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Notes and Comments

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Chen v. Fischer: Was It Judicial Legislation or Just Some Old Black Magic?

Chen v. Fischer, 783 N.Y.S.2d 394 (App. Div. 2004), recently decided by the Appellate Division, Second Department, is a remarkable case. It appears to be an example of judicial legislation, and an attempt to limit tort actions between marital partners, since the doctrine of *res judicata* appears not to be applicable to such litigants. Moreover, to compel a marital partner who may have a cause of action for damages for assault and battery to litigate such claim within a marital action, or other similar personal injury claims accrued because of their spouse's wrongful conduct, could cause irreparable harm to such a litigant, since an award obtained, although separate property, could nevertheless be subject to equitable distribution, resulting in the wrongdoer sharing in the award for damages—a grossly unfair result. This circumstance was considered in *Maharam v. Maharam,* 177 A.D.2d 262, 575 N.Y.S.2d 846 (1st Dept. 1991), a case cited in *Chen*, when it held:

> We recognize that if plaintiff is successful in her tort action, the defendant would be paying damages to the plaintiff with funds that later may be determined to have been, in part, marital property.

Such a result could mean that the plaintiff would be responsible for paying one half of her own damage. Moreover, the *Maharam* court observed possible further prejudice might befall such a spouse when it explained:

> It is clear that before making an equitable distribution award, the court will have to take into account the resolution of the plaintiff's tort claims, as a substantial award thereunder would have a significant impact upon "the probable future financial circumstances of each party."

In mulling over this vexatious issue, I kept hearing the lyrics of Cole Porter's "Old Black Magic" swirling in my head, and could not resist the query of whether the court had that old black magic in its spell when it rendered its decision.

This case either wittingly or unwittingly had the effect of limiting, if not judicially repealing, General Obligations Law § 3-313(2), which permits interspousal tort actions. Additionally, it declared a permissive statute, CPLR 601(a), which allows joinder of as many claims a party may have against another party, to be mandatory in a matrimonial litigation, forcing a plaintiff

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or a counter claiming defendant to include any accrued tort action in the divorce proceeding. In doing so, the court grasped for legal precedents to sustain its position, citing a New Jersey decision that held tort actions should be brought "in conjunction" with an action for divorce. One of the reasons advanced for reaching its conclusion in *Chen* that tort actions should be brought within the divorce action, is that the recovery in money damages would be subject to equitable distribution, and if it was brought outside the divorce action, it would not be subject to it. It is precisely for this reason that the rationale in *Chen* was flawed. Fairness and equity would seem to mandate that any award obtained against the wrongdoer should not be subject up to a fifty percent discount of the damage award, which would take place in the matrimonial context where all marital assets (including the damage award) are equitably distributed.

"What the appellate court failed to recognize is that the marital action might pollute the tort action and diminish its legitimacy in the eyes of the trial court . . . "

The court seemingly took liberties with the doctrine of *res judicata* in holding:

> Societal needs, logic, and the desirability of bringing spousal litigation to finality now compel us to expand upon the rule espoused in these cases, and hold that an interspousal tort action seeking to recover damages for personal injuries commenced subsequent to, and separate from, an action for divorce is likewise barred by claim preclusion.

Res judicata is defined in Black's Law Dictionary as a doctrine that limits successive lawsuits where the same issues were litigated or could have been brought in a previous action.

In hedging its conclusions the *Chen* court explained:

> We are cognizant that, unlike the equitable nature of the division of marital property in a divorce action, the aims of a tort claim are the assignment of fault and the award of damages. Marital fault, however, is relevant in New York divorce actions, and indeed is even relevant to the issue of equitable distribution in instances where it is found to be egregious enough to warrant its consideration. (see Havell v. Islam 301 AD2d 339).

[***Editor's note:*** *When was the last time that egregious fault was found to limit a maintenance award?*]

> It is therefore reasonable to expect a spouse to assert a cause of action seeking to recover damages for personal injures caused by the actions or the course of conduct of his or her spouse during the marriage within the divorce action where the same tortious activity would constitute grounds for divorce.

What the appellate court failed to recognize is that the marital action might pollute the tort action and diminish its legitimacy in the eyes of the trial court, as occurs in practice where trial judges often apply pressure to the parties and their counsel to withdraw the tort claim in the spirit of compromise, and as a vehicle to settle the case.

To grasp these principles and better understand the decision made by the court to adopt a policy that would limit matrimonial litigants from bringing lawsuits that would otherwise be permissible between unmarried persons, the facts of the case should be carefully reviewed.

Mrs. Xiao Chen, who held such title for but nine months, defended an action for divorce brought by her husband Ian Fischer in the Supreme Court of Westchester County on March 11, 2001, some ninety days after their marriage. Fischer alleged a cause of action for cruelty, at which time Chen counterclaimed for divorce on the ground of cruelty, and also asserted a cause of action for fraud, seeking to obtain money damages. Thereafter and on October 15, 2001, the parties entered into a stipulation resolving their claims for divorce, each withdrawing their allegations of cruelty (except for a "benign" allegation of cruelty which was not disclosed in the decision), and a dual divorce was granted by the court. Once fault was resolved, the remaining issues were tried, which included equitable distribution and the wife's claim of fraud, which was ultimately dismissed for lack of proof. On May 8, 2002, a reciprocal judgment of divorce was granted to the parties. While the action for divorce was still pending and after their stipulation of settlement resolving fault, and after the trial had commenced on all ancillary issues, Chen instituted a new cause of action for personal injuries allegedly sustained during the marriage, but not joined in the matrimonial action.

Apparently, Mrs. Chen failed to include the original pleadings in the record on appeal, and the appellate court only had before it the wife's second amended

complaint, dated May 10, 2002 and the husband's amended answer. The second amended complaint asserted two causes of action, one to recover damages for intentional infliction of emotional distress, and the other tort damages for assault and battery alleging, *inter alia*, that Fischer slapped her on her face and ear. There were allegations in the emotional distress cause of action that the husband repeatedly accused the wife of being unfaithful, threatened to lock her out of the marital residence, refused to permit her to socialize with friends, physically and emotionally abused her for failing to have sex with him, filed a false police report and referred to the wife as a slave and demanded subservience from her. [***Editor's note:*** *These allegations appear to be more consistent with cruelty than emotional distress.*] The assault charge alleged the husband had struck her on the face and ear. Significantly these precise charges were not included in the cruelty cause of action in the second amended complaint. Nevertheless the husband alleged an affirmative defense of *res judicata*, arguing that the wife's allegation for assault was substantially (but not exactly) the same as contained in her cruelty action for divorce, and when the stipulation of settlement on grounds was made, the wife had withdrew all but one allegation of cruelty (apparently not one for assault), and failed to expressly reserve her right to make the same or similar allegations in a later separate action.

The lower court dismissed the wife's personal injury claim as barred by the doctrine of *res judicata*, more specifically claim preclusion, since the personal injury cause of action was ". . . predicated on *virtually* identical factual transactions that were at issue in the matrimonial action." The appellate division affirmed this finding!

In deciding for yourself whether the result was justified by the facts in this case, one must review the doctrine of *res judicata,* as well as *claim preclusion.* Black's Law Dictionary defines *res judicata* as follows:

> A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute part to a subsequent action involving the *same claim*, demand or cause of action. . . . The sum and substance of the whole rule is that a matter once judicially decided is finally decided [emphasis added].

Claim preclusion is defined by Black's as follows:

> Term means that when a particular issue has already been litigated, further litigation of same issue is barred. . . . [I]t is in substance that any fact, question or matter in issue and directly adjudicated or necessarily involved in the determination of action before court of competent jurisdiction in which judgment or decree is rendered on merits, is conclusively settled by judgment therein and cannot be relitigated in any future action between parties or privies, either in same court or court of concurrent jurisdiction, while judgment remains unreversed or unvacated by proper authority, regardless of whether claim or cause of action, purpose or subject matter of two suits is same.

The operative words in the issue preclusion definition appear to be "directly adjudicated." The issue of whether Mrs. Chen had sustained money damages by reason of her husband's alleged wrongful behavior was never litigated even though it might have been necessary for the court to determine whether the husband was guilty of cruel and inhuman treatment as defined by the Domestic Relations Law. Moreover, although the appellate court thought that the *Boronow* decision by the Court of Appeals substantiated its findings, it actually was inapposite to its holding. In *Boronow*, the trial court considered and litigated the issue of title to the marital residence. Since the matter had already been litigated, the Court of Appeals held that a subsequent action to contest title to the same real property would be barred by the doctrine of *res judicata*. Put another way, the high court would not approve what would be tantamount to appellate review by permitting another action to be litigated.

The *Chen* court went on to reflect that interspousal tort actions relating to title to property commenced after an action for divorce are precluded by the doctrine of *res judicata*, citing *Rakowski v. Rawkowsi,* 109 A.D.2d 1, 489 N.Y.S.2d 929 (1985), in its decision, which was a case where a spouse following a divorce attempted to obtain a constructive trust against the marital residence. While such holding pertaining to real property is certainly correct, since title could be adjudicated by the marital court, it does not appear that the same holding should be applied to the *Chen* situation, where no money damages were sought and the tort cause of action was not litigated in the divorce case.

Unfortunately *Chen* reached its decision based upon "societal needs" rather than *stare decisis,* in deciding to expand the rule promulgated by the Court of Appeals.

For the court to suggest that marital fault is the same as fault in a tort action, is stretching the definition of the terms. It found in this regard, ". . . where the same tortious activity would constitute grounds for divorce," it would be barred in a subsequent suit. But the court failed to discuss the fact that there are many contested cases seeking divorce on the grounds of cruelty, which would be insufficient to obtain a divorce, but nevertheless actionable for recovery of personal injury damages.

Later in its decision the court noted that there is a "factual overlap between an action for divorce and an action . . . to recover damages for personal injuries," although the observation escapes me. The court also reflected, *in dicta*, that judicial economy as well as fairness supported its view that the tort cause of action would be barred by the doctrine of *res judicata*, and then went on to opine, after quoting from *Reilly v. Reid,* 45 N.Y.2d 24 (1978), that to permit the tort action to be separately litigated would ". . . violate the societal policy of proscribing parties from litigating related matters in a piecemeal fashion." The question must then be asked whether this conclusion is warranted where the tort action might be compromised by the court in the matrimonial action, and where the successful party might actually have to "share" the damage award with his or her own spouse. The court apparently felt that this diminution of damages was a further reason to insist that the actions be tried together, rather than separately. We find no rational support for this view for the reasons previously expressed in this article. To hold that if the tort action was preserved for later litigation would provide a "sword of Damocles" over the head of a matrimonial litigant, really begs the question of whether a tort action could receive the same attention in matrimonial litigation as it would in a separate action.

The court stated that although its ruling might further complicate divorce litigation, a trial court could sever the tort action and hold a separate trial. But once again, it would still be tried before the matrimonial judge, who might not find a tort action to be "warranted" between spouses.

Finally, the court determined that Chen's argument that she did not withdraw her allegations of cruelty "with prejudice" and therefore could bring a separate action, was found to be without merit because Chen was required to ". . . expressly reserve her right to pursue the claim in a separate action." However, it did acknowledge that Fischer could have acquiesced in Chen's separate tort action (which was brought while the divorce action was still pending), if Fischer failed to allege as an affirmative defense that there was another action pending for the same relief. Nonetheless, the court ruled that the record was incomplete, and it could not determine such issue without the original pleadings before it. It then held:

> On this record, therefore, Chen failed to establish that Fisher waived the affirmative defense regarding the right to object to the maintenance of the second action seeking to recover damages for personal injuries, by acquiescence.

In so holding, did the court forget it had the right to remand the case, or call for the missing pleadings that was part of the original record, in order to determine the issue? This is yet another reason for feeling that in the end, the court's ultimate conclusion constituted an act of judicial legislation. We await the view of the Court of Appeals, provided it reaches the high court for determination.

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The Sky (Is)(Is Not) Falling: *Crawford v. Washington* and the New Law of Confrontational Hearsay

By W. Dennis Duggan, F.C.J.

We've all heard of mission creep. Some task or policy starts out with one—usually limited—goal and ends up either doing something entirely different or something so much broader that we forget what the original purpose was. For example, in foreign policy we often see a limited police action expand into nation building. The Judiciary, not to be outdone by the Executive Branch, has sometimes engaged itself at both ends of the creep spectrum. For example, there is the phenomenon that could be called "mission jump." To go along with the principle of procedural due process, the courts invented the concept of "substantive due process." This became the Louisiana Purchase of judicial review. With the tool of substantive due process, courts could review all laws to determine if they were good social policy.[1]

So, you might ask, doesn't substantive due process review protect us from arbitrary legislative action? Well, yes it does. But what protects us from arbitrary judicial action? Not the voting booth to be sure. One should remember that during the "Lochner Era" (1905-1937), the Supreme Court protected us from workplace safety, racial and gender equality, and other social legislation—all based on our freedom to contract to work twelve-hour days in an unvented bakery or six days per week in a dust-filled coal mine. All the ideas that the Lochner Supreme Court rejected, we now take for granted as sound public policy.[2]

With judicial review, we also see something quite the opposite of mission creep—let's call it "mission shrink." This happens when a broad principle of constitutional law is eroded by exceptions "discovered" by the Supreme Court. For example, the Fourth Amendment requires that search warrants must be based "on probable cause supported by Oath or Affirmation . . ." and that the right of the people to be secure "against unreasonable searches and seizures, shall not be violated." However, there are so many exceptions to the warrant requirement that a police officer needs Westlaw™ in the cruiser or she acts at her peril. So, it is surprising when the Supreme Court says "whoa!" and reins in this mission shrink process, as it did recently in *Crawford v. Washington* (541 U.S. 36, March 8, 2004). If you are a due process freak you will love this decision. If you want to lock up all abusers of women and children and throw away the key, you will hate it.

This case involved the Sixth Amendment's confrontation clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him." Since this clause would seem to prohibit the admission of any evidence at trial not produced by a witness, *Crawford* gives us a good excuse to review how the confrontation clause was eroded by the Supreme Court. It was eroded when the Supreme Court "discovered" exceptions to the Framers' intent. These exceptions allowed hearsay to be admitted at trial if the hearsay was "firmly rooted" in the law of evidence or possessed "indicia of reliability." This made the law of hearsay co-extensive with the confrontation clause, which *Crawford* now holds was a mistake.

"If you are a due process freak you will love this decision [Crawford]*. If you want to lock up all abusers of women and children and throw away the key, you will hate it."*

So what's wrong with hearsay anyway? After all, even our knowledge of our own birth date is based on hearsay. We make most of the important decisions of our lives and the lives of our children based on hearsay. As we shall see, there is nothing inherently wrong with hearsay and the Constitution permits a lot of it to be used in criminal prosecutions. The confrontation clause is a procedural device meant to insure fairness, reliability, and prevent governmental overreaching. The first ten amendments to the Constitution reflect the well-grounded fear held by the American people who ratified the Constitution that government, given the chance, will oppress the governed. Our ancestors knew their English and European history. The right of the accused to confront the witnesses against him not only enhanced the reliability of criminal verdicts, but provided a brake on the power of government. It should be noted that the Constitution does not state that criminal verdicts must be made by a unanimous vote of the jury or that the jury must be twelve in number or that verdicts must be beyond a reasonable doubt. The beyond-a-reasonable-doubt standard did not come into play until the mid-1800s. It does say, very clearly, that the accused gets to face his accusers.

In *Crawford*, a husband, out to revenge an attempted rape of his wife, stabbed the attacker with a knife during a fight. He claimed self-defense. His wife, who accompanied him to the face-off, gave the police a sworn deposition that was mildly at odds with her husband's description of the fight. At trial, the prosecution sought to introduce the wife's deposition. The wife was not available to testify because the husband asserted his marital privilege. However, Washington State law had an escape valve for the marital privilege restriction that allowed spousal testimony into evidence if it met some other hearsay exception. The prosecution relied on Washington's declaration against penal interest exception to get the wife's statement before the jury. Crawford was convicted and he appealed.

On appeal, Crawford argued a confrontation right violation. That brought into play the Supreme Court's decision in *Ohio v. Roberts* (448 U.S. 56 (1980)). *Roberts* held that an out-of-court statement of an unavailable witness was admissible if it fell within a "firmly rooted hearsay exception" or bore "particular guarantees of trustworthiness." The Washington Supreme Court sustained the verdict on the trustworthiness issue. The United States Supreme Court reversed the Washington Supreme Court and overruled its *Roberts* holding, 9-0.[3]

Justice Scalia, writing for the Court, traced the origins of the confrontation clause back to Roman Law[4] up through the treason trial of Walter Raleigh in 1603, in which Raleigh was convicted based on evidence contained in un-confronted depositions.[5] Scalia concluded that if "testimonial" evidence was to be used at trial, the defendant must have been afforded a prior opportunity to cross-examine the witness. Gone is the *Roberts*' indicia-of-reliability rule. If the Pope gives a statement to the police or testifies *ex cathdra* (i.e., with infallibility) before a grand jury, that statement will never be admissible in an American criminal trial because the accused had no opportunity to cross-examine. While out-of-court statements made in the furtherance of a conspiracy will still be admissible because they are part of the criminal enterprise, the interlocking confession rule is also out the window. That rule permitted a co-defendant's confession to be admitted at a joint trial if the statements were so similar that they "interlocked." The ludicrousness of the interlocking confession rule is in plain view in the *Crawford* case. The Washington Supreme Court approved the use of the wife's out-of-court statement because, " . . . when a co-defendant's statement is virtually identical to that of a defendant, it may be deemed reliable" (54 P. 3d 656, 663). This was the argument of the State on appeal. However, at trial, the State had argued out of the other side of its mouth. It claimed that the wife's statement was "damning evidence" that "completely refutes" the defendant's claim of self defense. (This must be the interlocking-refutation-confession corollary exception to the hearsay rule.)

