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Notes and Comments

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Should Marriage Be Viewed as a Co-Equal Economic Partnership?

Recent trends appear to be leaning in the direction of awarding the lion's share of a business marital asset to the spouse who has formed and run the business. Generally, the longer the length of the marriage, the greater the percentage will be awarded to the non-operating spouse. But awarding 50% of the fair-market value of such assets is beginning to be the exception, rather than the rule. It is not unusual to see an award of 25%, 33% or 40% in lieu of a 50-50 division. The question that must be addressed in such instances is whether such division is fair to the non-working spouse. Put another way, should not the marital contributions of a homemaker, including rearing children to enable the working spouse the ability to devote his or her full energies to the enhancement of the business asset, and the diminution of a career by the other, be a sufficient contribution to divide the asset equally on divorce, especially in a seasoned marriage?

When *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985) was first decided by the Court of Appeals, it held that marriage was "an economic partnership" but did not complete such definition by adding the words "of co-equals." It left open the question of whether marital assets should normally be divided equally, and only reduced because of special negative circumstances, which might include a spouse's deliberate attempt to undermine the business activities of the company or other egregious conduct.

When a couple is married for 20 years and a wife has given up her employment and career opportunities to remain home with the children, she will never be able to recoup the years on an experience curve, and will be forced to enter the employment market at an entry-level position, and never command the same income level as her husband who may have over 20 years experience in the business world. This disparity in itself might make a strong argument for an equal division of a business asset.

Others may argue that each marital asset must be treated separately, that a spousal contribution, standing alone, is insufficient to qualify for a larger percentage of a valuable business asset established by dint of the hard work and creative efforts of the titled spouse, especially where other assets and investments, including the marital residence, will normally be divided equally. Moreover, where the marital estate is significantly large, and the non-working wife receives a generous dollar amount as her marital share, she would have sufficient assets to maintain her pre-separation standard of living, and may even generate a sufficient income from such assets, for a judge to deny maintenance.

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Of course, an award of maintenance will be made where there is a financial necessity to do so and the duration of such award can be tailored to once again maintain the pre-separation standard of living.

Simply put, because equitable distribution gives the court wide latitude and discretion to fashion marital asset divisions, unlike community property states that are compelled to make arithmetic division, it appears that the New York law is fairer to both litigants because it must include all of the statutory enumerated factors of DRL § 236B that impact the marriage and each parties' financial prospects and contributions in reaching a final determination. Under such parameters, the courts are free to make a case-by-case determination based upon the peculiar circumstances of each case, to do equity and recognize the marital partnership, albeit that it might not be determined an equal one.

In presenting your case at trial, it is essential that proof be offered as to each enumerated factor contained in DRL § 256B(5)(d)(1-13), some of which can be offered by your own client, and other testimony must, by necessity, be offered by an expert. Some of the elements that are often overlooked, or not given sufficient attention, include (4) the loss of inheritance rights, (8) the probable future financial circumstances of each party, and (9) the improbability or difficulty of evaluating any component asset.

In many instances, a spouse's loss of inheritance rights might exceed his or her claim for a share of the marital assets, especially where the monied spouse might have extremely large separate property components to his or her net worth received by gift or inheritance, or the ownership before marriage of assets that have substantially increased passively, without any efforts by the monied spouse. Under such circumstances, it would be wise to consider calling an estate and trust lawyer as an expert to quantify the loss of such inheritance rights, and once established, an argument can be made that a larger percentage of marital assets should be awarded the non-monied spouse to compensate for such loss.

There are often situations where the separate property component could be millions of dollars, and the marital portion *de minimus*, perhaps in a ratio of 80% to 20% or even less. Without receiving recognition for the loss of inheritance rights, your client will be severely prejudiced and disadvantaged. It is felt that the legislature anticipated such inequity in enacting this subdivision, especially in a long-term marriage. In doing so, the trial court can apply a division to the remaining marital assets that will do equity under the unique circumstances of the case.

Subsection 8 pertaining to the future financial circumstances of the parties would certainly require an employment expert to testify as to what impact the years being out of the job market will have on the ability to obtain employment and the years of experience necessary to complete in order to earn a meaningful income. For those in their 50s or 60s, it may not be possible to enter the job market, even on a professional level, let alone have a sufficient span of time to obtain the experience that will permit increased earnings. Certainly, such evidence may impel a court to award a larger percentage of marital assets, and certainly consider non-durational maintenance at a higher level.

Finally, Subsection 8 of the enumerated factors leads to the conclusion that if a marital asset is too difficult or impossible to evaluate, after expert testimony is given, it may create a circumstance where a division in kind may be warranted, which could take the form of an order directing an assignment of a specified percentage of the asset. This may be a logical choice in non-publicly traded securities, stock options, or future pension rights only partially vested.

In the final analysis of what constitutes a fair division of marital assets, the length of the marriage, the number of children, and the stay at home spouse's direct contribution to a specific asset must certainly be included in the mix. Nonetheless, the ultimate determination necessarily boils down to how much is enough; or, expressed another way, when is enough, enough? In a $100 million marital estate, would not an award of $25 million be sufficient to maintain an opulent life style, affording every luxury of life, and where such award would throw off, even at 5%, $1,250,000 in annual income. Under such facts, an unequal division, where the principal assets, a business, was responsible for the growth of the parties' net worth, may be just as fair as a larger percentage distribution. What courts will do will vary from judge to judge, so there is no reliable way to predict the ultimate outcome. But it does appear that the recent trend is to make unequal divisions of business properties or professional licenses and practices.

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The Implications of *Mesholam v. Mesholam*

By Glenn S. Koopersmith

In *Mesholam v. Mesholam*,[1] a decision of substantial importance to the daily practice of matrimonial law, the Court of Appeals has finally resolved a lingering dispute between the various judicial departments by determining that it is not permissible to use the commencement of a prior discontinued divorce action as the valuation date for marital property in a later divorce action.

While the Second Department had adopted a rule of law that permitted a prior action to be used as a valuation cutoff date in a subsequent discontinued[2] divorce action, courts in the other three departments had disagreed, indicating that it was inappropriate to use any action to terminate the acquisition of marital property in which equitable distribution was not available. In reiterating the fundamental principle which it set forth 16 years ago in *Anglin v. Anglin*,[3] the *Mesholam* Court confirmed that "the value of marital property generally should not be determined by the commencement of an action for divorce that does not ultimately culminate in divorce."[4]

The Second Department Rule

Where a prior action had been withdrawn or discontinued, the Second Department had fashioned a rebuttable presumption that the date of the prior action for divorce would control for valuation purposes unless proof was adduced that the parties either reconciled or continued the marital relationship. *Thomas v. Thomas*;[5] *Lamba v. Lamba*.[6]

According to the analysis espoused by the Second Department, since DRL § 236[B][1][c] defined marital property as "all property acquired by either or both spouses *during* the marriage and *before*. . .the commencement of *a* matrimonial action. . ." (emphasis in original), the Court retained the discretion to value the asset as of the commencement of a prior matrimonial action. *Thomas v. Thomas*, *supra*; see *Miller v. Miller;*[7] *Lamba v. Lamba*, *supra*. It appears that the reasoning underlying the rule was that "the earlier action signifies the demise of the marital partnership and that sharing after-acquired assets would be a windfall to the titled spouse."[8]

The Other Three Departments

The other three departments adopted a different analysis, consistent with the Court of Appeals ruling in *Anglin*. The respective controlling decisions in each of the other three judicial departments (and ultimately, the Court of Appeals as well) focused instead upon DRL § 236[B][4][b], which limits the parameters within which such classification may occur by stating "(t)he valuation date or dates may be anytime from the date of commencement of *the action* to the date of trial." (emphasis added). In reliance upon this provision, the respective courts concluded that the earliest date that an asset can be valued is the date of commencement of the second action in which equitable distribution remains available.

