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Notes and Comments

Elliot D. Samuelson, Editor

The Spousal Share of a Marital Asset: When Two Plus Two Does Not Equal Four

It is quite possible that you may have overlooked a short recent decision in the Appellate Division, Second Department. However, this case, *Peritore v. Peritore*,[1] is pregnant with implications and evidences a judicial trend to award to a non-contributing spouse a small percentage of the appraised value of a professional license, business or practice.

In a twenty-year childless marriage case, the Appellate Court reduced an award to the wife by the trial court[2] of forty percent of the value of the defendant's dental practice to but fifteen percent, reflecting that under the particular circumstances of the case where the wife successfully embarked on her own full time career (which was not indicated in the decision), and made only indirect contribution to her husband's dental practice (the indirect contribution was not noted), she was not entitled to a greater percentage. The court took pains to remind practitioners that even though a marriage is of long duration "where marital assets should be made as equal as possible,…there is no requirement that the distribution of each item of marital property be made on an equal basis," citing *Griggs v. Griggs*[3] and *Chalif v. Chalif*[4] for authority for this proposition. Unfortunately, reading these two cases creates more complexity and less clarity.

Interestingly, in *Chalif*, a long-term marriage, the husband had completed all but two years of neurosurgical residency when the parties married. The wife made no direct contribution to the husband's practice, and only a modest indirect contribution to his practice, and accordingly the court affirmed an award of twenty-five percent to the wife. Not surprisingly, there were no facts as to the length of the marriage reported, the number of children the parties had, or what acts of the wife constituted a "modest indirect contribution."

Griggs sustained an award to the wife, who had an MBA degree, of thirty-five percent of the husband's medical practice because of the direct and indirect contributions she made…without so much as stating what such contributions were.

The three cases are illustrative of the court's penchant for rendering abbreviated decisions which leaves the bar and matrimonial litigants at a loss to determine what result will obtain in the next decided appeal.

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However, to this writer, the above-quoted rationale in *Peritore, Chalif* and *Griggs* is a classic judicial oxymoron, and recalls author George Orwell's penetrating observation in *Animal Farm* that all animals are equal, but some animals are more equal than others. Unfortunately, as is most recently the practice of the appellate courts, the *Peritore* facts were not fully explored, there was no mention of what career the wife had embarked upon, and no hint in the decision of whether the court considered the childless marriage to be of long duration, although one must postulate that twenty years would ring the bell.

Two cases cited by the court as authority to reduce the award to fifteen percent were *Wagner v. Dunetz*[5] and *Granade-Bustick v. Bustick*.[6] But neither of these two cases sheds additional light on how the court reached this ultimate conclusion. Arithmetically, the court actually reduced the award by more than sixty percent, without offering any further guidance to the bar to prognosticate future equitable distribution awards.

In *Wagner*, both parties were physicians. The court found that neither party made significant direct or indirect contributions (without detailing the efforts) and concluded neither was entitled to an award of enhanced earnings. However, it reduced the award to the husband from fifty percent to twenty-five percent of the wife's medical practice because the husband made indirect contributions, without describing what such contributions were.

Granade-Bustick further brought to a boil the festering conundrum. Here, a fifty percent award of the value of the husband's non-business properties was sustained because there was an eleven-year marriage (long-term?) and the wife made a non-economic contribution to the marriage (undefined) which allowed the couple to amass a substantial net worth. However, as to the husband's law practice, it reduced the award to twenty-five percent because the wife did not put the husband through law school or help support him in the earlier years of the marriage.

Unfortunately, as has been the norm from the Appellate Courts, there was no dissenting opinion in any of the cited cases. Unanimous decisions stifle dissent, and preclude the consideration of the contrary side of legal arguments. One wonders how four judges can be consistently unanimous in opinion, when it is clear that the result obtained at the trial level will vastly differ from judge to judge depending upon personal predilections and experiences, with attendant diversity in results. It is easy to speculate that if other judges in Nassau County had heard the *Peritore* case, a far different percentage of the dental practice, ranging from fifty percent to perhaps five percent, would have been made. If this speculation be reasonable, it becomes far more difficult to accept unanimity of opinion at the appellate level.

Without a full and amplified explanation in *Peritore* of how the court determined to reduce an award by more than sixty percent, it becomes most difficult for counsel to evaluate any given factual pattern and predict with any degree of success or certainty what an appellate court might do upon appeal, how to prepare your case for trial, and whether a bad settlement would be far better than a catastrophic trial or appellate review. Simply put, the tendencies to write brief unanimous decisions actually encourages litigation and reduces settlements, a bad result in an era of overburdened judiciary and financial uncertainty.

Another troublesome part of the *Peritore* decision was the recognition by the court that the value of a pension should be discounted by the amount of income tax required to be paid by a party, yet refusing to recognize the discount made by the trial judges because there was no expert testimony in the record concerning the tax impact of the award. Although recognizing this rule and citing DRL § 236 B(5)(d)(10) and the *De La Torre v. De La Torre*,[7] *Johnson v. Johnson*,[8] *Chase v. Chase*[9] and *Gluck v. Gluck*[10] decisions, it nevertheless refused to sustain the trial court's determination of a discount for tax consequences although it is clear that the trial court must have made its own assessment based upon the relative tax brackets of the parties. Again speculation must be made, but since net worth statements and tax returns are mandatory documents to be filed in matrimonial litigation, such speculation seems to be reasonably prudent. Because the trial court could have taken judicial notice of the tax law, it would seem that the testimony of an expert witness would have been either irrelevant or superfluous.

The problem, of course, is that without a full recitation of the facts and a discussion of how the facts are applied to the law of a given case, there can be no understanding of the court's philosophy in deciding these several matters, or the direction of future decisions. Moreover, if dissents are the exception, rather than the rule, and cases continuously are unanimous, a dangerous practice is being countenanced which necessarily must lead to the total abdication of dissent in matrimonial litigation.

Endnotes

1. 2009 Slip Op. 07388 (2d Dep't October 13, 2009).
2. Justice Ross, although signing the judgment of divorce, did not write the opinion—that was made by JHO Marilyn Friedenburg.
3. 44 AD3d 710, 713 (2d Dep't 2007).
4. 298 AD2d 348, 349 (2d Dep't 2002).
5. 299 AD2d 347(2d Dep't 2002).
6. 249 AD2d 444 (2d Dep't 1998).
7. 183 AD2d 744 (2d Dep't 1992).
8. 297 AD2d 279 (2d Dep't 2002).
9. 208 AD2d 883 (2d Dep't 1994).
10. 134 AD2d 237 (2d Dep't 1987).

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From *O'Brien* to *Keane*: Building on a Weak Foundation

By Peter E. Bronstein and David A. Typermass

Bad law typically breeds even worse law.

For nearly 25 years, courts in New York have struggled to apply the aberrational ruling of *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985), the case which gave birth to the concept that a person's professional degree, license or enhanced earnings capacity could be valued and distributed as marital property. In bypassing the simpler and more logical approach of compensating the lesser earning spouse with a greater maintenance award, *O'Brien* and its progeny needlessly created a new asset class and added an unnecessary level of complexity to the law.

The courts are now wrestling with distinctions without differences, an incomplete understanding of the appraisal process, and the effort to do what appears equitable for the needy spouse, all without fully understanding the consequences of the precedents being created. Lawyers and judges must now grapple with arcane financial issues that are frequently beyond their grasp, such as the tangible or intangible nature of a stream of future income payments. What started with a poorly reasoned decision in *O'Brien* has spawned a line of cases which have left the lower courts adrift in a sea of illogic.

In *O'Brien v. O'Brien*, the New York State Court of Appeals deviated from the vast experience of every other state in the country when it decided that professional licenses constituted marital property and that such licenses should be valued and divided between spouses. Two months after obtaining his medical license, Dr. Michael O'Brien commenced divorce proceedings against his wife Loretta. In *O'Brien*, the Court was rightly sympathetic to Mrs. O'Brien, who had helped support the family while Dr. O'Brien completed his bachelor's degree, his medical degree and his medical internship. Unfortunately, in its zeal to compensate Mrs. O'Brien, the Court made what is widely considered to be a bad decision.

Dr. O'Brien had no practice to speak of as a young doctor. By placing a value on his medical license and awarding a portion of that license to Mrs. O'Brien, the Court effectively forced Dr. O'Brien to use his medical license to earn a high income and eliminated any chance that he might have used that license to further the public good. Dr. O'Brien's license was valued at $472,000 by Mrs. O'Brien's expert, who had capitalized (and discounted to present value) the difference in average earnings between a college graduate and a general surgeon from 1985 to 2012 (the year when Dr. O'Brien would be 65). By upholding the lower court's decision that Mrs. O'Brien was entitled to her proportionate share of the "enhanced earnings capacity" inherent in Dr. O'Brien's medical license, the Court of Appeals ensured that for better or worse Dr. O'Brien, who had no other significant assets, would be using his medical license for years to be able to pay off Mrs. O'Brien's distributive award.

On this dubious pillar, which has been rejected by every other state, the courts in New York have made other bad decisions in the name of valuing an individual's enhanced earnings capacity.[1] In *Elkus v. Elkus*, 572 N.Y.S.2d 901 (1st Dep't 1991) the First Department held that a wife's career as an opera singer was a marital asset which could be valued and distributed. The *Elkus* court referred to a lower court ruling by Justice Silbermann in *Golub v. Golub*, 527 N.Y.S.2d 946 (Sup. Ct. N.Y. Co. 1988), which had held that a person's celebrity status—in that case a model/actress—could be a marital asset. In *Hougie v. Hougie*, 689 N.Y.S.2d 490 (1st Dept. 1999) the First Department held that an investment banking career could be valued as a marital asset and distributed.

"What started with a poorly reasoned decision in O'Brien *has spawned a line of cases which have left the lower courts adrift in a sea of illogic."*

In the years following *O'Brien*, the lower courts, to avoid the problems of spouses being awarded a double recovery from a license and a professional practice, frequently merged the value of a professional license with a professional practice. The Court of Appeals in *McSparron v. McSparron*, 87 N.Y.2d 275 (1995) rejected this "merger principle" and held that a professional license should not be merged into a professional practice but rather they should be valued separately: "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." *Id*. at 286. The *McSparron* Court also recognized the potential for double dipping out of the same income stream when courts had to fashion maintenance awards in cases where a professional license was also being distributed: "The courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses." *Id*. at 286

In *Grunfeld v. Grunfeld*, 94 N.Y.2d 696 (2000), the Court determined that in order to avoid double dipping courts had to "reduce either the income available to make maintenance payments or the marital assets available for distribution, or some combination of the two." *Id.* at 705. The Court held that it is impermissible to value and divide a professional practice, which is inherently based upon the future income stream of that practice, and then

award maintenance as if the owner of that practice had access to the full income stream of the practice. In essence the Court recognized that the future income stream had been accounted for in the valuation process and could not be used again in fashioning a maintenance award. Any maintenance award had to be based upon other income which had not already been valued and distributed: "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." *Id.* at 705.

The lower courts then had a problem reconciling the outcome in *McSparron* and *Grunfeld* with the Child Support Standards Act ("CSSA") guidelines. In *Holterman v. Holterman*, 3 N.Y. 3d 1 (2004) the Court of Appeals ruled, in a rigid application of the CSSA, that it was permissible to double count a payor spouse's income that was part of a distributive award in calculating the child support payable to the custodial parent, and impermissible to count the distribution of future income as part of the imputed income of the recipient for CSSA purposes. The *Holterman* decision, in making a distinction between maintenance and child support, watered down the whole concept of double dipping. If the income stream attributed to a professional license has already been distributed to the custodial parent in a capital award, why should the payee of that capital not be considered to have that income stream as a basis for the CSSA guidelines, especially in cases where the capital award may have to be paid out over time (and with interest) since the payor spouse doesn't have the money yet? Similarly, there is no reason to pretend that the capital award has not been made and to assume that the payor spouse received the benefits of 100% of the future income.

The dissent in *Holterman* correctly pointed out that the CSSA did not require the strict interpretation followed by the majority since the CSSA "expressly permits departure from its formula to avoid an 'unjust or inappropriate' result." *Id*. at 18. The dissent also noted that even the wife's expert recognized the intellectual dishonesty of double dipping from one income stream which is why, in making his child support calculation, the wife's expert reallocated to the wife the portion of the husband's income which was part of the distributive award. The dissent agreed with the approach taken by the Court in *Goodman v. Goodman*, 755 N.Y.S.2d 822 (Sup. Ct., Nassau Co. 2003) which had applied the CSSA's escape clause and reallocated income from a distributive award based on enhanced earnings capacity to the non-titled spouse and subtracted it from the income of the titled spouse. *Holterman* at 20.

In *Keane v. Keane*, 8 N.Y.3d 115, 861 N.E.2d 98, 828 N.Y.S.2d 283 (2006), the Court of Appeals demonstrated a similarly peculiar grasp of reality. Perhaps the Court in *Keane* did not fully understand the concept of valuing a future income stream, although frankly, *Grunfeld* provided hope that it did.

In *Keane* the Court makes what appears to be a distinction without a difference in holding that *Grunfeld*'s prohibition against double dipping only applies to intangible assets and not tangible assets. In *Keane* the parties owned a parcel of real property which was leased to a car repair shop until the year 2010 and that lease provided them with a stream of income. The husband's expert valued this property using two different valuation methods: 1) a capitalized income approach which valued the property at $290,000, and 2) a market value approach which valued the property at $324,000. The Supreme Court in *Keane* adopted the capitalized income valuation and distributed the value of the property between the parties. There was no indication that the appraiser did not correctly apply the capitalized income method and did not fully value the property. The Appellate Division majority seemed to understand this when it wrote: "The Supreme Court valued the body shop property at **full market value** by utilizing the capitalization of income method." *Keane v. Keane*, 809 N.Y.S.2d 133, 136 (2d Dep't 2006 (emphasis added). The capitalization of income method values the income stream produced by an asset into perpetuity and therefore such a valuation does not leave any residual value because there is no theoretical remainder period in which an owner would be holding title to an asset whose income stream has run out.

After equitably distributing the car repair shop property, the Supreme Court had improperly included the monthly rental income the husband was to receive from that property in fashioning a maintenance award for the wife. The Appellate Division held the inclusion of this income to be an improper double count of the same income stream. The Court of Appeals disagreed and reversed.

The Court of Appeals, along with the dissent in the Appellate Division, clearly misunderstood the valuation conclusions reached by the appraiser: "We do not see why an inquiry as to double counting should depend on the valuation method used." *Keane v. Keane*, 8 N.Y.3d 115, 121. The fact that the appraiser used two valuation methods which resulted in two different values did not mean that the appraiser carved out a separate value for the income stream generated by the property and a separate value for the residual value remaining in the property. Different valuation approaches usually result in different values but both theoretically would have captured the "full market value" of the asset as the Appellate Division majority seemed to understand.

The Court of Appeals adopted the *incorrect* reasoning of the Appellate Division's dissenting Justice Goldstein, who had concluded that the capitalized income approach, because its valuation was lower than the market value approach, did not fully value the property:

> The use of the lower value ascertained from the capitalization of income approach was appropriate since the de-

> fendant was retaining the property as income-producing property.…If the higher market value approach had been used, there would undoubtedly be no argument with respect to 'double counting'…When the cash flow from the current lease of this asset is exhausted and maintenance based thereon terminates, the defendant will retain a valuable asset which he may use to generate yet another stream of income or sell at market value. *Keane v. Keane*, 809 N.Y.S.2d 133 at 140.

The Court of Appeals had no reason to assume that the property would have additional value in excess of its appraised value at the end of its lease term, although that is exactly what it concluded:

> The property will continue to exist, quite possibly in the husband's hands, long after the lease term has expired, as a marketable asset separate and distinguishable from the lease payments. *Keane v. Keane*, 8 N.Y.3d 115, 122.

In fact, to assume there was residual value in the property in excess of the valuation would have been to alter the findings of fact, something the Court itself acknowledges it cannot do: "As a court of law we are precluded from reviewing affirmed findings of fact unless there is a question of legal sufficiency of the evidence" *Id.* at 122. We note that the property could actually turn out to have less value than its appraised value as would be the case if a significant liability, such as an oil leak, was later discovered on the property or if a tenant went bankrupt and the property could not be re-leased.

Ignoring the underlying reasoning of *Grunfeld*'s prohibition against double dipping, the Court in *Keane* made a distinction between cases involving intangible assets from cases involving tangible assets and held that this distinction alone justified a double count. Logically, however, this makes no sense because the same problem of double counting exists whether a court is distributing an intangible asset or a tangible asset. The Court failed to understand that the income stream from the car repair property, or any other tangible property for that matter, was not separate and distinct from the appraised value of that property which would have inherently included the full value of all future income streams. Rather than making a distinction between intangible and tangible assets, which was intellectually flawed, the Court should have made a distinction between assets that are fully capitalized and those that are not fully capitalized and have residual value (which the Court wrongly assumed was the case in *Keane*).

Like the Court in *O'Brien*, the Court of Appeals in *Keane* ignored established precedent and used faulty reasoning in order to fashion a result which it felt was right. Mrs. Keane, although she may have received half of the assets, was in need of cash flow because her assets were largely illiquid. Instead of double counting Mr. Keane's income from the real property, the Court should have offered a more intellectually honest solution to this dilemma, such as adjusting maintenance or equitable distribution accordingly, as *Grunfeld* suggested. Instead, the Court created a meaningless distinction between intangible and tangible assets which it used to justify its decision to double count the same dollars in a maintenance award which had already been distributed in a capital settlement. The result in *Keane* is that Mr. Keane had to pay maintenance from his half of a divided asset as if he had the benefit of the whole asset.

"The problem with bad precedent is that it tends to be adopted and applied without any reservations or examinations."