According to the Supreme Court, the flaw in their *Roberts* holding was this:

> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing credibility with a wholly foreign one . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes (*Crawford*, p. 27).

Crawford closes the *Roberts* door which required the judge to weigh the reliability of out-of-court statements of an unavailable witness. However, *Crawford* now opens another door which requires the judge to determine if the statement is testimonial. If it is, it's out. If it's not, it's in—assuming it's the good type of hearsay. How wide the "testimonial" door will swing, no one knows. *Crawford* does not reach, and therefore prohibit, the long-standing exceptions to the hearsay rule such as for business records or dying declarations. It is not all that clear why this is so. Since there is no debate material available for this particular clause, Scalia must resort to a contemporary dictionary and a search for the evils that the Framers were presumably attempting to prevent. The best explanation offered is that the Framers could not have intended to abrogate the entire body of hearsay law by means of the confrontation clause, but no Framers ever said that and the law of hearsay was both fluid and inchoate at the time, so how could we know what the Framers intended?[6]

The confrontation clause, the Court explains, is addressed only to witnesses. Scalia notes that according to the 1828 edition of Webster's dictionary, a witness is one who "bears testimony." "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." If it's testimonial, the accused gets to cross-examine it. So, what is testimonial? The short list would include affidavits, custodial examinations, confessions, depositions, prior testimony that the defendant was unable to cross-examine, "or similar pretrial statements that the declarants would reasonably expect to be used prosecutorially" (p. 15). "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial'" (p. 33).

Crawford has raised some alarm bells among prosecutors who fear that it will impede their ability to prosecute domestic violence and child abuse cases. No doubt, the Constitution and the Bill of Rights sets a high bar for prosecutors. But *Crawford* will not cause the sky to fall. A large majority of domestic violence and abuse cases are prosecuted in family courts. The confrontation clause does not apply to civil cases and the more generalized due process clause gives the law of evidence a wide playing field. Vulnerable witness statutes, which allow children to testify by video outside the courtroom, have passed constitutional muster.[7] The Court also noted the continuing validity of the rule of "forfeiture by wrongdoing." For example, a defendant who makes a witness unavailable by threats may find himself confronted by that witness' uncross-examined grand jury testimony.[8] Neither does *Crawford* restrict expert testimony on such topics as the battered woman syndrome or child abuse accommodation syndrome which are used to explain counter-intuitive behaviors or statements of victims of certain types of crimes. 9-1-1 calls will still be admissible if they constitute excited utterances.

On the other hand, specific DV hearsay exception statutes, such as those enacted in California (O.J.'s Law) and Oregon, must be brought back to the drawing board.[9] Domestic Violence Incident reports will not pass the *Crawford* rule.[10] No doubt, prosecutors will be challenged in their efforts to prosecute domestic violence cases without the cooperation of the victim. (Ironically termed "evidence based prosecutions.") However, this might not be a bad thing if it results in structural changes in the way we address family violence.

A victim of family violence refuses to cooperate with the prosecution for two basic reasons. First, she may be making a very considered and intelligent decision that she does not want that level of State intrusion into her private life. In these cases, for the State to say: "We know better than you what's best for you," is arrogant. Second, if the victim is refusing to cooperate because she is fearful that the State cannot protect her, then the process is broken because the State is failing in its first duty to protect its citizens from both crime and the fear of crime. (Twenty witnesses have been murdered in New York City over the past fifteen years.) In both cases, the State can find itself in violation of the Hippocratic rule that applies to all human endeavor: first, do no harm.

Woody Hayes, the great Ohio State football coach, once explained his fondness for the running game by saying: "When you pass the ball, three things can happen and two of them are bad." The same thing can be said of the victimless prosecution of family violence cases. Sooner or later the batterer will get out of jail. In the case of the victim who has made an intelligent decision not to seek prosecution, that prosecution may have permanently terminated the family healing process. In the case of the fearful victim, she will be at a heightened risk when her attacker has been released and she will be in no better position to protect herself. Having been cast into permanent victimhood, she will be provided with no more help than a direction to follow the yellow brick road which will lead not to Oz but, more likely, to a relationship with a new person who will batter her. The circle will remain unbroken.

The admissibility of the out-of-court statement of a young child who is the victim of abuse is also a nettlesome problem. No one has come up with a very good solution that balances the protections provided by the confrontation clause and the societal need to punish the perpetrators of serious crime. For example, in a larceny prosecution, we would not let a social worker testify that she interviewed a child witness who stated to her: "I saw my next door neighbor steal the car." Why then would we let the same social worker testify in a sex abuse prosecution that the child stated; "My daddy hurt my pee-pee." Don't the same confrontational issues come into play? At another level, the unreliability of young children as accurate reporters of past events is well known. The absence of uniformly applied, scientifically based interview techniques is widespread. Most often, by the time a child victim of a sex crime is interviewed by a competent evaluator, the child has been previously questioned by a half dozen unqualified interviewers. The videotaping of the taking of a child's statement is the exception, not the rule. The "testimonial" test offered by Justice Scalia stumbles badly when the witness is a child. Under that test, the statement of the child given to a trained state sex abuse investigator would not be admissible because it would be the equivalent of a police interview. However, the same statement made by the child to the mother-in-law who hates the father could be admissible as a non-testimonial "casual remark."

What about statements made to a physician for medical treatment? A notation in the medical chart of a shooting victim that "my boyfriend shot me with a shotgun," would be redacted to eliminate the reference to the boyfriend because the identity of the assailant is not germane to treatment. But, what if the notation stated: "child stated that her father touched her vagina." Isn't the identity of the perpetrator relevant to how a psychologist might treat the child? No doubt that it is. However, the medical records hearsay exception assumes that a person will tell his doctor the truth because he wants to receive the right medical treatment and, therefore, such out-of-court statements are reliable.[11] This assumption is strained when the information comes from a young child who would not have that same awareness as an adult of the importance of conveying accurate information. In fact, why is the

child's disclosure to a physician more reliable than that made to the sex abuse investigator, which would not be admissible under the *Crawford* test?

The Supreme Court looked at this situation in *Idaho v. Wright* (497 U.S. 805 (1990)). In *Wright*, the Court held that the confrontation clause was violated when a pediatrician was allowed to testify about a remark made to him by his three-year-old patient. "When I asked her 'Does daddy touch you with his pee-pee,' she did admit that." The Court analyzed the issue under the *Roberts* firmly rooted / indicia-of-reliability test. First, it agreed with the state courts that the child was "unavailable" because, at three years old, she was not able to communicate in court to a jury in a meaningful way, and accordingly, was not available to testify. Second, it agreed that the residual hearsay rule of *Idaho* was not a "firmly rooted" hearsay exception.[12] In finding that the child's statement did not meet the reliability test, the Court held that reliability must be measured by the circumstances surrounding the making of the statement and could not be bootstrapped by other evidence, external to the making, that corroborated the statement. The Court went on to say: "Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial."

So, how do child sex abuse victims get their voice before a jury? Both *Crawford* and the reliability test provide significant hurdles. I am not sure what direction the analysis will take, but if the following protocols are met, I believe the courts will find a way. First, the child's testimony cannot be polluted by multiple untrained interviewers. Second, the interview must be done using a *Daubert*-tested interview protocol. Third, the interview must be videotaped. Fourth, prosecution-based interviews will never pass the *Crawford* rule. To insure neutrality, the interviewing agency should be attached to a medical facility and not be an arm of the prosecution. One need only recall the massive breaches of justice that took place a decade or more ago with runaway daycare child abuse prosecutions. In some of those cases, the children were awarded with toy Deputy Sheriff badges if their statements implicated the defendants.

In the case of child victims of crime, we must recognize that the policy expressed in the confrontation clause is probably irreconcilable with an attempt to establish a sound evidentiary basis for placing into evidence the out-of-court statements of children who are too young to testify under oath. Searching for ways to end run the Constitution or the laws of evidence in child abuse cases, because our stomachs turn at the thought of allowing a child sex abuser to go free, will only increase the chance that the innocent will be convicted without significantly raising the probability that the guilty will be punished. When the Supreme Court came down with the *Miranda* ruling in 1966, the police community warned that the sky would fall. It didn't. In fact, despite the dire predictions that the police would never get another person to confess and they would never again solve a crime, just the opposite occurred. The police became better investigators, better interrogators, and better crime solvers. *Crawford* can provide the same impetus to the investigation and prosecution of family violence crimes that *Miranda* did.

Crawford *is nothing more than a return to basic constitutional principles that a jury, not a judge, should assess credibility and that credibility should be established by a witness, under oath, before a jury, facing the accuser, and who is tested by 'the greatest engine ever invented for the discovery of the truth,'—cross-examination.*

Crawford will be a big shock to the system. I predict that the courts will take some of the edge off *Crawford* by narrowly interpreting what statements are "testimonial." Those are now the only type of hearsay that kick the confrontation clause into gear. Also, expect to see a greater, more expansive use of the hearsay exceptions that don't implicate constitutional protections. These would include excited utterances, declarations against penal interest, present sense impressions, state of mind, and statements made for medical treatment. The legislatures should also weigh in with procedures that allow prompt, pre-trial, videotaped depositions of victims to be taken in a neutral and protected setting that provide the opportunity for cross-examination. These should be admissible under the *Crawford* rule. They will also serve the salutary purpose of lifting the weight off victims' shoulders caused by the enduring of long trial delays and the prospect of having to testify in a public setting before a jury.[13]

Crawford is nothing more than a return to basic constitutional principles that a jury, not a judge, should assess credibility and that credibility should be established by a witness, under oath, before a jury, facing the accuser, and who is tested by "the greatest engine ever invented for the discovery of the truth,"—cross-examination (*Wigmore, Evidence*, § 1367, 1976 ed.).

Endnotes

1. New York was the fertile crescent of substantive due process. The New York Court of Appeals got out front on this issue in 1856, in *Wynehamer v. People* (13 N.Y. 378). This case held that a prohibition statute could not be applied to a person who possessed liquor for resale prior to the passage of the law because of the property rights of the owner in the alcohol. As with many other legal doctrines that get their start in powerful dissents, Justice Stephen Field gave substantive due process federal traction in his opinion in the *Slaughterhouse Cases* in 1873 (83 U.S. 36). These cases involved a state-created monopoly for a New Orleans slaughterhouse. The high priest of substantive due process was Thomas Cooley, born in Attica, NY, in 1824. Cooley was a professor of law at the University of Michigan and a Justice of the Michigan Supreme Court. One of the most influential legal scholars of the 1800s, he is the author of *The Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*.

2. The "Lochner Era" started in 1905 with the Supreme Court's decision in *Lochner v. New York* (198 U.S. 45). It established as a bedrock constitutional principle that the freedom to contract could not be infringed by social legislation. In striking down New York's law regulating the maximum hours that a baker could work, the Court imbedded laissez-faire capitalism and social Darwinism into the constitution. *Lochner* was also the forum for Holmes' most famous dissent, where he commented that, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Herbert Spencer, who provided much of the philosophical support for the eugenics movement, coined the phrase "survival of the fittest." Darwin never used that term. The death blow to *Lochner* came in 1937 in *West Coast Hotel v. Parrish* (300 U.S. 379).

3. The controlling principle of *Crawford* and the decision to overrule *Roberts* garnered only seven votes. Chief Justice Rehnquist and Justice O'Connor concurred in the judgment but did not buy into the testimonial/non-testimonial distinction. They would have reversed the verdict as falling afoul of the *Roberts* rule. "We have never drawn a distinction between testimonial and non-testimonial statements. And for that matter, neither has any other court of which I am aware. I see little value in trading our precedent for an imprecise approximation at this late date." (p. 4.)

4. There being little new under the sun, one of the very earliest accounts of the right of confrontation comes from the Bible (Acts, 25:16). Paul was under arrest for sedition in Caesarea (The Roman Capital of Israel). The Jewish authorities asked for his release so they could execute him. Paul, being a Roman citizen, asked that his case be heard by authorities in Rome. In explaining the situation to King Agrippa (the Roman ruler in Israel), Festus (the Roman Provincial Governor) stated: "There is a certain man left prisoner by [the last governor] and, when I was at Jerusalem, the chief priests and elders of the Jews presented their case against him and asked for his conviction. *But I told them that Romans are not accustomed to give any man up before the accused has met his accusers face to face and has been given a chance to defend himself against the charges."* Paul was kept in prison in Israel for two years, shipped to Rome and released two years later, only to be reimprisoned several years later. He was beheaded in Rome in the year 67.

5. Walter Raleigh (1554-1618) rose to prominence under Elizabeth I. A lawyer, writer, and man of adventure, Raleigh was always operating on thin ice due to his extravagance and audaciousness. Elizabeth had him imprisoned in the Tower of London for awhile, but it was John I whom he fatally crossed. Accused of plotting to overthrow the King, he was convicted and kept in the Tower for thirteen years under a death sentence. His sentence was suspended in 1616, so he could lead an expedition to South America to look for gold. In 1618, the King unsuspended the sentence and he was beheaded. Almost four hundred years later, one can still stand in Raleigh's "apartment" in the Tower of London where he lived under arrest with his family and where he wrote *The History of the World.*

6. For an interesting survey of the fluidity of the development of hearsay, confrontation, and the law of evidence, see the following: Friedman, Richard D., "Confrontation: The Search for Basic Principles," 88 Geo. L.J. 1011 (Feb. 1998); Gallanis, T.P., "The Rise of Modern Evidence Law," 84 Iowa L. Rev. 499 (March 1999); Hermann, Frank R. and Brownlow M. Speer, "Facing the Accuser and Medieval Precursors of the Confrontation Clause," 34 Va. J. Int'l L. 481 (Spring 1994).

7. *Maryland v. Craig*, 497 U.S. 836 (1990); *Coy v. Iowa*, 487 U.S. 1018 (1988). Passing constitutional muster is one of those overworked, but useful, legal phrases similar to, but not as trite as, "at first blush." Muster is derived from the Latin *monstrare*, to show. Troops would muster to show themselves for inspection hoping they would pass. A legal principle that does not pass constitutional muster cannot cut the legal mustard.

8. *See* Fed. R. Evid. 804(b)(6).

9. *See* Cal. Evid. Code §§ 1370 and 1109; OR Evid. Code § 803(26).

10. However, the reports used by the San Diego Police may pass muster. Those forms have specific check boxes to note the condition of the victim such as: "distraught," "shuddering," "crying," to substantiate whether the victim's statement can meet the excited utterance test.

11. Why doesn't the medical records statement-for-treatment exception violate the confrontation clause? It is not a "firmly rooted" hearsay exception in terms of an ancient pedigree. It is no more reliable than an out-of-court statement made by, say, Mother Theresa, which would not be admissible. For example, say that two women are examined by the same doctor and each has a large abrasion on her right cheek. One woman tells the doctor that she was pushed down the stairs and the other says that she fell down the stairs. Each will receive the same quality care regardless of what force caused them to fall. So, what makes either statement reliable and therefore admissible in evidence? The first woman may be lying to get an order of protection removing her husband from the home. The second may be lying to cover up a domestic violence relationship because she is afraid that DSS will remove her children. Or, they both may be telling the truth. How do you tell? The fact is, that at this level of abstraction, the constitutional/evidentiary basis analysis breaks down and we must acknowledge that medical record hearsay is admissible because we have deemed it to be so, that it has not created any huge problems and it is not that unfair to the accused.

12. "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in *assessing* the trustworthiness of certain types of out-of-court statements" (*Wright*, 815). The Court should have stated "assuming" not "assessing" the trustworthiness of the admissible hearsay. There has been little assessment by anyone of whether these hearsay statements are empirically reliable. For example, we allow dying declarations into evidence because we assume that no one will "go to meet their maker with a lie on their lips." We don't really know if that is true. Does that rule hold for atheists or agnostics? What about pathological liars?

13. I am cognizant of the perception problem caused by the use of the word "victims" to generically refer to complainants in unadjudicated family violence cases. In the Kobe Bryant case, the Court granted a motion *in limine* to require the prosecution to refer to the "victim" as the "accuser," or its equivalent. However, when an "accuser" is before you in court with visible injuries, it is only natural to refer to that person as being the "victim" of a crime.

Separate Property Revisited—Appreciation and Proof

By Lee Rosenberg

While recently on trial in a case involving a client who started his business before the marriage, my adversary, shortly in advance of trial, began referencing the seminal *Price*[1] and *Hartog*[2] cases for the proposition that the wife was automatically entitled to 50% of the appreciation of the business' value as marital property. That position, which was opposed by me at trial on several grounds, involved various sub-issues, not the least of which was that the wife had not actually valued the business, nor engaged in timely expert disclosure, nor retained an expert and filed a report prior to the commencement of trial.[3]

In looking at DRL § 236B as well as relevant case law, it seems that the approach taken by attorneys similar to the wife's attorney in the aforementioned case occur more frequently that one would have thought. Those claims, of course, normally, and should, fail on the proofs.

