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# Family Law Review

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# Notes and Comments

**Elliot D. Samuelson, Editor**

## Leveling the Playing Field . . . at Last!

The Appellate Division, Second Department, on March 31, 2009 decided *Penavic v. Penavic*,[1] an extraordinarily important decision to unmonied spouses and their counsel. The appellate court, in no uncertain terms, condemned the practice by some IAS judges to refer *pendente lite* counsel fee application to the trial court, especially where the moving party makes far less than his or her spouse, or is a stay-at-home mom or dad without employment income.

The facts are interesting and must be reviewed in-depth in order to understand the reaching effect of this decision. The parties were married for 14 years and had four children, when the wife commenced an action for divorce. Both parties had graduate degrees, but the wife had left her employment shortly after their marriage, to essentially become a homemaker and raise their four children. The husband's career as a hedge fund executive flourished and his income as early as 1998 exceeded $1 million a year. Such income afforded the family an opulent lifestyle that included frequent luxurious trips to Europe and other foreign countries, household help, an *au pair*, expensive vehicles, and the other trappings of an exceedingly upscale standard of living.

When the wife commenced her action for divorce in 2003 the parties' pre-separation standard of living had already been cast. Sometime later in the litigation, the husband advanced to the wife the sum of $250,000 against her equitable distribution entitlement and agreed to supply her with $12,000 a month in support for her and the children, in addition to paying for health-care costs, educational and extra curricular activities for the children, and a one-year payment of $25,000 to defray the wife's travel and vacation expenses. A so-ordered stipulation was executed. At that time, the husband's income surpassed $2.7 million per year, so he was well able to make these generous payments, and at the same time continue to enjoy his own luxurious lifestyle.

A year later, the wife had gone through these funds, and was unable to pay for certain home repairs and the taxes on the marital residence. She also had incurred substantial legal fees during this hotly contested litigation, and owed her counsel $250,000. She then moved for an upward modification of maintenance and child support, and a *pendente lite* award of counsel fees in the

## Inside

sum that she presently owed to her counsel. The Supreme Court denied the motion for a support modification and referred the wife's request for fees to the trial court, although it seemingly authorized a withdrawal of funds from the parties' marital assets in order to pay counsel. This *dicta* was not agreed to by the husband's counsel and the appeal was perfected. This fact was not reflected by the appellate division in the *Penavic* decision, perhaps because it would cause confusion rather than clarification.

The *Penavic* appeal court sustained the lower court's denial of increased support, because the record demonstrated the wife failed to meet her burden of establishing a substantial change of circumstances since her prior agreement, and utilized the old chestnut that "the best remedy for a denial of such relief is a speedy trial." However, a totally different result was reached concerning the application for counsel fees. Quoting from the landmark *Prichep*[2] and *O'Shea*[3] decisions, the court reflected that the lower courts should not defer such requests to the trial court, especially where "there is a significant disparity in the financial circumstance of the parties." This pronunciation is even more remarkable where the spouse seeking support apparently had assets of her own, but no employment income, and received $12,000 monthly in agreed support.

The court again quoted from *Prichep* and expressed the rule that courts "should normally exercise their discretion to grant" such awards, and only deny them when " good cause" can be shown not to do so. The appellate court reversed the lower court despite its finding that both parties possessed ample assets to pay for their own legal expenses, and made an award because "the wife is currently unemployed . . ." and is a homemaker and parent with "no independent source of income." It then contrasted the husband's current financial circumstances with the wife, and commented that he was ". . . an extremely successful executive, who enjoyed an adjusted gross income of $2.7 million dollars". . . and is "capable of wearing down or financially punishing" his spouse by prolonged litigation, while she was an unemployed housewife who exclusively cared for the parties' children.

To make certain that there would be no confusion about the court's expressed policy to award interim counsel fees to the unmonied spouse during the pendency of the litigation, the court cautioned that where a party's superior financial position provides a palpable advantage over the other, counsel fees should be awarded with leave to apply for additional fees as the occasion arises.

It proceeded to award the wife an interim fee of $100,000.

Although there may be some rare instances when the refusal of an interim award of counsel fees will be sanctioned by the appellate courts—for example, when both spouses earn comparable incomes and have control of comparable assets—the day has now come to an end when a wealthy monied spouse will have the opportunity to exert financial pressure to effect the capitulation of the other to financial terms that are unfair and onerous . . . a result that is long overdue.

What is even more important in this decision is the court's recognition that interim awards can be made from time to time preceding trial. This rule, accordingly, will permit the retention of experts, proper trial preparation, and the extensive discovery that now must necessarily include the search for electronic evidence. In the age of information technology, electronic discovery is tedious, time consuming, and costly. It must be undertaken, despite its costs, in order to gather sufficient evidence to prove your client's needs for support, and a fair division and valuation of marital assets.

As these costs escalate, and the need of counsel to perform extensive legal services increases exponentially, counsel fee awards must be available throughout the pretrial aspects of a contested matrimonial case. Only then will the rule of fairness prevail and allow both parties to wage an effective litigation with equal ammunition.

## Endnotes

1. *Penavic v. Penavic*, 60 A.D.3d 1026 (2d Dep't 2009).
2. *Prichep v. Prichep*, 52 A.D.3d 61 (2d Dep't 2008).
3. *O'Shea v. O'Shea*, 93 N.Y.2d 187 (1999).

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# How to Apply the Principles of Business Valuation During This Recession

By Martin P. Randisi

The purpose of this article is three-fold. First, it is to give the matrimonial Bar some perspective on the challenges that valuation experts face in a recessionary economy when valuing a businesses, property, and stock options. Second, it is to show how the principles of valuation can be used to support issues related to the selection of the valuation date. Finally, through a case study I hope to generate some ideas on how to navigate a business valuation through the current economic climate.

> Many forecasters expect that the U.S. economy will recover as 2009 progresses. But a return to healthy economic growth next year is unlikely. The chances for a sustained recovery depend largely on the progress of stabilization in the financial markets, making the ever so-evolving outlook more uncertain than usual, with risks weighted to the downside.[1]

Given this scenario, how are matrimonial attorneys to advise their clients as to issues related to the value of a business?

Before I summarize the principles most applicable to business valuation in a recession, let me introduce the case study to you.

## Divorce Fact Pattern and Problem

It is June 2008 and Mary tells her attorney Madison that she wishes to file for divorce from her husband, who is a major plumbing subcontractor in New York City. She is confident that now is the time to file because their 2007 tax return showed that her husband earned $1.9 million. Meanwhile, a few blocks over on Lexington Avenue, Joe the plumber is explaining to his attorney, Johnson, that his accountant said now is a good time to get divorced because commercial construction jobs are declining by 60%. What should the attorneys tell their clients? By the way, the business was begun in 1925 by Joe's grandfather.

Those of us working in the New York metropolitan area had little concern answering these questions in 2007 and even in the first half of 2008. But since September of 2008, the answers to these questions are now very complicated. To help answer these questions, let us first look at some valuation rules and practices. After that, I will return to the case study to demonstrate how the attorneys for the titled and non-titled spouse can advocate for their clients with a better understanding of valuation principles.

## Valuation Principles

Internal Revenue Service Ruling 59–60, often quoted in equitable distribution matters, reminds us that valuation results and fair market value ("FMV") will change with changes in economic conditions:

> The fair market value of specific shares of stock will vary as general economic conditions change from "normal" to "boom" or "depression," that is, according to the degree of optimism or pessimism with which the investing public regards the future at the required date of appraisal. Uncertainty as to the stability or continuity of the future income from a property decreases its value by increasing the risk of loss of earnings and value in the future. The value of the shares of the stock of a company with very uncertain future prospects is highly speculative. The appraiser must exercise his judgment as to the degree of risk attaching to the business of the corporation which issued the stock, but that judgment must be related to all of the other factors affecting value.

This Revenue Ruling is reminding us that we must understand the economy's impact on a business and consider the risk of achieving future earnings. In other sections of the Revenue Ruling, the use of publicly traded securities to determine value is discussed. Thus, in the New York market, we must be concerned with the prices of publicly traded companies because of their impact on stock options and other forms of incentive compensation to highly paid executives, and on the pricing of privately held businesses.