As expected the flawed logic of the *Keane* decision has been adopted, without question, by the lower courts. In *Griggs v. Griggs*, 44 A.D.3d 710, 844 N.Y.S.2d 351 (2d Dep't 2007), the Second Department rejected the plaintiff-husband's argument that the lower court had improperly double counted the income from his medical practice in its maintenance award, since the practice had already been valued and distributed. The Second Department cited *Keane* in ruling that "the prohibition against double counting does not apply, where, as here, the asset to be distributed is a 'tangible income-producing asset,' rather than an intangible asset such as a professional license." *Id*. at 713. The Second Department again followed *Keane* in *Groesbeck v. Groesbeck*, 51 A.D.3d 722, 723, 858 N.Y.2d 707, 709 (2d Dep't 2008) when it held that the *Grunfeld* rule prohibiting double counting did not apply to income derived from the defendant-husband's home improvement contracting business, which it found to be a "tangible income-producing asset." The Second Department failed to understand that if the full value of the defendant husband's businesses had already been valued and distributed, then, theoretically, there should have been nothing of value left to pay maintenance. The problem with bad precedent is that it tends to be adopted and applied without any reservations or examinations.

As a result of *Keane*, attorneys will have to explain the differences between intangible and tangible assets to their clients. They will also have to explain how if the payor spouse has a tangible asset a court can take half a pound of flesh from that payor spouse and give it to the other spouse in equitable distribution and then come back to the payor spouse and direct that his or her remaining half pound be used to make support payments. The client will readily understand that the payor spouse in such a case would have less than half of the value of the asset left.

The *Keane* decision is unfortunately probably not the last, tortured interpretation of the law regarding enhanced earnings capacity stemming from *O'Brien*. While the *O'Brien* Court may have had good intentions, the decisions which it spawned demonstrate the inconsistencies that will continue to arise from courts trying to craft desired results using the flawed concept of enhanced earnings capacity. The difficulty subsequent courts have had in applying these holdings is evidence that bad law doesn't tend to get better with age and more often than not produces even worse law.

"The Keane *decision is unfortunately probably not the last, tortured interpretation of the law regarding enhanced earnings capacity stemming from* O'Brien*."*

Endnote

1. "[I]t is only in New York where professional degrees, licenses, and career enhancement are considered marital property," Jay E. Fishman, Shannon P. Pratt, and William J. Morrison, *Standards of Value*, p. 232 (2007).

Peter E. Bronstein practices in Manhattan and is a frequent commentator and lecturer on matrimonial matters. He is a Fellow of the AAML, a founding Fellow of the IAML, a Diplomat of the ACFTL, former chair of the Family Law Section of the NYSBA , and the principal member of Bronstein Van Veen LLC.

David A. Typermass, an associate at Bronstein Van Veen since 2003, is also a CFA charter holder. See http://www.Bronsteinvanveen.com.

New York Adopts Automatic Orders

By Kenneth David Burrows

It's not unusual for the commencement of a matrimonial action to be accompanied by a series of motions by which one or both sides seek to restrain the other from transferring, concealing or encumbering assets, incurring debt, or modifying insurance policies. Although such motions are readily granted—often on an *ex parte* basis—they nonetheless absorb time and energy that could be more productively devoted to more controversial matters.

Some of our sister states—Connecticut, for example—solved this problem by instituting a series of automatic orders that go into effect immediately upon the commencement of a matrimonial action, and which prohibit parties from taking steps to alter the status quo adversely to their adversary.

New York is now among those states.

Effective September 1, 2009, New York has adopted the concept of automatic orders on the Connecticut model. Pursuant to Laws of 2009, Chapter 72, § 1, DRL § 236B(2) is amended by the addition of a new subparagraph 'B' which provides that the plaintiff is required to serve upon the defendant, simultaneously with the service of a summons, notice of five "automatic orders" which prohibit altering the status quo during the pendency of the matrimonial action.

Accordingly, upon the commencement of a matrimonial action, both parties are forbidden: (a) the sale, transfer, encumbrance, concealing, assigning or removing property without the written consent of the other party, except in the usual course of business; (b) the transferring, encumbering, assigning, removing, withdrawing or disposition of tax-deferred funds, stocks or other assets held in retirement accounts, without the written consent of the other party; (c) the incurring of unreasonable debts, including borrowing against credit lines or credit cards, except in the usual course of business or for customary or household expenses; (d) causing the other party or the children to be removed from existing medical, hospital and dental insurance coverage; or (e) changing the beneficiaries of any existing life insurance policies or failing to maintain any existing life, automobile, homeowners or renters insurance policies.

These automatic orders are binding on the plaintiff immediately upon the commencement of the action by filing a summons, and upon the defendant immediately upon service of a notice of automatic orders with the summons, and will remain in effect during the pendency of the action unless terminated, modified or amended by a further order of the court or the agreement of the parties.

Similar, although somewhat more elaborate, automatic orders have been part of matrimonial practice in Connecticut for more than ten years (*see Practice Book*, § 25-5), and counsel's experience with them is almost uniformly favorable. It is no longer necessary to rush to the courthouse with applications aimed at preserving the status quo.

Set forth on page 9 is a proposed form of notice of automatic orders to be served at the same time the summons or summons and complaint is served in order to invoke the protection of these orders and comply with the statute.

Mr. Burrows, a member of the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers, has been practicing matrimonial law for 40 years. He currently is active both in New York and in Connecticut.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF _____

..... X

:

Plaintiff, Index No. _____

:

-against- **NOTICE OF AUTOMATIC ORDERS**

:

Defendant. :

..... X

PLEASE TAKE NOTICE that pursuant to Domestic Relations Law § 236(B)(2)(b), the automatic orders set forth below became binding upon Plaintiff upon the commencement of this action by the filing of a summons or summons and complaint, and will become binding upon Defendant upon the service of a summons or summons and complaint.

PLEASE TAKE FURTHER NOTICE that the automatic orders set forth below shall remain in full force and effect during the pendency of this action, unless terminated, modified or amended by further order of the Court, upon motion of either of the parties, or upon written agreement between the parties duly executed and acknowledged.

Accordingly, it is:

(1) ORDERED that neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action; and it is further

(2) ORDERED that neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court; and it is further

(3) ORDERED that neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrance any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action; and it is further

(4) ORDERED that neither party shall cause the other party or any children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical hospital and dental insurance coverage in full force and effect; and it is further

(5) ORDERED that neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

Dated:_____, New York

_____, 200_

Yours, etc.,

_____

Attorney for Plaintiff/Plaintiff Pro Se
[Address]
[Phone Number]

Kenneth David Burrows, Esq.
950 Third Avenue, 32nd Floor
New York, NY 10022

Who Is Entitled to Life Insurance Benefits and Top-Hat Benefits from an ERISA Plan Following a Divorce or a Marital Separation?

By Albert Feuer

The extent, if any, to which a participant's spouse or former spouse is entitled to the participant's employee benefits is often an important issue in divorces and marital separations. Benefit entitlements of ERISA plans,[1] i.e., pension plans and welfare plans (which include life insurance plans), are determined by the terms of those plans.[2] ERISA plans generally need not follow state-court orders.[3] On the other hand, state courts frequently issue domestic relations orders ("DROs") pertaining to such benefits. ERISA plans must follow the designation terms of those DROs which are qualified domestic relations orders ("QDROs").[4] Questions have been raised about whether life insurance plans and top-hat plans (which are pension plans maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees)[5] must follow the designation terms of a DRO that "satisfies the QDRO requirements," but contradicts a designation made pursuant to the plan terms.[6]

ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3) sets forth the QDRO requirements. Subparagraph (A) requires certain pension plans to follow the designation terms of a QDRO. Subparagraph (B) requires that a QDRO be a DRO that establishes an entitlement to receive plan benefits, i.e., the DRO must direct the ERISA plan to make benefit payments. Subparagraph (B) also sets forth the requirements to be a DRO and references the additional requirements of subparagraphs (C) and (D). Subparagraph (C) sets forth the disclosure features that a QDRO must include, such as the benefit entitlement being established, the plan at issue, and the person obtaining the entitlement. Subparagraph (D) describes the benefits that a QDRO may establish.

In *Metropolitan Life v. Drainville*[7] a federal district court in Rhode Island recently explained the disclosure requirements that a DRO must satisfy in order to be a QDRO. The court held an ERISA life insurance plan (the "MetLife Plan") must treat as effective a divorce decree[8] which required a participant to keep his first wife's children as his beneficiaries, because the court found the decree to be a QDRO. The court did not refer to any plan term that required the MetLife Plan to follow the designation terms of a DRO such as the one at issue. The dispute arose because at the time of his death, the participant had violated the terms of the decree by designating his second wife as his sole beneficiary pursuant to the plan terms.

The *Drainville* holding is incorrect because an ERISA life insurance plan must, as discussed, *infra*, disregard a DRO that violates the plan terms. Moreover, the court failed to consider the most fundamental QDRO requirement, viz., the order itself must require the ERISA plan to pay the benefits to specific persons.[9] However, the decree required the participant to name his first wife's children as beneficiaries. The first wife's children should have directed their complaint not at the life insurance plan administrator, who followed the terms of the ERISA plan, but at the participant who had breached his obligation to designate those children.

A. The *Drainville* Court's Incorrect Holding That the "QDRO Requirements" Are Applicable to Welfare Plans

The *Drainville* court presumed that the ERISA prohibition against the alienation of pension benefits, ERISA § 206(d), 1056(d) (the "Alienation Prohibition"), which contains the "QDRO requirements," is applicable to welfare plans, such as the MetLife Plan. Thus, the court concluded that the life insurance plan at issue was required to follow a DRO which satisfied the "QDRO requirements." However, the court set forth quotes from those requirements that refer only to pension plans, which makes the holding questionable on its face.[10] Thus, the MetLife Plan could and apparently did, provide that DROs were disregarded, and the participant's designee, his second wife, was entitled to his survivor benefit.

B. An Analysis of the ERISA Provisions Which Determine Whether the "QDRO Requirements" Apply to Life Insurance Plans

The applicability of the "QDRO requirements" to welfare plans, such as life insurance plans, is determined by the interaction of three ERISA provisions, which the *Drainville* court did not consider, although two cases it cited for other reasons did.[11] Their analysis was recently set forth in *Metropolitan Life Insurance Co. v. Hanson*[12] and may be found in more detail in *Metropolitan Life Ins. Co. v. Wheaton*.[13] The *Drainville* court cited *Wheaton* while discussing the disclosure parts of the "QDRO requirements."[14] The three provisions are herewith described.

First, there is a preemption of all state laws that "relate to any ERISA plan" (the "General ERISA Preemption").[15]

Second, there is an explicit QDRO exclusion from the General ERISA Preemption that cites a third section:

> (b) (7) Subsection (a) of this section shall not apply to qualified domestic relations orders (*within the meaning of section 206(d)(3)(B)(i)* of this title), qualified medical child support orders (within the meaning of section 609(a)(2)(B)(ii) of this title)….[16]

Third, there is ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B) (the "QDRO meaning section"):

> (B) For purposes of this paragraph–
>
> (i) the term "qualified domestic relations order'" means a domestic relations order–
>
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant *under a plan*, and
>
> (II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
>
> (ii) the term "domestic relations order"' means…[17]

The *Wheaton* majority opinion, which was written by Judge Richard Posner, rested on a "literal reading" of the ERISA provisions.[18] In particular, it observed that the QDRO meaning section cited by the exclusion refers to "a plan" rather than "a pension plan." Therefore, the opinion asserted that any DRO that meets the "QDRO requirements" is not preempted, and all ERISA plans must follow the designation terms of such an order.[19]

This interpretation must be rejected because it would violate "a cardinal principle of statutory construction" set forth by the Supreme Court that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[20] If ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7), in concert with ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B), provided that DROs that meet the "QDRO requirements" determine benefit entitlements for all ERISA plans, they determine benefit entitlements for pension plans, as well as life insurance plans. However, that interpretation would render superfluous the provision in ERISA § 206(d)(3)(A) 29, U.S.C. § 1056(d)(3)(A) that such QDROs determine benefit entitlements for pension plans.

Congress rejected this interpretation when it enacted ERISA § 206(d)(3)(L), 29 U.S.C. § 1056(d)(3)(L). Subparagraph (d)(3)(L) was enacted together with a similar addition to the corresponding tax-qualification Code Section as the part of Section 1898 of the Tax Reform Act of 1986,[21] which is entitled, "Technical Corrections to the Retirement Equity Act [which introduced the 'QDRO requirements']." The two provisions were intended to "clarif[y] that the qualified domestic relations provisions do not apply to any plan to which the assignment or alienation restrictions do not apply."[22] That subparagraph limits application of paragraph (d)(3), which includes the QDRO meaning section, to pension plans subject to the Alienation Prohibition. This limitation thus clarifies that life insurance plans, which are not pension plans, and top-hat plans,[23] which are pension plans, are excluded from the QDRO requirements.

This interpretation must also be rejected because it disregards the context of the QDRO meaning section. The meaning of a QDRO, like the meaning of a qualified medical child support order, which requires health care plans to provide children with health care benefits following a divorce or marital separation ("QMSCO"),[24] may not be discerned by looking at the respective meaning sections in isolation. In both cases, the full paragraph containing the respective meaning sections must be considered.[25] Paragraph (d)(3) is part of ERISA § 206, 29 U.S.C. § 1056, which is only applicable to pension plans subject to the Alienation Prohibition. Therefore, the definition and the associated "QDRO requirements" are similarly limited. Neither applies to a health care plan,[26] to a life insurance plan, nor to a top-hat plan.

Furthermore, other parts of the QDRO definition, which are included within the "QDRO requirements," confirm that those requirements are limited to pension plans. The QDRO meaning section refers to ERISA § 206(d)(3)(D), 29 U.S.C. § 1056(d)(3)(D). That subparagraph refers to permissible forms of benefit payments. Although life insurance payments may be made in a variety of forms, health care benefits are generally payable only as lump sums. In contrast, pension plan benefits may be paid in many forms, although some plans limit the form to lump-sum payments. Moreover, ERISA § 206(d)(3)(E), 29 U.S.C. § 1056(d)(3)(E) explains that the prior subparagraph (D) is not violated if the benefit payments begin before a participant has separated from service. Although health care benefits may be paid at such time, life insurance payments may never be paid before a participant has separated from service because the participant would be alive while in service. In contrast, pension payments may begin before a participant has separated from service. Similarly, both the spousal benefits described in ERISA § 206(d)(3)(F), 29 U.S.C. § 1056(d)(3)(F), and the PBGC premiums mentioned in ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J) refer only to pension benefits, but only those subject to the Alienation Prohibition, which excludes top-hat plans. Finally, if the "QDRO requirements" applied

to all ERISA plans, the QDRO processing requirements in ERISA § 206(d)(3)(G), 29 U.S.C. § 1056(d)(3)(G), and the double payment relief provisions of ERISA §§ 206(d)(3)(H) and (I), 29 U.S.C. §§ 1056(d)(3)(H) and (I), would have not been limited to pension plans.

Judge Posner stated in *Wheaton* that it would have been "odd" for Congress to make it harder to alienate with a DRO a life insurance benefit than a pension plan benefit.[27] Judge Posner was referring to the fact that plan sponsors may permit the alienation of life insurance benefits, but they may not permit the alienation of pension benefits. However, the alienations that pension plans, unlike life insurance plans, must permit are part of a system to better protect the pension benefits of the spouses and former spouses of participants. Although it may be "odd," Congress could and did so distinguish life insurance benefits. Spouses must be given survivor benefits from pension plans but not life insurance plans.[28] Former spouses also obtained more rights with respect to pension benefits than life insurance benefits. Pension plans, but not life insurance plans, as discussed *supra*, must and may only follow the designation terms of DROs that satisfy the QDRO requirements. In contrast, sponsors of ERISA plans, other than pension plans subject to the Alienation Prohibition, such as life insurance plans or health care plans, need not but may choose to provide similar protection for spouses and former spouses of participants.

C. The *Wheaton* and the *Drainville* Courts Incorrectly Disregarded the QDRO Requirement That the Order Create a Right to Receive a Benefit

Finally, contrary to the *Wheaton* majority's emphasis on a literal reading, their holding, like all life insurance holdings that the "QDRO requirements" are applicable to life insurance plans, disregarded the fact that the DRO at issue[29] failed to satisfy the most fundamental QDRO requirement, i.e., that the order "creates or recognizes the existence of an alternate payee's right to" the payment of the benefit at issue.[30] The DRO under consideration in *Wheaton* and the one under consideration in *Drainville* directed the participant to make or retain a certain beneficiary designation, and in both he failed to follow those directions. In contrast, the requisite QDRO provision would be a direction to the plan that an alternate payee is entitled to be paid the survivor benefit, such as "A is entitled to the participant's survivor benefit under the X Pension Plan." ERISA would also prohibit the first wife and her children from enforcing their claim against the participant's designee, the second wife, because such enforcement would violate the core principle that the terms of an ERISA plan determine ERISA benefit entitlements.[31]

Conclusion

The *Drainville* court, like many other courts, incorrectly disregarded the limitation of the "QDRO requirements," including the requirement that ERISA plans follow the designations of such an order, to pension plans that are subject to the Alienation Prohibition. The Prohibition, as discussed, does not apply to life insurance plans or to top-hat plans. Thus, the QDRO requirements also do not apply to such plans. Therefore, the court should have directed the MetLife plan to disregard the DRO at issue, and should have held that the participant's designee pursuant to the plan terms, his second wife, was entitled to receive and keep the proceeds.