Section 236B of the Domestic Relations Law defines marital property and separate property. Marital property is defined as

> all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part.

Marital property does not include separate property, which is defined as

> (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse; (2) compensation for personal injuries; (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; (4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

It has been held that separate property shall be narrowly construed while marital property shall be given a broad construction.[4] By statute, any property acquired during the course of the marriage, as defined, is presumptively marital and therefore subject to equitable distribution upon dissolution of the marriage.[5] In its defining separate property, the statute includes "property acquired in exchange for or the increase in value of separate property, *except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse*"[6] (emphasis added). Inasmuch as from the limited statutory definition of separate property, the appreciation is exempted *as indicated*, such appreciation has been held to be marital property.[7] Starting then from the statutory definition, such appreciation, to be marital must be found to have occurred due to some contribution or effort of the non-titled spouse—hence, all appreciation is not automatically marital.

In *Price*, the Court of Appeals, in addressing the appreciation issue, held

> where separate property of one spouse has appreciated during the marriage and before execution of a separation agreement or commencement of a matrimonial proceeding and where such appreciation was "due in part" to the contributions or efforts of the non titled spouse as parent and homemaker, the amount of that appreciation should be added to the sum of marital property for equitable distribution (§ 236[B][5]). Whether assistance of a non titled spouse, when indirect, can be said to have contributed "in part" to the appreciation of an asset depends primarily upon the nature of the asset and whether its appreciation was due in some measure to the time and efforts of the titled spouse. If such efforts, as allegedly is true of defendant's interest in Unity, were aided and the time devoted to the enterprise made possible, at least in part, by the indirect contributions of the non titled spouse, the appreciation should, to the extent it was produced by efforts of the titled spouse, be considered a product of the marital partnership and hence, marital property.

The Court continued

> As a general rule, however, where the appreciation is not due, in any part, to the efforts of the titled spouse but to the efforts of others or to unrelated factors including inflation or other market

> forces, as in the case of a mutual fund, an investment in unimproved land, or in a work of art, the appreciation remains separate property, and the non titled spouse has no claim to a share of the appreciation.

Even upon a determination that such appreciation of separate property is, in fact, marital property, the extent of its distribution remains subject to equitable considerations under the Domestic Relations Law. The *Price* Court continued on to make this clear, holding

> The question under section 236(B)(1)(d)(3) as to indirect contributions of the non titled spouse as parent and homemaker is whether there was an appreciation of separate property due to the efforts of the titled spouse during the period when it is shown that those efforts were being aided or facilitated in some way by these indirect contributions. If so, the amount of appreciation during that period is considered a product of the marital partnership over which the trial court "retains the flexibility and discretion to structure [a] distributive award equitably" (O'Brien v. O'Brien, 66 N.Y.2d 576, 588, 498 N.Y.S.2d 743, 489 N.E.2d 712, supra). The nature and measure of the services performed by the non titled spouse as parent and homemaker and the degree to which they may have indirectly contributed to the appreciation of separate property, are matters to be weighed and decided by the trial court—not in making this initial determination under section 236(B)(1)(d)(3)—but in making its distribution of the appreciation as marital property under section 236(B)(5).

Out of *Price* then comes a multi-prong test. First, is the asset separate property as defined;[8] second, has the asset appreciated; third, has the asset appreciated due to some *active effort* of the titled spouse; fourth, was the appreciation facilitated by the indirect efforts of the non-titled spouse? Only when these tests have been met, is the appreciation deemed "marital."

In *Hartog*, the Court of Appeals elaborated upon its decision in *Price* in addressing whether or not a specific quantifiable active connection between the titled spouse and the appreciation must be proven. The Court answered that question in the negative, holding

> We conclude that requiring a non titled spouse to produce a substantial, almost quantifiable, connection between the titled spouse's efforts and the appreciated value of the asset would be (1) contrary to the letter and spirit of the relevant statutes (*see,* Domestic Relations Law § 236[B][1][c], [d][3]; [5][c], [d][6]); (2) inconsistent with legislative intent (Governor's Mem approving L 1980, ch. 281, reprinted in 1980 McKinney's Session Laws of NY, at 1863; Sponsor's Mem L 1980, ch. 281, 1980 NY Legis Ann, at 129- 130); and (3) at odds with the purport of this Court's precedents construing the Legislature's directives (Price v. Price, 69 N.Y.2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684). . . . When a nontitled spouse's claim to appreciation in the other spouse's separate property is predicated solely on the nontitled spouse's indirect contributions, *some* nexus between the titled spouse's active efforts and the appreciation in the separate asset is required. . . . By considering the extent and significance of the titled spouse's efforts in relation to the active efforts of others and any additional passive or active factors, the fact finder must then determine what percentage of the total appreciation constitutes marital property subject to equitable distribution.

After considering the facts and respective contributions to the appreciation, the Court of Appeals held that only 25% of the appreciation was marital property subject to equitable distribution.[9]

While the criteria set forth in *Price* and *Hartog* seem well settled, establishing one's right to the appreciation and a distribution thereof may not be so simple. In the well known matter of *Capasso v. Capasso*,[10] the wife significantly contributed, both indirectly, and even directly, to the success of the husband's business. While the husband's contention that the business was worth $1,000,000 at the time of the marriage was based upon his own testimony, the wife claimed that value was not based upon competent proof. The Court held, however, that it was the wife's burden to demonstrate the extent of the business's appreciation "which necessarily required her to prove its value as of the commencement of the marriage. This she did not do." The wife's expert only valued the business at or about the commencement date of the action. The Court, however, using the husband's admission of the value as of the date of marriage, was able to ascribe a value to establish and distribute the appreciation. Had the husband not so testified, it would seem that such a distribution would have been impossible as the amount of the appreciation

would not have been established in the first place. Failure of proof in this regard has resulted in such an outcome.[11]

The valuation of the asset must of course be proven with competent witnesses—the expert witness in the case of the business valuation or other non-liquid types of assets. It has been long held that:

> Valuation is an exercise properly within the fact finding power of the court guided by expert testimony. . . . The determination of the fact-finder as to the value of a business, if within the range of the testimony presented, will not be disturbed on appeal if it rests primarily on the credibility of expert witnesses and their valuation techniques.[12]

This is, of course, axiomatic, as witness may speak of facts only and not of opinion, unless otherwise qualified to do so.[13] A party's failure to properly demonstrate the value of that asset results in an inability to obtain its distribution. Where an expert is thus required in order to prove such value, one must be mindful of the requirements of both CPLR 3101(d) and 22 N.Y.C.R.R. § 202.16(g).

Under CPLR 3101(d) a Notice for Expert Disclosure may be served, which required the responding party to

> identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. . . . However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just.

Separate and apart from the CPLR, however, 22 N.Y.C.R.R. § 202.16, which governs matrimonial actions, provides at paragraph (g) thereof, that responses to expert demands under CPLR 3101(d) be provided within 20 days of service; that written reports be exchanged and filed as to any expert expected to be called by a party no later than 60 days before trial; that reply reports be exchanged and filed within 30 days of the trial date; and that failure to so comply "may, in the court's discretion, preclude the use of the expert." The Rule additionally provides as follows:

> Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial. Late retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause as authorized by CPLR 3101(d)(1)(i). In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. In the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case.

Failure then, to comply with the provisions of the CPLR and the Uniform Rules could result in an inability to prove the value of any asset requiring expert testimony and most certainly an inability to prove the appreciation of an item of separate property which requires multiple valuations in order to arrive at the amount of that appreciation. It then becomes essential, as the title holder of the separate property, to be able to establish the asset as separately acquired and to early on serve a CPLR 3101(d) Expert Demand. The opposing spouse claiming the appreciation may find he or she is precluded if an inordinate time passes prior to compliance and good cause is not shown, particularly if that failure to comply is combined with a failure to also comply in a timely fashion with 22 N.Y.C.R.R. § 202.16(g).[14] Of course, this applies not just to cases of appreciation, but to valuation of other assets, issues of custody and visitation, income stream valuation and any other matters in which an expert is required.

Even where values are established, the distribution percentage of the marital portion of the asset remains to be determined equitably and not *per se* equally. It is not necessarily uncommon for certain assets such as appreciation of separate property and enhanced earnings to result in a less than 50% distribution.

In *Miller v. Miller*,[15] the wife received 40% of the appreciation of the value of the husband's pre-marital residence and no interest in his investment property. In *Kurtz v. Kurtz*,[16] the husband was denied a share in the appreciation of his wife's business as he failed to demonstrate a baseline value and the extent of the appreciation. In *Byck v. Byck*,[17] the court found the

husband to have failed to sustain his burden to establish that his contributions resulted in an increase in value of his wife's minority interest in the family business and made no equitable distribution of that appreciation. Similarly, in *Rubin v. Rubin*,[18] the husband also failed to establish the manner in which his contributions resulted in the appreciation of the wife's interest in her family's business or the value attributable to his effort. No distribution to the husband was then made in this regard.

In *Carniol v. Carniol*,[19] involving the appreciation of the marital residence, the wife failed to establish that the appreciation was the result of either party's efforts and the entire value was retained by the husband. A similar result occurred in *Saslow v. Saslow*,[20] which involved the appreciation of a Manhattan condominium. In *McCann v. McCann*,[21] the wife failed to provide any expert testimony to establish the appreciation of the marital residence or that the appreciation was not due to market or other passive forces even though she claimed direct and indirect contributions. In *Fish v. Fish*,[22] the court awarded the wife 10.08% of the appreciation of the marital residence attributable only to her efforts in the addition of a garage on the property. In *Robinson v. Robinson*,[23] the wife was awarded $18,500 of a $65,000 appreciation of the husband's pre-marital condominium. In *Van Dyke v. Van Dyke*,[24] the plaintiff's claim to the appreciation of the husband's business failed where both parties each engaged in homemaking activities, did not shoulder additional responsibilities and could not demonstrate the value of the appreciation or her contribution thereto. In *A.Z. v. C.Z.*,[25] no distribution of the husband's enhanced earning capacity or its appreciation was distributed.

It had appeared a well settled rule that it is the burden of proof of the non-titled spouse to demonstrate their entitlement to a portion of the appreciation. After this article was originally submitted, the Second Department in *Parise v. Parise*,[26] decided on December 20, 2004, held that although the husband's interest in a residential real estate holding was his separate property, "he failed to satisfy *his burden* of establishing that the defendant's indirect efforts did not contribute, in some degree, to the appreciation of the value of that interest" (emphasis added). What we thought was clear, is now markedly unclear. Whose burden now is it? Perhaps the Court of Appeals knows.

The appreciation issues borne of *Price* and *Hartog* are often more involved than many perceive them to be. The substantive and evidentiary requirements which must be met to entitle a party to a distribution of the appreciation provides yet another of the many pitfalls to avoid in matrimonial litigation by the unwary practitioner.

Endnotes

1. *Price v. Price*, 69 NY2d 8, 511 NYS2d 219, 503 NE2d 684 (1986).
2. *Hartog v. Hartog*, 85 NY2d 36, 623 NYS2d 537, 647 NE2d 749.
3. The case ultimately settled in mid-trial.
4. *Majauskas v. Majauskas*, 61 NY2d 481, 474 NYS2d 999, 463 NE2d 15.
5. *See also Dashnaw v. Dashnaw*, 11 AD3d 732, 783 NYS2d 93 (3d Dep't 2004).
6. DRL § 236B(d)(3).
7. *Price* at endnote 1.
8. Property which had been established as separate property may, however, lose its character as such if there is a pattern of commingling those funds. *Cassara v. Cassara,* 1 AD3d 817, 767 NYS2d 492 (3d Dep't 2003); *Fessenden v. Fessenden*, 307 AD2d 444, 761 NYS2d 725 (3d Dep't 2003).
9. The Court reinstated the finding of the trial court which had awarded the wife 50% of the 25% marital portion of the appreciation in question.
10. 129 AD2d 267, 517 NYS2d 952 (1st Dep't 1987).
11. In a non-appreciation case, *Antonin v. Antonin*, 215 AD2d 421, 626 NYS2d 535 (2d Dep't 1995), the Second Department declined to distribute the value of a business to the defendant-wife where, as the party seeking an interest in the asset, she failed to rebut the plaintiff's assertion that the business had no value at the time of trial. The court also distributed the other assets on a 45/55 basis.
12. *Atwal v. Atwal,* 270 AD2d 799, 704 NYS2d 765 (2000); *L'Esperance v. L'Esperance*, 243 AD2d 446, 663 NYS2d 95 (2d Dep't 1997); *Burns v. Burns*, 84 NY2d 369, 618 NYS2d 761, 643 NE2d 80 (1994).
13. *Teerpenning v. The Corn Exchange Insurance Co.*, 43 NY 279 (1871).
14. *Kaprelian v. Kaprelian*, 236 AD2d 369, 653 NYS2d 634 (2d Dep't 1997); *Meyers v. Meyers*, 255 AD2d 711, 680 NYS2d 690 (3d Dep't 1998); *Kim v. Kim*, N.Y.L.J., April 7, 2003 at 31, col 6 (Sup. Ct., Queens Co, Gartenstein, JHO).
15. 4 AD3d 718, 772 NYS2d 413 (3d Dep't 2004).
16. 1 AD3d 214, 767 NYS2d 104 (1st Dep't 2003).
17. 285 AD2d 577, 728 NYS2d 95 (2d Dep't 2001).
18. 309 AD2d 846, 766 NYS2d 68 (2d Dep't 2003).
19. 297 AD2d 697, 747 NYS2d 539 (2d Dep't 2002).
20. 305 AD2d 487, 758 NYS2d 825 (2d Dep't 2003).
21. 142 Misc2d 1083, 539 NYS2d 281 (Sup. Ct., Suffolk Co., Leis, J.).
22. 161 AD2d 979, 557 NYS2d 549 (3d Dep't 1990).
23. 166 AD2d 428, 560 NYS2d 665 (2d Dep't 1990).
24. 273 AD2d 589, 709 NYS2d 672 (3d Dep't 2000).
25. N.Y.L.J., July 9, 2004 at 19 col. 1 (Sup. Ct., Nassau Co., Ross, J.).
26. 13 AD2d 504, 787 NYS2d 360 (2d Dep't 2004).

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Matrimonial Business Valuations Can Now Be Improved

By J.L. Pierson

Except perhaps in cases involving large dollar amounts and where both parties understand the benefits of using experts, the valuation of private business interests in the various states' family courts could certainly be improved upon. Specifically, the spouse with the business ownership and thus the most to "lose" in an equitable distribution action will hire an attorney to negotiate a lower value, and he/she in turn will hire an appraiser to validate that low value. Conversely, the attorney working for the other spouse will hire a business appraiser who will validate a high value. Is there such a causal relationship? Aren't appraisers supposed to tell it like it is from a financial point of view?[1]

This article outlines a too commonly used technique to fit the appraisal to the client's wishes; it also explains that advances in valuation research and practice now make that technique obsolete.

It is not true that matrimonial valuations always come up short when the moneyed spouse hires the appraiser and too high when the other spouse does. Based on our observations, however, it still appears too easy to enter a low or a high valuation into the record. After all, the valuation standards applied in family court are purposely vague, partially because the statutes allow a good deal of latitude to the trier of facts. A typical "gimmick" is to use an income or cash flow discount or capitalization *rate as high or low* as possible, and *fail to justify, or gloss over the justification* of the rate.

As an example, an appraiser hired by the non-owner/manager's attorney valued a decidedly mid-sized $9.7 million revenues industrial distributorship by capitalizing cash flow at a capitalization rate based on a discount rate of 20.4% while the writer argued the discount rate should be 24.2%. Who is right? How is a trier of facts to know?

First, some basic theory. What is a discount rate? It is the rate which is used to convert earnings, cash flow or any proxy thereof, either historical or prospective, into value. Corporate management typically prepares a projection of earnings, which can then be "normalized." Using the projected data, the appraiser present-values the projected benefits into today's money through a common discounted cash flow analysis.

What is a capitalization rate? Say the business is too small, or too unstable to appropriately prepare reliable projections more than a year out. A potential buyer could and typically would estimate next year's earnings reliably enough, perhaps based on the previous year's results or next year's anticipated results. In order to translate this into value, the appraiser uses a capitalization rate. The capitalization rate is always equal to the discount rate, less a long-term growth rate.

The less the discount or capitalization rates, the higher the value with the same base of earnings or cash flow; conversely, the higher the rate, the lower the value.

The Business Valuation body of knowledge, however, has recently expanded to include a tool which removes any excuse for not justifying the discount rate, assuming your appraiser keeps current, and his client is knowledgeable. This is important and must be understood by all attorneys who represent clients with interests in closely held businesses in family court.

Historically, many discount rates used for matrimonial valuations have been derived by the "build-up" method where the discount rate is calculated as the sum of (a) the "risk-free" rate, typically a proxy of the 20-year U.S. Treasury bond rate equivalent[2] and (b) the equity premium calculated by Ibbotson Associates, which itself presents the excess of the aggregate return from investments in large traded stock investments, over the corresponding "risk free" rate[3] and (c) a measure of size, on the theory that smaller businesses are riskier than larger ones since they have less financial options, and (d) a premium for risks specific to the subject. In other words, 4.92% plus 7.20%, or 12.12% is the discount rate applicable to the very largest of publicly held multinational firms, say the common stock of General Electric, while smaller firms have a considerably higher discount rate.