We were reminded of the phrase "from boom to depression," as quoted in the Revenue Ruling, when just over a year ago, Bear Stearns' stock price tumbled from $90 a share to $10, almost overnight. In the fourth quarter of 2008, venerable institutions such as Lehman Brothers and Merrill Lynch either went bankrupt or had to find a buyer. The once secure accounting profession also took major hits, as thousands of accountants assigned to the Lehman Brothers engagement were given pink slips. Thus, the words of the Revenue Ruling are a very real reminder that we have to understand the economic environment and decide if we are in a period that is normal, boom or recession at the time of the valuation.

Another valuation principle is that a valuation is at a point in time. This means that the value will be different at different dates, e.g., if you sold Bear Stearns' stock in October 2007 you had $90 per share; in February 2008, you only received $10 per share.

In estate and gift matters, the tax court affords no flexibility to change a date (e.g., for the individual who made a gift of 20,000 shares of Bear Stearns one month before its crash, the IRS expects taxes to be paid on the $90 per share value). However, in the equitable distribution of property, the valuation date has flexibility and the courts might consider a valuation date after the crash, when it was worth $10 per share. For the advocate in a matrimonial action, this recession presents a greater need to understand the duration of the recessionary cycle on the subject business when petitioning for a specific date.

While the tax court has no flexibility to change the valuation date, some tax court cases have considered subsequent events that occurred after the valuation date. (*Business Valuation and Taxes, Procedures, Law and Perspective*, written by Shannon P. Pratt and Tax Court Judge David Laro, has an excellent discussion on the topic of subsequent events in Chapter 2.) Generally accepted appraisal practice recognizes that subsequent events can be considered in a valuation if they were known or could have been known at the valuation date. While I will not discuss it in this article, a review of Estate and Gift Tax case law and the Federal Rules of Evidence may give the matrimonial advocate some ideas as to how subsequent events could be used to their advantage in an equitable distribution valuation if the valuation date cannot be moved.

More background on the admissibility of subsequent events as evidence of value can be found in the Federal Rules of Evidence 401 under Rule 143(a). Also, the *Noble* case of January 6, 2005 (*Estate of Helen M. Noble v. Commissioner*, T.C. Memo 2005-2), which is the leading case providing guidance on use of a subsequent event as evidence of value, is thought-provoking. Thus, if a subsequent event is relevant to a valuation, the advocate will have to work very closely with the appraiser to explain how the subsequent event influences the valuation decision and the best way the facts can be presented.

## Value Is the Present Value of the Future Cash Flows

Let us now put these ideas about the valuation date into context with the definition of value. It has often been said that the simplest explanation of value is: "The value of a business is the present value of the *future* cash flows." The emphasis here is on future cash flows. The fear in this recession is that appraisers, attorneys and judges may just think the typical valuation report which uses the historical past as a proxy (such as the average earnings of the last five years) to estimate cash flow is the only way to do it. Well, in today's recession that method will most likely not be accurate. Yes, the future earnings will be a challenge for the expert to estimate, but much can be gained if the advocate can convince the court that the cash flow was arrived at in a clear and objective manner.

We are all more than a bit skeptical with economic predictions, because we saw how many institutions and companies did not read the tea leaves on our present economic failure. However, this is a time when, as we will soon see as the case study plays out, experts will have to face the music and drive in the fog to find what the proper cash flows are that the business can generate in the future. Again, recall that in the Revenue Ruling the emphasis is on the future earning, not what is in the historic financials during the boom economy.

This is why both the expert and advocate have to understand the client's business cycle, how it relates to the economic outlook, and that the cash flow conforms to objective data.

## Valuation Is at a Point in Time

In the course of a two-year period within which a typical divorce takes place, the value can be dramatically different, at different valuation dates. The chart in Figure 1 shows how the valuation of a major public company can change. Valuation is determined by multiplying the earnings (in billions) times the Price Earnings (P/E) multiple for that company at each valuation date.

**Figure 1—Valuations Based on Changed Dates**

| | June 2007 | Nov. 2008 | June 2009 |
|---|---|---|---|
| Earnings | $1,000 | $700 | $100 |
| P/E | x 30 | 7 | 10 |
| Value | **$30,000** | **$4,900** | **$1,000** |

These models show the relationship of earnings and the P/E multiple on values. If an appraiser was asked on January 20, 2009 to determine the value at June 2007 or November 2008, historical data are readily available. If asked in January 2009 to estimate the value at June 2009, the outlook would be more difficult. However, securities analysts make these calculations every day by using forecasts.

Let's now turn back to our case study and I will illustrate how to apply valuation principles in this recession to help you navigate through the stages of an equitable distribution matter in an uncertain economic environment.

## Return to the Case of Mary and Joe the Plumber

In today's economic world, valuation experts and attorneys do not have all the answers. Indeed, it is important for us to make clear to our clients that our predictions for future earnings are tentative at best. However,

appraisers and economists can help clarify the impact of the economy and business cycles on the valuation. Appraisers need to explain how the economy, industry, and company actions can drive a valuation higher or lower. However, what is clear from the events of the past year is that we cannot predict when valuations will change once an action for divorce has begun, or whether a judge will consider subsequent events and change the valuation date.

Let me now give you a hypothetical playback of our case study:

### Stage 1—Making the Decision to Commence an Action

Madison, on behalf of Mary, postulates that Joe's business will have another strong year and anticipates a June 2008 cutoff date. He made a few calls and the appraisers gave him a $7 million to $8 million valuation range. Madison calls to get an index number and starts an action. Of course, we are back in June 2008 and no one believes we are headed for a crash.

Johnson decides to double check what Joe told him and reviews the financial statements, and has the controller break out the numbers by quarter. He also sees the backlog has dropped dramatically. He then calls a few large general contractors who confirm the New York market is drying up quickly. Johnson comments to his client that he hopes Mary serves him with papers in the near future. Of course, Johnson realizes that he must convince the court that a current valuation date is more equitable.

### Stage 2—Discovery

Joe is served. It is now December 2008, five months into the matter and each side realizes there are issues. Neither attorney expected the downturn to be this bad. Each retains his own expert, as opposed to requesting a neutral appraiser, because there are very different perspectives that must be addressed. Johnson supplements his valuation expert with economists and industry experts. There is a lot of nail-biting:

1. Madison's expert says he has no idea when a recovery will begin; Madison tries to withdraw the action and delay it.
2. Johnson petitions the court to adopt a trial date for a current valuation due to the impact of market forces.

### Stage 3—Trial

The court declines to rule on the motion to fix a valuation date but sets the trial date for June 30, 2009. Clearly the economy is not better. The burden of proof seems to be more on Johnson to have the court consider current conditions. Obviously, Madison sticks to the June 2008 date and explains to the court that when he filed for divorce there was a boom economy and the husband was given every opportunity to settle. His expert supports the position.

Johnson brings in charts to show Joe's backlog was dropping at the date of action, and business was decreasing as early as the first quarter of 2008. A problem Johnson has is that there are no articles admitting to the recession in June of 2008 because of politics and the Presidential election.

### Stage 4—The Expert Reports

Judge Center reads the two expert reports and, as expected, the experts both prepared what appeared to be credible valuation reports if you assumed they had the correct valuation date.

| | *Mary* | *Joe* |
|---|---|---|
| **Valuation Date** | **June 2008** | **June 2009** |
| Earnings | $1,000,000 | $200,000 |
| Multiple | 6 | 3 |
| FMV | **6,000,000** | **600,000** |

## Summary and Observations

The wife's expert averaged the last five years' earnings and used a multiple at the high point of the market in June 2008. The husband painted a tale of gloom and doom and predicted the company was taking its last breath.

The approaches used polarized the results, leaving Judge Center disturbed that each was too extreme. What caught his eye was the fact that this particular business was begun before the crash of 1929 and has survived numerous business cycles.