This issue was addressed by the Third Judicial Department shortly after the implementation of the Equitable Distribution Law in *Matter of Ward v. Ward*.[9] Since that time, the Third Department consistently rejected the use of a prior action for divorce as a cut off date for the accrual of marital assets. See *O'Connell v. O'Connell;*[10] *McAteer v. McAteer*.[11]

The rulings in the Fourth Department were somewhat less clear. In *Cozza v. Colangelo*,[12] the Fourth Department confronted a case where the prior action had been dismissed on the merits. In rejecting the use of the prior action to establish valuation, the *Cozza* Court explicitly cited *O'Connell v. O'Connell*, *supra*, in holding that the assets could not be valued as of the commencement of a prior divorce action because "it neither ended the marriage nor resulted in the equitable distribution of the parties' property." See also *Nicit v. Nicit*,[13] *(*where the Court rejected the use of "the commencement date of the prior unsuccessful divorce action'' as a valuation date).

The leading case on this issue in the First Department was *McMahon v. McMahon*,[14] where, in a thoughtful decision by Justice Gishe, the Court explained the rational for its rejection of the Second Department rule in the following manner:

> The husband may not, on this motion, accomplish what he could not do in the first action for divorce, that is, utilize the commencement date of the discontinued action for purposes of defining marital assets.

See also *Match v. Match*,[15] where the Appellate Division, First Department, refused to permit the trial court to employ the date of the commencement of a prior separation action to terminate the acquisition of marital property noting that "(i)f the plaintiff had no grounds for divorce until the commencement of this action. . ., then it would be unfair to penalize the defendant by selecting an earlier date."

The Lower Court Decisions in *Mesholam v. Mesholam*

In *Mesholam*, the wife had commenced a prior action for divorce in 1994; the husband never counterclaimed in that action. When the wife sought discontinuance of that

action in 1999 following the appointment of a *guardian ad litem*, the Trial Court granted the application, noting that there was no evidence of "wrongdoing or ill-motive." The husband's responsive request to interpose a counterclaim for divorce was denied. Significantly, no appeal was taken from that determination.

The husband commenced a second action for divorce immediately after the prior action was discontinued. At the time of the commencement of the second action, the parties had been married for approximately 30 years. The issue of grounds was resolved when the husband obtained an uncontested divorce on the ground of constructive abandonment.

Following a trial, by memorandum decision dated February 22, 2002, the Supreme Court, Nassau County (Joseph, J.), relied upon DRL § 236(B)(4)(b) in ruling that the commencement of the second action was the earliest date that accrual of marital property could terminate. The Court noted that the husband's pension with the New York City Teachers' Retirement System was valued at $429,954 on September 7, 1994, when the prior action for divorce was commenced, and at $859,084 as of the commencement of the second action on August 24, 1999.

In its decision, the Trial Court concluded that the wife directly and indirectly contributed her services to the marriage partnership as well as the advancement of the husband's career. The Court stated that the wife had suffered from a major depressive disorder. Although the parties had been physically separated for several years after the commencement of the first action, the Trial Court nevertheless concluded that the parties should equally divide marital assets, including the husband's pension.

The husband appealed to the Appellate Division, Second Department, claiming, *inter alia*, that the Trial Court erred in using the commencement date of the second action to terminate the accrual of marital property because the parties had never reconciled or resumed the marital relationship following the discontinuance of the first action.

The Appellate Division Order

By decision and order dated January 24, 2006, the Appellate Division, Second Department, "modified" the determination of the Trial Court by holding that the husband's pension should have been valued as of September 4, 1994, the date of commencement of the first action, instead of the commencement of the instant action. In making this determination, the Court stated:

> There is no evidence that the parties reconciled and continued to receive the benefits of the marital relationship after the prior action was commenced. (*see Thomas v. Thomas*, 221 A.D.2d 621, *Lamba v. Lamba*, 266 A.D.2d 515).[16]

Following execution of an Amended Judgment of Divorce, the wife obtained leave to appeal to the Court of Appeals, claiming that the Second Department erred as a matter of law in utilizing the commencement date of the first action for divorce to terminate the acquisition of marital property.

The Court of Appeals Decision

In a decision by Judge Eugene F. Pigott, Jr., dated June 26, 2008, the Court of Appeals resolved any lingering confusion by determining that "courts must use the commencement date of the later, successful action as the earliest valuation date for marital property," *Mehsolam v. Mesholam*.[17] The Court cited its prior decision in *Anglin* and explained its conclusion in the following manner:

> We conclude that the value of marital property generally should not be determined by the commencement of an action for divorce that does not ultimately culminate in divorce. Equitable distribution is available "in an action wherein all or part of the relief granted is divorce" (Domestic Relations Law § 236[B][5]). Where there is no divorce there can be no equitable distribution. Consequently, permitting the commencement date of the prior, unsuccessful divorce action to govern the valuation date of marital property for the purposes of the later, successful action in which equitable distribution is available would be inconsistent with the statutory scheme.[18]

The Practical Ramifications of the Determination

The prior Second Department rule, as adopted by the respondent-former husband in the Court of Appeals, emphasized the seeming inequality of permitting any spouse to share in the property acquired following the commencement of a prior discontinued action for divorce where the parties did not resume the marital relationship. Respondent claimed that where the parties have not resumed the marital relationship following the discontinuance of the prior action, it is extremely difficult to convince many trial justices[19] to account for the nature of the parties' relationship in the interregnum between actions (presumably by awarding the non-monied spouse less than 50% of all of the marital assets). In his opinion, Judge Pigott addressed this issue by stating:

> However, the circumstances surrounding the commencement of the earlier action can and should "be considered as a factor by [the trial court] among other relevant factors as [it] attempt[s] to calibrate the ultimate equitable distribution of marital economic partnership property acquired

after the start of such an action by either spouse (*see Anglin*, 80 N.Y.2d at 558).

Thus, as a practical matter, it is now incumbent upon counsel for the monied spouse to insure that the trial court is provided with detailed evidence of that spouse's contributions to the acquisition of marital property between the commencement of the two actions for divorce[20] and, if appropriate, to establish the other spouse's failure to contribute to the marriage (either financially or otherwise) during the period at issue. Conversely, for those attorneys representing the non-monied spouse, it is imperative to show the full extent of that party's contributions, whether as a homemaker, parent and/or wage earner, to establish his or her contributions during the period at issue. Clearly, even where the parties do not resume the marital relationship, there are contributions, both financial and otherwise, which should be considered by the court in determining the ultimate equitable distribution of marital property. The opinion in *Mesholam* provides an appropriate reminder for the trial bench to carefully consider these critical factors in fashioning an equitable distribution award.