Endnotes

1. ERISA § 3(3), 29 U.S.C. § 1002(3) (2009).
2. *See generally Kennedy v. Plan Administrator of the DuPont Savings and Investment Plan*, 555 U.S. __ (2009), 129 S. Ct. 865, 2009 U.S. LEXIS 869 (January 26, 2009).
3. ERISA § 514(a), 29 U.S.C. § 1144(a). However, government plans are not subject to ERISA or this general preemption. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1). Nor are church plans unless they elect to be subject to those requirements. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2).
4. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3).
5. ERISA § 201(2), 29 U.S.C. § 1051(2).
6. *See e.g.*, Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 975-1003, 1025-1031 (2007), *available at* http://ssrn.com/abstract=1337276 (hereinafter Feuer, Beneficiary Article) [10/23/09].
7. 2009 U.S. Dist. LEXIS 63613 (D.C. R.I. July 23, 2009).
8. A more extensive discussion of this decision may be found at Albert Feuer, *A Well-Reasoned But Incorrect QDRO Decision Pertaining to Life Insurance Payments from an ERISA Plan*, *available at* http://ssrn.com/abstract=1467201 [10/23/09].
9. ERISA § 206(d)(3)(B)(i)(I), 29 U.S.C. § 1056(d)(3)(B)(i)(I).
10. *Op. cit.* at *8. The Court gave an incorrect reference at note 2 for three other conditions that may preclude a DRO from being a QDRO. The correct reference is 29 U.S.C. § 1056(d)(3)(D)(i)-(iii).
11. *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114 (10th Cir. 1991) and *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997).
12. *2009 U.S. Dist. LEXIS 92044* (D. N.H. Oct. 1, 2009) (the DRO at issue required the participant to designate his children from his divorced first wife as the beneficiaries under an ERISA life insurance plan but his divorced third wife was his designee at the time of his death.). The court cited decisions of the second, third, fourth, seventh and tenth circuits which agreed with this position but not the eleventh circuit, which disagreed in *Brown v. Connecticut General Life Insurance*, 934 F.2d 1193 (11th Cir. 1991).
13. 42 F.3d 1080, 1084 (7th Cir. 1994) (the DRO at issue required the participant to designate his children from a divorced wife as the beneficiaries under an ERISA life insurance plan, but his widow was his designee at the time of his death.).
14. Op. cit. at *13.
15. ERISA § 514(a), 29 U.S.C. § 1144(a).
16. ERISA § 514(b)(7), 29 U.S.C. § 1144(b)(7) (emphasis added).

17. ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B) (emphasis added).

18. *See generally* Teresa S. Renaker, *Employee Welfare and Other Nonpension Benefits-9.14-Preemption Exception for QDROs and Applicability to Welfare Plans* in DIVIDING PENSIONS AND OTHER EMPLOYEE BENEFITS IN CALIFORNIA DIVORCES (CEB 2007) (an excellent review of the case law in this area) and Feuer, Beneficiary Article at 1025-1035.

19. 42 F.3d 1080, 1083-1084 (7th Cir. 1994).

20. *TRW Inc. v. Andrews*, 534 U.S. 19 at 31 (2001). The Court observed the statute contained a narrow discovery exception if a creditor misrepresents its behavior that would delay the starting time of the two-year statute of limitations of the Fair Credit Reporting Act. Thus, the Court rejected the assertion that a far broader general discovery rule could also delay the starting time because this would make the language establishing the narrow exception superfluous.

21. Section 1898(c)(4) of Pub. L. 99-514, 100 Stat. 2948 (1986).

22. S. REP. NO. 99-313 (May 29, 1986). The final bill made no change to this section other than changing the section number from 1897(c) to 1898(c). Nor was any change made in the explanation. H.R. REP. NO. 99-514, 99th Cong. 2d. Sess., reprinted in 1986 U.S.C.C.A.N. 4075, 4941.

23. ERISA § 201(2), 29 U.S.C. § 1051(2) excludes top-hat plans from Part 2 of Title I of ERISA, which includes the Alienation Prohibition.

24. ERISA § 609, 29 U.S.C. § 1169.

25. The meaning of a QDRO is determined by looking at ERISA § 206(d)(3), 29 U.S.C. 1056(d)(3), not ERISA § 206(d)(3)(B)(i), 29 U.S.C. 1056(d)(3)(B)(i) in isolation. Similarly, the meaning of a QMSCO is determined by looking at ERISA § 609(a), 29 U.S.C. § 1169(a), not ERISA § 609(a)(2)(B)(ii), 29 U.S.C. § 1169(a)(2)(B) in isolation.

26. ERISA permits children, but not a participant's former spouse, to use a QMSCO to obtain benefits from an ERISA health care plan. ERISA § 609(a), 29 U.S.C. § 1169(a).

27. 42 F.3d 1080, 1083-1084 (7th Cir. 1994).

28. ERISA § 205, 29 U.S.C. § 1055 applies only to pension plans.

29. See Feuer, Beneficiary Article at 1030-1031. The decrees in two circuit decisions were described incorrectly in the *Drainville* decision as including requirements about the payment of life insurance benefits or proceeds. *Op. cit*. at *12. In both cases, the decree instead required the participant to make specified designations. Similarly, a decree requiring a participant to maintain his former spouse and her children as the beneficiaries of an ERISA life insurance plan was conceded by all parties to be a QDRO in *Metropolitan Life Insurance Co. v. Hanson*, 2009 U.S. Dist. LEXIS 92044 (Oct. 1, 2009) at *7.

30. ERISA § 206(d)(3)(B)(i)(I), 29 U.S.C. § 1056(d)(3)(B)(i)(I).

31. Feuer, Beneficiary Article at 1030-1031. See also *Kennedy v. Plan Administrator of the DuPont Savings and Investment Plan*, 555 U.S. __ (2009), 129 S. Ct. 865, 2009 U.S. LEXIS 869 (January 26, 2009) discussed in Albert Feuer, *Did a Unanimous Supreme Court Misread ERISA, Misread the Court's Precedents, Undermine Basic ERISA Principles, and Encourage Benefits Litigation?*, 37 Comp. P. J. 247 (October 2, 2009), *available at* http://ssrn.com/abstract=1126883 [10/22/2009].

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Taxation of Nerves: Understanding Innocent Spouse Relief from Joint Return Liability

By Vlad Frants

As a general rule, if a joint return is filed then "the tax computed shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several."[1] However, under certain circumstances, Code Section 6015 provides relief from this general rule. For a taxpayer who has filed a joint return, three avenues are available for obtaining relief: *first*, section 6015(b)(1), which allows a spouse to escape completely joint and several liability; *second*, sections 6015(b)(2) and (c), which allow a spouse to elect limited liability through relief from a portion of the understatement or deficiency; and *third*, section 6015(f), which confers upon the Secretary discretion to grant equitable relief in situations where relief is unavailable under the other sections.

Section 6015(b)(1)

To qualify for relief from joint and several liability under section 6015(b)(1), a taxpayer must establish that (1) a joint return has been made for a taxable year; (2) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return; (3) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement; (4) taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement; and (5) the other individual elects the benefits of this subsection not later than the date which is two years after the date the Secretary has begun collection activities with respect to the individual making the election. The third and fourth elements usually are the hardest to prove.

In evaluating the third element, a court will undertake a subjective inquiry, evaluating all of the facts and circumstances. It will consider factors such as: (1) the requesting spouse's level of education; (2) the degree of involvement in the family's financial affairs; (3) the presence of expenditures that appear lavish or unusual when compared to the family's past income levels, income standards and spending patterns; and (4) the non-requesting spouse's degree of evasiveness and deceit, if any, concerning the couple's finances.[2] A court would also consider the nature of the erroneous item and the amount of the erroneous item relative to other items and whether the erroneous item represented a departure from a recurring pattern reflected in prior years' returns.[3]

In terms of the fourth element, all of the facts and circumstances would be considered in determining whether it is inequitable to hold the innocent spouse jointly and severally liable for any alleged understatement.[4] A relevant factor for this purpose includes whether the innocent spouse significantly benefited, either directly or indirectly, from the understatement.[5]

Sections 6015(b)(2) and (c)

A taxpayer may qualify for relief from joint and several liability under sections 6015(b)(2) and (c).

Section 6015(b)(2) applies in situations where, but for failing to meet the third element of 6015(b)(1), the taxpayer would have been accorded relief. Thus, if the requesting spouse fails to meet 6015(b)(1) because she is unable to establish that she did not know and had no reason to know of the non-requesting spouse's understatement, but she can establish all of the remaining elements, then she will nevertheless be relieved of liability for tax "to the extent that such liability is attributable to the portion of [the understated amount] of which [the requesting spouse] did not know and had no reason to know."[6] In other words, under 6015(b)(2), even if the innocent spouse fails to establish the third element of 6015(b)(1), as long as she is able to meet the four other elements, she will be entitled to partial relief as to that portion of the understated amount she can prove she did not know of and had no reason to know of.

Section 6015(c) allows proportionate tax relief through allocation of the deficiency between individuals who filed a joint return and are either no longer married, legally separated or do not reside together for a 12-month period. However, such allocation is not permitted if the Secretary demonstrates that the individual electing relief had actual knowledge, at the time the return was signed, of any item giving rise to a deficiency. This provision relieving taxpayers from a portion of the understated amount differs from Section 6015(b)(2) in that "equitable considerations in holding the putative innocent spouse liable for unpaid tax or any deficiency are of no import."[7] Thus, even if equitable factors weigh against the requesting spouse and she is unable to be relieved of liability under any of the other sections, she may nevertheless be relieved of a portion of the understated amount as long as she did not have actual knowledge of the deficiency.

Section 6015(f)

Section 6015(f) confers discretion on the Secretary to grant innocent spouse relief to an individual if taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any deficiency.[8] Equitable relief is available only if relief is not available under the

other relief approaches.[9] The equitable factors considered under Section 6015(b)(1), requirement four, are generally the same ones considered here.[10] Revenue Procedure 2000-15 states that "[n]o single factor will be determinative of whether equitable relief will or will not be granted in any particular case. Rather, all factors will be considered and weighed appropriately.[11]" While no list of factors is intended to be exhaustive, the court in *Washington v. Commissioner* provides some guidance.[12]

In *Washington v. Commissioner*, the court listed six factors which, if true as to an requesting spouse, would weigh in favor of relieving him or her of liability for a deficiency: (1) the requesting spouse is separated or divorced from the nonrequesting spouse; (2) the requesting spouse would suffer economic hardship if relief is denied; (3) the requesting spouse was abused by the nonrequesting spouse; (4) the requesting spouse did not know or have reason to know that the unreported liability would be unpaid at the time the return was signed; (5) the nonrequesting spouse has a legal obligation pursuant to a divorce decree or agreement to pay the unpaid liability; and (6) the unpaid liability is attributable to the nonrequesting spouse.[13]

The *Washington* court also listed the following factors as those tending to weigh against granting relief for an unpaid liability: (1) The unpaid liability is attributable to the requesting spouse; (2) the requesting spouse knew or had reason to know that the reported liability would be unpaid at the time the return was signed; (3) the requesting spouse significantly benefited (beyond normal support) from the unpaid liability; (4) the requesting spouse will not suffer economic hardship if relief is denied; (5) the requesting spouse has not made a good-faith effort to comply with Federal income tax laws in the tax years following the tax year to which the request for relief relates; and (6) the requesting spouse has a legal obligation pursuant to a divorce decree or agreement to pay the unpaid liability.[14]

Recently Enacted Guidelines

The requesting spouse's available defenses, as discussed above, are subject to certain recently enacted guidelines. Regulation Section 1.6015-6 would give the non-requesting spouse the right to notice and participation in the administrative determination of whether the requesting spouse is entitled to relief under any provision of Code Section 6015.[15] Moreover, the non-requesting spouse would have the right to file a written protest and to receive an appeals conference if the requesting spouse were granted partial or full relief.[16]

Conclusion

As a general rule, when a joint return is filed, then all taxpayers signing off on the return are held jointly and severally liable. However, three possible defenses or avenues for obtaining relief may be available to a requesting spouse: *first*, section 6015(b)(1), *second*, sections 6015(b)(2) and (c), and *third*, section 6015(f). For section 6015(b)(1), the requesting spouse must timely elect this section, establish that the understatement on the 2002 joint return was not caused by her, that she did not know and had no reason to know of the understatement, and must establish that it would be inequitable to hold her liable for the deficiency. If the requesting spouse fails to prove that she did not know of and had no reason to know of there being a deficiency, then, under section 6015(b)(2), as long as she meets the remaining requirements listed above, she will be entitled to partial relief as to that portion of the amount omitted provided the requesting spouse can prove she did not know of and had no reason to know of a deficiency. If the requesting spouse is not relieved of liability under any of the other sections, and even if the equitable factors weigh against her, she may, under section 6015(c), nevertheless be relieved of a portion of the understated amount as long as she did not have actual knowledge of the deficiency. Finally, the innocent spouse may be relieved of liability under the broad discretionary provision located in section 6015(f), in which all of the facts and circumstances are taken into consideration.

Endnotes

1. I.R.C. § 6013(d)(3).
2. *Butler v. Comm'r,* 114 T.C. 276, 279 (2000).
3. Treas. Reg. § 1.6015-2.
4. *Id.*
5. *Id.*
6. *Vetrano v. Comm'r*, 116 T.C. 272 (2001).
7. *Cheshire v. Comm'r,* 115 T.C. 183 (2000).
8. *Id.*
9. I.R.C. § 6015(f).
10. *Rosalinda v. Comm'r*, 119 T.C. 306 (2002).
11. Rev. Proc. 2000-15, 2000-1 C.B. 448-49.
12. *Washington v. Comm'r,* 120 T.C. 137 (2003).
13. *Id.*
14. *Id.*
15. Treas. Reg. § 1.6015-6.
16. Rev. Proc. 2003-19, 2003-1 C.B. 371.

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The Importance of Understanding Individualized Education Programs (IEPs) in Family Law

By George Giuliani, J.D., Psy.D. and Roger Pierangelo, Ph.D.

In the United States today, there are more than six million students between 6 to 21 years of age receiving special education services. All of these students are mandated by the federal law (The Individuals with Disabilities Education Improvement Act of 2004, also known as IDEA 2004) to have an individualized education program (IEP) developed for them.

As we are aware, when parents separate or divorce, issues of custody and "best interests of the child" involve many different factors. Very often, one or more of the children whose parents are separating/divorcing has a learning disability, speech and language impairment, autism or another one of the disabilities recognized under the law.

Family lawyers need to be aware of the needs of children with disabilities and their rights. This all starts with an understanding of the IEP. Without understanding the IEP, it is very difficult, if not impossible, to truly grasp the needs of the child with a disability. The focus of this article is to present questions and answers on IEPs that are essential for family lawyers to understand when representing families whose children have disabilities and receive special education.

I. What Is an Individualized Education Program (IEP)?

An individualized education program (IEP) is a written statement for a student with a disability that is developed, reviewed and revised in a meeting(s) of a Committee on Special Education (CSE), Subcommittee on Special Education or Committee on Preschool Special Education (CPSE). The IEP is the tool that ensures a student with a disability has access to the general education curriculum and is provided the appropriate learning opportunities, accommodations, adaptations, specialized services and supports needed for the student to progress toward achieving the learning standards and to meet his or her unique needs related to the disability.

Each student with a disability must have an IEP in effect by the beginning of each school year. Federal and State laws and regulations specify the information that must be documented in each student's IEP, including the classification of the disability of the student, a description of the student's unique needs, the student's goals for the school year and the special education services that will be provided to the student in the least restrictive environment.

II. What Is the Purpose of an IEP?

The IEP is a written record of the decisions reached by the team members at the IEP meeting. The IEP serves many purposes:

a. The individualized education program (IEP) is the heart of IDEA 2004. It is a written statement that is developed, reviewed, and revised in an IEP meeting and serves as a communication vehicle between a parent/guardian and the District.

b. The IEP meeting serves as a communication vehicle between parent/guardians and school personnel, and enables them, as equal participants, to jointly decide what the student's needs are, what services will be provided to meet those needs, and what the anticipated outcomes may be.

c. The IEP process provides an opportunity for resolving any differences between the parent/guardians and the agency concerning the special education needs of a student with a disability: first, through the IEP meeting, and second, if necessary, through the procedural protections that are available to the parent/guardians.

d. The IEP sets forth in writing a commitment of resources necessary to enable a student with a disability to receive needed special education and related services.

e. The IEP is a management tool that is used to ensure that each student with a disability is provided special education and related services appropriate to the student's special learning needs.

f. The IEP is a compliance/monitoring document that may be used by authorized monitoring personnel from each governmental level to determine whether a student with a disability is actually receiving the Free Appropriate Public Education (FAPE) agreed to by the parent/guardians and the school.

g. The IEP serves as an evaluation device for use in determining the extent of the student's progress toward meeting the projected outcomes.

h. An effective process that engages parent/guardians and school personnel in a meaningful discussion of the student's educational needs must be used in developing the IEP. The completed IEP should be the product of collaboration between parent/guardians and educators who, through full

and equal participation, identify the unique needs of a student with a disability and plan the services to meet those needs.

i. The IEP is not a performance contract or a guarantee by the District and the teacher that a student will progress at a specified rate. However, the District must ensure that all services set forth in the student's IEP are provided, and it is also obligated to make good faith efforts to assist the student in achieving his or her IEP goals and objectives.

The IEP can be more than an outline and management tool of the student's special education program. It should be an opportunity for parent/guardians and educators to work together as equal participants to identify the student's needs, what will be provided to meet those needs, and what the anticipated outcomes may be. It is a document that is revised as the needs of the student change. The IEP is a commitment in writing of the resources the school agrees to provide. Also, the periodic review of the IEP serves as an evaluation of the student's progress toward meeting the educational goals and objectives. Finally, the IEP serves as the focal point for clarifying issues and cooperative decision-making by parent/guardians, the student and school personnel in the best interest of the student. For all of these reasons, the IEP is the cornerstone of special education.

III. Who Develops the IEP?

An IEP can only be developed or revised by the CSE, Subcommittee on Special Education or CPSE. The Committee is required to include certain individuals who know the student and his or her unique needs and who can commit the resources of the school to address the student's needs.

To develop an appropriate IEP for the student, a group of individuals with the knowledge and expertise about the student, curriculum and resources of the school must come together and the process for discussion and decision-making needs to be effective and efficient. Information about the student's strengths, interests and unique needs gathered from parent/guardians, teachers, the student, related service providers, evaluations and observations are the foundation upon which to build a program that will result in effective instruction and student achievement. Each member of the multidisciplinary team that makes up the CSE, Subcommittee or CPSE brings information and a unique perspective to the discussion of the student's needs and has an important role and responsibility to contribute to the discussion and the recommendations for the student.

Each Committee has a chairperson who has certain responsibilities under the law and regulations. The chairperson of the CPSE must be the school district representative. The required members of the Committee include the following:

A. Parent/Guardians of the Student

The parent/guardians of a student with a disability are expected to be equal participants along with school personnel, in developing, reviewing, and revising the IEP for their student. This is an active role in which the parent/guardians:

(1) provide critical information regarding the strengths of the student and express their concerns for enhancing the education of their student;

(2) participate in discussions about the student's need for special education and related services and supplementary aids and services; and

(3) join with the other participants in deciding how the student will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the student and in what setting.