The size premium add-on to the discount rate relevant to large public firms, designed to account for the smaller size, and thus higher risks involved in a given firm, has historically been determined empirically, based on research reported by Ibbotson.[4] Business appraisers have also added points to account for the specific risks of a private company over the sized-adjusted discount rate relevant to an average financial risk profile. The practice has gone on for years, and is logical enough, but clearly opens the appraisal to criticism that the size and the specific risk premia are, generally, highly subjective. After all, there were no studies correlating the premium to actual company characteristics. Well, until now.

In establishing that correlation, Standard & Poor's Corporation Corporate Valuation Consulting (S&P CVC) group has accomplished the following: (a) Scrubbed the database used by researchers to investigate the relationship between discount rate and risk, removing many public firms with obvious signs of financial stress and (b) determined a series of annually revised regression formulas which can be used to translate any of 8 measures of size into an objective add-on to the "risk-free" rate in

order to calculate a justifiable discount rate for a given firm. The eight (8) measures of "size" are:

(a) Market Value of Equity

(b) Book Value of Equity

(c) 5 year Average Net Income

(d) Market Value of Invested Capital

(e) Total Assets

(f) 5 year Average EBITDA[5]

(g) Size of Sales Revenues

(h) Number of Employees

Typical S&P CVC formulas, incorporating the current U.S. bond rate, would read:

Discount rate = 14.285% + 4.92% - 2.960% * log (average income)

Discount rate = 15.836% + 4.92% - 2.938% * log (average EBITDA)

Discount rate = 16.434% + 4.92% - 2.286% * log (Sales)

Discount rate = 17.453% + 4.92% - 3.171% * log (book equity)

Discount rate = 17.057% + 4.92% - 2.082% * log (number of employees)

Discount rate = 18.039% + 4.92% - 2.870% * log (total assets)[6]

Since the S&P CVC regression formulas are based on data which does not include financially stressed firms, the regression formulas are a welcome improvement over the one-rate-fits-all approach used by prior practice. The data has also been limited to 1963 and later, eliminating another reason why the old Ibbotson data is too diffused to be utilized. The regressions may be used to derive an objective, or at the very least a much less subjective measure of the discount rate applicable to a given firm. The most useful measures of size in small company valuations are the average net income, average EBITDA, total assets and book value of equity or invested capital because these measures are available for most valuations. Generally Accepted Accounting Principles provide, for the most part, some measure of consistency in these measures across industries.

Now back to the industrial distributor. Using its book net worth of $0.3 million, sales of $9.7 million, total assets of $2 million, and average EBITDA of, say, $0.3 million, the S&P equations return discount rates of 24.8%; 19.9%, 23.7% and 23.1%, respectively (using the bond rate at the time). From these rates, the writer would conclude that the appropriate discount is in the area of 23%. Clearly, the rates justified using S&P's research appear more reliable because they are derived from empirical data, not from unsubstantiated best guesses. Had the research been available at the time, a good deal of grief would have been avoided all around.

Business appraisers acknowledge that Business Valuation is not an exact science. But it is important to have the "ball park" discount rate correct in an income-based valuation, or risk being contra-indicative of probable range. It does not impact value much if the discount rate used is either 20% or 21%, but using a very different 15% or 25% would be incorrect. The moral of the story for users of valuation services is to insist that the business appraiser *justifies* his/her discount rates, perhaps through the use of the S&P CVC data. I know this business appraiser does.

Endnotes

1. Appraisers who are members of the American Society of Appraisers or of the Institute of Business Appraisers must follow the Uniform Standards of Professional Appraisal Practice, which are promulgated by the quasi-public Appraisal Foundation as required by FIRREA. USPAP requires that appraisers state that "analyses, opinions and conclusions are only limited by the reported assumptions and limited conditions and are (my) personal, impartial and unbiased professional analyses, opinions and conclusions." Appraisers who are members of the AICPA have, as of this writing, no obligation to follow USPAP; a draft version of the AICPA Business Valuation Standards was circulated in November 2004 for comments by members. CVAs do not have the obligation to follow USPAP but their accrediting organization, NACVA, has its own standards, which include independence requirements.
2. As of early November 2004, the 20-year U.S. Treasury bond rate equivalent is 4.92%.
3. The 2004 equity risk premium calculated by Ibbotson Associates is 7.2%.
4. For example, the add-on corresponding to the second half of the 10th decile of public companies is 9.8% according to Ibbotson. The companies' capitalizations range from $0.3 million to $96.9 million. *See Stocks, Bonds, Bills and Inflation 2004 Yearbook* Valuation Edition.
5. Earnings Before Interest, Taxes, Depreciation and Amortization.
6. Standard & Poor's Corporate Value Consulting *Risk Premium Report 2004* Chicago, IL: Ibbotson Associates. Research articles by Roger Grabowski, ASA and David King, CFA leading to the development of this resource were published in *Business Valuation Review* between June 1995 and March 2000.

J.L. Pierson, ASA is a business appraiser based in Darien, CT who values business interests for tax, corporate development and marital dissolution purposes. He is a senior accredited appraiser, designated by the American Society of Appraisers through peer review of his work product and other requirements. He recently took a course on the cost of capital taught by one of authors of the S&P study. He can be reached at 203-325-2703/203-434-4648 or jlp@NYNJCT.com. His practice's web site can be found at http://www.NYNJCT-BV.com.

Selected Cases

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

(Vol.) Fam. Law Rev. (page), (date, e.g., Spring 2005) New York State Bar Association

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

People of the State of New York v. Katherine G. and Dawn S., Justice Court, Town of New Paltz, Ulster County (Reichler, Judith M., July 13, 2004)

Ulster County
Assistant District Attorney: John G. Rusk, Esq.
275 Wall Street
Kingston, NY 12401

Counsel for Defendants: Robert C. Gottlieb, Esq.
Law Offices of Robert C. Gottlieb, Esq.
353 Veterans Memorial Highway
Comack, NY 11725

On March 6, 2004, in New Paltz, New York, two ordained ministers of the Unitarian Universalist Church performed marriage ceremonies for 13 same-sex couples who did not have marriage licenses. They are charged with a crime for solemnizing marriages without licenses being presented to them, in violation of section 17 of the Domestic Relations Law ("DRL"). Conviction could result in a maximum fine of $250 and/or incarceration for a maximum of one year.

The defendants claim that the charges against them are unconstitutional because the same-sex couples whose marriages they solemnized were unconstitutionally denied the ability to obtain marriage licenses. The defendants also argue that criminalizing the solemnization of unlicensed same-sex marriages by ordained clergy unconstitutionally infringes on the exercise of their religion and their religious belief that marriage is a desirable and holy state for all couples, including gay and lesbian.

The court may dismiss charges against a criminal defendant if the statute defining the offense charged is unconstitutional or otherwise invalid. CPL 170.35.

DRL 17 very simply states that a person who performs a marriage without being presented with a marriage license is guilty of a misdemeanor. It makes no distinction between same-sex and heterosexual couples. The clerk of the town of New Paltz, however, acting on an interpretation by the New York State Department of Health that DRL 13 allows only marriages between a man and a woman, had announced that it would not issue marriage licenses to same-sex couples. The couples married by the defendants were unable to obtain the required marriage licenses.

The prosecution argues that the constitutionality of same-sex marriage is *not* before the court, and that the only issue is whether the defendants have violated the plain language of DRL 17. The defendants argue that the constitutionality of same-sex marriage *is* before the court, and that a determination of the rights of the same-sex couples is necessary for their defense to the criminal charges.

I find that the two issues are inextricably intertwined, and that defendants meet the requirements for standing under the principles set forth by the United States Supreme Court in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *New York County Lawyers' Association v. State of New York*, 294 A.D.2d 69 (1st Dept. 2002). If it is unconstitutional to prohibit same-sex couples from obtaining marriage licenses, it is unconstitutional to charge defendants with a crime for marrying same-sex couples who are unable to obtain marriage licenses. The fact that there may be other ways the couples could have challenged their inability to obtain marriage licenses does not change this.

The defendants acknowledge that the state has an interest in regulating marriage. Even so, they argue that it is unconstitutional for the state to limit marriage to opposite-sex couples. In order for a statute to survive even the most deferential standard of review for constitutionality (the so-called "rational basis" test), there must be a rational relationship between the classification adopted and the societal interest it purports to promote. *Romer v. Evans*, 517 U.S. 620 (1996). Under this standard of review, a statute is presumed to be valid and will be sustained if the classification drawn is rationally related to a legitimate state interest. *Cleburn v. Cleburn Living Center*, 473 U.S. 432, 440 (1985).

The prosecution has advanced two state interests for limiting marriage to opposite-sex couples: tradition and procreation. The New York State Attorney General,

although given an opportunity to do so,[1] has not offered additional justification, and no reasons are contained in statute. The justifications proffered by the prosecution can be summarized as follows:

1. There is a long tradition of political, cultural, religious, and legal consensus that marriage is understood as the union of male and female.
2. Statutes prohibiting same-sex marriages further the state interest of encouraging procreation and child-rearing within a marital relationship.

I find that "tradition" is not a legitimate state interest, and that prohibiting same-sex couples from marrying is not rationally related to furthering the state's legitimate interest in providing a favorable environment for procreation and child-rearing. Accordingly, the criminal charges against the defendants must be dismissed. Discussion follows.

Traditional Definition of Marriage

Tradition does not justify unconstitutional treatment. Slavery was also a traditional institution.

The definition of "family" has changed so much over the years that it is difficult to speak of an average American family. See *Troxel v. Granville*, 530 U.S. 57, 63 (2000). The traditional definition of marriage has also undergone many changes, especially as gender roles have expanded. Concepts that were once considered essential to the definition have been abandoned, or even declared illegal.

A starting point is found in DRL section 10, which reminds us that "marriage, so far as its validity in law is concerned, continues to be a civil contract." The civil marriage laws set forth the benefits and obligations of legally married couples, almost all of which come into play only upon dissolution, or a breakdown, of the marriage. See DRL 30 through 254.

The definition of civil marriage, it appears, is flexible and subject to change—an "evolving paradigm." *Goodridge v. Department of Public Health*, 440 Mass. 309, 339 (Sup. Jud Ct of Mass, 2003). At one time, the traditional marriage was arranged primarily to further the property interests of families. Until 1849, when the first of the Married Women's Acts was enacted, a tradition of marriage was that a married man owned all his wife's property, while a married woman could own no property. The Court of Appeals described it this way: "The inferior [the wife] hath no kind of property in the company, care or assistance of the superior [the husband] as the superior is held to have in those of the inferior." *Van Allen v. Allen*, 246 N.Y. 571, 575 (1927), quoting Blackstone (3 Com. 143). See Domestic Relations Law 50 through 61 for a repeal of these laws.

The traditional definition of marriage in some states excluded interracial marriages, and laws provided stiff criminal penalties for persons who married "outside their race." That restriction on marriage was struck down by the U.S. Supreme Court, in 1967, when it ruled that a statutory scheme to prevent marriages between persons solely on the basis of racial classifications is unconstitutional. *Loving v. Virginia*, 388 U.S. 1 (1967).

Even as late as 1984, the traditional definition of marriage in New York included the right of a husband to be free of criminal charges for raping his wife. Similar statutes existed in at least 30 other states. In ruling the law unconstitutional, New York's Court of Appeals commented that this so-called marital exemption likely originated in an 1852 treatise, traceable to a statement made by the 17th century English jurist Lord Hale, who wrote

> [The] husband cannot be guilty of a rape committed by himself upon his lawful wife, for *by their mutual matrimonial consent and contract* the wife hath given up herself in this kind unto her husband, which she cannot retract. [emphasis added]

People v. Liberta, 64 N.Y.2d 152, 161 (1984), citing 1 Hale, History of Pleas of the Crown, p. 629. The court rejected all the justifications the state offered, finding that "the traditional justifications . . . no longer have any validity." 64 N.Y.2d at 161.

The prosecution points out that, even with all the changes that have occurred in the definition of marriage, never has the court gone so far as to include same-sex couples in the definition. The fact alone that the discrimination has been sanctioned by the state for many years does not justify it. See *Perez v. Sharp*, 198 P.2d 17, 27 (Sup. Ct. Calif. 1948), citing *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Religion and Marriage

Many marriages are celebrated in a religious setting. Whatever meaning and sanctity may attach to a religious marriage ceremony, however, marriage is a civil contract, and state marriage laws are entirely civil in nature. DRL 10. Although the authority to officiate at civil marriage ceremonies has been extended to members of the clergy (in addition to certain public officials, such as mayors and magistrates), this does not alter the fact that state-sanctioned marriage is a civil event, not a religious one. DRL 12.

The religious beliefs of some individuals and groups include a conviction that same-sex unions are unnatural and abhorrent. They would urge that their

beliefs be incorporated into the law, as reflecting a divinely ordained definition of marriage. This was also the argument once successfully advanced to justify prohibition of interracial marriages. See *Scott v. State*, 39 Ga. 321, 326 (1869) (justifying laws against interracial marriage because "the God of nature made it otherwise"). The U.S. Supreme Court finally rejected this restriction on marriage as unconstitutional in 1967. *Loving v. Virginia*, 388 U.S. 1, 2 (1967). In doing so, it overturned a lower court opinion that had offered the following religion-based reason for excluding interracial couples from marrying:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages.

Ironically, the defendants would also define marriage based on religious tenets. They argue that, by prosecuting them for solemnizing same-sex marriages, the state is preventing them from exercising an aspect of their religious beliefs that "the gender of the members of a couple is not a factor in determining whether they are appropriate candidates for marriage." Defendant's memorandum of law, pg. 27. Their religion, defendants say, "recognizes the sanctity of same sex relationships and has supported the solemnization of their holy union." Greenleaf affidavit, dated May 1, 2004, pg. 2.

Even though the state has granted a clergy member the authority to perform civil marriages (which some do in conjunction with a religious service), a lawful marriage that is subject to the laws of the state remains a civil contract, appropriately free of religious beliefs. Since the state has made an accommodation by permitting clergy to act in the state capacity of officiating at civil marriage ceremonies, the state does not violate the free exercise of religion by imposing valid restrictions on the ability to do so.

Procreation

Citing "procreation" as a broad justification for denying marriage to same-sex couples displays an anti-gay bias, rather than a real desire to provide a favorable environment for procreation and child-rearing. If family and children were truly the priority, the state would take all possible steps to protect them.

The prosecution acknowledges that married couples are not required to have children, or even to engage in sexual relations. No inquiry is ever made into the sexual activities or sexual preferences of a prospective opposite-sex couple before a marriage license is issued. In fact, all sorts of people can marry and have children: convicted murderers, child abusers, pedophiles, racketeers, and drug pushers.

It has long been recognized that the sexual orientation, alone, is not a factor in determining the appropriateness of adoption or custody of a child. See 18 N.Y.C.R.R. 421.16(h)(2) (single gay men and lesbians may adopt children); *In Re Adoption of Carolyn B.*, 6 A.D.3rd 67 (4th Dept. 2004) (the sexual orientation of the petitioners are of no significance because the goal of the statute is to encourage adoption of children); *Guinan v. Guinan*, 102 A.D.2d 963 (3rd Dept. 1984) (whether defendant had a sexual relationship with another women is not determinative in a custody dispute, unless this is independently shown to adversely affect the child's welfare). Many same-sex couples raise children, adopted or conceived by one of the partners. Some are raising the children of one partner that were conceived during a heterosexual marriage that failed. Excluding same-sex couples from civil marriage makes these children less, not more, secure.

Same-sex relationships are based on the same thing as heterosexual unions: intimacy, companionship, love, family. Prohibiting same-sex couples from marrying suggests that marriage is about nothing but sex. This is demeaning to all couples who seek to marry and to the institution of marriage. Disapproval of a group is an insufficient reason for exclusion. *Lawrence v. Texas*, 539 U.S. 558 (2003).

Economic and Legal Benefits of Marriage

Mixed-sex couples who do not love each other can marry. Couples who do not even like each other can marry. Regardless of the relationship a married couple has, legal privileges are granted to improve their economic, emotional, and physical health—simply because of their marital status. There can be no constitutional rationale for denying same-sex couples the right to receive the benefits that are so lavishly bestowed on mixed-sex couples.

Marriage laws provide many financial and legal protections to married couples. The U.S. General Accounting Office has identified 1,049 federal laws in which benefits, rights, and privileges are contingent on marital status. See U.S. General Accounting Office, *Defense of Marriage Act*, GAO/OGC-97-16 (Washington, D.C. Jan. 31, 1997); and U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (Washington D.C. Jan. 23, 2004). Benefits, rights, and privileges were found in all of these areas: (1) Social Security; (2) programs to alleviate poverty, such as housing, food stamps, and public assistance; (3) veterans and military programs; (4) taxation; (5) employment; (6) immigration; (7) criminal and family violence laws; (8) loans and credit; and (9) education.