Endnotes

1. 11 N.Y.3d 24 (1998).
2. In *Montalvo v. Montalvo*, 43 A.D.3d 1013 (2d Dep't 2007), where the Court refused to permit a prior action that was dismissed on the merits to be used as a valuation cut off date, the Second Department had created a distinction between prior actions that were discontinued and those that were dismissed on the merits.
3. 80 N.Y.2d 553 (1992).
4. *See Mesholam v. Mesholam*, *supra* note 1.
5. 221 A.D.2d 621 (2d Dep't 1995).
6. 266 A.D.2d 515 (2d Dep't 1999).
7. 304 A.D.2d 727 (2d Dep't 2003).
8. Tippins, T., *The Matrimonial Dating Game*, N.Y.L.J. Dec. 8, 2002, p. 3 (col. 1).
9. 94 A.D.2d 908(3d Dep't 1983).
10. 290 A.D.2d (3d Dep't 2002), reversed on other grounds as *O'Connell v. Corcoran*, 1 N.Y.3d 179 (2003).
11. 294 A.D.2d 783 (3d Dep't 2002).
12. 298 A.D.2d 914 (4th Dep't. 2002).
13. 217 A.D.2d 1006 (4th Dep't 1995).
14. 187 Misc.2d 364 (Sup. Ct., NY County 2001).
15. 179 A.D.2d 124 (1st Dep't 1992).
16. 25 A.D.3d 670 (2d Dep't 2006).
17. *See Mesholam v. Mesholam*, *supra* note 1.
18. *Id.*
19. Indeed, the Trial Court's decision to equally divide the marital property in *Mesholam*, notwithstanding the parties' physical separation, was an important issue raised by respondent's counsel.
20. Of course, it is also advisable to proffer any other evidence establishing that party's other, more indirect contributions, if any, during the period at issue.

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The Trivialization of Fault as a Factor Affecting Equitable Distribution

By Robert S. Grossman

While the misconduct underlying many divorces may often seem significant to litigants and their counsel, courts generally decline to consider misconduct in determining the distribution of the marital assets, except in rare and unusual or extreme circumstances. Not only are courts generally declining to consider marital misconduct, but there also appears to be a trend away from equally distributing marital property, even in marriages of long duration.[1] Declining to consider misconduct only seems to empower the party who committed the offending acts, especially when that party is the "monied" spouse.

The Court of Appeals has long since held that "[a]rguably, the court may consider marital fault under factor 10, 'any other factor which the court shall expressly find to be just and proper' (Domestic Relations Law § 236[B][5][d][10]; *see,* Scheinkman, 1981 Practice Commentary, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law C236B:13, pp. 205–206 [1977-1984 Supp. Pamphlet])" *O'Brien v. O'Brien***,** 66 N.Y.2d 576 (1985). In the same breath, the *O'Brien* Court also held that:

> [e]xcept in egregious cases which shock the conscience of the court, however, it is not a "just and proper" factor for consideration in the equitable distribution of marital property (*Blickstein v. Blickstein,* 99 A.D.2d 287, 292, 472 N.Y.S.2d 110, *appeal dismissed,* 62 N.Y.2d 802, *see, Stevens v. Stevens,* 107 A.D.2d 987, 484 N.Y.S.2d 708; *Pacifico v. Pacifico,* 101 A.D.2d 709, 475 N.Y.S.2d 952; *McMahan v. McMahan,* 100 A.D.2d 826, 474 N.Y.S.2d 974).

The Court reasoned that consideration of fault was "inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate." *Id.*

The conscience of each court obviously differs, as does the conduct that has been deemed "shocking." In *Havell v. Islam,* 301 A.D.2d 339 (1st Dep't 2002), the First Department affirmed the trial court's award of 95.5% of the marital assets to the wife, based in part upon the husband's attempted murder of the wife in the presence of the parties' three daughters, which was deemed "shocking." In *DeSilva v. DeSilva,* N.Y.L.J. Sept. 6, 2006, at 22 col. 1 (Sup. Ct. N.Y. County, Silbermann, J.), the Court, relying in part on *Havell v. Islam, supra,* expanded the definition of egregious fault to include "a pattern of domestic violence warranting an unequal division of marital assets." In doing so, the trial court awarded the non-offending party all of the marital assets and distributed almost all of the debts to the offending party. More recently, in *Levi v. Levi***,** 46 A.D.3d 520 (2d Dep't 2007), the Second Department noted that "the Supreme Court properly exercised its discretion in finding that the plaintiff's attempt to bribe the former justice constituted egregious marital fault to be factored into the equitable distribution award in addition to other considerations (*see Havell v. Islam,* 301 A.D.2d at 344, 751 N.Y.S.2d 449; *Blickstein v. Blickstein,* 99 A.D.2d at 292, 472 N.Y.S.2d 110)."

In a recent unreported case in Nassau County,[2] not only did the trial court decline to consider the misconduct of the husband, but it also awarded the wife substantially less than 50% of the marital assets,[3] notwithstanding that it was a 28-year marriage in which the wife made substantial contributions. In that case, the parties each contributed in different, but significant, ways to the marital partnership. The wife was 55 years of age at the time of trial, was in questionable health and, although carried for a time by the husband on the "company payroll," she had not been otherwise gainfully employed for the past 28 years. The wife married the husband after completing her education, and thereafter subordinated and sacrificed her career as a teacher to be and remain a stay-at-home mother, a helpmate and a wife. Although the husband went to great lengths to testify that the wife did nothing except spend "his" money, the wife testified to the contrary, pointing out that among other things, she raised the parties' two children, went to corporate events and conventions with the husband, helped locate real estate investments, declined to testify against the husband when he was arrested for felonious physical assault against her and a related drug possession charge (which the husband plea bargained down to two Class A misdemeanors, receiving three years probation and no jail time), and cooperated with him to obtain a necessary banking license. The battered wife, who was the victim of the husband's felonious physical assault and ended up in the hospital with multiple broken bones, declined, for reasons unexplained, to testify against the husband in the criminal matter and took him back.

In the matrimonial litigation, the parties entered into a stipulation resolving "fault." In that stipulation, the wife reserved the right to elicit testimony as to "egregious" fault affecting equitable distribution issues. The Supreme Court trivialized the spousal abuse and refused to permit the wife to testify regarding same as the Court noted that the incidents were "too remote in time." That Court simply declined to consider the husband's criminal conduct against the wife and the husband's own pleas of guilty. That Court also declined to consider that the wife relented, which allowed for the lesser charges against the husband to which he pleaded guilty, and that, at the

husband's urging, the wife later testified on his behalf and substantially assisted the husband in obtaining a Certificate of Relief from Civil Disabilities so he could obtain a banking license necessary to "his" business. Had the husband been convicted of, or pleaded guilty to, the original charges, or had the wife declined to assist him in obtaining the certificate, the husband likely would have had more difficulty obtaining the necessary banking license, if he could have obtained one at all.