Parent/guardians are important team members who can:

- Verify the accuracy of personal identifying information.
- Provide information and observations about the level of the student's functioning in his or her home environment and community.
- Provide information regarding the student's medical status.
- Participate in developing educational goals and objectives based on the present level of academic achievement of functional performance and identified needs.
- Participate in determining the special education and related services to be provided.
- Participate in identifying an appropriate educational program for the student.

Though parent/guardians are expected to be equal partners at the IEP meeting, writing IEPs or participating at IEP meetings is a new experience for many families. Information could be shared with parent/guardians throughout the evaluation process and prior to IEP notification, regarding what will be discussed at the meeting, questions to consider, Transition Questionnaires, etc. This would enhance parent/guardians' readiness to share their wishes (i.e., goals) for their student, as well as to contribute to the determination of the student's needs and present levels of performance. Please remember that all information sent to parent/guardians must be in their native language. Districts must arrange for interpreters for parent/guardians when necessary.

B. No Less Than One General Education Teacher of Such Student (If the Student Is, or May Be, Participating in the General Education Environment)

Very often, general education teachers play a central role in the education of students with disabilities and have important expertise regarding the general curriculum and the general education environment.

> Thus, a…general education teacher… must, to the extent appropriate, participate in the development, review, and revision of the student's IEP, including assisting in (1) the determination of appropriate positive behavioral interventions and strategies for the student; and (2) the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the student…

The teacher need not (depending upon the student's needs and the purpose of the specific IEP team meeting) be required to participate in all decisions made as part of the meeting or to be present throughout the entire meeting or attend every meeting. For example, the general education teacher who is a member of the IEP team must participate in discussions and decisions about how to modify the general curriculum in the regular classroom to ensure the student's involvement and progress in the general curriculum and participation in the general education environment.

Depending upon the specific circumstances, however, it may not be necessary for the general education teacher to participate in discussions and decisions regarding, for example, the physical therapy needs of the student, if the teacher is not responsible for implementing that portion of the student's IEP.

In determining the extent of the general education teacher's participation at IEP meetings, public agencies and parent/guardians should discuss and try to reach agreement on whether the student's general education teacher who is a member of the IEP team should be present at a particular IEP meeting and, if so, for what period of time. The extent to which it would be appropriate for the general education teacher member of the IEP team to participate in IEP meetings must be decided on a case by case basis.

C. Not Less Than One Special Education Teacher, or Where Appropriate, Not Less Than One Special Education Provider of Such Student

The special educator on the Team can be either the student's special education teacher, or the student's special education service provider, such as a speech therapist, if the related service is considered specially designed instruction. If the student is being considered for special education for the first time, the role of the special education teacher could be filled by a teacher qualified to provide special education in the student's area of suspected disability. Occupational therapists, physical therapists and guidance counselors cannot fill the role of the special education teacher/service provider on the IEP team since these individuals do not provide specially designed instruction.

In deciding which teacher should participate, the District may wish to consider the following possibilities:

- For a student with a disability who is receiving special education, the "teacher" could be the student's special education teacher. If the student's disability is a speech impairment, the "teacher" could be the speech-language pathologist.
- For a student with a disability who is being considered for placement in special education, the "teacher" could be a teacher qualified to provide education in the type of program in which the student may be placed.

D. Individual Who Can Interpret the Instructional Implications of the Evaluations

At least one individual must participate in the Committee meeting who can provide information on the results of the student's individual evaluation report and assist the Committee in identifying the implications of those results for the instruction of the student. This individual may be a member of the Committee who is also serving as the general education teacher or special education teacher or related service provider of the student, the school psychologist, the representative of the school district or a person having knowledge or special expertise regarding the student when such member is determined by the school district to have the knowledge and expertise to fulfill this role on the Committee.

E. School District Representative

The school district representative must be someone who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the district. This individual brings knowledge of the continuum of special education supports and services and should have the authority to commit the resources of the school and to ensure that whatever services are set out in the IEP will be provided.

The individual who meets these qualifications may also be the same individual appointed as the special education teacher or related service provider of the student or the school psychologist on the Committee. The chairperson of the CPSE must be the school district representative on the Committee.

Each district may determine the specific staff person who will serve as its representative in a particular

IEP meeting, so long as the person meets the following criteria:

(a) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;

(b) is knowledgeable about the general curriculum; and

(c) is knowledgeable about the availability of resources of the public agency.

F. Individuals with Knowledge or Special Expertise About the Student

In addition to the other required members, parent/guardians and school personnel have discretion to include other individuals who have knowledge or special expertise regarding the student. This is important to ensure that the Committee includes the input of those persons who can add to the discussion of the student's needs and recommendations for supports and services. Such individuals could include, for example, a school nurse, a physical therapist or other related service provider, the student's private counselor, a paraprofessional working with the student, a student's athletic coach, family member or family friend who knows the student and who can assist the parent/guardians. The determination of the knowledge or special expertise of any such individual is made by the party (parent/guardians or school) who invited the individual to be a member of the Committee.

G. Other Agency Representatives

- When the purpose of the meeting is to discuss transition services, other agency representatives are invited to discuss their role in supporting the student in school to post-school activities. If an agency invited to send a representative to a meeting does not do so, the district must find other ways to involve the other agency in the planning of any transition services.
- When a student is or may be attending a private school or facility, a representative of that school or facility must be invited to participate in the student's Committee meetings. This is also the case when a student is residing in a facility operated by another State department or agency (e.g., Office of Mental Health, Office of Students and Family Services). If the private school or facility representative cannot attend, the school district must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.
- Other members of the CPSE include the representative of the municipality and, for certain students when transitioning from early intervention services to the CPSE, a representative of the county's early intervention program.

H. Whenever Appropriate, the Student with a Disability

If a purpose of an IEP meeting for a student with a disability will be the consideration of the student's transition service needs or needed transition services, the school district must invite the student and, as part of the notification to the parent/guardians of the IEP meeting, inform the parent/guardians that the agency will invite the student to the IEP meeting.

If the student does not attend, the school district must take other steps to ensure that the student's preferences and interests are considered.

Student participation in the IEP can be a significant step in assisting students to become their own advocates. As students prepare for the move from school to adult life they will need opportunities to practice the skills necessary in situations where self-advocacy will be important.

Naturally, this is not accomplished by simply inviting the student to the IEP meeting. Activities designed to engage the student in the IEP process to be a full participant in the meeting include:

- reviewing assessment information, especially career/vocational assessments, prior to the meeting;
- examining academic progress;
- participating in long range planning;
- establishing post-school goals in employment, education, independent living and community participation;
- exploring post-high school education & training programs;
- researching options available through adult service agencies;
- brainstorming strengths and needs; and
- leading some of the discussion at the IEP meeting.

IV. What Content Must Be Included in a Student's IEP?

Under IDEA 2004, the IEP must address all of a student's identified special education and related services needs based on need, not the disability, and include:

A. A Statement of the Student's Present Level of Academic Achievement of Functional Performance

The IEP team reviews the existing evaluation data on the student, including information and concerns shared by the parent/guardians. The team also reviews any other current pertinent data related to the student's needs and unique characteristics, such as information provided by parent/guardians; progress toward desired post-school outcomes; current classroom-based assessments; the most

recent reevaluation; input from the student's special and general education teachers and service providers, and, as appropriate, the results of the student's performance on state- and district-wide assessments.

Statements of present level of academic achievement of functional performance in an area of need include how a student's disability affects his or her involvement and progress in the general education curriculum (i.e., the same curriculum as for students without disabilities). For preschool students, present levels of performance describe how the disability affects the student's participation in age-appropriate activities. The IEP for every student with a disability, even those in separate classrooms/schools, must address how the student will be involved and progress in the general education curriculum. The statement should accurately describe the effect of the student's disability on the student's performance in each area of education that is affected.

B. A Statement of Secondary Transition Service Needs and Needed Transition Services for Students

It is crucial for IEP teams to begin planning for a student's post-school outcomes while the student is still in school. A statement of the transition service needs of the student under the applicable components of the IEP that focus on the student's course of study (such as participation in driver's education courses, a vocational education program, and/or general education curriculum) must be included in the IEP by the student's 16th birthday, or earlier if determined appropriate by the IEP team. More on transition services will be discussed in Section VIII.

C. Transfer of Rights to Student

The IEP must include a statement that the student has been informed of his or her rights under IDEA 04 that will transfer to the student on reaching the age of majority (age 18) beginning at least one year before the student reaches the age of majority.

D. Special Considerations

Depending on the needs of the student, the IEP team needs to consider what the law calls special factors. These include:

- If the student's behavior interferes with his or her learning or the learning of others, the IEP team will consider strategies and supports to address the student's behavior.
- If the student has limited proficiency in English, the IEP team will consider the student's language needs as these needs relate to his or her IEP.
- If the student is blind or visually impaired, the IEP team must provide for instruction in Braille or the use of Braille, unless it determines after an appropriate evaluation that the student does not need this instruction.
- If the student has communication needs, the IEP team must consider those needs.
- If the student is deaf or hard of hearing, the IEP team will consider his or her language and communication needs. This includes the student's opportunities to communicate directly with classmates and school staff in his or her usual method of communication (for example, sign language).
- The IEP team must always consider the student's need for assistive technology devices or services.

E. State or District-Wide Achievement Testing

The IEP must include a statement of the accommodations that are necessary to measure the academic achievement and functional performance of the student as well as to participate in state and district-wide assessments. It is expected that all students, including students with disabilities, will participate in the statewide norm-referenced and criterion-referenced assessments. For district-wide assessments, if the IEP team determines that the student will not participate in the regular assessments, the IEP must state why that assessment is not appropriate for the student and include a statement of how the student will be assessed.

F. Progress Toward Goals

The IEP must include a statement of how parent/guardians will be informed of their student's progress toward the annual goals and the extent to which that progress is sufficient to enable the student to achieve the goals by the end of the IEP time period. Parent/guardians of students with disabilities must be informed of progress at least as often as parent/guardians of students without disabilities.

G. Measurable Annual Goals Including Academic, Functional Goals and Short-Term Objectives or Benchmarks

The academic and functional goals should focus on the learning and behavioral problems resulting from the student's disability and be aligned with state and district performance standards. They should address the needs that are summarized in the statement of the student's present levels of academic achievement and functional performance. For those students taking alternate assessment, there should be at least one goal, with corresponding objectives or benchmarks, for each area of need.

The goals and objectives or benchmarks provide a mechanism for determining whether the student is progressing in the special education program and the general education curriculum, and whether the placement and services are appropriate to meet the student's identified educational needs (20 U.S.C. § 1414(d)(1)(A)(i)(II)).

Measurable annual goals: A goal is a measurable statement that describes what a student is reasonably

expected to accomplish from the specialized educational program during the school year.

Short-term objectives or benchmarks: The short-term objectives or benchmarks derive from the annual goals but represent smaller, more manageable learning tasks a student must master on the way to achieving the goals. The purpose of short-term objectives and benchmarks is to enable families, students, and teachers to monitor progress during the year and, if appropriate, revise the IEP consistent with the student's instructional needs. They describe how far the student is expected to progress toward the annual goal and by when. In most cases, at least two objectives or benchmarks should be written for each annual goal. Progress on each short-term objective or benchmark should be documented.

H. A Statement of Program Modifications and Support for School Personnel

The IEP must include program modifications/accommodations for the student and support that will be provided to school personnel to allow the student to:

- Advance appropriately toward attaining the annual goals;
- Be involved and progress in the general education curriculum and participate in extracurricular and other nonacademic activities; and
- Be educated and participate with other students with disabilities and non-disabled students.

I. Need for Extended School Year (ESY)

Consideration of the need for an extended school year (ESY) must be documented. If it is determined that a student requires ESY, it must be included in the IEP. The information used to support the determination should be referenced. ESY is not the same as summer school.

J. A Statement of the Specific Special Education, Supplementary Aids and Services to Be Provided to the Student Based on Peer-Reviewed Research to the Extent Practicable

The statement of services contained in the IEP must include the following information:

- All the specific special education and related services needed by the student in order to receive an appropriate education (e.g., itinerant program supervision, speech/language pathology services, assistive technology services, transition services, counseling services, physical therapy services).
- Supplementary aids and services, based on peer-reviewed research to the extent practicable must be provided to the student, or on behalf of the student.
- The total amount of service required by the student per week.
- The frequency of on-site program review by each itinerant service provider.
- The amount and frequency of program supervision by certified special education staff.
- The amount and frequency of counseling services.

K. Projected Starting Date and Anticipated Frequency, Duration, and Location of Services

- The projected starting date and anticipated frequency, duration, and location of services (and modifications) must be indicated for each special education and related service.
- The date must include the month, day, and year, and extend no more than a year from the date of the meeting.
- The location refers to the type of environment that is the appropriate place for the provision of the service (e.g., the regular classroom, resource room).
- The total time that a student with a disability spends receiving general education, special education, and related services should equal the total amount of time the student spends in school.

L. The Extent to Which the Student Will NOT Be Able to Participate in General Education Programs

The IEP must include a statement of the extent, if any, to which the student will not participate in the regular classroom, general education curriculum, extracurricular, or other nonacademic activities. The same program options and non-academic services that are available to students without disabilities must be available to students with disabilities. Program options typically include: art, music, industrial arts, clubs, home economics, sports, field trips, and vocational education. Non-academic services and extra-curricular activities typically include athletics, health services, recreational activities and special interest groups or clubs.

M. Justification for Placement

The IEP must include an explanation of the extent, if any, to which the student will not participate with students without disabilities in the general education curriculum and regular classroom, as well as in extracurricular and other non-academic activities. A justification for placement must be provided on the IEP.

V. What Are Assistive Technology Devices and Services?

As part of developing a student's IEP, the IEP team will consider the student's need for assistive technology devices and services.

Assistive technology devices are defined as any item, piece of equipment, or product system that is used to in-

crease, maintain, or improve the functional capabilities of a student with a disability. Assistive technology devices can be acquired commercially off the shelf, modified, or customized. Since the explosion of technology in our country, assistive technology devices have become more widely available and have been shown to dramatically improve the functional capabilities of a student with a disability in terms of mobility, communication, employment, and learning. Many of the devices have been instrumental in allowing students with disabilities to be educated in regular classrooms, working and learning alongside of their non-disabled peers. Some examples of these devices are: electronic communication aids, devices that enlarge printed words on a computer screen, devices that facilitate communication for individuals with hearing impairments, prosthetic devices, Braille writers, and keyboards adapted for fist or foot use.

Assistive technology services are any services that directly assist a student with a disability to select, acquire, or use an assistive technology device. This includes evaluating the needs of the student, including a functional evaluation in the student's customary environment. The term also includes such services as:

- purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;
- selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
- coordinating and using other therapies, interventions, or services with assistive technology devices such as those associated with existing educational and rehabilitation plans and programs;
- providing training and technical assistance for the student with a disability or, if appropriate, the student's family; and
- providing training and technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or others who provide services to, employ, or are otherwise substantially involved in the major life functions of that student.

VI. What Are Related Services?

In general, the term related services are defined as "transportation and such developmental, corrective, and other supportive services as are required to assist a student with a disability to benefit from special education." The following are included within the definition of related services:

- speech-language pathology and audiology services
- psychological services
- physical and occupational therapy
- recreation, including therapeutic recreation
- early identification and assessment of disabilities in students
- counseling services, including rehabilitation counseling
- orientation and mobility services
- medical services for diagnostic or evaluation purposes
- school health services
- social work services in schools
- parent/guardian counseling and training
- transportation

It is important to recognize that each student with a disability may not require all of the available types of related services. As under prior law, the list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, art, music, and dance therapy) if they are required to assist a student with a disability to benefit from special education in order for the student to receive FAPE.

As States respond to the requirements of Federal law, many have legislated their own related service requirements, which may include services beyond those specified in IDEA. Further, if it is determined that a student with a disability requires a particular supportive service in order to receive FAPE, that service can be considered a related service and must be provided at no cost to the parent/guardians

School districts may not charge parent/guardians of eligible students with disabilities for the costs of related services that have been included on the student's IEP. Just as special and general education must be provided to an eligible student with a disability at no cost to the parent/guardian or guardian, so, too, must related services when the IEP team has determined that such services are required in order for the student to receive FAPE and have included them in the student's IEP.

VII. How Is a Student's Placement Determined?

In some states, the IEP team serves as the group making the placement decision. In other states, this decision may be made by another group of people. In all cases, the parent/guardians have the right to be members of the group that decides the educational placement of the student.

Placement decisions must be made according to IDEA's least restrictive environment requirements—

commonly known as LRE. These requirements state that, to the maximum extent appropriate, students with disabilities must be educated with students who do not have disabilities.

The law also clearly states that special classes, separate schools, or other removal of students with disabilities from the general educational environment may occur only if the nature or severity of the student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Depending on the needs of the student, his or her IEP may be carried out in the regular class (with supplementary aids and services, as needed), in a special class (where every student in the class is receiving special education services for some or all of the day), in a special school, at home, in a hospital and institution, or in another setting. A school system may meet its obligation to ensure that the student has an appropriate placement available by:

- providing an appropriate program for the student on its own;
- contracting with another agency to provide an appropriate program; or
- utilizing some other mechanism or arrangement that is consistent with IDEA for providing or paying for an appropriate program for the student.

The law requires that the public agency ensure that a continuum of alternative placements is available to meet the needs of students with disabilities for special education and related services. This continuum must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions, and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

VIII. What Happens After the IEP Is Written?

When the IEP has been written, parent/guardians must receive a copy at no cost to themselves. The IDEA also stresses that everyone who will be involved in implementing the IEP must have access to the document. This includes the student's:

- general education teacher(s);
- special education teacher(s);
- related service provider(s) (for example, speech therapist); or
- any other service provider (such as a paraprofessional) who will be responsible for a part of the student's education.

Each of these individuals needs to know what his or her specific responsibilities are for carrying out the student's IEP. This includes the specific accommodations, modifications, and supports that the student must receive, according to the IEP.