In New York, some employers and agencies offer limited benefits to partners of same-sex couples. Many more benefits, however, are available only to married couples. They include such things as status as next-of-kin for hospital visits; the ability to make medical decisions in the event a spouse becomes sick or disabled; joint health, home, and auto insurance policies; access to a spouse's disability and pension benefits; inheritance rights when a spouse dies intestate; joint income tax returns; family discounts from employers, banks, insurers and businesses; the legal protections afforded in the case of a divorce; the right to spousal support; the right to sue for wrongful death of a spouse; decision-making power with respect to whether a deceased partner will be cremated or not and where to bury him or her; and Family Court domestic violence protection orders. See Testimony of New York State Comptroller Alan G. Hevesi in Support of the Right to Civil Marriage for Same-Sex Couples in New York State. www.osc.state.us/press/release/mar04/030304b.htm [accessed July 11, 2004].

Using a purely pragmatic approach, there are many ways these inequities could be remedied. It is doubtful, however, that they would completely address the complicated reasons individuals have for wanting to join in marriage.

Other Court Decisions

Any reasons that have been developed for singling out and prohibiting—even criminalizing—same-sex relations have been all but abolished. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidated a state sodomy law that criminalized only members of the same sex from engaging in certain kinds of sexual activity); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidated a state constitutional amendment that deprived gay men and lesbians of certain protections granted to heterosexual individuals under state law).

New York's highest court has consistently extended rights and benefits to same-sex partners. See, e.g., *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201 (1989) (interpreted the term "family member" in the rent control code to include a same-sex partner in a committed, long-term relationship); *Matter of Jacob*, 86 N.Y.2d 651 (1995) (held that the same-sex partner of the biological parent of a child could adopt the child). New York courts have held that the sexual orientation of an individual, alone, is of no significance in making adoption and custody decisions. See *In re Adoption of Carolyn B.*, 6 A.D.3rd 67 (4th Dept. 2004); *Guinan v. Guinan*, 1023 A.D.2d 963 (3rd Dept. 1984).

New York statutes have regularly been amended to prohibit discrimination against any individuals on the basis of sexual orientation and to extend rights and benefits to same-sex partners. See, e.g., Civil Rights Law 40-c; Executive Law 290 et seq. (the opportunity to obtain employment and education and to use public accommodations, housing, and commercial space may not be denied on the basis of sexual orientation); 9 NYCRR 4.28 and 5.32 (benefits must be offered to the domestic partners of state employees); 9 NYCRR 2104.6 (state housing regulations recognize same-sex relationships); 18 NYCRR 421.16(h)(2) (single gay men and lesbians may adopt children).

In an opinion issued in March of this year, New York's Attorney General acknowledged that New York law recognizes the legitimacy of committed same-sex relationships in numerous ways and questioned the state's interest in maintaining the historical understanding of marriage as confined to opposite-sex partners. NYS Attorney General, Informal Opinion Number 2004-1, March 3, 2004, at 19.

The Hon. Jonathan D. Katz, in dismissing similar charges against the mayor of New Paltz, found that "none of the reasons stated in opposition to same-sex marriage is paramount to the equal protection guarantees enshrined in the state and federal constitutions." *People v. West*, 2004 WL 1433528 (New Paltz Just. Ct.).

The U.S. Supreme Court has not yet ruled on the precise issue, but Justice Antonin Scalia made a persuasive argument for recognizing same-sex marriage in his scathing dissenting opinion, a year ago, in *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (striking down a statute making it a crime for persons of the same sex to engage in certain intimate sexual conduct). The majority opinion makes clear that its ruling does not address whether there should be formal recognition of homosexual relationships, but Justice Scalia warns us not to believe it. Instead, he insists that the majority's rationale regarding personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education applies to homosexual relationships. Given the broad scope of the majority opinion, he adds,

> what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.

For the reasons stated herein, the motion to dismiss the charges against the defendants is granted, and the charges are dismissed. This constitutes the decision and order of the court.

Dated: New Paltz, New York
July 13, 2004

ENTER

Hon. Judith M. Reichler

The following papers numbered 1 through 8, with attached exhibits, were read on the motion of the defendants to dismiss:

Defendants' Notice of Motion, Affidavits, and Memorandum of Law 1-3

People's Affirmation in Opposition and Memorandum of Law 4-5

Defendants' Reply Memorandum 6

Letter to Attorney General, pursuant to CPLR 1012(b) 7

Letter from Attorney General Eliot Spitzer 8

Endnote

1. The Attorney General has informed this court that it chooses not to participate "at this stage," and asks the court not to draw an adverse inference from this decision. None is drawn, but it is noted that any reasons the state has to justify its actions should be presented at this time, and not after the court has already ruled.

* * *

Robert W. O. v. Ann V. O., Supreme Court, Columbia County (Hummel, Christian F., August 12, 2004)

For Plaintiff: Maney, Mc Conville & Liccardi, P.C.
(Joseph B. Liccardi, Esq., of Counsel)
77 Troy Road
East Greenbush, New York 12061

For Defendant: Gordon, Siegel, Mastro, Mullaney, Gordon & Galvin, P.C.
(Barbara J. King, Esq., of Counsel)
9 Cornell Drive
Latham, New York 12110

Defendant has moved pursuant to CPLR §3212 for summary judgment dismissing Plaintiff's action for divorce. Defendant asserts that based upon the allegations of the Amended Verified Complaint, discovery, and the deposition transcripts of the parties, it can be established as a matter of law that the causes of action alleged in the Amended Verified Complaint lack merit. Plaintiff opposes the motion.

Plaintiff commenced this action for divorce after 36 years of marriage by the filing of a Verified Complaint on October 18, 2002. That Complaint had as its sole cause of action one for constructive abandonment. Defendant filed a Verified Answer denying the allegation and raised affirmative defenses, including the defense of failure to state a cause of action. Plaintiff subsequently filed a Verified Amended Complaint adding a cause of action for cruel and inhuman treatment. Defendant again filed an Answer denying the allegations and raising affirmative defenses.

Defendant asserts as a matter of law that Plaintiff has failed to establish a cause of action on the grounds of constructive abandonment. Plaintiff alleges that Defendant refused marital relations after July, 1998, constructively abandoning him for a period in excess of a year prior to the commencement of the action. Plaintiff fails to allege, nor was he able to establish through his discovery responses or deposition, that he repeatedly requested the resumption of marital relations and was refused during that entire one year period. In fact, in July of 1998 Plaintiff moved into the guest room in the marital residence and in February, 1999 he moved out the house entirely.

Defendant also asserts that Plaintiff's cause of action for cruel and inhuman treatment lacks merit. Plaintiff lists only six minor incidents between March, 1998 and February, 1999 as Defendant's course of conduct. Notably, Plaintiff does not allege that this conduct left him with serious physical or emotional problems or that it rendered it unsafe and improper for him to continue to reside with Defendant.

To prevail on a motion for summary judgment, a defendant must first establish its defense as a matter of law, by tender of evidentiary proof in admissible form (see, CPLR 3121; Winegrad v. New York University Medical Center. 64 NY2d 851). The burden then shifts to the plaintiff to provide evidence sufficient to establish a genuine issue of material fact (*see*, *Zuckerman v. City of New York*, 49 NY2d 557).

In order to prove an abandonment claim, a plaintiff is required to demonstrate that defendant unjustifiably abandoned him, without his consent, for a period of one or more years (*see*, *Schine v. Schine,* 31 NY2d 113; *Relvea v. Relvea,* 2 AD3d 1176 [3rd Dept., 2003]). Failure to prove repeated requests for the resumption of marital relations is fatal to a claim of constructive abandonment (*see*, *Shortis v. Shortis,* 274 AD2d 880 [3rd Dept., 2000]). Moving out of the marital residence prior to the expiration of the one year period has been held to defeat a cause of action for constructive abandonment (*see*, *Emanuele v. Emanuele,* 218 AD2d 726 [3rd Dept., 1995]). Failure to present testimony that Plaintiff, after agreeing to leave the marital residence, was unjustifiably excluded from returning is also fatal to a claim of constructive abandonment (*see*, *Relvea, supra*).

When the marriage is one of long duration, a high degree of proof of cruel and inhuman treatment is required to maintain an action for divorce on those grounds (*see*, *Brady v. Brady,* 64 NY2d 339). Serious misconduct, not mere incompatibility, is required (*see, Biegeleisen v. Biegeleisen,* 253 AD2d 474 [2nd Dept.,

1998]). In a marriage of long duration, allegations which establish at most a strained relationship will fail to sustain a cause of action for cruel and inhuman treatment so endangering the husband's physical and mental well-being that it would be unsafe or improper for him to cohabit with the wife (*see*, *Passante v. Passante*, 206 AD2d 770 [3rd Dept., 1994]).

The Court finds as a matter of law that Plaintiff has failed to establish a cause of action for constructive abandonment. The Court finds that there may have been some question of fact as to whether Plaintiff requested martial relations between July, 1998 and the date he left the residence in February, 1999. Plaintiff's decision to move out of the marital residence prior to the expiration of a one year period is fatal to his claim. After February, 1999 Plaintiff is unable to detail any specific requests he made, verbal or otherwise, for the resumption of marital relations. Plaintiff testified that he called his daughter to say he loved her but he did not ask Defendant to resume marital relations. A one year period of requests and denials is necessary to establish a cause of action for constructive abandonment.

The Court finds as a matter of law that Plaintiff has also failed to establish a cause of action for cruel and inhuman treatment. It is noteworthy that in a marriage of such long duration, 36 years, Plaintiff complains of only six incidents over a period of just a 11 months. Plaintiff has not established a pattern of conduct, or any conduct which was so egregious as to have endangered his physical or mental well-being, or rendered it unsafe or improper for him to cohabit with Defendant. In fact, two of the incidents complained of occurred during dinner, and Plaintiff testified that he merely took his dinner into another room to finish. The Plaintiff could not recall if the two incidents during dinner were accompanied by an verbal altercation, he merely recalled that on one occasion Defendant threw her glass of water in his face, and on another occasion she threatened him with her dinner fork. Defendant testified that she never threw his wardrobe down the stairs as he claimed, and that she did throw his papers around to distract him when he grabbed her. Defendant denies she threatened to scratch his truck, and testified in her deposition that it was Plaintiff who threw her to the floor in the incident he complains of in his Amended Complaint.

Even assuming all of the allegations set forth in the Amended Complaint are true, they do not state a cause of action for divorce on the grounds of cruel and inhuman treatment. Plaintiff did not allege any physical or emotional consequences of the cruel and inhuman treatment, sought no police or medical attention, and only testified that he lost some weight after he moved out of the marital residence.

Defendant's motion for summary judgment is granted, and the Amended Verified Complaint is dismissed.

Dated: August 12, 2004

Enter,
Christian F. Hummel Acting Supreme Court Justice

* * *

***Stanley B. v. Marlene B.*, Supreme Court, Schenectady County (Eidens, Michael C.)**

September 27, 2003

Barbara J. King
The Gordon, Siegel Law Firm
9 Cornell Road
Airport Park
Latham, New York 12110

Richard M. Antokol
Antokol, Reisman & Coffin
514 State Street
Schenectady, New York 12305

Re: ***Stanley B. v. Marlene B.***

Letter Decision

Dear Counselors;

On September 8, 2003, plaintiff moved for an order striking the above entitled matter from the trial calendar upon the ground that it was not ready for trial by reason of defendant's making in excess of 150 edits to his deposition testimony, many of which plaintiff contends are improper. Plaintiff argues that many of the edits were substantive and involved the making of significant changes, deletions and the re-writing of testimony. The initial edits were made without the furnishing of any reasons for the changes. Subsequent to the motion, defendant furnished an amended Errata Sheet with reasons given for each change. Plaintiff contends that although case law permits a party to make changes to deposition testimony, the defendant has failed to furnish adequate reasons for the changes made, and the nature and extent of those proposed changes has resulted in plaintiff's being deprived of the benefit of discovery. Plaintiff submitted a copy of the deposition and a letter memorandum dated September 24, 2003.

Defendant submitted an amended Errata Sheet dated September 11, 2003 and a letter memorandum dated September 18, 2003. He argues that a deponent is permitted to make substantive changes to the deposition transcript provided reasons for those changes are set forth, and contends that he was very specific about

the changes to his deposition testimony and the reasons for those changes. The defendant further contends that cross examination during trial is the appropriate place for plaintiff to challenge the credibility of the changes made.

Review of the amended Errata Sheet and the deposition reveal that the defendant has failed to furnish adequate non-generic reasons for many of the changes made to his deposition. In addition, he has directed that certain of his responses be omitted from the deposition. Defendant correctly argues that he may make substantive changes to the deposition testimony, if reasons are given for those changes. Case law holds that generic reasons for the edits are not permitted. Both parties cite *Marine Trust Company of Western New York v. Collins* (19 AD2d 857; 4th Dept, 1963) as authority for their positions. The language of that decision is important to consider:

> "However, the omnibus statement of the witness that corrections were made to correct his errors in testifying or errors of the reporter is improper . . .'Before the witness signs and subscribes his testimony, he may add to the foot thereof a statement that certain of his answers (indicating the answers to which he refers) are incorrect, *giving the reason therefor*—either that it is an incorrect transcript or that his present recollection of the facts is more accurate—and he may then state what his corrected answer is and give any other explanation he desires with respect to his prior answer." *(emphasis added) (Marine Trust v Collins, supra)*

Therefore, a deponent may not edit his deposition to change testimony that he gave, after reflection, that he wishes that he had not. If an *omnibus* statement that edits are made to correct errors in testifying is improper, as *Marine Trust* (*supra*) holds, then repeating that contention 125 times should also be improper. Review of the edits submitted by defendant indicate the reason for the change is or includes "More correct response" no less than 125 times. When the reason given includes "More correct response", the remaining portion of the reason given is "More complete response." Viewed in its totality, the defendant has rewritten his deposition. As stated, the statutory provision permitting corrections in a deposition requires that the party desiring to edit an answer give reason(s) for the need to edit the answer. Stated differently, the party wanting to change his deposition answer must explain what about the answer actually furnished at the deposition is incorrect. To permit the generic phrase "More complete response" to permit, sanction and authorize a deposition to be rewritten to the satisfaction of the party deposed results in no real discovery at all. The follow up questions posed by plaintiff's counsel depend in large part on the substantive answer actually given at the deposition. To permit the changes proposed by defendant would result in denial of effective discovery by plaintiff.

Not all of the edits by defendant to the deposition are improper. Certainly those changes which simple transcription errors in spelling or which change "uh-huh" to "yes" are appropriate. Based on the foregoing, plaintiff's motion is granted to the extent of striking each entry of the Errata Sheet other than those correcting spelling errors or changing the form of the answer to "yes" from "un-huh" where indicated.

Plaintiff may submit a request for counsel fees made in connection with this motion within fifteen (15) days of the date of this letter decision. The request for sanctions is denied.

This shall constitute the opinion, decision and order of the court.

Hon. Michael C. Eidens, Acting JSC

* * *

Stanley B. v. Marlene B., Supreme Court, Schenectady County (Eidens, Michael C., December 24, 2003)

Appearances:

For the Plaintiff: Antokol, Reisman & Coffin, by Richard M. Antokil, Esq.

For the Defendant: Gordeon, Siegel, Mastro, Mullaney, Gordon, & Galvin, by Barbara J. King, Esq.

Defendant seeks summary judgment, alleging that plaintiff's complaint, in which he alleges that defendant treated him in a cruel and inhuman manner, and constructively abandoned him, has no merit and cannot, as a matter of law, be established at trial. Defendant bases her motion on the amended pleadings and the deposition of plaintiff conducted in May of 2003. Plaintiff's allegations are to be viewed in the light most favorable to him.

Plaintiff's amended complaint contains two causes of action; one grounded in cruel and inhuman treatment and one alleging constructive abandonment. Defendant's motion to dismiss the first cause of action must be granted because Domestic Relations Law section 210 applies a five year statute of limitations to a claim based on cruel and inhuman treatment. Defendant pled the Statute of Limitations in her Amended Answer. Plaintiff's claim of cruel and inhuman treat-

ment is essentially based on two allegations: that the defendant engaged in an adulterous relationship with George P. from 1991 to an unknown point in time within the last five years, and lived openly with him in her home, and that the defendant engaged in an adulterous relationship with an exchange student between 1990 and 1991. At the deposition of the plaintiff, he testified that he based his allegations of adultery on his conclusion that George P. resided at the farm with defendant. Plaintiff contended that he and others saw Mr. P. at the farm on numerous occasions, and he and other people boarded horses there. He stated that Mr. P. and defendant went horse back riding on the weekends. Plaintiff concludes that because he believes defendant engaged in adultery with the foreign exchange student in 1991, she engaged in the same behavior with Mr. P. However, the deposition reveals that plaintiff cannot establish inappropriate behavior between Mr. P. and defendant, nor that defendant engaged in conduct with Mr. P. which endangered his physical or mental well-being or made it inappropriate for the parties to cohabit. Plaintiff left the marital residence in 1991 before the defendant met Mr. P. Moreover, the defendant testified that his difficulty eating and sleeping and his emotional distress existed for only one year and ended more than ten years prior to his commencement of the within action for divorce.