In addition to the physical and emotional abuse, that Court also declined to meaningfully consider that the husband committed various acts of financial misconduct, including his attempts to dissipate marital assets. The term "*dissipation*" is generally used to characterize wasteful expenditures as gambling, the purposeful destruction of assets or a business, secreting assets, or squandering large amounts of money on completely separate concerns. For example, in *Maharam v. Maharam***,** 245 A.D.2d 94 (1st Dep't 1997), the Court increased an equitable distribution award in the wife's favor from 55% to 65%, where the defendant husband "secreted [marital] assets in a foreign bank account" and "squandered sizable sums on luxury items and in admitted adulterous affairs." In *Davis v. Davis*, 175 A.D.2d 45 (1st Dep't 1991), the husband's "dissipation of marital assets, including efforts at diminishing the value of [a business] and transfers of funds without fair consideration to third parties," were found to support the court's 60%-40% distribution of the marital estate in the wife's favor. In *Contino v. Contino*, 140 A.D.2d 662 (2d Dep't 1988) the Court remarked that "[s]ecreting assets in order to prevent the trial court from making an equitable distribution of property supports a finding of economic fault (citations omitted)." Accordingly, it awarded to the defendant the amount secreted by the plaintiff, then divided the remainder of the estate evenly.

In the above-mentioned unreported case, the husband's financial misconduct consisted of his concealment of marital assets in nominee names, his using marital funds to pay court-ordered maintenance when he had post-commencement funds available, his transferring a $1.2 million brokerage account to his son to try to keep it out of the martial estate, his purchasing a Florida residence in a nominee name, and his bogus attempt to transfer 49% of the family business to a friend for far less than full value. The husband's brazen attempt to prove that he owned 51% of the family business, rather than 100%, by means of an illusory 1996 "option agreement" elevated "chutzpah" to a new level in that case**.** These are just some of examples of the economic fault that should have been considered as factors within the contemplation of the statute.

In its decision after trial, the trial court took a backward step and trivialized the wife's contributions to the husband's successful career and overlooked the wife's significant direct and indirect contributions to the marital partnership. The trial court also chose to overlook or trivialize the husband's physical abuse of the wife, his criminal behavior, his financial misconduct, his chicanery, and his economic waste when it *rewarded* the husband with an 80% share of the family business and awarded the wife only 20% of the value thereof. The wife could easily have been awarded a 50% share of the family business as well as 50% of the remaining marital assets [*see, e.g.*, *Meza v. Meza*, 294 A.D.2d 414 (2d Dep't 2002)] because the trial record was replete with evidence of the husband's economic fault as well as a pattern of financial chicanery designed by the husband to mislead the Court, diminish the value of the family business, and reduce the value of the assets available for equitable distribution.

While the equitable distribution statute sets forth the criteria or factors Supreme Court must consider, it does not address how much weight, if any, courts are to attribute to any particular factor, leaving courts free to trivialize or refuse to even consider egregious marital or economic fault. The Court's determination in the above-referenced matter that the wife was entitled to only a 20% share of the family business ignored the wife's direct and indirect contributions to the family business and her contributions as a spouse, homemaker, confidant and parent, as well as the husband's misconduct. The Court thusly bestowed credence upon unwritten law holding that once the trial court mentions the statutory factors, it is free to give weight to or ignore any factor. At the very least, under the facts and circumstances of that case, the wife could have, and should have, been awarded a 50% share of all of the marital assets accumulated by the marital partnership during the 28-year marriage. Perhaps on appeal a reviewing court will revisit the impact that marital and economic fault should have on the equitable distribution equation.

At this time, unless one of the litigants literally attempts to kill the other, or seeks to bribe the judge, it appears that matrimonial courts will continue to accord little or no weight to marital misconduct. New York remains a "no fault" state when it comes to equitable distribution, and to the discredit of the legislature, a "fault state" when it comes to the divorce itself.

Endnotes

1. In an article in this publication, Elliot Samuelson discusses the trend of the Courts to move away from the 50% concept in long-term marriages.
2. Given the existence of ongoing post-trial litigation, the name of the case and the identity of the trial judge are not being disclosed at this time.
3. Apart from other marital assets, in the instant case, the family business was valued at $52 million by the Court. The determination of the value of business interests was a function properly within the fact-finding power of Supreme Court, *e.g.*, *Amodio v. Amodio***,** 70 N.Y.2d 5 (1987); *Burns v. Burns***,** 84 N.Y.2d 369 (1994); *Miness v. Miness***,** 229 A.D.2d 520 (2nd Dep't 1996).

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Tolling the Statute of Limitations on Prenuptial and Postnuptial Agreements: The Third (And Last) Version of DRL § 250

By Lee Rosenberg

After years of inter-departmental disagreement and two prior versions of legislation, we finally have a statute that effectively tolls the statute of limitations for three (3) years on the challenge to prenuptial and postnuptial agreements during an intact marriage—the new and improved DRL § 250 signed into law on May 21, 2008.

A prenuptial or postnuptial agreement is permitted under DRL § 236B(3)(4) and must, to be an enforceable document, adhere to the requirements of other such marital agreements. DRL § 236B(3) states:

> An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

For years, the First and Second departments were divided on the issue of whether the six-year statute of limitations to rescind an agreement as set forth in CPLR 213 was tolled by the existence of an intact marriage. The First Department had held that the statute tolled in deference to public policy considerations, including the intermediate appellate decision in *Bloomfield v. Bloomfield*,[1] and in other prior decisions such as *Lieberman v. Lieberman*[2] and *Zuch v. Zuch*.[3] The Second Department, to the contrary, had maintained that the six-year statute of limitations governed and such claims are time barred by CPLR 213. (*See DeMille v. DeMille;*[4] *Rosenbaum v. Rosenbaum*;[5] *Anonymous v. Anonymous*[6])

When *Bloomfield* went up to the Court of Appeals,[7] the Court, in lieu of breaking the tie between the departments, end-ran the issue and applied CPLR 203(d), holding that it permitted the defendant to contest the validity of the agreement when the claim arose from the same transaction asserted in the complaint, notwithstanding that the same claim "*might* have been time-barred at the time the action was commenced." (emphasis added) *DeMille,* which was decided post-*Bloomfield* by the Second Department, reiterated the lack of a tolling in that department and also determined, as per *Bloomfield,* that CPLR 203(d) could only be used by defendants and not by plaintiffs.[8] The Second Department's position on a lack of tolling was again reiterated in its February 2007 decision in *Katz v. Katz*.[9]

Given the ongoing discrepancy between the departments, DRL § 250 was enacted on July 3, 2007, and then immediately amended. In actuality, DRL § 250 was twice enacted on that day, as the initial enactment was made and then quickly amended. Its first incarnation was generated in January 2007, while the *Katz* appeal was pending, and was approved by the Assembly on March 19, 2007, by the Senate on June 4, 2007, and signed into law by then Governor Spitzer on July 3 at L. 2007, c. 104. The text read as follows:

> Section 1.
>
> The domestic relations law is amended by adding a new section 250 to read as follows:
>
> § 250. AGREEMENTS RELATING TO MARRIAGE; STATUTE OF LIMITATIONS. The statute of limitations for commencing an action or claiming a defense that arises from an agreement pursuant to section two hundred thirty-six of this article shall be three years. However, the statute of limitations shall be tolled until

such time as both parties have made an appearance in the action concerning the agreement. If an action is dismissed, dropped, or otherwise resolved, any remaining time limits shall be tolled until both parties make an appearance in a subsequent action concerning the agreement.