IX. How Does the IEP Get Implemented?

Once the IEP is written, it is time to carry it out—in other words, to provide the student with the special education and related services as listed in the IEP. This includes all supplementary aids and services and program modifications that the IEP team has identified as necessary for the student to advance appropriately toward his or her IEP goals, to be involved in and progress in the general curriculum, and participate in other school activities. While it is beyond the scope of this guide to discuss in detail the many issues involved in implementing a student's IEP, certain suggestions can be offered.

- Every individual involved in providing services to the student should know and understand his or her responsibilities for carrying out the IEP. This will help ensure that the student receives the services that have been planned, including the specific modifications and accommodations the IEP team has identified as necessary.
- Teamwork plays an important part in carrying out the IEP. Many professionals are likely to be involved in providing services and supports to the student. Sharing expertise and insights can help make everyone's job a lot easier and can certainly improve results for students with disabilities. Schools can encourage teamwork by giving teachers, support staff and/or paraprofessionals time to plan or work together on such matters as adapting the general curriculum to address the student's unique needs. Teachers, support staff, and others providing services for students with disabilities may request training and staff development.
- Communication between home and school is also important. Parent/guardians can share information about what is happening at home and build upon what the student is learning at school. If the student is having difficulty at school, parent/guardians may be able to offer insight or help the school explore possible reasons as well as possible solutions.
- It is helpful to have someone in charge of coordinating and monitoring the services the student receives. In addition to special education, the student may be receiving any number of related services. Many people may be involved in delivering those services. Having a person in charge of overseeing that services are being delivered as planned can help ensure that the IEP is being carried out appropriately.

- The regular progress reports that the law requires will help parent/guardians and schools monitor the student's progress toward his or her annual goals. It is important to know if the student is not making the progress expected-or if he or she has progressed much faster than expected. Together, parent/guardians and school personnel can then address the student's needs as those needs become evident.

X. How Often Will a Student's IEP Be Reviewed and Revised?

The IEP team must review the student's IEP at least once a year. One purpose of this review is to see whether the student is achieving his or her annual goals. The team must revise the student's individualized education program, if necessary, to address:

- the student's progress or lack of expected progress toward the annual goals and in the general curriculum;
- information gathered through any reevaluation of the student;
- information about the student that the parent/guardians share;
- information about the student that the school shares (for example, insights from the teacher based on his or her observation of the student or the student's classwork) ;
- the student's anticipated needs; or
- other matters.

Although the IDEA requires this IEP review at least once a year, in fact the team may review and revise the IEP more often. Either the parent/guardians or the school can ask to hold an IEP meeting to revise the student's IEP. For example, the student may not be making progress toward his or her IEP goals, and his or her teacher or parent/guardians may become concerned. On the other hand, the student may have met most or all of the goals in the IEP, and new ones need to be written. In either case, the IEP team would meet to revise the IEP.

XI. What Are Some Guiding Principles for IEP Development?

The following guiding principles for IEP development are important to ensure that each student's IEP is developed and implemented in the true spirit and intent of the law.

- The IEP development process is a student-centered process. No other issues, agenda or purposes should interfere.
- Information provided by parent/guardians regarding their student's strengths and needs is a vital part of the evaluation and is critical in developing an IEP that will lead to student success.
- The input of each individual on the Committee should be encouraged and valued.
- All members of the Committee share the responsibility to contribute meaningfully in the development of a student's IEP.
- Meaningful efforts must be made to ensure parent/guardians and students participate in the IEP development process. Information is shared in language a parent/guardian and student can understand.
- Special education is a service, not a place. The IEP development process evolves to address concerns and considerations so as to support the student's progress toward the State's learning standards and to ensure the student receives services in the least restrictive environment appropriate for the student.
- The IEP recommendations are based on the student's present levels of performance and in consideration of the student's strengths, needs, interests and preferences and the concerns of the parent/guardian for the education of their student.
- The IEP needs to be developed in such a way that it is a useful document that guides instruction and provides a tool to measure progress.
- The IEP must appropriately address all the student's unique needs without regard to the current availability of needed services.
- Positive behavioral supports and services needed by the student are identified.
- A student's need for transition services is considered throughout the IEP development process, including during discussions of the student's present levels of performance, projected post-school outcomes, goals and objectives/benchmarks, services, accommodations, program modifications and placement.
- The student's parent/guardians participate in developing, reviewing and revising the IEP, having concerns and information considered and being regularly informed of their student's progress.
- The IEP development process includes steps to ensure IEP implementation.

XII. Summary of the Steps to Developing and Implementing an IEP

The IEP needs to be developed in a particular sequence, in accordance with a parent/guardian's due process rights (e.g., meeting notices, prior notices, consent, participation). The information considered and discussed

in each step provides the basis for the next step in the process.

Step 1: Obtain and consider evaluation information
Evaluation information must be obtained in all areas of the student's disability or suspected disability. Evaluations need to identify and provide instructionally relevant information as to the unique needs of the student, current functioning, cognitive, physical, developmental and behavioral factors that affect learning and how the disability affects the student's participation and progress in the general education curriculum and in general education classes (or, for preschool students with disabilities, participation in appropriate activities).

Step 2: Obtain and consider evaluation information
Evaluation information must be obtained in all areas of the student's disability or suspected disability. Evaluations need to identify and provide instructionally relevant information as to the unique needs of the student, current functioning, cognitive, physical, developmental and behavioral factors that affect learning and how the disability affects the student's participation and progress in the general education curriculum and in general education classes (or, for preschool students with disabilities, participation in appropriate activities).

Step 3: Identify the student's present levels of educational performance
The student's present skills, strengths and individual needs must be discussed and documented. This includes how the student's disability affects his or her participation and progress in the general education curriculum (or for preschool students, participation in appropriate activities), consideration of specific student needs, and the student's needs as they relate to transition from school to post-school activities.

Step 4: Identify the projected post-school outcomes
Beginning at age 15, the Committee must, in consideration of the student's needs, preferences and interests, identify projected post-school outcomes for the student in the areas of employment, post-secondary education and community living.

Step 5: Set realistic and measurable goals for the student
The measurable annual goals that the student can realistically reach in the year in which the IEP will be in effect and that will move the student toward the projected post-school outcomes must be discussed and documented on the IEP. For each annual goal, measurable intermediate steps between the student's present levels of performance and the annual goals (i.e., the short-term instructional objectives and/or benchmarks) must be identified. These goals should relate to the student's unique needs and promote the student's participation and progress in the general education curriculum in the least restrictive environment. In determining goals, the Committee must discuss and document how the student's progress toward the goals will be measured and communicated to the student's parent/guardians.

Step 6: Determine the special education services the student will need
Based on the student's needs and goals, the Committee must decide what services and programs, as well as accommodations, program modifications and supports the student needs.

Step 7: Determine the coordinated set of transition activities
For students beginning at age 14, the Committee must identify courses of study to meet a student's transition needs; beginning at age 15, the Committee must identify the transition activities that will be provided to help the student reach his or her annual goals and projected post-school outcomes.

Step 8: Determine where those services will be provided
The Committee must decide where the special education services will be provided. The location of services and the recommended placement must be based upon least restrictive environment requirements. Unless the student's IEP requires some other arrangement, the student with a disability must be educated in the school he or she would have attended if the student did not have a disability.

Step 9: Implementation
There may be no delay in implementing a student's IEP, including any case in which the payment source for providing or paying for special education services for the student is being determined. The student's IEP needs to be implemented as soon as possible following the Committee meeting and must be implemented as recommended by the Committee.

The school must take steps to ensure a student's IEP is implemented as recommended by the Committee, including but not limited to:

- providing copies of the student's IEP, as appropriate;
- informing each individual of his or her IEP implementation responsibilities; and
- providing a student with his or her instructional materials in an alternative format if recommended on the student's IEP.

Step 10: Measure progress throughout the year
A process needs to be identified to measure the student's progress toward meeting the annual goals and report the progress to the student's parent/guardians in the format and time schedule as agreed upon in the student's IEP.

Step 11: Review and, if appropriate, revise the IEP
The Committee must reconvene to review the student's IEP when requested by the student's teacher or parent/guardian, but at least annually. Discussions at the IEP

review meeting must consider the student's progress toward meeting the annual goals, the concerns of the parent/guardian, any new evaluation information, the student's progress in the general education curriculum (or for preschool students, participation in appropriate activities), the student's need for test accommodations and identify the least restrictive environment for the student. For students ages 15 and older, the projected post-school outcomes should be reviewed annually.

Upon consideration of these factors, the IEP should be revised, as appropriate, to address any lack of expected progress toward the annual goals and in the general education curriculum; the results of any reevaluation and any information about the student provided to, or by, the parent/guardians; the student's anticipated needs; or other matters, including a student's need for test accommodations.

Step 12: Conduct a meeting to review reevaluation information on the student

The needs of students change over time. Therefore, a reevaluation of the student's individual needs and the continued appropriateness of the special education services that have been provided to the student must be conducted at least every three years, but more often if conditions warrant or if the parent/guardian or the teacher requests a reevaluation of the student. The Committee must convene a meeting to discuss and, if appropriate, revise the student's IEP in consideration of the results of the reevaluation.

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In Memoriam: Maxine K. Duberstein

It is with sorrow that we note the passing of Justice Maxine K. Duberstein, a friend of the matrimonial bar.

To Halve and to Halve Not: The Drastic Reduction of Awards in Enhanced Earnings and Business Distribution Cases

By Lee Rosenberg

While New York is an equitable distribution and not a community property state, marriages of longer standing with "equal" contributions have been presumed to require an equal division of the assets.[1] The "equal contribution" part was historically and stereotypically the indirect contributions of the wife in her spousal and child rearing capacities. In what seems to be an increasing amount of recent decisions, however, the court while giving lip service to the "marriage of long standing equal distribution" language, is reminding us that "equitable distribution does not necessarily mean equal distribution."[2]

Pursuant to DRL § 236B, the trial court has the power and authority to distribute the marital assets equally or unequally on an asset-by-asset basis. This is the very principle of equitable distribution. Trial courts are accorded substantial deference in determining what distribution of marital property is equitable, and such determinations will not be disturbed if the court considered the statutory factors and did not abuse its discretion.[3] Business interests and enhanced earning capacity cases in particular are resulting in far less than equal distributions.

Expansion and Recoil

In the case of enhanced earnings, trial and appellate division decisions are uniformly decimating those claims—and all for the better; doing in effect what the legislature and the Court of Appeals have not. The concept of enhanced earning capacity which commenced with the Court of Appeals' 1985 decision in *O'Brien v. O'Brien*,[4] permits a party to ascertain and distribute a spouse's advanced degree or license to the extent that it enhances the spouse's earning ability. It was given clarification in *McSparron v. McSparron*[5] (in which the court also took the sensible merging of license and professional practice and deemed it inappropriate), further clarification and approval in *Grunfeld v. Grunfeld*,[6] and was given renewed life in *Holterman v. Holterman*,[7] all despite what seems a complete disdain for the concept everywhere other than in the High Court's majority decisions.

Enhanced earning capacity, often referred to as "EEC," is singularly a New York family law concept. No other state has had the lack of judgment to adopt it. It had been expanded in the years shortly after *O'Brien* to a variety of circumstances.[8] The trial and intermediate appellate courts then began to reconsider.

Even as the Court of Appeals was reiterating its EEC imprimatur in *Holterman*, many courts were becoming reluctant to give anywhere near a 50/50 distribution of this asset. In *Milteer v. Milteer*,[9] the court awarded 35% of the wife's nursing license; in *Miklos v. Miklos*,[10] the trial court's 50% distribution of the marital portion of the husband's law license was reduced to 30%; in *Biglin v. Biglin*,[11] an award of only 10% of the wife's EEC was affirmed; in *Cabeche v. Cabeche*,[12] no award was made to the husband for her nursing license as his contribution to its attainment was deemed "de minimis"; in *Pudlewski v. Pudlewski*,[13] the husband's MBA was found not to have enhanced his earning capacity so there was no distribution; the same circumstance existed in *A.Z. v. C.Z.*,[14] as to the husband's B.A.

Is the End Nigh for Enhanced Earnings Awards?

The percentages of distribution have continued to shrink to further and further lows. As an example of this clear trend, in *Guha v. Guha*,[15] the court awarded only 5% of the EEC derived from the wife's medical license holding,

> Where only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity" (Higgins v. Higgins, 50 A.D.3d 852, 853, 857 N.Y.S.2d 171, quoting Farrell v. Cleary-Farrell, 306 A.D.2d 597, 599-600, 761 N.Y.S.2d 357).
>
> Here, the evidence at trial established that the defendant made minimal financial contributions to the marriage (see Evans v. Evans, 57 A.D.3d at 719, 870 N.Y.S.2d 394; Arrigo v. Arrigo, 38 A.D.3d 807, 834 N.Y.S.2d 534; Sade v. Sade, 251 A.D.2d 646, 647, 675 N.Y.S.2d 119). The defendant, moreover, failed to satisfy his burden of demonstrating that he made substantial contributions to the plaintiff's attainment of her license to practice medicine in the United States (see Higgins v. Higgins, 50 A.D.3d at 853, 857 N.Y.S.2d 171; Brough v. Brough, 285 A.D.2d 913, 914, 727 N.Y.S.2d 555; Sade v. Sade, 251

> A.D.2d at 647, 675 N.Y.S.2d 119). The record reflects that the plaintiff completed medical school in India prior to meeting the defendant and that she passed the United States Medical Licensing Examination based on her own ability, tenacity, perseverance, and hard work (see Gandhi v. Gandhi, 283 A.D.2d 782, 784-785, 724 N.Y.S.2d 541). Thus, the Supreme Court, after properly considering the relevant statutory factors (see Domestic Relations Law § 236[B][5]; Arrigo v. Arrigo, 38 A.D.3d 807, 834 N.Y.S.2d 534; Falgoust v. Falgoust, 15 A.D.3d at 614, 790 N.Y.S.2d 532), providently exercised its discretion in distributing the marital estate.

In *Higgins v. Higgins*,[16] the court reduced a 30% EEC award of the wife's bachelor's and master's degrees to *nothing*.

> In the instant matter, the defendant did not demonstrate that his contributions were substantial. Despite making some efforts to help, there is no evidence that he made career sacrifices or assumed a disproportionate share of household work as a consequence of the plaintiff's education. In this regard, the record reveals that the defendant made only minor contributions. Moreover, the plaintiff worked full time while attending school, funded some of her own educational costs, and was still the primary caregiver for the parties' children. Consequently, the trial court improvidently exercised its discretion in awarding the defendant a share of the plaintiff's enhanced earning capacity (citation omitted).

Similarly, in *Kriftcher v. Kriftcher,*[17] the wife's award of 40% of the husband's law degree and license was *reduced to 10%* since

> it is…incumbent upon the nontitled party seeking a distributive share of such assets to demonstrate that they made a substantial contribution to the titled party's acquisition of that marital asset [and], [w]here only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity.

In a case which appears shockingly representative of the reluctance to come anywhere near 50% on EEC awards, the Third Department, in *Mairs v. Mairs*,[18] awarded 25% of the husband's medical license. Now, given that the appellate court actually *increased* the trial distribution from 15%, it would seem incongruous to consider this case representative of the downward trend. The facts of *Mairs*, however, are that the parties were married in 1981, and that

> the wife not only gave birth to the parties' *seven children*, but cared for them, managed the household and earned a salary that, for a time, was the *principal source* of the family's income. She relocated the family from Utah to Philadelphia and later to New York for the express purpose of allowing the husband to pursue his medical studies and obtain his medical license. When the husband entered private practice, the wife, in addition to her maternal obligations, *continued to work*—commuting on a regular basis to Philadelphia—and *managed the practice*, assuming the responsibility for the preparation of all invoices and the payment of all bills. (Emphasis added).

As a result, the court found the wife's contributions to the husband's earning his ophthalmology degree and license to be "both meaningful and significant." The 25% award of not only the EEC, but *also* of the medical practice resulted from her "meaningful and significant" contributions in this long term marriage.[19]

Lesser Than Equal Percentages on Business Distributions

As is referenced in some of the EEC case cited above, businesses interests are also often distributed on a less than equal basis. This is particularly so with professional practices. In *Griggs v. Griggs*,[20] the court awarded the wife 35% of the husband's medical practice holding,

> The court providently exercised its discretion in awarding the defendant 35% of the plaintiff's medical practice (hereinafter the Practice). "Although in a marriage of long duration, where both parties have made significant contributions to the marriage, a division of marital assets should be made as equal as possible..., there is no requirement that the distribution of each item of marital property be made on an equal basis" (*Chalif v. Chalif*, 298 AD2d at 349; *see Arvantides v. Arvantides*, 64 NY2d 1033, 1034). Here, the award of 35% takes into account the limits of the defendant's involvement with

> the Practice, while not ignoring the direct and indirect contributions that she did make (*see Wagner v. Dunetz*, 299 AD2d 347, 349; *Chalif v. Chalif*, 298 AD2d at 349; *Granade-Bastuck v. Bastuck*, 249 AD2d at 445).

In the *Mairs* case cited above, the wife was ultimately awarded only 25% of the husband's medical practice. In *Quinn v. Quinn*,[21] only 30% of the medical practice was awarded. In *Kaplan v. Kaplan*,[22] the court distributed 30% of the dental practice. In *Schwartz v. Schwartz*,[23] the wife was awarded 35% of the husband's law practice. As stated *supra*, the court in *Fleischmann v. Fleischmann*,[24] awarded the wife 25% of the husband's interest in Shearman & Sterling. Most recently, a 40% award of the husband's dental practice was reduced to 15% by the Second Department in *Peritone v. Peritone*.[25]

The reduced distribution, is not, however, limited to professional practices. There would appear to be no good reason to distinguish the two unless the court would wish to create two separate classifications and the concomitant constitutional issues. In *Hiatt v. Tremper-Hiatt*,[26] 15% of the wife's title insurance business was distributed to the husband where

> the record reveals that plaintiff, an attorney, did not sacrifice any employment or educational opportunities so that defendant could start and nurture her business, did not work in the company and did not substantially alter his daily schedule due to this business pursuit (compare *Mutt v. Mutt*, 242 AD2d 612, 613 [1997]). Rather, the record establishes that even after she began this business, defendant continued to be the primary caretaker of the parties' two children, prepare all meals, do all laundry and maintain the house (albeit with some hired assistance with respect to this latter task). Plaintiff served as an Air Force reserve officer during most of the marriage reaching the status of Lieutenant Colonel, a commitment which averaged 15 weekends and two weeks per year. Defendant's business never interfered with this commitment or any other employment he had during the marriage. Moreover, it was mutually agreed by both experts that the ultimate success of the company was directly attributable to defendant's personal efforts and goodwill.