It is clear that in this case each side should have recognized the longevity of the company and referred to the Revenue Ruling on business cycles. This judge indicated that based on the expert presentation by an economist and industry expert, he was going to consider changes due to market forces but was not looking for either side to achieve a windfall. This is a case where the court understood the husband was going to stay in this business and not sell it. We are in a new world. Valuation principles do have flexibility when they are applied to the facts of each case. Matters like this in today's uncertain future call for compromise and willingness to cut deals contingent on the future. If settlement cannot be had, the expert who takes the high road could be more convincing for his or her client. Let me explain:

1. While valuation is at a point in time, the appraiser is trying to determine the future earnings and risk associated with those earnings.

2. The Revenue Ruling speaks in terms of normal conditions, boom or depression. Explain where the company is today, that it is in the valley. Both sides should play out that they recognize it's more a matter of when momentum resumes. Again, recall this company survived the days of depression and many recessions.
3. Rather than using a fixed earnings amount, either appraiser could have explained that the discounted cash flow ("DCF") model is a recognized valuation method based on future earnings, as the Revenue Ruling discusses.
4. Each expert could have used low earnings for 2009 and 2010 but then increased it as normal times return in 2011 and beyond.
5. Different risk-adjusted rates could have been applied to the recession years and normal years.
6. A DCF method would have moved each valuation to a higher degree of credibility rather than leaving the court with two extremes.
7. Ultimately, in today's recession, there are those businesses that will not survive and others that will.
8. The attorney has to rely on experts who can help him decide if the company will be a survivor or will go out of business. Then implement a credible position.

This case example is about how to be successful for your client with a business that is expected to survive by getting behind the deeper meaning of Revenue Ruling 59–60 and applying valuation principles with different methods tied to the facts of the specific case at hand.

I only touched on the broader principles in this article. Look for the experts who have been through a few recessions to help you build a better case.

### Endnote

1. "After Rocky 2008, U.S. Consumers Seek Stable Ground in 2009," ECONSOUTH, Volume 10, Number 4, Fourth Quarter 2008.


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# Domestic Relations Law § 250 Update

By Jad Greifer

Whether challenges to prenuptial and postnuptial agreements were time barred has been a consistent source of controversy and confusion, and the litigation result generally depended on whether you were in the First Department or the Second Department, and/or whether the challenge to the nuptial agreement was by way of defense or affirmative challenge.

The First Department held the statute of limitations was tolled during the marriage and would not begin to run until the parties had physically separated or commenced an action for divorce. *Lieberman v. Lieberman,*[1] *Zuch v. Zuch*[2] (requiring a spouse to take affirmative action to preserve claims to potential marital assets even before there had been any hint of marital discord flies in the face of logic and would be against public policy). The First Department's view was consistent with the Uniform Premarital Agreement Act. Conversely, the Second Department took the view that there was no toll during the marriage. *Pacchiana v. Pacchiana*.[3]

In *Bloomfield v. Bloomfield*,[4] the Court did not directly address the issue of "tolling," but did specifically hold that the six-year statute of limitations applicable to contract actions would only bar affirmative claims and not those brought by way of defense.

Fortunately, most of the controversy and inconsistency has been eliminated by the May 21, 2008 amendment to Domestic Relations Law § 250 (the third amendment to the statute that was originally enacted on July 3, 2007).

DRL § 250 provides that the statute of limitations for a nuptial agreement shall be three years, but that said statute of limitations shall be tolled until service of process in a matrimonial action or the death of one of the parties. The recent amendment to DRL § 250 clarifies that with respect to agreements executed prior to the effective date of the statute (July 3, 2007), the statute of limitations was tolled unless *a court* had previously barred the action to set aside. Specifically, the amended statutory provision provides that the statute ". . . shall not apply to any agreement where the commencement of an action thereon was previously barred by a court under the civil practice law and rules in effect immediately prior to such effective date." This differs from the prior language, which read that DRL § 250 "shall not apply to any agreement where the commencement of an action thereon was barred under the civil practice law and rules in effect immediately prior to such effective date."

In the first case interpreting the newly amended DRL § 250, Justice Jeffrey S. Brown in Nassau County Supreme Court confirmed, in *Petracca v. Petracca,*[5] that the Wife's challenge to the parties' 1996 postnuptial agreement could go forward over the Husband's statute of limitations objections. Justice Brown held that insofar as no court had previously barred a challenge to the agreement pursuant CPLR 213 and insofar as the Wife's matrimonial action was commenced after the effective date of the statute, the Wife's challenge could go forward. Justice Brown expressly rejected the Husband's position that since the Wife's challenge predated the May 21, 2008 amendment, she could not avail herself of the statute, insofar as the amended statute remained effective as of July 3, 2007 (well prior to the commencement of the matrimonial action in *Petracca*).

In the alternative, Justice Brown held that the Wife's challenge could go forward since the Husband had affirmatively asserted the postnuptial agreement in his verified answer and in a motion for a protective order, and that the Wife's challenge to the validity of the agreement was by way of defense. Pursuant to *Bloomfield v. Bloomfield,* the Husband was therefore barred from raising a statute of limitations defense as a bar to the Wife's motion. Justice Brown's decision of first impression in *Petracca v. Petracca* was rendered on November 5, 2008 and published in the *New York Law Journal* on November 18, 2008.

So long as the nuptial agreement is contested within three years of the earlier of service of process in a matrimonial action or the death of one of the parties to the nuptial agreement, and so long as a court has not previously barred a challenge to the agreement, there should no longer be statute of limitations issues barring challenges to nuptial agreements. Insofar as it was never realistic to expect a spouse to challenge a nuptial agreement during the marriage and because it is inherently undesirable to have different litigation results hinge on which judicial Department a litigant lives in, the statutory amendment was long overdue.

## Endnotes

1. 154 Misc. 2d 749 (Sup. Ct., N.Y. Co. 1992).
2. 117 A.D.2d 397, 405 (1st Dep't 1986).
3. 94 A.D.2d 721 (2nd Dep't 1983).
4. 97 N.Y.2d 188 (2001).
5. Clair, Greifer LLP, by Bernard E. Clair and Jad Greifer, represented the Plaintiff-Wife in the aforementioned decision.

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***Assistant Editor's Note:*** The tortured history of DRL § 250 was explored in the Fall 2008 issue of the *Family Law Review*. *See* "Tolling the Statute of Limitations on Prenuptual and Postnuptial Agreements: The Third (And Last) Version of DRL § 250."

# When Issues of Occupational Capacity and Imputed Income Arise in Matrimonial Cases, Bring in the Employability (or Vocational) Expert

By Rona E. Wexler

Today's matrimonial attorneys rely on a variety of forensic experts to prepare for trial or to help decide the economic aspects of a settlement. Attorneys are all well-acquainted with the forensic accountant and the business valuation expert. In matters regarding maintenance (duration and amount) and child support, questions often arise with regard to each spouse's employment capabilities and earning capacity. For these questions, the attorney has another important, often overlooked, forensic expert at his or her disposal: the employability (or vocational) expert.

The employability or vocational expert's services are used to determine the highest level of occupational capacity and imputed income a party can achieve. An employability evaluation considers an individual's employment capabilities, his or her potential to transition to higher levels of employment, and earning and career options. A vocational expert should be consulted when a party:

- Is recently unemployed or under-employed and claims to be unable to find comparable employment or employment with comparable earning capacity;
- Has not been active in the workforce for a significant time period or has had a disrupted career (e.g., leaving a profession to raise a family, to become a caregiver to another family member or due to his or her own health matters);
- Has been engaged in work that does not produce income (ongoing situation or recent development);
- Has skills and education or prior experience that do not readily translate into another occupation or career by which income can be imputed;
- Requests or desires a period of retraining or education to enter a different career with better earning capacity (return on investment);
- Is evaluated by, receives, or will receive, a report from another vocational expert;
- Claims that the current, weakened job market precludes him or her from returning to a position with reasonable earning capacity;
- Has received a report from an economist evaluating education, degree or professional license with no apparent consideration of spouse's employment history and position in current job market;
- Has been employed in a family or sole proprietor business, and there are questions about how his or her skills and experience translate into employment and imputed earnings in the job market.