The session law read:

Section 2. This act shall take effect immediately and shall not apply to prenuptial agreements where the commencement of an action thereon was barred under the civil practice law and rules in effect immediately prior to such effective date. (emphasis supplied)

The statute was then amended on July 3 by L. 2007, c. 226. *and still presently* is as follows:

§ 250. Agreements relating to marriage; statute of limitations

1. The statute of limitations for commencing an action or proceeding or for claiming a defense that arises from an agreement made pursuant to subdivision three of part B of section two hundred thirty-six of this article entered into (a) prior to a marriage or (b) during the marriage, but prior to the service of process in a matrimonial action or proceeding, shall be three years.

2. The statute of limitations shall be tolled until (a) process has been served in such matrimonial action or proceeding, or (b) the death of one of the parties.

3. The provisions of this section shall not apply to a separation agreement or an agreement made during the pendency of a matrimonial action or in settlement thereof.

The language was modified so as to eliminate a re-tolling of the statute in the event an action was commenced and then discontinued or dismissed. When the amendment was made, the chapter 226 session law followed suit:

This act shall take effect on the same date [July 3, 2007] as a chapter [L.2007, c. 104] of the laws of 2007 amending the domestic relations law relating to the statute of limitations for agreements relating to marriage, as proposed in legislative bills numbers S.4564 and A.3074, takes effect; and *shall not apply to any agreement where the commencement of an action thereon was barred under the civil practice law and rules in effect immediately prior to such effective date*. (emphasis supplied)

Regardless of the version enacted on July 3, 2007, it seems clear in the plain reading of DRL § 250 that the statute of limitations on prenuptial and postnuptial agreements is three years and that it tolls during the intact marriage. It should be noted, however, that it does not begin to run from the commencement of the action, but from *service of process* in that action. Clearly, however, the session laws to the first two versions of DRL § 250 refer to agreements being time-barred under the civil practice law and rules in effect immediately prior to such effective date. It was arguable, then, that under the July 3, 2007 versions of DRL § 250, the statute did not apply to agreements in which an action thereon would have been time barred under the six-year statute of limitations in CPLR 213. Accordingly, it appeared that if on July 2, 2007, the six-year statute of limitations had expired, that agreement would not have been subject to attack nor was the tolling applicable to it—the Second Department position. Alternatively, it could have been argued that the session law intended that *actions* on agreements that were barred as of July 3, 2007 would still have been barred, but that actions not as yet commenced on those agreements (even if the agreement is more than six years old) benefit from the tolling—the First Department view.

In the May 6, 2008 decision in *Brody v. Brody*,[10] Hon. Robert A. Ross in the Supreme Court, Nassau County, actually addressed the issue head-on, finding that DRL § 250, as enacted for the second time on July 3, 2007, did not serve to toll the statute of limitations on those agreements that were executed six or more years prior to July 3, 2007. In that case, the prenuptial agreement was executed on January 26, 2001. The court did, however, permit the defendant to use CPLR 203(d) to challenge the agreement as a defense "as a shield," only to fend off the plaintiffs' attempt at its enforcement. The court found further that DRL § 250 did not expressly render the use of CPLR 203(d) unavailable even on agreements over six years old because no specific intent to rule out its use was set forth in the statute.

On May 23, 2008, Governor, David A. Paterson signed a second amendment to DRL § 250. This time, the session law states:

§ 2. Section 2 of chapter 226 of the laws of 2007 amending the domestic relations law relating to agreements relating to marriage, is amended to read as follows:

§ 2. This act shall take effect on the same date as {a} chapter 104 of the laws of 2007 {amending the domestic relations law relating to the statute of limitations for agreements relating to marriage, as proposed in legislative bills numbers S.4564 and A.3074,} takes effect; and shall not apply to any agreement where the commencement of an action thereon was PREVIOUSLY barred BY A COURT under

the civil practice law and rules in effect immediately prior to such effective date. (emphasis in session law).

This final revision enacted on May 21, 2008 serves to eliminate the division that existed between the statute and the session law and between the First and Second departments as to those agreements that were more than six (6) years old as of July 3, 2007. DRL § 250 now makes it clear that the three-year statute of limitations on such agreements tolls unless a court had previously barred the agreement prior to July 3, 2007, under the old six-year statute.

As it now stands, existing prenuptial and postnuptial agreements can be challenged regardless of their age as long as the marriage is intact. So, the statute of limitations defense is now seemingly meaningless despite the three year limitation set forth in the statute, barring some very strange circumstances. Accordingly, it would appear foolish not to take issue with a prenuptial or postnuptial agreement that might be subject to challenge while a matrimonial action is pending for three years and then wait until after that period has expired to raise a claim. One last twist: The wife's case is pending for *over* three years. There is a prenup that is now 10 years old and would have been time-barred under the six-year statute of limitations of CPLR 213. She never raised issue with the agreement's validity as a result, but no court previously declared the agreement time-barred. She could not have availed herself of CPLR 203(d) because she is a plaintiff. DRL § 250 is prospective from July 3, 2007. Is the wife now barred under DRL § 250 because more than three years has passed since she served process upon the husband? Strange circumstance indeed, and one that remains for the court to decipher.

Endnotes

1. 281 A.D.2d 301 (1st Dep't 2001).
2. 154 Misc.2d 749 (Sup. Ct., N.Y. Co. 1992).
3. 117 A.D.2d 397 (1st Dep't 1983).
4. 5 A.D.3d 428 (2d Dep't 2004).
5. 271 A.D.2d 427 (2d Dep't 2000).
6. 233 A.D.2d 350 (2d Dep't 1996).
7. 97 N.Y.2d 188 (2001).
8. Both the Third [*U.S. Fidelity and Guar. Co. v. Delmar Development Partners, LLC*, 803 N.Y.S.2d 254 (3d Dep't 2005)] and Fourth [*Harrington v. Gage*, 843 N.Y.S.2d 745 (4th Dep't 2007)] departments adopted the *DeMille* Court's view of the use of CPLR 203(d) as being available to defendants only.
9. 37 A.D.3d 544 (2d Dep't 2007).
10. 20 Misc.3d 350 (Sup. Ct. Nassau Co. 2008).

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Domestic Relations Law § 177: Remedying the Unanticipated Burdens of an Unnecessary Notice Requirement

By John P. DiMascio, Jr. and Joshua B. Hecht

Domestic Relations Law § 177 was initially enacted "to ensure that parties who receive health coverage under their spouse's plan are made aware of their loss of health insurance coverage upon the issuance of a judgment of divorce." Notwithstanding the statute's praiseworthy purpose, its application has confounded members of the bench and bar alike, since taking effect on October 30, 2007, and has resulted in the delay of thousands of matrimonial matters from reaching a conclusion.

DRL § 177 currently requires that *every* agreement accepted by the court contain or be accompanied by a prescribed statement, signed by the parties, acknowledging that they may no longer be entitled to their spouse's health insurance coverage. This requirement conceivably applies to agreements executed prior to the statute taking effect. Consequently, either spouse can obstruct the other's efforts to rightfully obtain a judgment of divorce by simply refusing to sign the DRL § 177 acknowledgment.