In *Ciampa v. Ciampa*,[27] the court awarded 35% of the husband's multimillion dollar business interest to the wife in a long-term marriage where the parties had four children. The award took into account "the wife's limited involvement in the defendant's business, while not ignoring the direct and indirect contributions she made as the primary caretaker of the parties' children, as homemaker, and as social companion to the defendant, while forgoing her career as an attorney."

In *Schwalb v. Schwalb*,[28] the wife was awarded only 10% in the entity which owned the real property upon which the husband's medical practice was located. The overall distribution of marital assets to the wife was found to be equitable at 40%.

A recent Second Department case, *Wasserman v. Wasserman*,[29] did, however, see an equal division of the husband's businesses in a 30-year marriage. The court presented the following facts in rendering its decision:

> The plaintiff and the defendant were married on July 6, 1979. The plaintiff is 65 years old and the defendant is 57 years old. During the course of their marriage, the parties had two children, who are emancipated.
>
> In 1979, shortly before the birth of their first child, the plaintiff became the sole source of financial support for the family. The defendant was a stay-at-home mother prior to the commencement of this divorce action. In 2002 the defendant graduated from SUNY Purchase with a BA degree. In November 2003 she became a licensed real estate broker.

The court gives us no rhyme nor reason why *Wasserman* is a 50% business distribution case in contrast to many of the other decisions being issued, other than it fits into the generalized "long-term marriage" factor referenced at the beginning of this article. Since there is no in-depth factual analysis**,** we are left to merely guess at the court's reasoning. What guidance this case gives us on the distribution issue seems minimal in light of the existing trend as set forth above. The lack of factual analysis *vis-à-vis* the application of the law is unfortunately an ongoing problem with a great deal of appellate decisions**.**

The Effect on Spousal Support and the Future

We remain, after all and purposefully, an equitable distribution state. Strict constructionists would say, "had the legislature intended equal distributions, there would have been a different law passed." Given the "correction" which is being made to enhanced earning capacity cases—a correction which will hopefully find the concept's complete elimination—and the reduction of awards for business interests, one must wonder where the court will go on the issue of spousal support. The *O'Brien* court could have better addressed the enhanced earnings issue with a modifiable spousal support award, but opted to go the other way. The enacters of the Equitable Distribution

Law nearly 30 years ago could not have predicted all of these shifts. Is it politically viable or even appropriate to consider women to still be needing protection as a gender even where statistics may still demonstrate need? In a world where both parents are often in the workforce and facing divorce in the midst of an economic debacle, where is the money for support going to come from?

While these are not necessarily problems in high-income cases, they are in all the rest of them. The Child Support Modification Act, which goes into effect January 31, 2010 and which increases the baseline for calculation of child support from $80,000 of combined income to $130,000, also has an automatic increase of that baseline built in. That being said, instances of true joint custody and shared parenting have significantly risen, which usually results in a deviation from the Child Support Standards Act award as unjust or inappropriate. It would seem, then, that women in particular would be receiving less now than before, but if fathers are spending more time with the children doesn't that help to ameliorate the financial burden? In the non-CSSA deviation cases, the non-custodial parent (still usually the father) is often faced with a child support obligation which should financially preclude a spousal support award and the mother should have to seek suitable employment. In the year 2009 as opposed to 1980, we are in a Catch-22. Have I mentioned that matrimonial lawyers are often still not properly paid (either by court order or by our own clients) and our judges are still litigating the pay raise matter, so that everyone continues to have his or her own view of the limited resources which are accessible?

If we are to remain on the low end of distributions for enhanced earnings and business interests, it would seem that the court has to decide where it stands on the support issue. Is it conceptually going to be used to try and establish self sufficiency or as compensation for a lesser equitable distribution award in such cases? To compound matters, just while we all thought we were clear on the law, the Court of Appeals in *Keane v. Keane*[30] threw a monkey wrench into the double counting of income issue as it relates to tangible assets such as businesses.[31]

In the end, some 30 years post the equitable distribution law, it may be time to go back to the drawing board so that we have some understanding of what the touchstone principles are since they change every time the advance sheets come out.

Endnotes

1. *Steinberg v. Steinberg*, 59 A.D.3d 702 (2d Dep't 2009); *Meza v. Meza*, 294 A.D.2d 414 (2d Dep't 2002); *Wagner v. Dunetz*, 299 A.D.2d 347 (2d Dep't 2002); *Ahrend v. Ahrend*, 123 A.D.2d 721(2d Dep't 1986); *Konigsberg v. Konigsberg*, 3 A.D.3d 330 (1st Dep't 2004).
2. *See Fields v. Fields*, 65 A.D.3d 297(1st Dep't 2009); *Evans v. Evans*, 57 A.D.3d 718 (2d Dep't 2008); *Michaelessi v. Michaelessi*, 59 A.D.3d 688 (2d Dep't 2009); *Quinn v. Quinn*, 61 A.D.3d1067 (3d Dep't 2009); *Arnone v. Arnone*, 36 A.D.3d 1170 (3d Dep't 2007).
3. *Altieri v. Altieri*, 35 A.D.3d 1093 (3d Dep't 2006) referencing *Carman v. Carman*, 22 A.D.3d 1004, 1007 (2005); *Robbins-Johnson v. Johnson*, 20 A.D.3d 723, 725 (2005); and Domestic Relations Law § 236 (B)(5)(d).
4. 66 N.Y.2d 576 (1985).
5. 87 N.Y.2d 275 (1995).
6. 94 N.Y.2d 696 (2000).
7. N.Y.3d 1 (2004).
8. *See, e.g.*, medical board certification (*Savasta v. Savasta*, 146 Misc. 2d 101 (Sup. Ct., Nassau Co. 1989); law degree (*Holihan v. Holihan*, 159 A.D.2d 685 (2d Dep't 1990); accounting license (*Duspiva v. Duspiva*, 181 A.D.2d 810 (2d Dep't 1992); physician's assistant certificate (*Morimando v. Morimando*, 145 A.D.2d 609 (2d Dep't 1988); academic degree and teaching certificate (*McGowan v. McGowan*, 142 A.D.2d 355 (Sup. Ct., Suffolk Co. 1988); un-utilized master's degree (*Kaufman v. Kaufman*, 207 A.D.2d 528 (2d Dep't 1994); congressional career (*Martin v. Martin*, 200 A.D.2d 304 (3d Dep't 1994); celebrity (*Golub v. Golub*, 139 Misc. 2d 440 (Sup. Ct., N.Y. Co. 1988), *Elkus v. Elkus*, 169 A.D.2d 134 (1st Dep't 1991), *lv. dismissed*, 79 N.Y.2d 851 (1992); harbor pilot's apprenticeship and license (*Pino v. Pino*, 189 Misc. 2d 331 (Sup. Ct., Nassau Co. 2001); extraordinary career earning ability (*Hougie v. Hougie*, 261 A.D.2d 161 (1st Dep't 1999).
9. 6 A.D.3d 407 (2d Dep't 2004).
10. 9 A.D.3d 397 (2d Dep't 2004).
11. 2 A.D.3d 380 (2d Dep't 2003).
12. 10 A.D.3d 441 (2d Dep't 2004).
13. 309 A.D.2d 1296 (4th Dep't 2003).
14. 4 Misc. 3d 1029 (Sup. Ct., Nassau Co. 2004).
15. 61 A.D.3d 634 (2d Dep't 2009).
16. 50 A.D.3d 852 (2d Dep't 2008).
17. 59 A.D.3d 392 (2d Dep't 2009).
18. 61 A.D.3d 1204 (3d Dep't 2009).
19. *See also Fleischmann v. Fleischmann*, 24 Misc. 3d 1225 (Sup. Ct. Westchester Co. 2009 (10% of EEC and 25% of the husband's partnership interest in Shearman & Sterling in a marriage of over 25 years with three children) *cf. Jayaram v. Jayaram*, 69 A.D.3d 951 (2d Dep't 2009) (35% of EEC).
20. 44 A.D.3d 710, (2d Dep't 2007).
21. 61 A.D.3d 1067 (3d Dep't 2009).
22. 51 A.D.3d 635 (2d Dep't 2008).
23. 54 A.D.3d 400 (2d Dep't 2008).
24. 24 Misc. 3d 1225 (Sup. Ct., Westchester Co. 2009).
25. __ A.D.3d __ , 2009 N.Y. Slip Op. 07388 (2d Dep't October 13, 2009).
26. 6 A.D.3d 1014 (3d Dep't 2004).
27. 47 A.D.3d 745 (2d Dep't 2007).
28. 50 A.D.3d 1206 (3d Dep't 2008).
29. 66 A.D.3d 880 (2d Dep't 2009).
30. 8 N.Y.3d 115 (2006).
31. *See also Groesbeck v. Groesbeck*, 51 A.D.3d 722 (2d Dep't 2008).

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Leave to Withdraw as Counsel for Nonpayment of Fees

By Elliott Scheinberg

An oft-encountered dilemma involves counsel who has devoted countless hours on behalf of a client, with extraordinary mounting bills and no likely end in sight, whereupon the client announces an inability to pay additional legal bills, or an intent not to make any further payments due to dissatisfaction with results, even when the client has been the epicenter of the problem. The attorney is deeply mired in the case, especially where there are no assets against which to assert a charging lien or from which to collect payment, such as, when a raging custody battle is the exclusive dispute between the parties. The client typically expects and demands continued representation irrespective of counsel's entitlement to payment. Does the exhaustion of the client's finances require ongoing representation without any expectation of compensation? Depends on the Department.

Klein

In *Klein v. Klein*[1] the wife's second counsel brought a motion seeking, *inter alia*, leave to withdraw from the case. After a near 20-year marriage, the husband commenced an action for divorce. The assets and income of the parties were lean and unremarkable. The husband's $53,000-a-year salary plus small commission and bonus made it improbable for him to underwrite two sets of legal fees. The case was bitterly acrimonious and high maintenance, which translated into costly litigation. Intense motion practice ensued regarding pleadings and re-pleadings, with the wife determined to resist the husband's every effort to win a divorce. The court held that although the allegations in the husband's complaint were insufficient to establish grounds for divorce on cruel and inhuman treatment, the wife's misconduct following the commencement of the action, resulting in the husband's baseless arrest, incarceration, and dismissal of criminal charges after trial, would provide sufficient grounds for divorce upon the commencement of a new action. The wife's attorney expended significant efforts on her behalf.

At the time of counsel's motion, the wife had already sustained $21,000 in fees. The court acknowledged the clear provision in the retainer agreement that authorized counsel's withdrawal from the case "if any bill remains unpaid for 60 days…account delinquency shall be good cause for withdrawal." The court, however, focused on counsel's other allegations that discussed: the client's lack of income, her dependency upon her husband for support, her counterclaim, her inability to pay current and future fees, the absence of grounds for divorce which negated the possibility of property distribution, ergo, precluding a satisfaction of the fees from distributed assets, and the husband's declared intent to commence a new action for divorce wherein the wife would require representation. The court targeted the absence of any allegations regarding the wife's failure to cooperate, disagreement regarding litigation strategy, or any breakdown in the attorney-client relationship, and denied counsel's motion.

Critical to the ruling is its reach far beyond the facts of the case; Supreme Court painted a universal with the broadest stroke imaginable. *Klein* implies that inherent in matrimonial litigation, as a matter of law, is an attorney's "right" *not* to anticipate full compensation for services rendered: "…family law practitioners…are not immune to the risk of not being fully compensated for services rendered."

Every matrimonial attorney is all too familiar with the instant comradery amongst disgruntled clients, and their "how to" hotlines, which include defeating legal fees. *Klein* is a powerfully invigorating force to them because the simple formulaic recitation of "exhausted funds with no additional resources" immediately envelopes counsel in a seemingly irrebuttable negative presumption notwithstanding a labor-intensive case or severe unanticipated litigation, resulting in future uncompensated services. It seems inherently wrong to demonize counsel whose client had no expectation of unpaid services and who understood the plain terms of the retainer agreement. Retainer agreements are not adhesion contracts; protection for the client is assured by the mandatory rules.

Klein reached its conclusion without the benefit of a hearing and without as much as any consideration given to the client's own responsibility in driving the case. *Klein* encases clients in a bubble and insulates them at a significant distance from their fee obligations. Clearly, litigants cannot be molly coddled to the extent of a total absolution of even the most basic intelligence regarding simple withdrawal language in a retainer agreement; the corollary is a (judicially crafted) presumption that sound litigants are functionally incapable of understanding retainer agreements, thereby necessitating the need for the court to act as guardian ad litem from the very moment the retainer agreement is first presented, a patently untenable proposition.

The withdrawal provision in Mrs. Klein's retainer must have meaning, it cannot mean nothing. It was framed in easy non-legalese language, and was not thrust upon her. She had every opportunity to review the agreement, familiarize herself with the firm's billing practices, question the provision, or retain different counsel. It is common for litigants to represent that their fees will be covered by a family member. Known to her alone was her true economic posture. There are many who believe

that nothing is too good for them, irrespective of their budgets, or what they have to say to get whatever they want, including free legal services where none were ever contemplated.

The court's reference (to the Client's Bill of Rights) that counsel must recite the expected litigation costs after a reasonable opportunity to explore the case may often be implausible because of the impossibility to predict the animus factor. Attorneys, during consultations, typically explain the varying scenarios ranging from the amicable resolution to the outright scorched-earth war—they cannot prognosticate the outcome; once counsel is steeped in a case that has gone unforeseeably awry he is punished for failed prophecy.

Under *Klein*, counsel's only exit from a case is via an uncooperative client, etc. Logic dictates that a blatant rejection of additional payments with expected free services will accelerate a breakdown between attorney and client. But this does not necessarily offer relief either.

Applicable hereto is the spirit of *Frankel v. Frankel*[2] where, under other circumstances, the Court of Appeals, only seven months prior to *Klein*, expressed concern over restricting or complicating an attorney's access to payment following exerted efforts on behalf of a client; that non-monied spouses would be unable to secure quality counsel because no attorney will knowingly chance representing high-risk clients with no recourse. *Frankel* firmly acknowledged the economic realities of a law practice: "A matrimonial lawyer may be willing to carry a client on its accounts receivable books, but not as to accounts that will prove unreceivable." The reasoning in *Frankel* logically flows to counsel seeking departure for nonpayment because no attorney wants to view a retainer agreement as an inescapable trap.

The Court's postulate that clients like Mrs. Klein can choose among counsel other than the experienced and the high-powered does not reflect reality[3]; attorneys of any caliber will not queue up to represent humble financial clients embroiled in hotly contentious imbroglios over concern regarding compulsory uncompensated work. In real terms, *Klein* says "not only is excellent representation unavailable to you, but representation by an attorney 20 minutes out of law school may also be beyond your reach."

Klein's focused on a court's "traditional discretion to regulate the legal profession by denying leave to withdraw in an appropriate case"[4] without examining other authority within its department.

Judicial Authority to Regulate the Practice of Law

As a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients.[5] Traditionally, under their inherent and statutory power to regulate the practice of law, courts have the authority to supervise the charging of fees for legal services,[6] which power includes the authority to deny a motion to withdraw.[7] The promotion of judicial economy is a factor in such considerations.[8]

Withdrawal from representing a client is not absolute.[9] To be "entitled to terminate the relationship with a client, an attorney must make a showing of good or sufficient cause and reasonable notice."[10] The mere fact that a client fails to pay an attorney for services rendered does not, without more, entitle the attorney to withdraw.[11] Prior to the enactment of the Rules of Professional Conduct, the Fourth Department stated: "[e]ven a provision in a retainer agreement allowing counsel to withdraw for any reason does not override the requirement in the Code of Professional Responsibility that it show the requisite 'good and sufficient cause' for withdrawal," which counsel failed to make that showing here[12] The argument that a party's objection to counsel's withdrawal amounts to conduct that "rendered it unreasonably difficult for [it] to carry out employment effectively" (former DR 2-110(C)(1)(d)) was deemed to have been without merit,[13] a counter-intuitive theory.

As a general principle, the decision to grant or deny permission for counsel to withdraw lies within the discretion of the trial court, and the court's decision will not be overturned absent a showing of an improvident exercise of discretion;[14] while an attorney will be permitted to withdraw from employment where a client refuses to pay reasonable fees, there may be circumstances in which a court may properly compel an attorney to continue to represent a client who is in arrears.[15]

Generally, there are three primary reasons allowing withdrawal of an attorney from a case: failure of a party to remain in contact with counsel; deterioration of the attorney/client relationship; and non-payment of legal fees.[16] The Professional Rules of Conduct, Part 1200, effective April 1, 2009, Rule 1.16(c)(5), formerly DR2-110(C)(1)(f) (22 N.Y.C.R.R. 1200.15(c)(1)(vii)), provides: "Except as stated in paragraph (d), a lawyer may withdraw from representing a client when: the client *deliberately* disregards an agreement or obligation to the lawyer as to expenses or fees."[17] Another pre-Professional Rules of Conduct decision stated: "It is well settled that an attorney will be permitted to withdraw from employment where a client *refuses* to pay reasonable fees (DR 2-110(C)(1)(f) (22 N.Y.C.R.R. 1200.15(c)(1)(vii)))…[counsel] should not be forced to continue 'to finance the litigation or render gratuitous services'—counsel is under no such continuing obligation." [18] "It hardly needs saying that a client's *refusal* to pay…or cooperate with the attorney is a satisfactory reason for allowing the attorney to withdraw."[19]

Professional Rules of Conduct, Rule 1.16(d) provides: "If permission to withdraw from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before the tribunal without its permission. When ordered to do so by a tribunal, a

lawyer shall continue representation notwithstanding good cause for terminating the representation." The first sentence is identical to the former DR. The second sentence is new.