The courts recognize that both men and women have earning capacity. Since the introduction of limited durational support in the 1970s, vocational experts have been introduced increasingly in divorce cases nationwide. The pursuit of or defense against spousal maintenance and support is one of the most negotiated and litigated issues that have long-term economic impact in divorce. The New York Court of Appeals has held that it is proper to direct a party to submit to an evaluation by a vocational expert where capacity to perform in the workplace is a material issue.[1]

New York attorneys, however, often overlook employability experts or consult with them late in the divorce proceeding. The practitioner has a distinct advantage when an employability evaluation is utilized in the initial stages of negotiation or litigation such as the Preliminary Conference. Practitioners can use the vocational evaluator's expertise to ensure that they have all pertinent information or documentation that they may otherwise omit during Interrogatories, Notice for Discovery and Inspection or at Deposition.

During a recession and rising unemployment, the matrimonial attorney faces more challenging questions. How does the practitioner provide evidence about a spouse's ability to secure employment and earn income? How does she or he demonstrate if a party is conducting a sincere and appropriate search for a position that matches his or her abilities and earnings capacity? What activity and documentation best supports this? After an absence from an occupation, how long is it before skills are considered less relevant or "obsolete?" Where can a party transfer skills and experience to other higher level occupations with the best earning capacity, if he or she can't obtain a position in a chosen field? The vocational expert brings the knowledge and skills to objectively address and provide answers to these questions for the court.

Without a vocational assessment, a practitioner often relies on recent past earnings and other documents produced during discovery to estimate earning capacity. This information is limited and can present an inaccurate estimate of likely income. Then the lawyer must leave it to the court to decide. If it has been a long time (over five years) since the party changed jobs, the court may find it less reasonable to project earnings based on the prior employment. If a prior job was part-time, will the court consider it fair to impute full-time income based solely on that employment? The vocational expert, however, has specific knowledge

and experience to render an objective opinion. He or she uses a clear methodology to address these questions, to go beyond media coverage about the economy and regional job losses and present a well-documented evaluation report, including a local labor market survey.

Income can be imputed if a position offering higher wages is "currently available." This can be ascertained through a local labor market survey. Labor market research determines a position's wages, if a position is currently available, and if a particular candidate is likely to be hired for that job. If the party is unlikely to be hired, the vocational expert will determine what it will take for him or her to attain the requisite skills or experience to increase hiring opportunities. Vocational experts rely on published salary surveys, job advertisements and other sources of information which can look "beneath the surface" of a job posting. They may use other sources such as industry experts, hiring managers, and executive or placement agencies. Experts are allowed to rely on such hearsay facts to reach an opinion as long as the facts are traditionally relied upon by experts in the field. A qualified expert's opinion should be issued with a "reasonable degree of certainty" based upon personal facts, facts-in-evidence and professional reliable hearsay.[2] Such opinions bring unique value to the practitioner.

Once the practitioner retains the services of a vocational expert, the evaluator will usually request that the party to be evaluated submit information regarding his or her education, license or certification (past and current), employment history, volunteer activity, health, any restrictions to full-time employment, career options, and training and/or job search strategy and activity. The evaluator, through counsel, will request an interview with the evaluated party. This interview takes place solely between the expert and the evaluated party, usually without attorneys present, at a neutral location such as the expert's office. The evaluator may choose to administer a series of aptitude and skills tests to highlight the party's vocational strengths and weaknesses and transferable skills. The test results and information obtained during the interview are used to evaluate the individual's employment options. The expert will recommend where the party is most likely to have greatest success and if additional education or experience is necessary. If so, the expert will determine the likely period of time for completing the experience, education or certification requisite to the desired or optimal employment opportunity, the costs to be incurred, and the income the party is likely to earn afterward.

A few examples where vocational experts have been effectively engaged nationwide and in the state of New York are as follows:

- Attorneys, teachers, accountants, financial advisors and analysts, who have interrupted their careers;
- Individuals with professional certification and licenses who have an extended absence from their practiced professions;
- Technology professionals currently unemployed or self-employed to ascertain their employability in the current market;
- Individuals seeking new careers that require retraining where a cost-benefit analysis and validating employability options are required;
- Financial services professions where jobs were eliminated due to new technology;
- Health-care professionals (physicians, nurses, pharmacists, EMTs and paramedics) who left careers due to physical restrictions and are looking for alternative employment;
- Employment options for other careers, e.g., construction, trades, cosmetology, maritime, retail, customer service;
- Individuals from their mid-30s to mid-60s with different levels of education and little recent employment experience who will re-enter the workforce.

In today's world where both husbands and wives are generally employed before or during marriage, it is reasonable to expect that both will be employed after divorce and income will be imputed accordingly. The vocational expert can also help the evaluated party to see that he or she has the ability to contribute to support, even after an absence from the workforce. This recognition can help the party to look ahead with greater confidence and to move forward with litigation.

The matrimonial attorney has the clear advantage when he or she presents objective, well-researched information from a vocational expert. Imputed income findings are solidly based on the expert's fair evaluation of the party's capabilities and the reality of the labor market. The expert's opinion will assist the court in making a decision based on fact and strengthens the credibility of a practitioner's position.

## Endnotes

1. *Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S. 2d 156, 705 N.E. 2d 1197 (1998).
2. *Mattot v. Ward*, 48 N.Y.2d 455, 423 N.Y.S. 2d 643 (1979).

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# *Kennedy v. Dupont Savings & Investment Plan*: Waiver of Retirement Benefits in Light of a Recent Supreme Court Decision

By Sharon McAuliffe and Cecelia R.S. Cannon

Today, retirement accounts are often one of an individual's most valuable assets. Consequently, division of retirement benefits is nearly always an important part of negotiations during a matrimonial matter. Unfortunately, division of retirement benefits will not be controlled merely by the settlement between the parties but also by the very complex world of ERISA, the Employee Retirement Income Security Act.

If retirement benefits are to be split between the parties upon divorce, matrimonial practitioners know to use Qualified Domestic Relations Orders ("QDROs") to ensure that clients receive the negotiated share of retirement benefits. However, if there is an agreement between the parties not to divide one or more sources of retirement benefits, the common practice has been to include a waiver of the retirement benefits in the separation agreement or on the record, and often leave it at that. A recent Supreme Court decision, *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*,[1] is a reminder of the need to be attentive to the rules of ERISA, where division of retirement benefits is involved. The U.S. Supreme Court determined that waivers of benefits contained in otherwise legally binding documents, such as separation agreements, do not have to be honored by an ERISA plan if they conflict with valid beneficiary designations on file with the plan.

## The *Kennedy* Fact Pattern

In *Kennedy*, the decedent had money in two separate qualified retirement plans, one of which was the DuPont Savings and Investment Plan. The ex-wife had originally been named as the beneficiary for both plans, but in the divorce settlement she waived all rights to benefits under either plan. After the divorce was finalized, the decedent changed the beneficiary designation on one plan, but failed to change the beneficiary designation for the Savings and Investment Plan. After Mr. Kennedy's death, both plans paid the benefits according to the on-file beneficiary designations, with the Savings and Investment Plan benefits being paid to the ex-wife. The daughter, as executrix of her father's estate, sought to recover the Savings and Investment Plan benefits. At the heart of the case was the question of whether the ex-wife's waiver contained in the divorce settlement could trump the beneficiary designation on file naming her as the beneficiary.

The U.S. Supreme Court held that the Savings and Investment Plan Administrator had fulfilled its fiduciary duty by paying the benefits to the former spouse because she was the designated beneficiary under the documents on file with the Plan, despite the fact that this designation was contrary to the parties' negotiated settlement. The Court grounded its decision in the need to keep plan administration simple and on a straightforward reading of the statute. Under ERISA, a qualified retirement plan is required to have a written plan document, and fiduciaries are required to act in accordance with that plan document. Because the divorce settlement was not recognized by the Plan document as a means to change the beneficiary designation or to waive benefits, the Plan was not required to honor the waiver.