Plaintiff's claim for abandonment stems from his allegation that defendant refused sexual relations with him since 1985. Domestic Relations Law section 170(2) requires that sexual abandonment must be for a period of one or more years. The refusal or failure to engage in sexual relations must be wilful and continuous for at least one year, despite repeated requests from plaintiff *(Silver v. Silver,* 253 AD2d 756; *Shortis v. Shortis,* 274 AD2d 880). Plaintiff contends that defendant refused sexual relations with him from the time of his retirement in 1985, and that her refusal to engage in sexual relations with him continues to the present. There is no statute of limitations for constructive abandonment. Defendant contends that plaintiff cannot establish constructive abandonment because in his pretrial deposition, he testified that following defendant's refusal, his requests for sexual relations were in November or December of 1985, and the parties resided together in a sexless marriage until 1991 when the defendant voluntarily left the marital residence. Plaintiff relies on his contention that defendant unjustifiably refused to engage in sex with plaintiff for more than one year *(Passante v. Passante,* 206 AD2d 770) and that plaintiff is not welcome in defendant's home and she is currently having an adulterous affair with George P. In his pretrial deposition, plaintiff testified that he and others believe that the defendant is living in an adulterous relationship with George P. He offered no specific proof in support of his belief, nor any inappropriate behavior or relationship between defendant and Mr. P. Plaintiff admitted in his deposition that he left the marital residence several years before defendant met Mr. P. Plaintiff contends that the abandonment continues to the present day.

The plaintiff left the marital residence in 1991 following six years of a sexless marriage. He commenced an action for divorce shortly after he left the residence and then withdrew the action at the request of defendant because she told him she did not want to be divorced. Since 1991, the defendant has lived with two women, and currently resides with one. With respect to Mr. P., plaintiff stated in his deposition "All I know is that he lives there." [with defendant] (Defendant's Exhibit C. p 88 line 24 through p 89, line 6). Plaintiff concedes that following his heart surgery in 2001, defendant offered to have plaintiff reside at the marital residence with her and he refused.

The issue for determination is whether, given the circumstances of this marriage and the conduct of the parties, defendant consented to a sexless marriage and therefore cannot sustain a cause of action for constructive abandonment *(Hammer v. Hammer,* 34 NY2d 545). This is a childless marriage of 32 years. The pleadings and discovery reveal that viewed in the light most favorable to plaintiff, his wife refused sexual relations with him in 1985 and that he requested resumption of those relations verbally and by his actions for several months. After six years of a sexless marriage, plaintiff voluntarily left the marital residence based on his belief that defendant was then having an adulterous affair. He submits that defendant's conduct caused him to suffer upset and difficulty eating and sleeping. He began a divorce action and then withdrew it at the request of his wife. Several years following lapse of the statute of limitations for a cause of action grounded on adultery, he commenced this action for divorce alleging adultery because he believes defendant resides with another man and for the refusal of sexual relations beginning in 1985. It is clear that he cannot sustain a cause of action for adultery in 1991 and has no proof of adultery with respect to alleged conduct with George P. His claim for constructive abandonment must also fail because of the passage of time of six years of a sexless marriage followed by his withdrawal of his claim for divorce. There can be no argument that he consented to a sexless marriage on his wife's terms when he withdrew his divorce action at her request.

Defendant's motion for summary judgment is granted. Defendant shall submit an order reflecting the findings of this opinion and decision on notice to plaintiff.

Dated: Schenectady, New York

Hon. Michael C. Eidens, Acting JSC

Nancy K. v. Robert J. K., Supreme Court, Nassau County (Lamarca, William R., October 20, 2004)

Appearances:

For Plaintiff: Parola, Gross & Marino, PC
By: Barry J. Gross, Esq.
775 Wantagh Avenue
Wantagh, NY 11793

For Defendant: Saltzman Chetkof & Rosenberg, LLP
By: Michael Chetkof, Esq.
300 Garden City Plaza, Suite 130
Garden City, NY 11530

MEMORANDUM DECISION AFTER TRIAL

Introduction

This is an action for absolute divorce commenced on October 2, 1998 by plaintiff, NANCY K., (hereinafter referred to as the "wife") against defendant, ROBERT J. K., (hereinafter referred to as the "husband"). The trial of this action began on April 26, 2002, and, on said date, an inquest was conducted on the ground of abandonment. The husband withdrew his answer, neither admitting nor denying the wife's allegations. A Judgment of Divorce was granted to the wife, with the entry of judgment stayed pending the hearing and determination of the remaining issues to be resolved in this matter, including Equitable Distribution, Maintenance and Child Support. The trial of this matter concluded on March 11, 2004. During the period from April 26, 2002 through March 11, 2004, there were 55 days of trial.

STATEMENT OF FACTS

Background

The parties were married on March 2, 1968. At the time of the commencement of the action, the wife was 50 years of age and the husband was 52 years of age and they had been married for approximately thirty (30) years.

There are four issue of the marriage, ROBERT, ROBIN, SHARON and SUZANNE K., all of whom are presently emancipated. However, the parties' youngest child, SUZANNE, born on January 20, 1983, was 15 years of age at the commencement of the action and turned twenty-one (21) years of age on January 20, 2004 during trial.

Education and Employment History

The wife is a high school graduate with a regents diploma who attended WOODS SECRETARIAL SCHOOL for one year where she studied stenography, typing, transcription and travel arrangements. In 1966 she commenced employment with MOBILE OIL CORPORATION which continued for approximately 1 ½ years. While at MOBILE OIL CORPORATION she worked for a statistical analyst and was paid $85.00 per week. In February 1968, just prior to the parties' marriage, the wife left MOBILE OIL CORPORATION to work closer to home, which the husband preferred, and she was hired by AMF BOWLING PRODUCTS in Westbury, NY as a secretary. She continued at that job for approximately 1 3/4 years and gave notice several months before the parties' eldest child was born. At that time, she earned $110.00 per week.

During 1972, the wife worked occasionally for K. ROOFING which was a business owned by the husband's father for whom the husband worked. Her duties were as a bookkeeper although she had no training in the field. In the mid 1970's, the husband formed HEART SAVER INSTITUTE ASSOCIATES, INC. and the wife continued working part-time in the husband's business where she had secretarial duties, billed and followed up on payments from insurance companies, kept ledger cards on customers and sent monthly bills, all without the aid of computers.

With the arrival of the parties' third child, the wife became a full-time homemaker for approximately four (4) years. Thereafter, in 1978-1979 she returned to work for the HEART SAVER INSTITUTE ASSOCIATES, INC., and did billing and collection work for the business. After the birth of the parties' fourth child, the wife became a homemaker, exclusively, until 1987 when she returned to work part-time for HEART SAVER between the hours of 9:00 A.M. and 2:30 P.M., three to four days a week. At that time, her duties expanded to include the payroll, billing and collections from insurance companies, paying taxes, working with the Medicare system and assisting with the interview of perspective employees. Her hours fluctuated and in 1997, she began to receive a salary of $350.00 per week. That salary continued until the *pendente lite* order of the Court, dated May 13, 1999 (Parga, J.). During her years of working in the family businesses, the wife acquired computer skills and she attended seminars on Medicare, Blue Cross/Blue Shield and other subjects which assisted her in the performance of her job.

During the marriage, the husband worked with his father in K. ROOFING. When that business terminated in the mid-1970's, the husband formed HEART SAVER INSTITUTE ASSOCIATES, INC. and thereafter, in 1987, formed CARDIOLINK CORPORATION. Also, he formed two other businesses, which became inactive, and throughout the marriage, the husband worked at growing the above named corporations.

The parties had a comfortable lifestyle and often took foreign vacations. They purchased two time shares in Cancun, Mexico and one at Jiminy Peak.

The Children's History

The children's early education included parochial school and, in an effort to expose their children to a good education, the husband paid for out-of-district public school tuition. Of the four children, ROBIN completed college and received a Physician's Assistant's license after studying at CORNELL UNIVERSITY. The youngest child, SUZANNE, is currently attending LOYOLA UNIVERSITY in Maryland. Both ROBERT and SHARON went to college for a brief period of time. Thereafter, ROBERT went to work for the Town of Hempstead and SHARON married and had a family.

Health Problems

The wife testified that she has health problems including high blood pressure, diabetes and a visual infirmity that limits the number of hours that she may wear glasses. Additionally, the parties' son, ROBERT, age 34, has serious diabetes, which required a kidney transplant, as well as other ailments. He lives at home with the wife, who testified that he requires her services to keep him functioning each day.

The Parties' Stipulation

On April 10, 2003, the parties stipulated to the equitable distribution of a substantial part of their marital assets and resolved the issue of payment of SUZANNE's college expenses. The parties agreed to the following:

a. The value of the marital residence —$735,000.00;

b. The value of the husband's businesses (CARDIOLINK CORPORATION and THE HEART SAVER INSTITUTE ASSOCIATES, INC.)—$565,000.00;

c. The value of commercial real estate located in Carle Place, NY —$215,000.00.

The parties agreed to equitably distribute the above listed property as follows:

Wife	**Husband**
Marital Residence plus $22,000.00	Businesses CARDIOLINK CORPORATION and HEART SAVER INSTITUTE ASSOCIATES INC. and the commercial real estate located in Carle Place, NY.

The husband commenced two additional businesses after the commencement of the action which, it was agreed, are separate property.

Additionally, the husband agreed to be responsible for $58,750.00 of SUZANNE's past, present and future college expenses at LOYOLA UNIVERSITY in Maryland.

THE HUSBAND'S PROPOSED DISPOSITION

1. Equitable Distribution—it is the husband's position that the parties' Stipulation of Settlement leaves only the following marital assets to be distributed by the Court:

   a. Two time shares in Cancun, Mexico, the Royal Mayan and the Royal Caribbean;

   b. Jiminy Peak time share;

   c. Various bank accounts.

   With regard to the time shares, the husband proposes the wife receive the November Mexico time share and the Jiminy Peak time share in addition to a CADILLAC automobile owned by the business, and that he receive the February Mexico time share.

2. Maintenance—the husband proposes that the wife be awarded no maintenance. His rationale is that both parties have substantial assets and have the ability to be self sufficient.

3. Child Support—the husband proposes that, for the purposes of the Child Support Standards Act (CSSA), his income be capped at $80,000.00.

4. Child Support Arrears—the husband states that a portion of the carrying charges on the marital residence that he has been paying pursuant to the *pendente lite* order, is child support which should be credited to him toward any child support arrears. He also proposes that he receive credit toward any child support arrears for the educational expenses he has paid and continues to pay for daughter, SUZANNE. Finally, he states that the UGMA fund, which SUZANNE received in the amount of $37,377.83, was established to assist in the payment of SUZANNE's education and should be credited to him toward any child support arrears.

THE WIFE'S PROPOSED DISPOSITION

1. Equitable Distribution—the wife proposes that the Court revisit the parties' Stipulation regard-

ing the equitable distribution of the marital residence and the husband's businesses and commercial property (Court's Exhibit "2").

2. Cash Value of Life Insurance—the wife proposes that she receive one half of the cash surrender value of a policy she owns on her husband's life which was valued at $24,000.00 at the commencement of the action. The value of that account is presently $20,000.00, and was reduced by the use of the cash value to pay the premiums for the policy which the husband was mandated to pay under the *pendente lite* order of the Court. She asks that the diminution in value be taken from the husband's share and that she be awarded $12,000.00 and that the husband be awarded $8,000.00.

3. Rental Income from property at Carle Place, NY—the wife proposes that she receive $57,800.00 as her share of the rental income from said property for a sixty-eight (68) month period from 1998 through 2004. This property was previously distributed to the husband in accordance with the parties' Stipulation.

4. Loan to the Husband's Business—the wife alleges that she made a loan to the husband's business in the sum of $15,000.00 and she proposes reimbursement of same.

5. Personal Property—the wife proposes that she receive all the personal property in the marital residence and that the husband have the right to remove corporate records and equipment from the premises. The parties' Stipulation reserved this issue for determination by the Court.

6. Assets in Particular Accounts—there are a number of banking accounts which the wife proposes should be equitably distributed. Each party submits a list of the assets and their status as detailed below. The parties are in agreement on some of the accounts but disagree on others.

7. Child Support—the wife proposes that the CSSA statutory percentage of seventeen (17%) percent for one child be applied to the husband's total income and that any child support award by the Court be retroactive to October, 1998, the commencement date of the action. Further the wife urges that the only credit due the husband are the payments he made under the mandate of the *pendente lite* order. The wife is seeking child support arrears in the sum of $259,623.00.

8. Maintenance—the wife proposes that she receive non-durational maintenance in the sum of $1,400.00 per week, notwithstanding that she has received equitable distribution of her share of the husband's business, as provided in the parties' Stipulation, and that the valuation of said business utilizes the same income stream. She also proposes that she receive retroactive maintenance based on her assertion that maintenance should have been between $1,500.00 and $2,000.00 per week, not $500.00 per week as directed in the *pendente lite* order of the Court, dated May 13, 1999 (Parga, J.). She calculates the arrears to be $366,600.00 after giving credit for payments received.

9. Health Insurance—due to her alleged health issues, the wife proposes that the husband be responsible for providing health insurance for her and that he pay all unreimbursed medical expenses on her behalf.

10. Life Insurance—the wife proposes the husband continue to maintain all life insurance policies which were in existence at the time of the commencement of the action.

DECISION OF THE COURT

Equitable Distribution

In an action for divorce, the Court shall determine the respective rights of the parties in their separate and marital properties and provide for the disposition of the property in the final judgment of divorce. Domestic Relations Law §236(B)(5)(a).

Separate Property

The wife claims that State Street Bank account containing mutual funds is her separate property which was gifted to her by her parents. The account is valued by her as of October 2, 1998, the date of commencement, at $21,373.47. The husband valued that account on the aforementioned date at $25,594.00. The wife also claims the Fleet Bank account is her separate property which she values as of October 2, 1998 at $15,196.00 and that the funds were a gift from her parents.

The husband claims that an account at the GreenPoint Savings Bank, # unknown, valued on October 2, 1998 at $11,316.00, contains funds belonging to CARDIOLINK CORPORATION which he asserts are not his property. He also claims that numerous assets purchased after the commencement of the action are his separate property as no marital funds were utilized for their purchase.

Marital Property

The marital property listed below was not covered by the parties' Stipulation, dated April 10, 2003 (Court's Exhibit "2").

Various Accounts and Alleged Value

Owner	Bank	Amount (wife)	Amount (husband)
Husband	Dime Savings Bank	$820.00	$820.00
Wife	Met Life (State Street)	$17,385.67	$23,835.50
Wife	Merrill Lynch	$5,368.78	$5,368.78
Joint	Met Life	$11,128.00	$11,128.00
Joint	Met Life (State Street)	$76,174.14	$66,047.00
Husband	State Street	$37,132.00	$37,122.00
Husband	State Street	$65,963.00	$65,963.00
Wife	State Street	$13,270.32	$15,872.58
Wife	State Street	$1,597.99	$1,911.36
Wife	State Street	$2,517.36	$4,284.06
Joint	Dime Savings Bank	$ 5,467.00	$5,467.00
Totals		**$236,782.12**	**$237,819.28**

Disputed Accounts Utilized by a Party for Which Credits Are Sought

Owner	Bank	Amount (wife)	Amount (husband)
Joint	Dime Savings (wife used funds to pay bills)	$793.76	$956.00
Husband	Greenpoint (husband used funds to pay bills)	$3,171.00	$3,171.00
Husband	Ridgewood (husband used funds to pay bills)	$1,000.00	$1,000.00
Wife	Ridgewood (wife used funds to pay bills)	$1,000.00	$1,080.00
Joint	Mexican Bank (husband used funds to pay bills)	$6,000.00	$6,000.00
Joint	Dime Savings (husband used funds to pay bills)	$5,467.00	$5,467.00
Wife	Merrill Lynch (wife used funds to pay bills)	$2,081.00	$2,081.00
Totals		**$19,512.00**	**$19,755.00**

Non-Existing Accounts

The husband alleges that the wife owns an account at Merrill Lynch, # unknown, in the sum of $61,264.00 which the wife claims does not exist. The wife also rejects the husband's claim that an account exists at State Street Bank in the sum of $13,041.38, # unknown. (Defendant's Exhibits "TTT"; Plaintiff's Post Trial Memorandum).

Time Shares

1. Cancun, Mexico —2 units

   Royal Mayan and Royal Carribean

2. Jiminy Peak

Automobiles

The parties did not have these assets valued.

Household Furnishings

The parties did not have these assets valued.

Cash Surrender Value of Life Policy

See Wife's Proposed Disposition, *supra*.

Rental Income, Carle Place, NY

See Wife's Proposed Disposition, *supra.*

Loans to Business

See Wife's Proposed Disposition, *supra.*

Factors

In determining an appropriate equitable distribution of marital assets, the Court has considered the factors set forth in DRL §236(B)(5)(d), as follows:

(1) The income and property of each party at the time of the marriage, and at the time of the commencement of the action.

At the time of the marriage the wife was employed by AMF BOWLING PRODUCTS as a secretary earning $110.00 per week. The husband worked with his father in K. ROOFING but there is no indication in the record of his earnings at that time. Also, there is no evidence in the record as to the property owned by the parties at the time of the marriage but the Court concludes from these proceedings that there were no significant property holdings by the parties.

At the commencement of the action, the wife was earning $350.00 per week paid by the family business. The parties' experts determined that the husband's reasonable compensation from his businesses at that time was $75,000.00 per annum. The experts employed by the parties were as follows:

Wife: LEON BELTZER, CPA, (hereinafter referred to as "BELTZER"), RAKOWER FINANCIAL APPRAISAL SERVICES, by JOEL RAKOWER, CPA (hereinafter referred to as "RAKOWER").