Such was the case in *Brown v. Brown*, N.Y.L.J. (July 8, 2008, p. 27, col. 1) (DeStefano, J), where the defendant-wife opposed the plaintiff-husband's motion for summary judgment, granting him a conversion divorce, pursuant to a separation agreement, because the parties did not execute an addendum pursuant to DRL § 177. Judge DeStefano ultimately granted the husband's motion for summary judgment, holding that "the statute cannot be literally applied without causing an absurd result." He instead looked to the legislative intent behind the statute. In rendering his decision, Judge DeStefano, described certain provisions of DRL § 177 as "devoid of meaning," "incomprehensible,'' and "anomalous," asserting that "[t]he statute cannot be described as a model of precision either grammatically, or in substance and structure."

There is currently a bill before the New York legislature to repeal and modify Domestic Relations Law § 177, to give the statute greater clarity and simplify its application. The proposed bill appears to rectify the ill-conceived current version of the statute, which, in part, resulted from the legislature's failure to confer with matrimonial judges and practitioners prior to its enactment. Apparently, the legislature recognized its folly, and conferred with the Office of Court Administration in drafting the new bill, which was introduced at the request of the Judiciary and upon the recommendation of Justice Jacqueline W. Silbermann, Deputy Chief Administrative Judge for Matrimonial Matters.

The proposed bill to repeal and revise DRL § 177 does much to relieve the burdens and constraints needlessly placed on judges, practitioners and litigants alike. For instance, it concisely delineates between contested and uncontested matrimonial matters and succinctly provides for the procedure for advising the parties of the potential termination of their health insurance coverage. The proposed bill requires that, prior to the entry of judgment, the court notify the parties that they may be ineligible for coverage under their spouse's health plan upon being divorced. Where the parties have entered into a stipulation or settlement agreement, it must contain a provision related to health insurance coverage, either providing for the future coverage of each party or providing the requisite notice to each party that they may no longer be eligible for coverage under the spouse's health plan upon the issuance of a judgment of divorce.

"DRL § 177 currently requires that every agreement accepted by the court contain or be accompanied by a prescribed statement, signed by the parties, acknowledging that they may no longer be entitled to their spouse's health insurance coverage."

More importantly, the proposed version eliminates the current requirement that the parties sign a form statement acknowledging that they may no longer be entitled to their spouse's health insurance coverage upon the entry of the judgment of divorce. The legislature, in the memorandum accompanying the bill to repeal and amend DRL § 177, acknowledged that the requirement that the parties sign such a form has "potentially complicated the lives of perhaps thousands of individuals who, after living for many years subject to the terms of a stipulation / separation agreement . . . now want a divorce." Conceivably, "for each of these individuals it will be necessary to find his or her former spouse and gain his or her agreement to a modification of the stipulation / settlement so that it complies with section § 177."

Notwithstanding the legislature's efforts to revise DRL § 177 to facilitate its application, one must question the efficacy of the statute. The stated legislative purpose behind DRL § 177 was to "require parties in an action for divorce to be made aware of the potential loss of their

health-care coverage obtained through their spouse's health insurance." As pointed out by Justice Alan D. Sheinkman, "the statute may address a problem that does not exist," as there are already laws in effect to ensure that a former spouse is not suddenly without insurance.

"If the legislature wishes to serve the interests of matrimonial litigants it may wish to consider proposals to streamline the process rather than measures such as DRL § 177, which will only result in a needless waste of time, money and judicial resources."

The Consolidated Omnibus Budget Reconciliation Act, or COBRA, is applicable to the overwhelming majority of group or employer-sponsored health insurance plans, and is available to a former spouse who loses coverage upon the entry of a judgment of divorce. Under COBRA, the plan administrator is required to provide the dependent spouse with notice of his or her termination of coverage and his or her right to continue coverage for a period of up to 36 months, at his or her sole expense. Consequently, in all likelihood, even if the parties to a divorce enter into a Stipulation of Settlement that fails to address the issue of future health insurance coverage, the dependent spouse will not suddenly be without coverage, but rather will be notified by the other spouse's carrier well in advance of any such termination.

The current statute needlessly complicates the divorce process and adds yet another document to the ever-expanding list of forms that must be submitted to the county clerk to obtain a divorce. The entry of the judgment of divorce has countless legal and financial consequences for the spouse, such as the loss of the right of election or the right to file joint income tax returns, for which the legislature could conceivably draft notice requirements. It is, however, the responsibility of the matrimonial attorney to advise his or her client as to the effects of the entry of a judgment of divorce on his or her substantive rights, not the legislature on an *ad hoc* basic.

Consequently, DRL § 177 should not be revised or amended, but repealed. If the legislature wishes to serve the interests of matrimonial litigants it may wish to consider proposals to streamline the process rather than measures such as DRL § 177, which will only result in a needless waste of time, money and judicial resources.

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Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

California is the second state in the nation to allow same-sex marriage.

On May 15, 2008, the California Supreme Court ruled in *In Re: Marriage Cases* to uphold the freedom to marry. As of June 16, 2008, same-sex couples can receive marriage licenses from the state of California. California is the second state in the nation to allow same-sex marriage. Massachusetts was the first in 2004.

In its 4-3 ruling, the Republican-dominated court struck down state laws against same-sex marriage, reasoning that domestic partnerships as they stand, while providing many of the rights and benefits of marriage, are insufficient:

> In contrast to earlier times, our state now recognizes that an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation.

Christian and conservative groups are seeking a stay of the decision until after a proposed November vote on a constitutional amendment that would bar same-sex marriage. As of this writing, the motion has not been heard by the court.

Unlike Massachusetts, which is the only other state that has legalized gay marriage, but has residency requirements, residents from all over the United States will be permitted to marry in California.

Although New York does not permit gay marriages, the state honors out-of-state gay marriages, as explained in my previous column. In May 2008, Governor David Paterson directed state agencies to ensure that the out-of-state marriages of same-sex couples are respected and treated equally under law, the same as New York does with different-sex couples' marriages. Governor Paterson ordered all state agencies to begin to revise their policies and regulations to recognize same-sex marriages performed in other jurisdictions, such as Massachusetts, California and Canada. The revisions are most likely to involve as many as 1,300 statutes and regulations in New York governing everything from joint filing of income tax returns to transferring fishing licenses between spouses.

The governor's directive cited the recent ruling in *Martinez v. County of Monroe*, 50 A.D.3d 189, 850 N.Y.S.2d 740 (4th Dep't 2008), as mentioned in my previous column, which directed the recognition of a Canadian same-sex marriage so as to provide a lesbian partner health insurance benefits.

Civil unions are recognized in Vermont, Connecticut, New Jersey and now, effective January, 2008, New Hampshire. However, same-sex marriage advocates argue that civil unions do not provide the same legal protections and social status as marriage.

Recent Legislation

Family Court Act § 842(j) order of protection statute amended, effective April 23, 2008

The statute regarding orders of protection was amended to include the following:

- In any proceeding in which an order of protection or temporary order of protection or a warrant has been issued under this section, the clerk of the court shall issue to the petitioner and respondent and his counsel and to any other person affected by the order a copy of the order of protection or temporary order of protection and ensure that a copy of the order of protection or temporary order of protection be transmitted to the local correctional facility where the individual is or will be detained, the state or local correctional facility where the individual is or will be imprisoned, and the supervising probation department or division of parole where the individual is under probation or parole supervision.