It seems that, with limited exception, the selection of words in a decision strongly hints at its outcome, either a likely right to withdraw, or a denial of counsel's application. Cases couching a client's reluctance to pay in terms of "refusal" or some other word/phrase/expression evidencing a deliberate intent not to pay, irrespective of the reason, will likely earn counsel an exit visa as attorney of record, whereas, "disputed fees,"[20] or "unpaid fees with reasonable expectations of recovery" will require ongoing representation:

> [A]n attorney will be permitted to withdraw [] when a client *refuses* to pay a reasonable fee"…But "[n]onpayment of counsel fees alone will, not entitle an attorney to withdraw from representation."…"even where the retainer has been fully exhausted, where there is no deliberate violation of a fee agreement by a client, a court may still *refuse* to allow the attorney to withdraw."…Disputing the amount owed is not a refusal to pay. And withdrawal is not permitted when the client *refuses* to pay additional fees that the attorney is not entitled to collect…[21]

Klein's ruling (that an inability to pay due to a lack of assets does not constitute a deliberate refusal) logically invites scrutiny: a declaration of no future payments, irrespective of the reason, is clearly deliberate within the purview of the Rules of Professional Conduct, Rule 1.16(c)(5), especially when the client was informed well in advance of the anticipated prosecution costs.

Kaufman

Most recently, *Kaufman v. Kaufman*[22] held that the contractual provision in the retainer agreement that purports to authorize counsel to withdraw upon nonpayment of fees does not vitiate the procedural requirements of CPLR 321(b), nor does it deprive the court of its traditional discretion in regulating the legal profession by overseeing the charging of fees for legal services.

Winters

In a decision of major significance, the Second Department, in *Winters v. Winters*,[23] citing primarily its own precedent authority, affirmed the principle that "an attorney may be permitted to withdraw from employment where a client refuses to pay reasonable legal fees." However, although the aforementioned language has been repeatedly hailed as the great hope for uncompensated counsel, there is a pivotal fact in that decision: the client "did not oppose the nonparty-appellant's motion for leave to withdraw as his counsel." The Appellate Division underscored that it was "under *these* circumstances, [that] the motion for leave to withdraw should have been granted…" (emphasis provided).

Winters does not, therefore, stay the cudgel of chaining counsel to uncompensated work. Nor does *Winters* clarify to what extent the client's failure to oppose to counsel's application figured in the decision.

The same was true in *Zhan v. Sun Wing Wo Realty Corp.*,[24] wherein the Second Department held: "Based upon the papers submitted and the fact that the defendant did not oppose its counsel's motion to withdraw, the court did not improvidently exercise its discretion in permitting counsel to withdraw."

Cashdan v. Cashdan[25] held: "the record does not demonstrate that the defendant's 'conduct render[ed] it unreasonably difficult for [counsel] to carry out [his] employment effectively.'" "Unreasonable" is an expansive word with broad implications. In reality, the denial of an application to be relieved further empowers and incentivizes a client to take a harder position against reasonable settlement because counsel has been ordered to continue.

Conclusion

Counsel must manage his time records closely and not wait to make the application to be relieved at a time close to trial. Regrettably, the common law teaches that patience and loyalty to a client are susceptible of punishment.

Endnotes

1. *Klein v. Klein*, 6 Misc. 3d 1009(A) (Sup. Ct., Nassau Co. 2005).
2. *Frankel v. Frankel*, 2 N.Y.3d 601 (2004).
3. *Klein*: "Where it appears likely, in counsel's estimation, that the prospective client's and or the client's spouse's income and assets may not be adequate to secure payment of counsel's customary fee, counsel should either decline the case, *so that the prospective client can seek other representation*, or undertake to represent the client through disposition of the action, despite the acknowledgment that the parties' resources and any interim and or final counsel fee award may be insufficient to fund the litigation or satisfy counsel's fee."
4. Spatial limitations preclude review of the case law cited by the court.
5. *Jacobson v. Sassower*, 66 N.Y.2d 991 (1985).
6. *First Nat. Bank of East Islip v. Brower*, 42 N.Y.2d 471 (1977); *Kaufman v. Kaufman*, 63 A.D.3d 618 (1st Dep't 2009); *Willis v. Holder*, 43 A.D.3d 1441 (4th Dep't 2007); *J.M. Heinike Associates, Inc. v. Liberty Nat. Bank*, 142 A.D.2d 929 (4th Dep't 1988).
7. *J.M. Heinike Associates, Inc. v. Liberty Nat. Bank*, 142 A.D.2d 929 (4th Dep't 1988).
8. *George v. George*, 217 A.D.2d 913 (4th Dep't 1995).
9. *In re Jamieko A.*, 193 A.D.2d 409 (1st Dep't 1993).
10. *Kaufman v. Kaufman*, 880 N.Y.S.2d 491 (1st Dep't 2009); *Willis v. Holder*, 43 A.D.3d 1441 (4th Dep't 2007); *George v. George*, 217 A.D.2d 913 (4th Dep't 1995); *Catrone v. Catrone*, 92 A.D.2d 559 (2d

In Memoriam: Susan Keiser

A skillful, gracious and effective matrimonial law practitioner, Sue Keiser was a great teacher, a worthy adversary who often saw her role as trying to find a solution to a common problem for both sides of the dispute.

I recall a case I had against Sue early in my career. I received discovery demands, and I remember that sinking feeling in the pit of my stomach as I counted pages of questions. Being the kind of person I am, I immediately sent the same demands back to Sue. I brought my client into the office and a funny thing happened as we answered the questions. Both of us started to see the case with greater clarity. Strengths and weaknesses became more apparent. Legitimate issues for us to contest separated from the less legitimate. We were able to take that experience and engage in a meaningful discussion about settling the case in a way that protected what was truly important to my client, but gave ground where the point was less significant. What Sue did, and what happened when she answered her own questions that I sent back to her, was to compel all parties to confront the issues, and to allow everyone to reach a settlement early in the proceeding that worked for the parties.

The message that Sue, as teacher, as advocate, as proponent of collaborative settlement, left her community: when your family or campaign, or anything else you hold dear, breaks up and you can be bitter and resentful, find a way to take the broken pieces and put them back so that you and everyone else can hold onto what you truly need; compromise on the nonessential and move on not just without resentment, but with grace and with dignity.

—John Ferrara

This is an excerpt from a testimonial that was given by attorney John Ferrara at a memorial service for Susan Keiser.

Dep't 1983); *In re Dunn*, 205 N.Y. 398 (1912) (The general rule is that [the attorney] may terminate his relationship at any time for a good and sufficient cause and upon reasonable notice.); prior Code of Professional Responsibility, DR 2-110(C), currently covered under The Professional Rules of Conduct, Part 1200, effective April 1, 2009, Rule 1.16(c).

11. *Kaufman v. Kaufman*, 880 N.Y.S.2d 491 (1st Dep't 2009); *Cashdan v. Cashdan* 243 A.D.2d 598 (2d Dep't 1997); *Kiernan v. Kiernan*, 233 A.D.2d 867 (4th Dep't 1996) (The questioning by plaintiff of her attorneys' competence, strategy and ethics has rendered it unreasonably difficult for the firm to carry out its employment effectively.); *George v. George*, 217 A.D.2d 913 (4th Dep't 1995).
12. *Willis v. Holder*, 43 A.D.3d 1441 (4th Dep't 2007).
13. *Id*.
14. *Zhan v. Sun Wing Wo Realty Corp.*, 208 A.D.2d 668 (2d Dep't 1994); *Cashdan v. Cashdan*, 243 A.D.2d 598 (2d Dep't 1997).
15. *Frevola v. Frevola*, 260 A.D.2d 480 (2d Dep't 1999).
16. *Countryman v. Watertown Housing Authority*, 13 Misc. 3d 632, 633 (N.Y. Sup. 2006), see internal cites.
17. *Holmes v. Y.J.A. Realty Corp.*, 128 A.D.2d 482 (1st Dep't 1987).
18. *Galvano v. Galvano*, 193 A.D.2d 779 (2d Dep't 1993); *Tremont Elec., Inc. v. Rampinelli Elec. Co., Inc.*, 142 Misc. 2d 80 (N.Y. Sup. 1988), "Ordinarily this court would permit withdrawal since counsel has a right to payment for his services."; *In re Lenk*, 218 A.D.2d 802 (2d Dep't 1995), counsel relieved where the executor refused to pay a reasonable fee for services rendered. Matrimonial and Family Law, Counsel Fees and Litigation Expenses, West's McKinney's Forms, MFL, § 19:01, *citing Kay v. Kay*, 245 A.D.2d 549 (2d Dep't 1997), notwithstanding an obstreperous client, the Appellate Division, frowning on gratuitous services, held that although some circumstances may warrant continued representation for a client in arrears: "it is well settled that an attorney will be permitted to withdraw…where a client refuses to pay reasonable fees…in accordance with the clear terms of the retainer agreement.; *Holmes v. Y.J.A. Realty Corp.*, 128 A.D.2d 482 (1st Dep't 1987); *Stephen Eldridge Realty Corp. v. Green*, 174 A.D.2d 564 (2d Dep't 1991); *Cullen v. Olins Leasing, Inc.*, 91 A.D.2d 537 (1st Dep't 1982), *appeal dismissed*, 61 N.Y.2d 867 (1984).
19. *Golden v. Guaranty Acceptance Capital Corp.*, 1993 WL 88191 (S.D.N.Y. 1993).
20. *Frevola v. Frevola*, 260 A.D.2d 480 (2d Dep't 1999); *Cashdan v. Cashdan*, 243 A.D.2d 598 (2d Dep't 1997), withdrawal denied where counsel established an installment payment schedule honored by the client.; *In re Benjamin*, 129 A.D.2d 886 (3d Dep't 1987), disputed fees are not synonymous with refused payment.; *see Anderson v. Schlenker*, 281 A.D.2d 575 (2d Dep't 2001), court relieved counsel and enforced a retaining lien where "the plaintiff acknowledged the debt, praised the legal work…but refused to pay the outstanding debt."; *Kiernan v. Kiernan*, 233 A.D.2d 867 (4th Dep't 1996).
21. *Dar v. Nadel & Associates, P.C.*, 5 Misc. 3d 1016(A) (N.Y. City Civ. Ct. 2004); *Kiernan v. Kiernan*, 233 A.D.2d 867 (4th Dep't 1996); *see Tartaglione v. Tiffany*, 280 A.D.2d 543 (2d Dep't 2001).
22. *Kaufman v. Kaufman*, 880 N.Y.S.2d 491 (1st Dep't 2009).
23. *Winters v. Winters*, 25 A.D.3d 601 (2d Dep't 2006), *citing Kay v. Kay*, 245 A.D.2d 549 (2d Dep't 1997); *Galvano v. Galvano*, 193 A.D.2d 779 (2d Dep't 1993); and *Stephen Eldridge Realty Corp. v. Green*, 174 A.D.2d 564 (2d Dep't 1991).
24. *Zhan v. Sun Wing Wo Realty Corp.*, 208 A.D.2d 668 (2d Dep't 1994).
25. *Cashdan v. Cashdan*, 243 A.D.2d 598 (2d Dep't 1997).

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Your Passport: A Privilege to Those Who Pay Child Support

By Catharine M. Venzon and William Z. Reich

Deadbeats who owe court-ordered child support have another incentive to pay their arrears. Effective October 1, 2006, Federal law prohibits the issuance or renewal of a U.S. passport to anyone with child support arrears of $2,500.00 or more and allows the government to revoke or limit previously issued passports to such individuals.

Many states already have their own penalties for deadbeats who owe child support. These penalties include loss of professional licenses, wage garnishment, court ordered judgments and liens.[1] But Federal law now provides yet another incentive.

22 C.F.R. 51.70(a)(8) states that "[a] passport, except for direct return to the United States, shall not be issued in any case in which the Secretary of State determines or is informed by competent authority that the applicant has been certified by the Secretary of Health and Human Services…to be in arrears of child support in an amount exceeding $2,500.00." 42 U.S.C. § 652(k)(2) further states that the Secretary of State "may revoke, restrict, or limit a passport issued previously to such individual."

The Department of State Passport Services has interpreted this to mean that anyone who has child support arrears in excess of $2,500.00 is ineligible to receive a U.S. passport. Furthermore, Passport Services will not issue a passport to such persons until the Department of Health and Human Services (HHS) certifies that arrears have been paid or that acceptable payment arrangements have been made.

The purposes of the provision are to ensure that individuals stay current on child support obligations and to aid in enforcing payment of those who fall into arrears within the U.S. where additional administrative and judicial remedies are available. The October 2006 Federal law modifies a previously enacted 1998 statute by reducing the required amount of arrearages owed from $5,000.00 to $2,500.00.

This provision has had a profound effect on obtaining past due child support from parents in arrears. From the inception of the provision in 1998 to 2006, approximately $22 million in child support was collected. In 2006, an approximate $24 million in child support was collected through the passport denial provision. This amount is expected to double in 2007 and 2008, when the new passport and travel requirements go into effect.[2]

The concern over this provision's infringement on the right to travel was addressed in the Ninth Circuit case of *Eunique v. Powell*.[3] The court held that there is an important governmental interest in making sure that those who do not pay their child support obligations remain within the country where they can be reached by process. The court reasoned that the failure to pay **child support** has both an economic and moral effect on the country, so there is a sufficient connection between nonpayment of child support and the government's interference with an individual's right to travel.

"…Federal law prohibits the issuance or renewal of a U.S. passport to anyone with child support arrears of $2,500.00 or more and allows the government to revoke or limit previously issued passports to such individuals."

How it Works

42 U.S.C. § 654 requires that each state establish and maintain a statewide child support enforcement agency for the purpose of obtaining, collecting and enforcing child support orders. In New York State, child support services are provided by the New York State Division of Child Support Enforcement (CSE) and Support Collection Units (SCU) in county and in New York City offices.[4] Any court order of arrears or child support order referred to a Support Collection Unit is monitored and enforced by CSE.

Upon notice to an individual in arrears, the enforcement agency may take several administrative actions to recover child support. This administrative action includes mandatory notification to HHS once an individual is in arrears of $2,500.00 or more. An electronic list is compiled of these individuals by HHS and forwarded to the U.S. Secretary of State for action. This action includes the *mandated* denial of any application for a new or renewal passport and the *discretionary* action of revoking, restricting or limiting a previously issued passport.

Currently, passport applications ask applicants to "self-identify" as being in arrears on their child support payments. However, the Department of State Passport Services (Passport Services) will also screen each application against HHS' electronic list of individuals in arrears. If an applicant is listed on this electronic list, the individual will be sent a passport denial Pre-Offset Notice by Passport Services. Passport Services will then hold the application for 90 days pending the removal of the

individual's name from HHS' electronic list. If the name is removed before the end of the 90-day hold period, then Passport Services will process the application. If not, the application will be denied.

Passport Services strongly recommends that individuals believing that they are in arrears of their child support should contact their state's child support enforcement agency before applying for a passport.[5] Contact information for each state child support enforcement office can be found at http://www.acf.hhs.gov/programs/cse/extinf.html.

Once arrears have been paid or acceptable payment arrangements have been made, the state agency will certify to HHS that arrears have been satisfied. HHS will then remove the individual's name from their electronic list and will notify Passport Services of the removal. The estimated time between payment to the state agency and Passport Services notification by HHS is two to three weeks.[6]

It is suggested that if you owe arrears over $2,500.00 you should wait three weeks after making payment arrangements with the state agency before submitting a passport application. Passport Services has no information regarding any individual's amount of arrears or how to make payment arrangements. They also have no control over HHS's electronic list. Therefore, all questions or concerns should be directed to the proper state agency, rather than Passport Services.

Potential Problems

There are issues with the breadth of this program's impact. First, for the provision to be applicable to an individual, a state agency has to have control over that individual's obligation to pay child support. In most states, including New York, that requires an order of child support be on file with, and have collection go through, a local or state child support collections unit. Only when a court decides that there are arrears due or that future child support payments must be made through a collections agency can the state have any control over arrears and make a report to HHS. Therefore, this provision will only affect individuals who have had previous court intervention in their child support matter and who are utilizing support collections services.

Secondly, there is very little data on how frequently the Department of State invokes its discretionary powers under the law to revoke, restrict or limit a previously issued passport. U.S. passports are valid for ten years. State Department policy suggests that an individual would have to actually apply for a passport renewal or other consular service before the Department of State would invoke its discretionary power to revoke. If the Department of State does not utilize this discretionary power, individuals could obtain or renew their passport and then let their child support obligations fall into arrears for up to ten years before they need to renew again.

Another problem is the discrepancy in the payment requirements from state to state in order to remove an individual's name from the HHS list. Some states require actual payment (cash or otherwise) of arrears.[7] Others require only that payment arrangements be made, such as through income execution or other gradual payment plans.[8] Furthermore, some states require full payment of all arrears to release the name from the list.[9] Other states require only that the arrearages fall below $2,500.00.[10] Therefore, a person owing $10,000.00 in arrears could pay only $8,000.00 of the arrears and then have his or her name removed.

These discrepancies may allow individuals to manipulate the policy by making payment arrangements they have no intention of fulfilling or paying only as much of their arrearages as is needed to get their passport issued. This may prove problematic if the Department of State is not pursuing revocation of passports for those individuals who have previously issued passports.

Practical Effect

A similar federal provision for passport denial has been around for several years, with a higher threshold amount of $5,000.00. However, 22 C.F.R. § 51.70(a)(8), with its lowered threshold of $2,500.00, is of even greater significance given today's concern for national security. In addition to the requirement of a valid passport for any travel overseas, as of January 23, 2007, **all persons** traveling by **air** between the United States and Canada, Mexico, Bermuda, and the Caribbean region are required to present a passport or other valid travel document to enter or re-enter the United States.[11]

Since the summer of 2008, it is required that all U.S. citizens entering the United States by sea or land present either a U.S. passport or other Department of Homeland Security-approved form of identification.[12] While this passport does not apply to U.S. citizens traveling to, or returning directly from, a U.S. territory, virtually any travel out of the country, even a weekend getaway to Canada, now requires a valid U.S. passport.

Conclusion

Deadbeats have another incentive to pay their child support because now the federal government has stepped in and is working with states to ensure payment of child support. It is expected that any problems will be resolved in favor of the payee and a person's freedom to travel will be restricted if child support is owed.