Husband: ISRAELOFF, TRATTNER & COMPANY, P.C., by MICHAEL GARABALDI, CPA, (hereinafter referred to as "GARABALDI").

RAKOWER was retained by the wife to offer testimony in rebuttal to the husband's expert. It should be noted that RAKOWER did not dispute the sum of $75,000.00 per annum as reasonable compensation for the husband at his businesses. However, he opined that the sum should be increased in accordance with the Department of Labor statistics to $97,812.00 at the time of trial due to the length of time it took the parties to resolve their conflict. The Court rejects that argument as all income in excess of reasonable compensation has already been distributed between the parties in the form of an asset when converted to same for the purpose of equitable distribution. The issue of "double dipping" will be further discussed under MAINTENANCE, infra.

Also, the wife received equitable distribution of a substantial share of the parties' assets in accordance with a Stipulation voluntarily entered into by the parties, which included her share of the value of the husband's businesses. (Plaintiff's Exhibits "95" and "127"; Defendant's Exhibits "PP", "RR" and "LL"; Court's Exhibit "2").

(2) The duration of the marriage and the age and health of both parties.

At the time of the commencement of the action the wife was 50 years of age and the husband 52 years of age, and the parties were married for approximately 30 years. They are presently approximately age 56 and 58 years, respectively.

The husband is in good health, however, the wife has health problems including diabetes, high blood pressure and vision impairment.

(3) The need of a custodial parent to occupy or own the marital residence and to use or own its household effect.

Not applicable. There are no minor children and the wife has title to the marital residence by agreement of the parties.

(4) The loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution.

Both parties will lose their respective inheritance rights upon dissolution of the marriage.

(5) Any award of maintenance under subdivision six of this part.

Maintenance will be discussed hereinafter.

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party.

Over the years of the marriage, the wife worked part-time in the husband's businesses and was the primary homemaker for the family. Her role as employee and homemaker contributed to the career potential of her husband who was the wage earner. It is clear to the Court that until the marital discord, the parties viewed their respective positions as homemaker and wage earner as equally necessary to keep the household functioning. While equitable distribution does not necessarily mean equal distribution the Court finds that the contribution of each party to the marriage and toward the accumulation of assets to be equal. *Cf. Price v. Price*, 69 NY2d 8, 511 NYS2d 219, 503 NE3d 684 (C.A. 1985); *Capasso v. Capasso*, 119 AD2d 266, 506 NYS2d 686 (1st Dept. 1986); *Granada-Bastuck v. Bastuck*, 249 AD2d 444, 671 NYS2d 512 (2nd Dept. 1998); *Rizzuto v. Rizzuto*, 250 AD2d 829, 673 NYS2d 200 (2nd Dept. 1998).

(7) The liquid or non-liquid character of all marital property.

Many of the remaining marital assets listed above are liquid accounts. The illiquid assets such as the husband's businesses and the marital residence have been previously equitably distributed by agreement of the parties.

(8) The probable future financial circumstances of each party.

It is contemplated that the husband will continue to grow his businesses and that he has a relatively bright future while the wife's future financial circumstances are not as secure.

(9) The impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party.

Not applicable. The parties' assets have been evaluated.

(10) The tax consequences to each party.

There may be tax consequences to the extent that any transfer of assets are deemed to be a taxable event.

(11) The wasteful dissipation of assets by either party.

Not applicable.

(12) Any transfer or encumbrance made in contemplation of a matrimonial action without a fair consideration.

Not applicable.

(13) Any other factor which the court shall expressly find to be just and proper.

The credibility of the parties was scrutinized by the Court during the trial. Each party gave testimony which was skewed to assure a favorable outcome for that party. The husband was the least forthcoming and was often evasive in his testimony. However, notwithstanding the terms and conditions of the Stipulation executed by the parties in which they agreed to the valuation and distribution of a substantial part of their assets, at the time of trial, the wife made renewed requests for the Court to revisit the valuations of the businesses and real estate, a request that the Court rejects. A party who seeks to invalidate a Stipulation has the burden to show that the Stipulation was the result of fraud or overreaching or that the terms are unconscionable. *Michalowski v. Michalowski*, 286 AD2d 712, 730 NYS2d 448 (2nd Dept.2001); see, Greenfield v. Greenfield, 147 AD2d 440, 537 NYS2d 558 (2nd Dept. 1989). The Stipulation of the parties was arrived at when both parties were represented by able counsel and their appears to be no fraud or overreaching that would warrant the requested relief and none is alleged. The balance of the assets, not subject to the Stipulation, of the parties, shall be divided equally.

CONCLUSIONS AS TO EQUITABLE DISTRIBUTION

The Court has great flexibility in determining the equitable distribution of marital assets. *See, Obrien v. Obrien*, 66 NY2d 576, 498 NYS2d 743, 489 NE2d 712, (C.A. 1985); *Markel v. Markel*, 197 AD2d 934, 602 NYS2d 477 (4th Dept. 1993); *Leider v. Otero-Leider*, 161 AD2d 277, 554 NYS2d 911 (1st Dept. 1990). Equitable distribution presents issues of fact to be resolved by the trial Court based on considerations of fairness, and its judgment should be upheld absent an abuse of discretion. *Oster v. Goldberg*, 226 AD2d 515, 640 NYS2d 814 (2nd Dept. 1996), *leave to appeal* denied, 88 NY2d 811, 849 NYS2d 478, 672 NE2d 604 (C.A. 1996).

Separate Property

The Court directs that the State Street Bank account, and the Fleet Bank account, and all appreciation therein to be the wife's separate property.

The Court finds that the CARDIOLINK bank account at the Greenpoint Savings Bank belongs to the corporation and is not subject to equitable distribution herein. Furthermore, the Court directs that the assets purchased or formed by the husband after the commencement of the action, and all appreciation therein, are his separate property or corporate properties, such as RJL REALTY, LLC., MEDLINE NEW YORK CORPORATION, NY, two (2) parcels in Ghent, NY, the KUBOTA tractor, and the DISNEY and Manhattan time shares, and are not subject to equitable distribution.

Marital Property

Based upon the testimony at trial and documentary evidence, the Court directs that all of the marital assets listed above under the heading "Various Accounts"shall be divided equally between the parties. Said division shall be made as soon as practical after entry of Judgment herein and shall be based upon the present value of the assets, subject to market fluctuations. The Court finds the "Various Accounts" to be passive assets and that the parties should equally share in the gains and losses of the accounts. *Cf. Zelnik v. Zelnik*, 169 AD2d 317, 573 NYS2d 261 (1st Dept. 1991); *Greenwald v. Greenwald*, 164 AD2d 706, 565 NYS2d 494 (1st Dept. 1991).

With respect to the above listed "Disputed Accounts", the Court finds the total value of the marital accounts utilized by the parties to be $19,512.76. An equal division of the assets had they not been utilized would have resulted in $9,756.38 to each party. As the husband utilized $15,512.76 of the funds and the wife utilized $3,874.76 of the funds, the husband is directed to pay the wife $5,881.62 to equalize the division of the assets.

As to the category above entitled "Non-Existing Accounts", the Court finds that, despite the husband's allegations that said accounts exists, he has provided no proof upon which the Court can rely and the Court rejects the husband's claim for same.

Automobiles

The parties did not provide the Court with a valuation of these assets, however, they shall each have title to the vehicles they are presently driving. Each shall be responsible for maintaining the vehicles at their own cost and expense and shall execute any documents to transfer title, if necessary.

Time Shares

The parties shall sell the two Cancun, Mexico and the Jiminy Peak time shares and divide the proceeds equally. However, an in kind distribution of the properties is acceptable to the Court if the parties can agree.

Household Furnishings

The household furnishings were not valued by the parties. Based upon the circumstances herein, in this marriage of long duration, the wife is awarded the well used contents of the marital residence. However, the husband shall have access to the residence so that he may remove the following items, which are deemed to be his personal property and are awarded to him:

1. Corporate equipment in the basement of the marital residence (medical equipment, testing equipment);
2. Files in the basement;
3. Construction tools;
4. Automotive tools;
5. Personal effects (including clothing, cameras, slides, pictures).

Cash Surrender Value of the Life Insurance Policy

The wife is awarded a credit of $12,000.00 which is one half of the cash surrender value of the life insurance.

Loans to Business and Rental Income on the Carle Place, NY Property

The Court rejects the wife's claim that she made a loan of $15,000.00 of separate property to the "business" and that she is entitled to the post-distribution income on the Carle Place, NY Property. As to the loan, the wife has provided no proof on which the Court can rely and, furthermore, the husband alleges that the loan was repaid. The Court denies the wife reimbursement of the alleged loan and concludes that any loans made to the businesses were part of the evaluation of the businesses on which the wife has received her equitable share. Similarly, the rental income on the property distributed to the husband by Stipulation of the parties shall remain his property, without claim from the wife.

MAINTENANCE

Domestic Relations Law §236(B)(6)(a) contains the substantive provisions with respect to the amount and duration of maintenance, in particular, the factors the Court must consider prior to any award of maintenance.

Factors

(1) The income and property of the respective parties including marital property distributed pursuant to subdivision five of this part.

See Factors 1 and 7 above, under Equitable Distribution.

(2) The duration of the marriage and the age and health of both parties.

See Factor 2, above, under Equitable Distribution.

(3) The present and future earning capacity of both parties.

See Factor 8 above, under Equitable Distribution.

(4) The ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor.

See Factors 1 and 8 above, under Equitable Distribution.

The wife, over the many years of this marriage, has worked part-time in the family businesses. She has learned computer skills and accounting skills, but due to her health problems, the Court concludes that it is unlikely that she can return to work on a full time basis and become self-supporting at the parties standard of living. It is the Court's view that she is entitled to non-durational maintenance in this marriage of long duration.

(5) Reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage.

There was no indication at the trial of the wife having foregone or delayed educational training, employment or career opportunities during the marriage. In fact, she did receive training and has developed some rudimentary skills in the use of the computer and word processing. She also received training in office management. The wife testified that the parties agreed she would be a full-time homemaker during their children's tender years and that she would work part-time in the business at other times. However, it was clear that the husband was the wage earner in the family.

(6) The presence of children of the marriage in the respective homes of the parties.

The parties' emancipated son has many health problems and presently resides with the wife. The Court acknowledges the aid and comfort provided to the son by the wife but any claim that she is unable to seek part-time employment because of her need to remain at home to care for the son is rejected by the Court as unproven.

(7) The tax consequences to each party.

Maintenance to be awarded to the wife shall be taxable income to her and deductible by the husband. *Cf., Blasco v. Blasco*, 99 AD2d 747, 471 NYS2d 660 (2nd Dept. 1984).

(8) Contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party.

The role of the wife was as homemaker, parent and spouse, enabling the husband to pursue a business career.

(9) The wasteful dissipation of marital property by either spouse.

Not applicable.

(10) Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.

Not applicable.

(11) Any other factor which the court shall expressly find to be just and proper.

See Factor 13 above, under Equitable Distribution.

After consideration of the above listed factors and under the circumstances of this case the wife is awarded non-durational maintenance based upon the reasonable compensation of the husband established by the parties' experts at the trial in the sum of $75,000.00. The Court is mindful that anything above reasonable compensation has been capitalized and distributed as an asset and is not available for support (*Sodaro v. Sodaro*, 286 AD2d 434, 729 NYS2d 731[2nd Dept. 2001]; *Grunfeld v. Grunfeld*, 94 NY2d 696, 709 NYS2d 486, 731 NE2d 142 [C.A. 2000]), and is being careful not to double count an income stream for the calculation of maintenance (*McSparron v. McSparron*, 87 NY2d 275, 639 NYS2d 265, 662 NE2d 745 [C.A. 1995]). However, the husband's expert added income from the husband's personal investments, not used in determining the value of the businesses, thus bringing the total income of the husband for the purpose of calculating maintenance to $103,670.00 (Defendant's Exhibit "PP"). BELTZER, the wife's expert, provided no such analysis.

Based upon the foregoing, the wife is awarded prospective maintenance in the sum of $800.00 per week which shall be effective upon entry of Judgment. The maintenance to the wife shall continue until the death of either party, the wife's remarriage or her habitual living with another man in accordance with DRL § 248. The wife's request for an award of retroactive maintenance is denied. The wife has not demonstrated that the *pendente lite* support provided to the wife in a

combination of carrying charges on the marital residence and direct support was inadequate.

CHILD SUPPORT

Domestic Relations Law § 24(1-b), commonly referred to as the Child Support Standards Act, (CSSA) establishes the formula to be used in determining child support. The issue at bar is the retroactive child support allegedly due to the wife for the support of daughter, SUZANNE, who became emancipated during the trial. The statutory percentage for the support of the one child under the CSSA is seventeen (17%) percent of the combined parental income. As provided by statute, the Court must deduct FICA taxes from the parties gross incomes. (DRL §240 (1-b)(5)(vii)).

There was much controversy with respect to establishing the husband's gross income for the purpose of calculating child support. The Court of Appeals has recently held in *Holterman v. Holterman*, 3 NY3rd 1, 781 NYS2d 458, 814 NE2d 765 (2004), that the "double dipping" issue does not apply to the calculation of child support and that the CSSA does not require the reduction of a distributed income stream from the payor's income prior to calculating child support. Therefore, the Court is not confined to utilize the reasonable compensation figure utilized for the calculation of maintenance.

BELTZER, the wife's expert, was unconvincing as to the purported income figures he sought to establish, which were highly inflated (Plaintiff's Exhibits "95" and "127"), and he had difficulty verifying same because he had limited knowledge of the figures placed on the aforementioned exhibits which were prepared by his assistant. Furthermore, RAKOWER, the wife's second expert, who was retained one week prior to giving testimony on March 11, 2004, the last day of the trial, for the purpose of giving his opinion as to the husband's income during the period of the litigation, was equally unconvincing. RAKOWER testified that he did not discuss the income figures contained in Exhibit "127" with Mr. BELTZER., and that his analysis of the husband's income was based upon his review of certain evidence introduced at trial, including all expert reports and tax returns, both personal and corporate, but that he did not analyze the valuation of the businesses which was stipulated to by the parties. His analysis was superficial. The Court credits the conclusions reached by the husband's expert, Mr. GARABALDI, who was fully familiar with the workings of the husband's businesses and the corporate perquisites utilized by the husband, and who testified that the husband's income for year 2003 was $216,101.00. (Defendant's Exhibit "LLL").

Notwithstanding, the $216,101.00 sum found to be the husband's income, in accordance with DRL § 240(1-b)(c)(1)(2) and (3), and as a matter of discretion, the court is applying the CSSA guideline to the first $100,000.00 of the husband's income to determine retroactive child support for SUZANNE, the youngest child of the parties, who was emancipated in January, 2004. The Court has considered the factors set forth in DRL § 240(1-b)(f) which permit a deviation from the minimum statutory standard of child support such as the financial sources of the parties, the family's marital standard of living, the child's education and vocational needs and aptitudes as well as the non-monetary contributions that the parents will make toward the care and well being of the child, and concludes that application of the statutory percentage to the husband's full income will be unjust and inappropriate. The Court notes that the husband paid out of district tuition for SUZANNE for several years, established a UGMA account for SUZANNE from marital assets in the sum of $37,377.80, which the child received, and has agreed to pay an additional $58,750.00 toward the child's college expenses in accordance with the parties' Stipulation.

In arriving at the combined parental income to establish child support, the Court has made the following calculations:

Husband's Income	$100,000
FICA Deduction	(7,650)
Net CSSA Income	$92,360
Wife's Income	$0

The husband's percentage obligation for child support is 100%. The statutory percentage of seventeen (17%) percent is calculated to be $15,700.00 per annum or $302.00 per week. The child support awarded by the Court shall be retroactive to the date of the first request for said support, October 6, 1998, and shall continue through January 20, 2004 when SUZANNE turned 21 years of age. The husband shall receive a credit for the child support payments made pursuant to the *pendente lite* order of the Court. Any arrears shall be paid within ninety (90) days from notice of the entry of Judgment of Divorce. A schedule of the computation of arrears shall be included in the proposed Judgment.

HEALTH INSURANCE

The wife shall be responsible for her own health insurance, and the husband shall cooperate in making COBRA available to the wife if she makes such a request.

LIFE INSURANCE

To secure payment of the husband's obligation to provide maintenance, the husband is directed to provide a policy of decreasing term insurance with an initial face value of $1,000,000, with the wife as beneficiary. *Miness v. Miness,* 229 AD2d 520, 645 NYS2d 838 (2nd Dept. 1996); *Verdrager v. Verdrager*, 230 AD2d 786, 646 NYS2d 185 (2nd Dept. 1996). The husband's obligation to provide said insurance shall cease upon the termination of his support obligation. *Ross v. Ross,* 174 AD2d 1045, 573 NYS2d 13 (4th Dept. 1991).

ARREARS UNDER THE *PENDENTE LITE* ORDER

The wife claims that the husband has failed to comply with the directions of the *pendente lite* order of the Court and has refused to pay the expenses directed therein. The wife requests reimbursement for payments made by her which she claims were the obligation of the husband, in the following categories:

1. Unreimbursed medical expenses
2. Landscaping
3. Chemlawn
4. LIPA/Keyspan
5. Telephone
6. SUZANNE's cell phone
7. Sun Carting (garbage)
8. Accident/travel policy insurance
9. Term life insurance —Met Life
10. Universal Life Insurance —Met Life paid from cash value
11. Cablevision
12. Pharmaceutical expenses
13. Automobile expenses
14. Water expenses
15. Real estate taxes
16. Household maintenance

(Defendant's Exhibit "DDD").