CPLR § 5241 income execution statute amended, effective May 27, 2008

If a debtor is served with a notice of income execution for support enforcement, he or she has 15 days to allege a mistake of fact. In the past, this had to be done by petition in a special proceeding. Now, the debtor can move by order to show cause or motion within the action in which the order for support that is sought to be enforced was granted.

Author's note: This amendment saves the creditor time and money by allowing the enforcement motion to be brought under the same index number. In addition, it serves to protect the creditor because the same judge handling the other aspects of the parties' case will decide the enforcement motion.

Legislative intent of DRL § 250 tolling of statute of limitations of prenuptial agreement amended

Section 2 of bill number A. 9822,[1] enacted May 21, 2008

The change to DRL § 250 tolling the statute of limitations during marriage and imposing a three-year statute of limitations became effective July 3, 2007. Prior to the May 21, 2008 enactment of bill number A. 9822, the bar was confused with regard to the legislative intent surrounding DRL § 250. Did the legislature intend that tolling would not be extended to all agreements barred by the six-year state of limitations on or before July 2, 2007? Or did the legislature intend that an action commenced on or before July 2, 2007, which would be barred by the six-year statute of limitations, continues to be barred, but an action not yet commenced on or before July 2, 2007, which if commenced, would be barred by the six-year statute of limitations, is entitled to the protection of tolling?

Section 2 of bill number A. 9822 now provides that DRL § 250 "shall not apply to any agreement where the commencement of an action thereon was **previously** barred **by a court** under the civil practice law and rules in effect immediately prior to such effective date." The words in bold were added. It is now clear that the amendment to DRL § 250 extends the tolling protection to agreements that would have been barred on or before July 2, 2007, provided a court did not previously bar an action relating to that agreement because it violated the six-year statute of limitations.

Author's note: Unfortunately, the legislative intent is still unclear. One wonders if a party who commenced an action on or before July 2, 2007—and there has not yet been a determination of whether the action is barred by the statute of limitations—whether that party could withdraw it (as of right if issue had not yet been joined or with court permission if issue has been joined) and re-file after July 3, 2007, and receive the protection of the amendment.

Access to qualified mental health professionals 22 N.Y.C.R.R. 680.1-680.10, effective July 1, 2008

These court rules were added to ensure that the court and the parties have access to qualified mental health professionals to evaluate adults and children in areas of custody, visitation, child abuse and neglect, family offense cases and the like. A panel of social workers, psychologists and psychiatrists shall be established in the First and Second Judicial Departments to aid such court appointments. A mental health certification committee shall be formed to assist with, *inter alia*, the selection of mental health professionals to be part of the panel.

Failure to pay support will be a crime

New York Penal Law § 260.05(2), effective November 1, 2008:

Pursuant to New York Penal Law § 260.05(2), commencing November 1, 2008, the following will become effective:

> 2. being a parent, guardian or other person obligated to make child support payments by an order of child support entered by a court of competent jurisdiction for a child less than eighteen years old, he or she knowingly fails or refuses without lawful excuse to provide support for such child when he or she is able to do so, or becomes unable to do so, when, though employable, he or she voluntarily terminates his or her employment, voluntarily reduces his or her earning capacity, or fails to diligently seek employment.

If a person is convicted of the non-support of a child in the second degree, he or she is charged with a Class A misdemeanor.

Similarly, commencing November 1, 2008, New York Penal Law § 260.06(1)(a) will be added so that if the party is guilty pursuant to New York Penal Law § 260.05 and was previously convicted within the preceding five (5) years for a crime in that same section, the party will be charged with non-support of a child in the first degree, which is a class E felony.

Author's note: Finally, a law that has some teeth in the crackdown on deadbeats. However, it is strange that this new law applies only to the failure to support children under the age of 18, when a child is entitled to be supported in New York until the age of 21 or sooner emancipated.

Orders of protection extend to people who have had an "intimate relationship"

Family Court Act § 812 (1)(e) added, effective July 21, 2008

Previously, Family Court was authorized to grant civil orders of protection only to spouses, family members, or the parent of a couple's child. On July 21, 2008, Governor David A. Paterson signed Senate bill No. 8665, effective immediately, which adds subdivision 1(e) to Family Court Act § 812 to extend civil orders of protection to people who have had an "intimate relationship" with the abusers. The victim does not need to live with the abuser, or have had a sexual relationship with the abuser, to quality as "intimate," and the group of protected class includes dating and same-sex couples. The subdivision lists factors the court should consider when determining the existence of an "intimate relationship":

> Persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship."

Family Court Act §§ 446, 550, 551, 655, 656, 759, 841, 842, 1056, Criminal Procedure Law § 530.12 and Judiciary Law § 212(2) were amended to reflect this change. Criminal Procedure Law § 530.11 was amended to mirror Family Court Act § 812.

Court of Appeals Round-up

Valuation date

Mesholam v. Mesholam, 2008 NY LEXIS 1824, N.Y. Slip Op. 5778 (June 26, 2008)

The wife brought a divorce action in 1994, and, five years later, made a motion to discontinue the action. Simultaneously, the husband sought permission to interpose a counterclaim. The wife's motion was granted, and the husband's motion was denied. Immediately thereafter, the husband brought his own action for divorce, which was granted on the basis of constructive abandonment. While the trial court held that the husband's pension had to be valued as of the commencement date of the husband's current action pursuant to DRL § 236B(4)(b), the Appellate Division determined that the valuation date was the commencement date of the prior action. The Court of Appeals modified the appellate court's order and determined that the valuation date was the date of the second action, because the DRL only permits the valuation date to be between the date of the commencement of the action and the date of trial. The court noted, however, that the circumstances of the prior action could be considered a factor in the equitable distribution of the asset. The case was remanded to the trial court for a further determination.

Author's note: This seems to be an unfair result. If the husband brought a counterclaim for a divorce, he would have had the benefit of a valuation date five years earlier. The practitioner should note that a counterclaim is the best way to protect the client.

Family Court lacks subject matter jurisdiction to modify a separation agreement

Johna M.S. v. Russell E.S., 10 N.Y.3d 364 (2008)

When the parties separated, they executed a written separation agreement. No divorce action was commenced. The separation agreement provided that the husband would pay the wife $100 per week in maintenance and $250 per week in child support. The wife's Article 4 petition expressly stated that it was an application for an upward modification of maintenance, premised on the insufficiency of current maintenance as a result of a loss of certain Social Security benefits. The Court of Appeals found that although the parties' separation agreement purported to permit the Family Court to treat any application by the wife as *de novo*, such language could not confer jurisdiction upon Family Court. Moreover, in practical terms, the wife was not presenting a new, or *de novo*, application for maintenance to the Family Court; rather, she was simply seeking increased maintenance from that provided under the separation agreement. Consequently, the Family Court was without jurisdiction to entertain the petition, and properly dismissed the action.

Justice Smith issued a dissent, stating that pursuant to FCA § 411 the Family Court has exclusive original jurisdiction over proceedings for support or maintenance. Although Family Court lacks equity intervention, where a husband or wife seeks the intervention of equity to alter the terms of an agreement—a remedy amounting to reformation or rescission—they must seek it in Supreme Court. But here, the wife is not asking for equitable relief that would change the terms of the parties' agreement. She is asking for relief expressly permitted by the agreement's terms: "The Wife shall not be foreclosed from seeking additional maintenance." There is no need for Family Court to exercise the equitable powers; rather, it need only do what the statute permits it to do—award maintenance. Justice Smith noted that the court focused too much on the label of the application of "modification" when the parties could have called the initial $100 weekly payment an interim arrangement, and treated permanent maintenance not as a "modification" of the interim amount, but as a separate issue that the agreement did not decide.