Endnotes

1. *See* NY FCA § 454 et al; NY CPLR 5242.
2. http://www.onlinelawyersource.com/news/child-support-passport.html.
3. 281 F.3d 940 (9th Cir. 2002).
4. http://www.newyorkchildsupport.com.
5. http://travel.state.gov/passport/ppi/family/family_863.html.
6. *Id.*
7. *See, e.g.,.* Rhode Island policy at http://www.cse.ri.gov/services/enforcement.php (accessed November 9, 2007).
8. *See, e.g.,* Maryland policy at http://www.dhr.state.md.us/csea/whatsnew/pasport2.htm (accessed November 9, 2007); Wisconsin policy at http://dwd.wisconsin.gov/bcs/bulletins/2006/CSB06-16.pdf (accessed November 9, 2007).
9. *See, e.g.,* Virginia policy at http://www.dss.virginia.gov/news/2005/pr_dcse_%20passport_11_09_05.pdf (accessed November 9, 2007); Minnesota policy at http://www.childsupport.dhs.state.mn.us/Action/RemedyDescriptions (accessed November 9, 2007).
10. *See, e.g.,* North Carolina policy at http://info.dhhs.state.nc.us/olm/manuals/dss/cse/man/CSEcP.pdf (accessed November 9, 2007).
11. http://travel.state.gov/travel/cbpmc/cbpmc_2223.html.
12. *Id.*

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Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

States that permit same-sex marriages

Currently, Connecticut, Iowa, Massachusetts and Vermont allow same-sex couples to marry, made possible by courts and legislatures. In May, 2009, the Maine legislature approved a same-sex marriage law and planned to allow same-sex couples to marry in September; however, Maine voters decided to repeal the law. As the reader may recall, last year, in California, such a same-sex marriage law was repealed by the California voters, known as Proposition 8.

The Respect for Marriage Act is pending before the U.S. Senate

On September 15, 2009, Congress introduced a bill, The Respect for Marriage Act, to repeal the 1996 Defense of Marriage Act (DOMA). The bill is sponsored by Congressman Jerrold Nadler of New York, Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties; House Judiciary Chairman John Conyers, Jr. of Michigan; and two openly gay members of Congress, Congresswoman Tammy Baldwin of Wisconsin and Congressman Jared Polis of Colorado. The purpose of the bill is that same-sex marriages are taking place in some states, and those married couples should be treated with equal respect by the federal government. For example, as a result of DOMA, same-sex married couples cannot file federal income tax returns as a married couple and receive the same tax advantages, and cannot receive federal employment and retirement benefits, Social Security payments, and health insurance coverage.

Same-sex marriage progress in New York

On April 16, 2009, New York Governor David Paterson introduced a marriage equality bill to the New York Assembly and Senate. The Assembly passed the bill for the second time (it passed in 2007 also). However, the Senate recently voted to turn down the bill.

Although New York does not yet permit same-sex marriages, it does recognize same-sex marriages performed outside of its jurisdiction, based on the principle of comity. Governor Paterson issued a broad executive order in 2008, directing state agencies to review their policies to recognize gay marriages performed in other states. On October 13, 2009, the Court of Appeals heard oral argument in two cases by taxpayers attacking government respect for out-of-state same-sex marriages, which permitted same-sex couples to receive government benefits such as health insurance. *In Godfrey v. Spano*, __ N.E.2d __ 2009 WL 3849908, Slip Op. 08474 (Nov. 19, 2009), the action was properly dismissed, as such directives did not violate the statute governing health insurance coverage for state employees, since the statute expressly gave the President the authority to define the term "spouse." Moreover, the taxpayers failed to specify a circumstance where taxpayer funds were expended as a result of the Executive Order that would not have been expended in the absence of the order since the county already insured same-sex domestic partners and dependents of county employees before the Executive Order was issued, requiring only that applicants for domestic partner coverage have lived with their domestic partners in a committed financially interdependent relationship for at least a year.

Recent Legislation

In my previous column, the following new statutes were discussed that will dramatically affect matrimonial practice:

- New CPLR 5205 (o), effective May 4, 2009: New exemption provisions for the collection of money judgments are not applicable to the collection of support.
- DRL § 177 repealed and new DRL § 255 is added, effective October 9, 2009: new COBRA language.
- DRL § 236(B)(2) amended to add subdivision b, effective September 1, 2009: Automatic restraining orders language to be served simultaneously upon the commencement of a matrimonial action.

DRL § 236B(6) amended, effective September 14, 2009: Loss of health insurance benefits as a factor to be considered in awarding maintenance

The loss of health insurance benefits upon the dissolution of a marriage is now a designated factor "11" in considering an award of maintenance.

DRL § 240(1-b)(c)(2), FCA § 413(1)(c)(2), SSL § 111-i(2)(a), (b), (c); effective January 31, 2010: Child Support Modernization Act: CSSA combined parental income threshold raised from $80,000 to $130,000

Since its enactment in 1989, the CSSA's combined parental income threshold of $80,000 has not changed until now. Starting on January 31, 2010, the threshold will be raised to $130,000. Commencing January 31, 2012, and every two years thereafter, the Commissioner of Social Services is responsible for raising the threshold amount based on the cost of living, pursuant to SSL § 111-i(2), which DRL and FCA cross-references. The Commissioner shall publish annually a child support standards chart which shall include the revised poverty income guideline, the revised self-support reserve, and the combined parental income threshold amount.

Amendment to DRL § 240(1)(a-1) and FCA § 651(e), effective August 11, 2009: Record-checking in matrimonial and Family Court matters

Domestic Relations Law § 240 and Family Court Act § 651 were amended to provide that any judge making decisions concerning custody of or access to children has relevant information concerning the parties and children prior to issuing any order regarding these issues. In the past, judges have been asked to issue temporary orders of custody and/or access early in proceedings, often before the court and counsel were aware of the background of the parties. This statute was enacted to further protect the best interests of children and specifically provides that prior to the issuance of any temporary or final orders affecting custody or access where more than ninety (90) days have passed since the issuance of a previous order, the court is required to conduct a record check review of the parties and children involved in the action from the statewide registry of Orders of Protection, the Sex Offender Registry, and the Family Court child protective records and warrants. The court is further required to notify the attorneys for the parties and child(ren) and any *pro se* litigants of the results of these searches and to indicate, on the record, that the court has considered these results in making its determination.

Furthermore, upon submission by counsel of any temporary or final order or Judgment of Divorce which involves custody of or access to children, counsel is now required to include the following language in the order or judgment:

> Pursuant to Chapter 595 of the Laws of 2008, the Court has searched the required databases and has notified parties and counsel of said results and has considered the results of that search in making this determination.

If the temporary or final order of custody and/or access is generated by the Family Court, the Universal Case Management System (UCMS) will automatically include the language within the temporary or final order indicating that the record checking requirements have been met.

FCA § 249-b amended, effective December 16, 2009: Domestic violence or child abuse must be considered on the record in determining custody and visitation

In 1996, the legislature recognized the harmful effects of domestic violence on children and established domestic violence as a factor that courts must consider in child custody and visitation proceedings. However, the legislature found that studies indicate that the presence of domestic violence often has little impact on custody and visitation determinations. This bill requires courts to state on the record how the findings, facts and circumstances of domestic violence or child abuse were factored into the custody or visitation determination, where such abuse was established by a preponderance of the evidence. In addition, it requires that attorneys for children be trained on the dynamics of domestic violence so they can better counsel and represent their clients.

IRS Form 8332 has been amended: Revocation of release of claim to child exemption form

New rules apply to allow the custodial parent to release a claim to the child exemption so that the non-custodial parent can claim said exemption or for the custodial parent to revoke a previous release of claim to exemption. The non-custodial parent must attach this form to his or her tax return each year the exemption is claimed. The form is available online at http://www.irs.gov/pub/irs-pdf/f8332.pdf.

Author's note: The matrimonial practitioner should have this form signed simultaneously upon the execution of the parties' settlement.

Cases of Interest

Child Support

Military allowances constitute income for purposes of calculating child support

***Massey v. Evans*, 2009 WL 3153251, Slip Op. 06933 (4th Dep't, Oct. 2, 2009)**

In this case of first impression, the court properly determined that military allowances for food and housing constitute "income" for the purposes of calculating a parent's child support obligation, despite the fact that said income is not taxable, since such category of income falls under the "and such other resources as may be available to the parent" (Family Ct. Act § 413(1)(b)(5)(iv)) which includes meals and lodging.

Child support based on child's needs in high income case

***Jackson v. Tompkins*, 65 A.D.3d 1148, 885 N.Y.S.2d 228 (2d Dep't 2009)**

Under FCA § 413(1)(f), in high-income cases, an award of child support on parental income in excess of $80,000 should be based on the child's actual needs and that amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties. In this case, the father was directed to pay $6,700/month in child support, but since no facts were reported, it is difficult to discern what the parties' respective incomes were and what the child's needs were.

Father's income is irrelevant when determining whether to grant an upward modification of support

***Friedman v. Friedman*, 65 A.D.3d 1081, 885 N.Y.S.2d 720 (2d Dep't 2009)**

Where the parties' separation agreement was incorporated into the judgment of divorce, in order to receive an upward modification of child support, the party must

show an unforeseen change in circumstances and that the child's needs are not being met. The father's increase in income alone does not constitute an unanticipated change in circumstances.

Custody

Relocation granted where mother remarried

***Mathie v. Mathie*, 65 A.D.3d 527, 884 N.Y.S.2d 433 (2d Dep't 2009)**

The denial of the mother's motion to relocate from Merrick, New York to Marlboro, New Jersey was reversed on appeal. The court found that it was in the child's best interest for the mother to relocate to live with her husband and his family, so as to establish a permanent home for the child rather than living in three places, and they would be near other extended family members. Under the parties' agreement, the father had only alternate weekend visitation, and no alternate school vacation, summer recess or mid-week visitation. Despite the stipulation, the father, at one point, was visiting with the child on some evenings. The court found that the mother's offer to transport the child to and from visitation and a more liberal visitation schedule would allow the father more visitation time than he currently enjoyed. The court also found that it was significant that the father did not ask for a change in custody to him.

Equitable Distribution

Appreciation of separate property

***Smith v. Winter*, 64 A.D.3d 1218, 883 N.Y.S.2d 412 (4th Dep't 2009)**

In this 12-year childless marriage, the wife was awarded only 10% of the $20 million appreciation in value of a subsidiary of a corporation which the husband was the sole shareholder of prior to the marriage. (The husband's parent corporation was found to have no appreciation during the marriage.) The court considered that the increase in value attributable to the husband was minimal compared to the increase attributable to the employees who were hired by the husband to run the daily operations of the company.

***Author's note*:** This case may open up a can of worms. If a business owner hires a management team, does that mean that the owner is not responsible for master-minding the overall success of the company?

Personal injury awards

***Howe v. Howe*, 2009 WL 3136332, Slip Op. 06804 (2d Dep't, Sept. 29, 2009)**

In this case, the court effectively delegated to a pension plan administrator the obligation to apportion a disability pension plan between the separate property component of compensation for personal injury and the marital property portion related to deferred compensation for past services. The court held that the economic loss component (compensation for lost wages) of an award from the September 11th Victim Compensation Fund is separate property, just as is the non-economic loss component for pain and suffering.

Equitable distribution of law license and degree

***Fleischmann v. Fleischmann*, 24 Misc. 3d 1225(A), 2009 WL 22176384 (Sup. Ct., Westchester Co. July 22, 2009) (J. Lubell)**

In this long-term marriage, the husband is a partner of Shearman & Sterling, and the wife is a homemaker and mother to the parties' three children. One-half of the husband's law degree was earned during the marriage. The court found that as a result of the husband's "ability, tenacity, perseverance and hard work" he achieved academic honors such as *Law Review* and graduated second in his class. The entire cost of the law school education was paid by non-marital resources, including the husband's scholarship during his last year in law school. The wife did not assist the husband with his studies during law school or the bar exam, and pursued her own academic studies and career. Therefore, the court found that the wife contributed minimally to the husband's acquisition of his law license and awarded her 10% of the marital portion of the license.

The court awarded the wife 25% of the husband's partnership interest. The court found that the husband's rise to partnership was a direct result of his own efforts and long hours. After the husband became a partner, the wife then had the parties' three children, and was a stay-at-home mother, and attended law firm functions and hosted clients and co-workers at the marital residence.

The wife was awarded maintenance until age 65 or her sooner remarriage, the sum of $6,500/month for the first two years, and thereafter $6,000/month. Since the husband has supported the wife during the pendency of the litigation, the award was prospective, rather than retroactive.

Enforcement

Unenforceable penalty to enforce installment payment of distributive award

***Chumsky v. Chumsky*, 64 A.D.3d 1156, 881 N.Y.S.2d 774 (4th Dep't 2009)**

The parties executed a stipulation of settlement that was incorporated, but not merged, into the judgment of divorce. The agreement provided that in the event any installment payment was more than 15 days overdue, plaintiff was obligated to pay 9% interest on the balance due at the time of the late payment calculated from the initial payment due date. Order granting the defendant wife's motion to enforce a post-judgment order, which imposed interest in accordance with the settlement agreement, is reversed, and motion denied, because the provision of the

post-judgment order imposing interest as a consequence of a payment less than 30 days late nearly doubled the amount owed, and constituted an unenforceable penalty.

Contempt reversed where other remedies are available

***Jones v. Jones*, 65 A.D.3d 1016, 885 N.Y.S.2d 323 (2d Dep't 2009)**

The court below sentenced the husband to a jail sentence of 180 days for his failure to pay more than $15,000 in *pendente lite* support arrears. The Appellate Division granted the husband's motion for a stay of commitment until such time as the appeal was decided. The Second Department reversed the order because the wife failed to show that less drastic remedies would be ineffectual, such as sequestration, money judgment, income execution, income execution or income deduction.

No entitlement to money judgment for child support offset by equitable distribution award where the asset is later devalued

***Deabreu v. Deabreu*, 24 Misc. d 1234(A), 2009 WL 2462237 (Sup. Ct., Nassau Co. Aug. 13, 2009) (J. Falanga)**

The wife brought a post-judgment enforcement action seeking a money judgment for child support arrears in the sum of more than $484,000. The parties entered into a stipulation of settlement which was incorporated in the judgment of divorce, which provided that the parties would equally divide the marital assets, which included two homes—one in Uniondale worth $380,000 and the other, the marital residence with equity of $1,450,000. The husband was to retain the Uniondale property and instead of the wife paying the husband $535,000 for his share of the marital residence, this amount was considered the husband's pre-payment of his entire child support obligations. Two years later, when the wife sold the marital residence, she received less than the marital residence was appraised at the time of the settlement (instead of receiving $1,450,000 she received $735,000), and therefore claimed she was owed child support arrears in excess of $484,000. The court denied the wife's motion because the court will only look at the value of the assets as of the date of the agreement, not prospective events and market fluctuations. The court noted that the wife may have other remedies available to her, including an upward modification of child support based on an unanticipated and unreasonable change in financial circumstances and that she is unable to pay for the children's needs.

Counsel Fees

In the wake of *Prichep v. Prichep*, 52 A.D.3d 61, 858 N.Y.S.2d 667 (2d Dep't 2008)

As discussed in my previous columns, the Second Department in *Prichep* held that pursuant to DRL § 237, an application for interim counsel fees by the non-monied spouse in a divorce action should not be denied or deferred to trial without good cause, articulated by the court in a written decision "because of the importance of such awards in the fundamental fairness of the (divorce) proceedings." In my previous columns, I reported several cases that followed *Prichep*, including but not limited to *Mueller v. Mueller,* 61 A.D.3d 652, 878 N.Y.S.2d 74 (2d Dep't 2009), $10,000 interim counsel fee award modified to $25,000; and *Penavic v. Penavic*, 60 A.D.3d 1026, 877 N.Y.S.2d 118 (2d Dep't 2009) order deferring wife's request for $250,000 in interim counsel fees to the trial court modified by awarding wife interim counsel fees of $100,000 without prejudice to make a future application for further counsel fees; *Meltzer v. Meltzer*, 879 N.Y.S.2d 722 (2d Dep't 2009) award of an additional $35,000 in interim counsel fees.

Since my previous column, another case has been reported which follows the *Prichep* principle, *Frase v. Frase*, 24 Misc. 3d 1235A , 2009 WL 24776334 (Sup. Ct., Westchester Co. July 31, 2009) (J. Jameson) in which the wife was awarded prospective legal fees in the sum of $50,000. In that case, the case was ready for trial, and the wife had access to $1.5 million in assets but had no income except for the substantial support she received from her husband. By contrast, the husband had access to approximately $5 million in assets, and his income was in the millions. The wife had already incurred over $220,000 of legal fees, all of which was paid prior to the application. The request was for future fees to be incurred if a settlement does not take place, including pre-trial conferences, preparation for trial, trial work and post trial memorandum. The court considered that the wife should not be forced to dissipate her own resources, particularly where the husband is able to pay his own legal fees without any substantial impact on his lifestyle.

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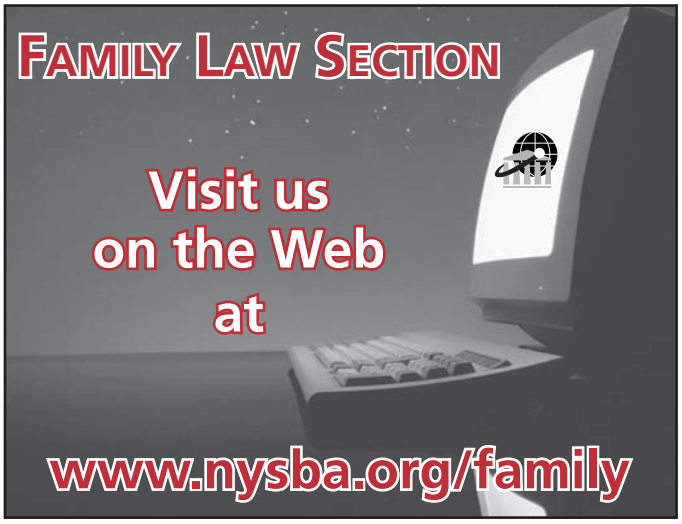

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