The *pendente lite* order of the Court, dated May 13, 1999 (Parga, J.), directed that the husband pay the monthly mortgage, taxes, insurance, cable television, telephone, landscaping, fuel, electricity and water on the marital residence; pay auto insurance and reasonable repairs on the wife's car; maintain medical, dental and life insurance policies for the wife and SUZANNE and to pay 100% of their reasonable and routine unreimbursed medical, pharmaceutical, optical and dental expenses. Despite the husband's assertions to the contrary, the Court does not find the submitted expenses of the wife to be unreasonable and directs that, commencing from April 12,1999, the date of the *pendente lite* application, the husband reimburse the wife as follows:

1. The husband shall reimburse the wife for the unreimbursed medical and dental bills in the sum of $10,482.97, which the Court finds to be reasonable and routine;
2. The husband shall reimburse the wife for the landscaping expenses at the marital residence in the sum of $2,885.00;
3. The husband shall reimburse the wife for the Chemlawn service at the marital residence in the sum of $3,702.43;
4. The husband shall reimburse the wife for the LIPA/Keyspan expenses at the marital residence in the sum of $2,295.69;
5. The husband shall reimburse the wife for telephone bills she paid for the telephones located at the marital residence and the wife's cell phone in the sum of $10,388.55.
6. The husband shall not be responsible for the payment of SUZANNE's cell phone bills.
7. The garbage removal as performed by SUN CARTING is not specifically mentioned in the *pendente lite* order, however, the Court deems the refuse removal to be an integral part of maintaining the marital residence. The husband shall reimburse the wife for those expenses in the sum of $2,461.42;
8. The husband shall not be responsible for the payment of premiums for the accident/travel policies;
9. The husband shall reimburse the wife for the term life insurance premiums paid by the wife in the sum of $11,450.00;
10. The use by the husband of the cash surrender value in payment of the premiums for the Universal Life Insurance policy was addressed, *supra;*
11. The husband shall reimburse the wife for the cable television payments she paid in the sum of $99.76;
12. The husband shall reimburse the wife for the pharmaceutical expenses she paid in the sum of $45.00;

13. The husband shall reimburse the wife for the automobile expenses she paid in the sum of $674.78;

14. The husband shall reimburse the wife for the water bills she paid in the sum of $1,032.00;

15. The husband shall reimburse the wife for the real estate taxes she paid that are applicable to the marital residence in the sum of $255.78;

16. The husband shall not be responsible for the payment of "maintenance" charges paid by the wife which appear to be mostly for the *replacement* of items not covered by the *pendente lite* order.

The arrears total $45,773.38. Said sum shall be a credit to the wife from the husband's share of the marital assets equitably distributed herein.

COUNSEL FEES

The attorneys for the parties waived a hearing with respect to an award of counsel fees and stipulated that this Court shall award said fees based upon attorney affirmations, with supporting documentation. The affirmations were received and considered by the Court.

In any action or proceeding for a divorce, the Court, in its discretion, may direct the payment of counsel fees so as to enable a party to carry on or defend said action, having regard to the circumstances of the case and of the parties. Domestic Relations Law § 237(a). In determining the appropriateness and the necessity of fees, the Court shall consider the following:

1. the nature of the marital property;
2. the difficulties in identifying and evaluating marital property;
3. the services rendered and the time involved;
4. the applicant's financial status.

Domestic Relations Law § 237(d). The relative merits of the parties' positions and the results achieved are also factors to be considered by the Court when awarding counsel fees. See *DeCabrera v. Cabrera-Rosete*, 70 NY2d 879, 524 NYS2d 176, 518 NE2d 1168 (C.A. 1987); *O'Shea v. O'Shea*, 93 NY2d 187, 689 NYS2d 8, 711 NE2d 193 (C.A. 1999); *Cohen v. Cohen*, 154 AD2d 808, 546 NYS2d 473 (3rd Dept. 1989).

Furthermore, notwithstanding that the wife has received a substantial distribution of marital assets and has separate property of her own, an award of counsel fees is warranted based upon the parties' disproportionate earnings. *Cf.*, *Hackett v. Hackett*, 147 AD2d 611, 538 NYS2d 20 (2nd Dept. 1989); *Maher v. Maher*, 196 AD2d 530, 601 NYS2d 165 (2nd Dept 1993).

The unrealistic views taken by the parties in the disposition of the issues confronting them led to a protracted trial. After a careful reading of the parties' submissions, and based upon the foregoing, the wife is awarded, and the husband is directed to pay, counsel fees on behalf of the wife in the sum of $50,000.00. Said sum shall be a credit to the wife from the husband's share of the marital assets equitably distributed herein.

This constitutes the Findings of Fact and decision of the Court. Settle Judgment on notice.

Dated: October 20, 2004

WILLIAM R. LaMARCA, J.S.C.

Recent Decisions, Legislation and Trends

By Wendy B. Samuelson

Social Security and Divorced Spouse Benefits

In order for the ex-wife to collect Social Security from her ex-husband, the parties must have been married for at least ten years, and the wife must be unmarried and age 62 or older. (However, if the ex-husband is deceased, the ex-wife can file for benefits at age 60.) The ex-wife does not have to wait for her ex-husband to die prior to filing for Social Security benefits.

The ex-wife may receive a maximum of 50% of the ex-husband's earning history. However, if the wife's income results in a higher benefit, she may collect based on her own earning history.

In 2005, the maximum Social Security benefit will be approximately $1,940/month, when filing for benefits at his or her full retirement age and for a person who always earned the maximum taxable earnings. Therefore, a wife or ex-wife would be entitled to half of that amount, or $970/month.

The ex-wife has only one chance to pick the earnings history. If an ex-wife files for benefits at age 62, Social Security will look at her earnings history and that of her ex-husband, and award whichever payout is higher. Therefore, the ex-wife can't draw on the ex-husband's earning history at age 62, and then her earning history at age 66. The exception is that if the ex-husband dies, his ex-wife can begin collecting Social Security benefits based on his earnings history when she reaches 60, and also be eligible at 62 or higher for increased benefits based on her own income.

If a woman was married to several men, each for ten years or more, she is entitled to collect benefits from only one of those ex-husbands, generally the ex-husband that yields the highest benefit amount.

Information supplied by the *Wall Street Journal* "Tax News," 11/6/04.

CPLR Amendments

Telephone Depositions

CPLR 3113(d), effective January 1, 2005, provides as follows:

> The parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically. The stipulation shall designate reasonable provisions to ensure that an accurate record of the deposition is generated, shall specify, if appropriate, reasonable provisions for the use of exhibits at the deposition; shall specify who must and who may physically be present at the deposition; and shall provide for any other provisions appropriate under the circumstances. Unless otherwise stipulated to by the parties, the officer administering the oath shall be physically present at the place of the deposition and the additional costs of conducting the deposition by telephonic or other remote electronic means, such as telephone charges, shall be borne by the party requesting that the deposition be conducted by such means.

Gay Marriage Update

A year ago, four state constitutions explicitly barred same-sex marriage. Currently, 17 states have such constitutional bans. On Election Day, 2004, voters in 11 states voted to ban same-sex marriage, and opponents of the concept are pushing ahead to enact bans in as many as 15 more states in 2006, including Minnesota, Wisconsin and South Dakota.

New York City Pension Funds Recognize Gay Marriage

The five pension systems that comprise the retirement funds for New York City municipal employees have all voted to approve a decision announced November 17, 2004 by Mayor Michael Bloomberg that the spouses and partners of same-sex marriages sanctioned in other jurisdictions (Massachusetts, Canada, Norway) and of Vermont civil unions will be recognized as though they are legal spouses and therefore entitled to receive the same pension benefits, including accidental death payments, as married couples.

Health Benefits for Domestic Partners

Eleven states, including New York, provide domestic partner benefits for public employees. Four years ago, Eastchester became one of the first communities in Westchester County to offer health benefits to the domestic partners of its employees. On or about January 3, 2005, Eastchester has become the first town in New York to end the benefits. The town board voted 3

to 2 to approve new union contracts and to end a town policy of providing coverage for domestic partners. The town's Civil Service Employees Association and police union agreed to dropping the coverage, saying their members had more pressing concerns. The two employees who have made use of the benefits will be allowed to continue to do so, but new employees will not be eligible.

Legal Documents that Provide Protection for Same-Sex Couples in New York

A New York gay resident should consider signing the following documents to protect the same-sex partnership: power of attorney for health care and finances, living wills, medical emergency cards, relationship agreements, wills, funeral arrangements, living revocable trusts, co-parenting agreements, and nomination of guardianship.

Social Security Administration Recognized New Paltz Marriage License

The Social Security Administration announced in the last week of December 2004, that it will recognize marriage licenses issued for heterosexual couples by the clerk of the town of New Paltz, New York.

Court of Appeals Roundup

QDRO and Survivor Benefits

Kazel v. Kazel, 2004 N.Y. LEXIS 3526 (November 14, 2004)

After a 28-year marriage, the wife was awarded a portion of the husband's pension by a QDRO. The ex-husband died prior to retirement. The ex-wife requested a modification of the QDRO to include the pre-retirement death benefits. The trial court denied the motion, which was affirmed on appeal, and affirmed by the Court of Appeals. A judgment of divorce and QDRO awarding the wife an interest in the husband's pension plan do not automatically include pre-retirement death benefits available under the plan. If the intent is to distribute such benefits, the Court must separately, and explicitly state this.

ERISA and I.R.C. require all pension plans to provide survivor benefits to a participant's surviving spouse (see ERISA [29 U.S.C.] § 1055[a]; Internal Revenue Code [26 U.S.C.] § 401[a][11]; § 417). The Court of Appeals held that pursuant to a divorce, a QDRO can provide that a former spouse be treated as a surviving spouse—to the exclusion of the actually surviving spouse if the decedent had remarried—for purposes of ERISA and the joint and survivor rules of the I.R.C. (see ERISA [29 U.S.C.] § 1056[d][3][F]; Internal Revenue Code [26 U.S.C.] § 401[a][11]; §§ 417, 414[p][5][A] n2.) A former spouse can overcome the right of an actually surviving spouse to receive a survivor annuity only if specifically awarded such benefits by the matrimonial court, and such award must be reflected in a QDRO, evidenced by clear language designating the former spouse as the surviving spouse for purposes of the survivor benefits.

Author's note: *Matrimonial counsel should be aware of this important Court of Appeals case, and request the court to specifically distribute the pre-retirement death benefits, or specify this in a settlement agreement.*

In the Wake of the Recent Court of Appeals' Decision in *Holtermann v. Holtermann*, 3 N.Y.3d 1; 781 N.Y.S.2d 458, 814 N.E.2d 765 (2004)

Miklos v. Miklos, 9 A.D.3d 397; 780 N.Y.S.2d 622 (2d Dep't 2004)

The trial court ordered the husband to pay a distributive award of his law license and law practice, maintenance, and child support. The case was remanded to the trial court because the appellate court could not determine if the supreme court had impermissibly engaged in "double counting" of income by valuing the husband's interest in the law firm as both an asset for marital property distribution and as income for determining the maintenance award.

Author's note: *The trial court must state its specific mathematics calculations in determining maintenance, child support and equitable distribution in order to show that it is not double or triple counting the same income stream. Otherwise, the case will be remanded on appeal.*

Support Enforcement

Contempt

Marcus v. Marcus, 2005 N.Y. App. Div. LEXIS 52 (1st Dep't, January 6, 2005)

Justice Silbermann found the husband in contempt for failure to pay child support and maintenance totaling approximately $439,000, which was affirmed on appeal. The husband's failure to pay was determined to be "willful" based on "clear and convincing evidence." The wife sustained her burden of proof that the failure to pay was "not inadvertent." The burden of proof then shifts to the husband to prove his inability to pay the support directed, which he failed to do. The husband's payment of $110,000 after the lower court issued the contempt order did not purge his contempt, nor did his offer to sell his Rolls Royce to pay the children's tuition.

Author's note: *The courts are taking a more aggressive approach in dealing with deadbeat dads.*

Child Support

Poverty Guidelines

***Snow v. Snow*, 2005 N.Y. App. Div. LEXIS 50 (3d Dep't, January 6, 2005)**

The trial court's award of child support of $25 per month was affirmed on appeal because pursuant to DRL § 240(1-b)(d), the court may not impose a child support obligation that will reduce a non-custodial parent's income below the federal poverty level. Here, the defendant husband was unable to work due to a medical condition, and has no assets, and received annual income from Social Security disability of $6,900 in 2003, which was below the federal poverty income guideline of $8,980 (see 68 Fed. Reg. 6456 [2003]).

Deduction of Maintenance

***Parise v. Parise*, 2004 N.Y. App. Div. LEXIS 15600 (2d Dep't, December 20, 2004)**

The court below erred by failing to reduce the husband's income by the amount of maintenance paid to the wife before determining his child support obligation. The trial court properly imputed income to him from his home improvement and carpentry businesses higher than the amount he claimed since the trial court found that the husband's testimony lacked credibility.

Modification of Support

***La Russo v. Spencer*, 2004 N.Y. App. Div. LEXIS 16356 (4th Dep't, December 30, 2004)**

The ex-husband failed to sustain his burden that an unanticipated and unreasonable change in circumstances has occurred, warranting a downward modification, particularly where his reduction of income was caused by his own actions.

***Davis v. Davis*, 2004 N.Y. App. Div. LEXIS 15752 (2d Dep't, December 27, 2004)**

The husband was a bricklayer and did not have a high school education at the time the parties signed their divorce agreement, which was incorporated but not merged into the judgment of divorce. After suffering an injury which caused him to be permanently partially disabled, he brought a motion for downward modification of his support obligations. The court found that although the ex-husband showed a substantial unanticipated change in circumstances, he failed to make any effort to find a job in another line of work that was not as physically demanding as his former job, nor had he sought retraining in preparation for looking for different work. The court reasoned that a parent's current financial ability is not necessarily determinative, but rather the parent's ability to provide support.

Author's note: *The court denied the application "without prejudice." The father must do something to show reasonable efforts to obtain new employment and not just sit back and say "oy."*

Custody

***Amanda B v. Anthony B*, 2004 N.Y. App. Div. LEXIS 16436 (4th Dep't, December 30, 2004)**

Although the appellate court agreed that the lower court failed to determine whether extraordinary circumstances existed before awarding joint custody of the child to the a non-parent, the paternal grandmother, the record was sufficient for the appellate court to make such determination on its own. The mother was determined to be an unfit parent due to her repeated allegations of sexual abuse by the father, which were unfounded and detrimental to the child and her relationship with the father. The mother even continued to file new reports, including one filed during the trial. Then, the appellate court agreed that it was in the child's best interests for the father and the paternal grandmother to have joint custody, as the father demonstrated that he was willing to care for the child and had a desire to do so, with the temporary assistance of his mother. Further, the court disagreed with the mother that she had been the primary caretaker and that stability and continuity in the child's life was best advanced by keeping her in her custody, since the record established that the child had many caretakers during her young life, including living at the residence of the paternal grandmother.

Relocation

***Paul v. Pagnillo*, 2004 N.Y. App. Div. LEXIS 15871 (3d Dep't, December 23, 2004)**

The parties had joint custody of their 10-year-old son, and the mother had physical residential custody. The mother brought an application to relocate with the child to Mississippi, where her new husband had found a job as zoologist, which will pay $35,000/year. The appellate court reversed the lower court's granting permission for the relocation, since the mother failed to meet her burden of proof that the relocation would be in the child's best interests. Factors to be considered in determining best interests in relocation cases are as follows: "each parent's reasons for seeking or opposing

the move, the relationship between the child and each parent, the impact of the move on the quality and quantity of the child's future contact with the non-custodial parent, and the move's potential enhancement of the child's and custodial parent's lives."

The appellate court determined that the mother's desire to live with her new husband where he received a job did not outweigh the child's need for stability as well as maintaining regular and continuous contact with his father. The court found that the mother failed to prove that the move would increase their financial stability or the child's education development. The mother's new husband did not testify, and the mother failed to prove that the new husband's position in Mississippi was permanent, that he would have the opportunity for advancement, or that his annual salary would increase in regular increments. The mother had no firm job prospects in Mississippi. Moreover, she did not check out whether the child would be able to receive the educational remedial assistance he receives in New York.

Torts in Matrimonial Law

***Chen v. Fischer*, 783 N.Y.S.2d 394 (2d Dep't 2004)**

The parties' judgment of divorce bars, as *res judicata*, the ex-wife's tort claim of assault and battery alleged to have occurred during the marriage. In addition, New York does not recognize a cause of action to recover damages for intentional infliction of emotional distress between spouses.

Wendy B. Samuelson is a partner in the Garden City matrimonial law firm of Samuelson, Hause & Samuelson, LLP, and 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*. She has also appeared on the local radio program, "The Divorce Law Forum." Ms. Samuelson may be contacted at (516) 294-6666 or WBSesq1@aol.com. The firm's website is www.matrimonial-attorneys.com.

Publication of Articles

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

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