The Court went on to say that the waiver could not have been achieved by filing a QDRO with the Plan. According to the Court, in order for a domestic relations order to be a qualified domestic relations order, or QDRO, the order must create or recognize another payee's right to the benefits. Therefore, a QDRO could not be used in a situation such as Kennedy's, where the only intent of the order would be for the ex-wife to waive benefits. According to the Court, the only way for the parties' negotiated deal to have been carried out in this situation would have been for Kennedy to change the beneficiary designation on his account or the ex-wife to waive benefits under a mechanism provided by the Plan. Since neither of these was done, the Plan Administrator was correct in disregarding the divorce settlement and paying the benefits to the former wife. This was true even though the Court found that the waiver in the divorce settlement was not in violation of ERISA's anti-alienation provision and was therefore otherwise valid.

## The Possibility of a Post-Distribution Remedy

The Court's decision leaves open the possibility of recoupment from the ex-spouse, since the question decided is limited to a plan fiduciary's obligations, not the ex-spouse's contractual requirements. Circuit decisions on this point have been mixed.

This question had been considered by some federal circuits even before *Kennedy*. The Seventh, Ninth, and Fourth Circuits have held that a constructive trust remedy is not available to plaintiffs seeking to recover ERISA benefits paid to designated beneficiaries allegedly in violation of divorce agreements. The Sixth Circuit, on the other hand, permits constructive trusts to be imposed on the proceeds of ERISA benefits after those benefits have

been distributed according to plan documents. The Ninth Circuit's decision in *Carmona*, however, may be reviewed in light of the *Kennedy* decision. A request for a rehearing *en banc* has been submitted and is under consideration.

Consequently, the availability of the constructive trust remedy is still very much open to debate. Ultimately, allowing such post-recovery action seems to be the most logical interpretation of the Court's bifurcated holding that the waiver did not violate ERISA but Plan fiduciaries do not need to honor it. It also would serve the purpose of simplifying plan administration while simultaneously allowing the negotiated settlement between the parties to determine the ultimate distribution of assets between them. However, whether New York and the Second Circuit will agree with this reasoning is yet to be seen.

Even if New York and the Second Circuit do allow a constructive trust remedy, however, this may be a hollow option. In the *Kennedy* case, for example, the ex-wife had already spent the money, making recovery difficult. In addition, pursuing an action against a former spouse is an additional cost that can be avoided if a matrimonial attorney and his or her client take appropriate steps to ensure that the plan pays the money to the appropriate party in the first place.

## What to Do in the Post-*Kennedy* World

Attorneys advising clients in this situation need to stress the importance of changing the beneficiary designation on the retirement benefits, if a waiver of benefits has been part of the negotiated settlement. In addition, the attorney should remind the client that if he or she has money in multiple plans, even with the same employer, multiple beneficiary designation forms will generally need to be changed. Indeed, given the importance of retirement assets to the overall net worth of clients these days, failing to give this advice could open up an attorney to a claim of malpractice.

In addition, if one spouse will be waiving benefits, the attorney should make inquiries as to whether there is a specific method for waiving benefits under the plan. While changing the beneficiary designation may be sufficient in some cases, in other cases where joint and survivor annuities are involved, the former spouse may have rights that cannot be waived without extra steps. The attorney should contact the plan to inquire about the proper procedures, and consider consulting a specialist in the retirement benefits field who can assist them with navigating through the ERISA world.

## Endnote

1. 129 S. Ct. 865 (2009).

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***Editor's Note:*** The practitioner should be most careful in drafting marital or nuptial agreements to comport with this new change.

# Does *Draper* Change the "Away Game" Playing Field to the Uniform Interstate Family Support Act?

By Stuart Perlmutter and Beth Perlmutter

A prospective client calls and says that his ex-wife has commenced a proceeding in New York against him whereby she is seeking an upward modification of the child-support provisions contained in the parties' Oregon judgment of divorce on the ground that his income has substantially increased from the time when the Oregon divorce decree was obtained. The prospective client proceeds to give the following facts (for ease of reference, we shall refer to the ex-wife as "Jane" and the ex-husband as "John"): The parties grew up in New York, got married in New York in 2000, and lived in New York for three years after their marriage. In 2002, their son was born in New York. In 2003, they moved to Oregon. In 2006, the parties were divorced in Oregon and the Oregon judgment of divorce provided that John would pay child support of $1,000 a month. After the parties obtained their Oregon divorce, Jane returned to New York with the child, where they continue to reside, and John moved to Florida, where he continues to reside. John then asks whether New York has jurisdiction over him and whether Jane has to bring her upward modification petition in Florida, where he now resides.

*"If* Draper *is followed by other jurisdictions, it will have nationwide ramifications and will drastically change the law in this area."*

While the answer to the question of whether New York has jurisdiction to grant Jane's upward modification petition would have been previously answered very quickly in the negative, attorneys must now have an understanding of the Federal act, known as the Full Faith and Credit for Child Support Orders Act ("FFCCSOA")—28 U.S.C. § 1738B—and the recent decision in *Draper v. Burke*,[1] which turns the Uniform Interstate Family Support Act ("UIFSA")—which has been adopted in all 50 states—on its "head" and nullifies the jurisdictional provisions contained in the UIFSA, at least in those instances where a court has long-arm personal jurisdiction over an obligor. *Draper* involved the typical three-state scenario. The parties are divorced in State A and the court in State A issues a child support order requiring the noncustodial parent (the obligor) to pay child support. After the divorce, the custodial parent (the obligee) and child move to State B and the noncustodial parent moves to State C. The question then becomes which state has jurisdiction to hear and determine the custodial parent's petition for an upward modification of child support. Under the jurisdictional provisions of the UIFSA of every state, absent the consent of the parties, only State C would have subject matter jurisdiction, i.e., where the obligor resides. *Draper*, however, held that, at least in those instances where the court had long-arm personal jurisdiction over the ex-husband, the FFCCSOA preempted the jurisdictional provisions of the Massachusetts UIFSA and conferred jurisdiction upon the Massachusetts court (State B, where the obligee and children resided).

If *Draper* is followed by other jurisdictions, it will have nationwide ramifications and will drastically change the law in this area. The purpose of this article is to show that *Draper* was wrongly decided and that the Massachusetts court created a preemption issue and a conflict between the FFCCSOA and the UIFSA where no such conflict exists.

## Introduction

In the late 1980s Congress created the Commission on Interstate Child Support to address the problem of multiple, often conflicting, child support orders issued by different jurisdictions. The Commission reported that a significant factor contributing to the creation of multiple orders was that child support orders were not entitled to full faith and credit. To remedy this situation, in 1994 Congress enacted FFCCSOA, which requires each state to give full faith and credit to another state's validly issued child support order.

Congress's efforts to create nationally uniform standards for the administration of child support orders continued with the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, adding 42 U.S.C. § 666 [f]). Among other things, this act mandated that each state enact the UIFSA by January 1, 1998 in order to receive federal funding for social welfare programs (*see* 42 U.S.C. § 654 [20]; §§ 655, 666[f]). New York adopted the 1996 version of the UIFSA on December 31, 1997 (Family Ct. Act § 580-101 *et seq*.).

As will be discussed in greater detail below, the key to promoting the UIFSA's intent that only one valid child support order may be effective at any one time is the concept of "continuing exclusive jurisdiction." A state that issues a child support order has continuing exclusive jurisdiction over that order. No other state may modify that order as long as the issuing state has continuing exclusive jurisdiction. Similar to the UIFSA, FFCCSOA mandates that a state *shall* not modify an order of another state that has "continuing exclusive jurisdiction." However, if an issuing state loses continuing exclusive jurisdiction (i.e., when both parties and all the children have left the state

where the initial order was entered), FFCCSOA provides that another state *may* modify the issuing state's order in certain limited circumstances. While a state "may" modify an issuing state's order in those instances where the issuing state does not have continuing exclusive jurisdiction, FFCCSOA does not require or mandate when a state "shall" modify the issuing state's order.