Other Cases of Interest

Change in Custody

Manfredo v. Manfredo, 2008 NY App. Div. LEXIS 5962, No. 2007/0215 N.Y. Slip Op. 6158 (2d Dep't July 1, 2008)

The father's motion for a change in a joint-custody agreement to an award of sole custody was affirmed on appeal. A sufficient change in circumstances was shown to warrant a modification in custody under FCA § 652(a) where the relationship between the mother and the child

had deteriorated to the extent that they had engaged in verbal and physical altercations. The mother's husband had brought the child, who was 14 at the time, to the father's home after an argument with the mother, and the child did not wish to return to the mother's home. Although the child's wishes were not controlling, they were entitled to great weight. Based on the animosity between the parties, joint custody was no longer appropriate.

Counsel Fees

Bonus Agreements

Sheresky Aronson & Mayefsky, LLP v. Whitmore, 851 N.Y.S.2d 71 (Sup. Ct., NY Co. 2008)

The trial court's dismissal of the law firm's action against the client to recover a bonus was affirmed on appeal. The premium-fee clause in the parties' retainer agreement provided as follows:

> We reserve the right to discuss with you at the conclusion of your matter your payment of a reasonable additional fee to us, in excess of the actual time and disbursements, for exceptional results achieved, time expended, responsiveness accorded or complexity involved in your case. However, no such fee will be charged to you without your consent.

The court found that this clause does not satisfy the requirements of 22 N.Y.C.R.R. 1400.3(8) and the defendant's oral agreement to pay the premium fee of $150,000 is unenforceable.

Judge Adrias concurred. But in a separate opinion, he emphasized that the holding does not criticize the proposed bonus agreement, and that the courts should approve such agreement when fairly negotiated and properly drafted (with notice to the client how such fee would be calculated). The judge supported the bonus agreement as a method to encourage counsel to expedite the resolution of a matrimonial matter.

Author's note: The lesson to be learned is that an agreement to agree is not an agreement.

Interim Counsel Fees

All too often, the courts have deferred a request for interim counsel fees in a divorce action until trial, which is a grave injustice to the non-monied spouse. Two recent cases have put a stop to such practice, making the only consideration whether the monied spouse should be required to advance the fees for the non-monied spouse, not whether the monied spouse should be ultimately responsible for said fees.

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

The Second Department 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 nor 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." The court suggested examples of failure to show "good cause," such as "where the required fees are unsubstantiated or clearly disproportionate to the amount of legal work required in the case."

In this seven-year litigation, the wife non-monied spouse sought interim counsel fees in the sum of $35,000, the amount she currently owed her attorney. The wife's interim award of $20,000 had previously been consumed. The husband was a vascular surgeon, earning $420,100 per year, while the wife worked part-time as an early intervention therapist, earning $4,015 per year. The wife argued that the husband had obstructed discovery and caused severe delay. The husband argued that the wife was overly litigious.

The court denied the wife's application and deferred it to trial, claiming that the trial court will be in a better position to determine the financial circumstances of the parties, the nature and complexity of this case, which includes the valuation of a medical practice, the legal services rendered, and the expertise of the attorneys. The wife sought renewal, arguing that now she owed her attorney $159,000, and again requested an award of the original $35,000 plus an additional $40,000. The application was denied again, but counsel's request to be relieved was granted.

The Second Department reversed, and awarded the wife $75,000, finding that deferring counsel fees to trial is a grave injustice to the non-monied spouse, quoting the reasoning of the Court of Appeals' cases, *O'Shea v. O'Shea*, 93 N.Y.2d 187, 689 N.Y.S.2d 8 (1999) and *Frankel v. Frankel*, 2 N.Y.3d 601, 781 N.Y.S.2d 59 (2004) regarding protecting the non-monied spouse and creating a level playing field. The lower court should only consider whether the husband should be responsible for advancing the funds to cover the wife's counsel's fees, not whether he should be ultimately responsible for paying them. The issues of whether the husband's litigation tactics caused delay or whether all of the wife's counsel's services were necessary for her defense of the action can ultimately be determined at trial.

Cohen v. Cohen, 2008 N.Y. Misc. LEXIS 3890, 239 N.Y.L.J. 121 (June 17, 2008) (J. Ross)

In the wake of *Prichep v. Prichep*, which Judge Ross praised as "cogent" and "well-written," the court awarded the non-monied wife *pendente lite* counsel fees in the sum of $30,000, the amount actually owed to her counsel.

The husband earned $630,000 last year, whereas the wife earned nothing. The court deferred to trial the issue as to which party would be ultimately responsible for said fees. In addition, if the husband failed to pay the counsel fee within the time required, the attorney was entitled to an automatic money judgment.

Judge Ross modified his part rules to require oral argument on all motions for interim counsel fees in order to promptly determine the issue.

Endnote

1. I did not cite a corresponding Senate bill number because on April 29, 2008, Assembly bill number 9822 was substituted for Senate bill number 6834.

Wendy B. Samuelson is a partner of the law firm of Samuelson, Hause & Samuelson, LLP, located in Garden City, New York. She has written literature for the Continuing Legal Education programs of the New York State Bar Association and the Nassau County Bar Association. She authored two articles in the New York Family Law American Inn of Court's Annual Survey of Matrimonial Law. Ms. Samuelson has also appeared on the local radio program, "The Divorce Law Forum." She was recently selected as one of the Ten Leaders in Matrimonial Law of Long Island for the under age 45 division.

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A special thanks to Carolyn Kersch for her research assistance in the New Legislation section of this article.

This article is dedicated to my husband in celebration of our fifth wedding anniversary (August 25, 2008).

Letter to Editor

Dear Editor:

In the recent article (summer issue) entitled "The Case for Parental Access Guidelines in New York," Michael P. Friedman does not mention the Parenting Plan developed by the American Academy of Matrimonial Lawyers. I was national President of the Academy and I mention this with great pride since it was adopted during my term in 2005.

The Committee of the Academy, which put together the comprehensive Parenting Plan, reviewed plans from various jurisdictions. We also met with Dr. Joan Kelly, who was a major architect of the Arizona parental guidelines (with developmentally appropriate schedules) cited by Mr. Friedman in his article.

The Academy's Parenting Plan contains numerous options and schedules. We felt that parents and their lawyers should have a variety of choices which would force them to think about what might be best for their child(ren) at various stages. The media, in referring to the Academy's Plan, frequently mentioned the fact that we provided unique provisions, including pet care and attendant costs.

The Academy Plan can be found under "articles" on the Academy website (AAML.org). The Academy national office can be contacted at 312-263-6477. The Academy address is 150 North Michigan Avenue, Ste. 2040, Chicago, Ill. 60501.

Barbara Ellen Handschu

Ms. Handschu is a former Chair of this Family Law Section. She practices in Buffalo and New York City, handling trial and appellate work.

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar.

Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word, (pdfs are NOT acceptable), along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

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