws of 1999, Ch 606, effective Nov. 1, 2000.
5. *See* Family Court Act § 842-a; Criminal Procedure Law § 530.14; L. 1996, c. 644.
6. *See* N.Y. Legis Leg. Memo 606 (1999).

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