## The New York UIFSA

Under the jurisdictional provisions of the UIFSA, Family Ct. Act § 580-611(a), the conditions for modifying another state's child support order, after the child support order issued in another state has been registered in this state, provides, in pertinent part:

> (1) the following requirements are met:
>
> (i) the child, the individual obligee and the obligor do not reside in the issuing state;
>
> (ii) *a petitioner who is a nonresident of this state seeks modification*; and
>
> (iii) the respondent is subject to the personal jurisdiction of the tribunal of this state. [Emphasis added.][2]

Since Jane is a resident of New York, she cannot satisfy the second prong of the test in § 580-611(a)(1). The drafters' comments to the UIFSA make clear that this requirement applies to both an obligee and an obligor:

> This [requirement] contemplates . . . that the obligee may seek modification in the obligor's state of residence, or that the obligor may seek a modification in the obligee's state of residence. This restriction attempts to achieve a rough justice between the parties in the majority of cases by preventing a litigant from choosing to seek modification in a local court to the marked disadvantage of the other party.[3]

The drafters' comments to the 2001 UIFSA refer to the "anti-hometown" rule:

> A colloquial (but easily understood) description of [the] requirement is that the modification movant must "play an away game on the other party's home field." This rule applies to either obligor or obligee, depending on which of those parties seeks to modify.[4]

It can be expected that Jane will argue, in response to any dismissal motion, that the Family Ct. Act § 580-611(a)(1)(ii) does not bar her petition in New York for upward modification of child support because that statutory limitation is preempted by FFCCSOA and will cite to *Draper* for that proposition.

## *Draper*'s Holding That the FFCCSOA Preempts the UIFSA Is Misplaced

In *Draper*, the parties grew up in Massachusetts, were married in Massachusetts, and lived thereafter in Massachusetts for approximately ten years. During this time, they had two children born in Massachusetts. The family then moved to Oregon. The parties were divorced in Oregon and the wife then returned to Massachusetts with the children and the husband moved to Idaho. The Oregon judgment provided that the husband would pay child support of $750 a month and that the husband's child support obligation would continue "for so long as said child is under the age of eighteen (18) and thereafter for so long as said child is under the age of twenty one (21) and is a 'child attending school [under Oregon law].'"[5] The issue of college expenses for the children was not addressed in the Oregon judgment, but according to the decision, the parties intended to share those expenses. The ex-wife filed her complaint in the Massachusetts court to revise and amend the Oregon judgment, seeking contribution by the ex-husband to the children's college expenses.

While the ex-husband had filed motions to dismiss for lack of personal jurisdiction, they were denied, and on appeal, the ex-husband no longer challenged the existence of personal jurisdiction and limited his appeal on the ground that the Massachusetts court lacked subject matter jurisdiction, Section 6-611 (a)(1), the Massachusetts' version of the UIFSA.

The ex-wife conceded that the Massachusetts court lacked subject matter jurisdiction under the Massachusetts UIFSA because she was a resident of Massachusetts. She argued, however, that Massachusetts § 6-611(a)(1)(ii) —which is identical to New York Family Ct. Act § 580-611(a)(1)(ii) —does not bar her complaint for modification because that statutory limitation is preempted by FFCCSOA. The ex-wife argued that preemption was proper because FFCCSOA does *not* contain the "nonresident" petitioner requirement that appears in all versions of § 611 of the UIFSA. In agreeing with the ex-wife's argument, the court acknowledges that FFCCSOA "obligates States to enforce child support orders issued by another State, and imposes limitations on a State's authority to modify child support orders issued by another state. *See* 28 U.S.C. § 1738B(a)."[6] Regarding modification, the court observes that the FFCCSOA provides:

> A court of a State may modify a child support order issued by a court of another State if–
>
> (1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

> (2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant.

28 U.S.C. § 1738B(e).[7] Title 28 U.S.C.§ 1738B(i), in turn, provides:

> If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

The court then focuses on the word "jurisdiction" in § 1738B(i) and comments:

> Jurisdiction extended over a "nonmovant" is jurisdiction over a person and constitutes personal jurisdiction. The jurisdiction contemplated under 28 U.S.C. § 1738B(i) is personal jurisdiction and not subject matter jurisdiction.[8]

The court concludes that these provisions of the FFCCSOA—§§ 1738B(a), (e) and (i)—confer subject matter jurisdiction in Massachusetts because the issuing state, Oregon, no longer has continuing exclusive jurisdiction (because the ex-wife, ex-husband and children no longer reside in Oregon); no other state has modified the Oregon judgment; the parties have not executed written consents to jurisdiction elsewhere; and the Massachusetts court has personal jurisdiction over the husband.[9]

The ex-husband in *Draper* argued that the term "jurisdiction" under § 1738B(i) should be interpreted to include both personal jurisdiction and subject matter jurisdiction. The ex-husband further argued that such an interpretation would further the purpose of the FFCCSOA to have uniformity with respect to jurisdiction over child support orders and that to interpret § 1738B(i) as only requiring personal jurisdiction would "defeat the purpose of the Federal act to avoid jurisdictional competition and conflict among State courts with respect to the modification of child support orders."[10] The court rejected the ex-husband's argument and provided two arguments to support its holding—the first of which was based on its finding that its modification of the Oregon judgment was not in conflict with the Oregon judgment and the second of which was based on its expansion of the social policy reasons underlying FFCCSOA to nullify the "nonresident" petitioner requirement of the UIFSA, which are not supported by the language of FFCCSOA.

In this connection, the court held that, since the Oregon court lacked jurisdiction to modify its judgment to add a provision for payment of college expenses (Oregon lost continuing exclusive jurisdiction), there is no competition or conflict with the Oregon court "[b]ecause the Oregon judgment is silent on the topic [sharing of college expenses], an order issued by the [Massachusetts] Court will not disrupt the Oregon judgment in any way."[11] To the extent that the court was holding that it was merely issuing a new order confirming the parties' prior agreement on sharing college expenses for the children, which was not in conflict with the Oregon judgment, while understandable from an equity standpoint, the court would still lack subject matter jurisdiction.[12] In any event, in the situation where the custodial parent is seeking to modify the express terms of a prior issuing state's order to increase the noncustodial parent's child support obligations, the modifying state's order would, unlike *Draper*, be clearly in conflict with and disrupt the prior issuing state's child support order.

Turning to its next point, the court, in stating that the concern over jurisdictional competition and conflict was not the sole purpose motivating the FFCCSOA, wrote:

> Further, Congress's express findings manifest concern for the "burden on *custodial parents* that is expensive, time consuming, and disruptive of occupations and commercial activity" and the situation where the "noncustodial parents avoid the payment . . . resulting in substantial hardship for *the children*" (emphasis added). *Id*. at 4063. When viewed in context with these express purposes and findings, application of the "nonresident" petitioner requirement would create an obstacle to the execution of the objectives of Congress. Preemption is clearly appropriate in these circumstances.[13]

In summarizing the reason for its holding, the court leaves no doubt for the underpinning of its decision —which is not supported by FFCCSOA—and speculates that "forcing the wife to litigate in Idaho would unreasonably burden her because her income is substantially less than the husband's and her economic resources most likely have been diminished by paying for college expenses of the children without benefit of contribution by the husband."[14]

If the *Draper* court was correct that the interests of the children and where the children reside are of paramount importance in determining which state court has jurisdiction to modify another state court's child support order, when the issuing state court no longer has continuing, exclusive jurisdiction, FFCCSOA could have easily provided and mandated such jurisdiction in the state where the custodial parent or child resides. That it did not is equally clear.

That the *Draper* court's preemption argument is faulty and should not be followed by other jurisdictions will now be explored.

## FFCCSOA Does Not Confer Jurisdiction—Rather It Tells State Courts When to Decline Jurisdiction and Defer to Courts of Other States

In *Mattmuller v. Mattmuller*,[15] the court discussed the interplay of FFCCSOA and the Illinois UIFSA when an Indiana court —which had continuing exclusive jurisdiction to modify a child support order —deferred its jurisdiction to an Illinois court. The Illinois court held that it did not violate the FFCCSOA by taking jurisdiction to modify the Indiana's child support order by increasing the amount of child support issued by the Indiana court and that the Illinois court did not have to decide whether FFCCSOA preempts the UIFSA because the application of either yields the same result.

The relevant facts in *Mattmuller* are as follows: The ex-wife filed a petition to enroll a previously issued Indiana judgment in Illinois and a petition to modify child support and visitation in Illinois. The ex-husband, who resided in Indiana, filed a motion and objected to the Illinois's trial court's personal jurisdiction. The Illinois court found that it had personal jurisdiction over the ex-husband by virtue of his children's residence within Illinois and that his objections to Illinois's jurisdiction over him could be resolved by applying Indiana law.[16]

The ex-husband then filed a petition to modify child support and a petition for the court to assume exclusive jurisdiction with the court in Indiana. The ex-wife filed a motion to dismiss the ex-husband's Indiana petition for inconvenient forum. The Indiana court held that Indiana was an inconvenient forum, granted the ex-wife's petition to dismiss, denied the ex-husband's petition to assume exclusive jurisdiction and deferred the action to the Illinois court. The ex-husband did not appeal the ruling of the Indiana court.

Thereafter, the ex-husband filed a motion to dismiss the ex-wife's modification petition in Illinois on the ground that Illinois lacked subject matter jurisdiction. The Illinois trial court denied the ex-husband's motion to dismiss. The ex-husband filed a motion for reconsideration and for the first time raised FFCCSOA and argued that, pursuant to FFCCSOA, the Illinois court issued an order increasing the ex-husband's child support obligations in contravention of FFCCSOA. The Illinois trial court denied the ex-husband's motion and the appeal followed.

The Illinois appellate court, in affirming the lower court's order, makes this instructive observation: "Rather than confer jurisdiction, the Full Faith and Credit Act tells state courts when to decline jurisdiction and defer to the courts of other states."[17] As will be discussed, except when a state court must decline jurisdiction to another state court that has continuing exclusive jurisdiction, FFCCSOA merely leaves to each state to determine, under its laws, when it may modify a child support order, provided, however, that in order to modify another state court's order in those instances where that other state court does not have continuing exclusive jurisdiction, the modifying state court must have personal jurisdiction over the person against whom the order is imposed—that requirement is consistent with the U.S. Supreme Court decision in *Kulko v. Superior Court*.[18]

A reading of § 1738B supports the *Mattmuller* court's conclusion. In this connection, § 1738B(a)(2) provides that a state "*shall* not seek or make a modification of such an order [child support order] except in accordance with subsections (e), (f), and (i)." [Emphasis added.][19] That language is mandatory —a state court "shall" decline jurisdiction except in accordance with subsections (e) and (i). On the other hand, § 1738B(e) says a state court "may" modify a child support order issued by a court of another state provided that it has jurisdiction pursuant to subsection (i) *and* the court of the other state no longer has continuing exclusive jurisdiction *or* all the parties consent to the modifying court's jurisdiction (which is not applicable here). Accordingly, it is irrelevant whether the word "jurisdiction" under § 1738B(i) means only personal jurisdiction (as found in *Draper*) or both personal jurisdiction and subject matter jurisdiction. What is relevant is that the FFCCSOA merely provides when a state court shall decline jurisdiction, i.e., *when another state court has continuing exclusive jurisdiction*, and leaves it up to the state, subject to compliance with subsection (e) and (i), when it *may* modify another state court's child support order.

*Mattmuller* concluded that, even if the ex-husband did not forfeit his FFCCSOA argument by failing to raise it in his initial objections to jurisdiction, the Illinois court's exercise of jurisdiction was proper in light of the Indiana court's decision to decline jurisdiction.[20] The court held that FFCCSOA does not preclude courts from declining jurisdiction as the Indiana court did, and when the Indiana court declined jurisdiction and permitted the Illinois court to exercise jurisdiction, Illinois was not acting in contravention of FFCCSOA. The court also held that, since the Illinois trial court applied Indiana law, the ex-husband's interest in having the case decided under the law of his choice was protected and by failing to appeal the Indiana's court's decision not to assume jurisdiction, the ex-husband implicitly acknowledged the validity of that ruling.[21]

As to the Illinois UIFSA, the ex-wife argued that the requirement of Section 611 is inapplicable when Illinois courts have personal jurisdiction over nonresidents pursuant to Section 201. The court correctly rejected the ex-wife's argument and, instead, held that Section 205 of the Illinois UIFSA precludes the exercise of jurisdiction by the Illinois court "unless the Indiana's court's decision

to decline jurisdiction in its favor permitted it."[22] In this connection, the court wrote:

> For the same reasons we concluded that the Indiana court's decision to decline jurisdiction permitted the [Illinois] court to exercise jurisdiction under the Full Faith and Credit Act, we conclude that the Indiana decision also permitted the Illinois court to exercise its jurisdiction under the Uniform Support Act. We need not decide whether the Full Faith and Credit Act preempts the Uniform Support Act because the application of either yields the same result.[23]

As another court opined:

> The FFCCSO Act works only to set the guidelines by which the states can determine jurisdiction to order or modify child support obligations. It does not govern the area of child support per se, but merely establishes the rules and procedures used to give full faith and credit to child support orders properly rendered by a state court. The substantive aspects of child support are necessarily left to the individual states. Accordingly, we conclude Congress, by passing, 28 U.S.C. § 1738B, did not preempt state law in the area of child support.[24]

Thus, where, as here, Oregon does not have continuing exclusive jurisdiction of the child support order, New York would have the authority to determine, under its law, when it may modify another state court's child support order (subject to it having personal jurisdiction over the respondent), and if it determines that the petitioning party must be a nonresident of New York for it to have subject matter jurisdiction (even in those situations where the New York court has personal jurisdiction over the respondent),[25] FFCCSOA does not mandate or compel New York to accept jurisdiction and the jurisdictional provisions of the UIFSA do not conflict with FFCCSOA. Further demonstrating that FFCCSOA does not conflict with the jurisdictional provisions of the UIFSA, § 1738B(c)(1) provides that a child support order made by a court of a state is consistently made with this section if the court of another state no longer has continuing, exclusive jurisdiction, *and* the court that makes the order "pursuant to the laws of the State in which the court is located" "(A) has subject matter jurisdiction to hear the matter and enter such an order; and (B) has personal jurisdiction over the contestants." Accordingly, when a state court "may" modify another state court's child support order, two conditions must be met *under its laws*: (1) subject matter jurisdiction and (2) personal jurisdiction over the contestants. That is precisely the requirement of Section 611 of the UIFSA in each and every state. Therefore, the issue of preemption is never reached because, in the words of *Mattmuller*, the application of either FFCCSOA or the UIFSA "yields the same result."[26]

Turning next to the *Draper* court's interpretation of the word "jurisdiction" under § 1738B(i) to mean only personal jurisdiction, the opinions of other courts which interpret the word "jurisdiction" to mean both personal jurisdiction and subject matter jurisdiction are better reasoned and are consistent with the New York Court of Appeals decision in *Spencer v. Spencer*,[27] which held that the FFCCSOA and the UIFSA have "complementary policy goals and should be read in tandem."[28]

## *Draper* Is Wrong in Interpreting "Jurisdiction" Under § 1738b(I) to Mean Only Personal Jurisdiction and Not Both Personal Jurisdiction and Subject Matter Jurisdiction

In *Draper*, the court rejected the two cases relied upon by the ex-husband—*LeTellier v. LeTellier*[29] and *Gentzel v. Williams*[30]— both of which held that there was no conflict between the UIFSA and FFCCSOA and, therefore, no preemption issue because the word "jurisdiction" under § 1738B(i) of the FFCCSOA should be "interpreted to include both personal jurisdiction and subject matter jurisdiction."

In *LeTellier*, the ex-wife argued that FFCCSOA confers jurisdiction upon the Tennessee court, which was precisely the same argument made by the ex-wife in *Draper* that FFCCSOA conferred jurisdiction upon the Massachusetts court. The ex-wife contended that jurisdiction is proper in the Tennessee court under FFCCSOA in spite of her status as a resident of Tennessee because of the doctrine of federal preemption. The Tennessee court disagreed.

After going through the legislative history of FFCCSOA, the court noted that, while FFCCSOA was signed into law in 1994, in 1996 Congress enacted a law requiring all 50 states to adopt the UIFSA by January 1, 1998. That fact supported its conclusion that Congress did *not* intend for FFCCSOA to preempt UIFSA. Thus, the court wrote:

> Congress clearly did not intend for FFCCSOA to preempt UIFSA. Indeed, it appears that FFCCSOA was intended to follow the contours of UIFSA. There is unsurprisingly no indication in the text of FFCCSOA or its legislative history of any intent to preempt UIFSA. The very fact that Congress mandated that all fifty states adopt UIFSA strongly mitigates against a construction of FFCCSOA that would impliedly preempt UIFSA to any degree. We, therefore, hold that the jurisdictional provisions of FFCCSOA do not

> preempt the jurisdictional provisions of Tennessee's UIFSA.[31]

In the absence of preemption, the court stated it was applying traditional rules of construction to reconcile both statutes. "The proper approach is to reconcile the federal and state laws rather than to seek out conflict where none clearly exists."[32] The court then observed that the word "jurisdiction" as used in § 1738B(i) is ambiguous. FFCCSOA does not specify whether "jurisdiction" refers to personal jurisdiction alone or to both personal and subject matter jurisdiction.[33] In considering the legislative history of FFCCSOA, the court reasoned:

> Nevertheless, the legislative history of FFCCSOA consistently addresses UIFSA and FFCCSOA in tandem and expresses that the statutes were intended to work together without conflict. In light of this legislative history, we find it appropriate to construe the ambiguous jurisdictional provisions of FFCCSOA to be in harmony with UIFSA to the greatest extent possible.[34]

Continuing, the court emphasized:

> A consistent reading of UIFSA and FFCCSOA requires only that "jurisdiction" under subsection (i) of FFCCSOA be construed as referring to both personal jurisdiction and subject matter jurisdiction. *Accord Gentzel v.* Williams, 25 Kan. App.2d 552, 965 P.2d 855, 860-61 (1998). This construction is consistent with the specific jurisdictional provisions of UIFSA and with the intent of FFCCSOA. Accordingly, under FFCCSOA, a state has jurisdiction to modify an out-of-state support order only when the petitioner registers the order in a state having personal and subject matter jurisdiction for the purpose of modification.[35]

Since under the UIFSA, the Tennessee court would not have subject matter jurisdiction to modify an issuing state court's order because the petitioner (Ms. LeTellier) was a resident of Tennessee, the Tennessee court did not have "jurisdiction over the nonmovant for the purpose of modification" under FFCCSOA.[36]

In *Spencer*, the New York Court of Appeals, agreeing with *LeTellier*, held that both statutes—FFCCSOA and the UIFSA—"have complementary policy goals and should be read in tandem [citing to *Matter of Auclair v. Bolderson*[37]]."[38] In short, FFCCSOA does not preempt the jurisdictional provisions of the UIFSA because, in the words of the court in *Spencer*, "[t]his is not a case where the two statutes conflict. Rather, the relevant provisions are consistent."[39]

## Conclusion

Turning to the facts here, notwithstanding that New York may have personal jurisdiction over John, New York would lack subject matter jurisdiction to modify the Oregon child support order because Jane is a resident of New York and she would not comply with the jurisdictional provisions of the UIFSA, Family Ct. Act § 580-611(a)(1)(ii).

*"Draper was wrongly decided, and neither the legislative history nor the language of FFCCSOA supports its conclusion that FFCCSOA preempts the jurisdictional provisions of the UIFSA, and it should not be followed by other jurisdictions."*

Furthermore, FFCCSOA would not preempt the jurisdictional provisions of the UIFSA for two separate and distinct reasons. First, because the issuing state—Oregon —no longer has continuing exclusive jurisdiction (Jane, John and the child no longer reside in Oregon), New York under the UIFSA—Family Ct. Act § 580-611(a)(1)(ii)—has the right to limit modification to those instances where the petitioner is a nonresident of New York, and such limitation, contrary to *Draper*, would not be in conflict with the FFCCSOA because the FFCCSOA merely tells state courts when to decline jurisdiction and defer to the courts of other states which have continuing exclusive jurisdiction over a child support order. Therefore, there is no preemption issue because the application of either FFCCSOA or the UIFSA yields the same result. Second, the word "jurisdiction" under § 1738B(i), contrary to *Draper's* interpretation, should be interpreted to mean both personal jurisdiction and subject matter jurisdiction so that the FFCCSOA and UIFSA are read in tandem and no conflict is created between the two statutes where clearly none exists.

In conclusion, *Draper* was wrongly decided, and neither the legislative history nor the language of FFCCSOA supports its conclusion that FFCCSOA preempts the jurisdictional provisions of the UIFSA, and it should not be followed by other jurisdictions.

## Endnotes

1. 450 Mass. 676 (2008).
2. A state may also modify a child support order upon consent of all the parties, despite the parties' state of residence. Family Ct. Act § 580–611(a)(2).
3. Quoting from *Draper v. Burke*, 450 Mass. at 680-81, 881 N.E.2d at 126.
4. *Id*.
5. *Id*. 450 Mass at 677.
6. *Id*. 450 Mass. at 683.
7. *Id*. 450 Mass. at 683–84.
8. *Id*. 450 Mass. at 684–85.

9. *Id*. 450 Mass. at 684.
10. *Id*. 450 Mass. at 685.
11. *Id.*
12. FFCCSOA defines "modification" of a child support order to mean "a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order." The *Draper* court changed the scope of the initial order by adding a provision for the sharing of college expenses. Thus, whether the Massachusetts order conflicted with the Oregon court's order was irrelevant—the Massachusetts court's order was a "modification" of Oregon's order.
13. *Id*.
14. *Id*.
15. 336 Ill. App.3d 984 (2003).
16. The Illinois trial court's decision that it had personal jurisdiction over the ex-husband because the children resided in Illinois was wrong and not supported by the long-arm personal jurisdiction provisions of Section 201 of the Illinois UIFSA, which was similar to New York Family Ct. Act § 580-201. The ex-husband, though, never appeals that decision and, as in *Draper*, the appeal is limited to whether the court has subject matter jurisdiction.
17. 336 Ill. App.3d at 989.
18. 436 U.S. 84, 91-92 (1978).
19. Subsection (f) of § 1738B has no application here.
20. Whether the Indiana court had the authority under FFCCSOA to decline jurisdiction—considering that it had continuing, exclusive jurisdiction because the ex-husband resided in Indiana (§ 1738B(d))—had been answered in the negative by another court. *See Early v. Early*, 269 Ga. 415 (1998). *See also In re Welfare of S.R.S.,* 2008 WL 4394530 (Minn. App. 2008) (notwithstanding that Colorado refused to accept continuing, exclusive jurisdiction and transferred the matter to Minnesota, FFCCSOA did not require Minnesota to accept jurisdiction in violation of the UIFSA applicable in both Colorado and Minnesota).
21. While *Mattmuller* held that the Indiana court had the authority to decline jurisdiction under the FFCCSOA, it was troubled with the Indiana's court's decision to decline jurisdiction under the UIFSA (§ 205(a)) and noted that "[r]egardless of the propriety of the Indiana's court's decision, we lack the authority to reverse that court; therefore, we decide only the effect of its decision on Illinois's exercise of jurisdiction." 336 Ill. App.3d at 991. Under § 1738B(h) and Section 604 of the Illinois UIFSA—which is identical to the New York Family Ct. Act § 580-604—the forum's state's law (Illinois) would have ordinarily applied to the facts in *Mattmuller*, but because Indiana (which had continuing exclusive jurisdiction) deferred to Illinois to decide the matter, the Illinois court applied Indiana law.
22. *Id*. 336 Ill. App.3d at 992. This position was rejected by the Minnesota court in *In re Welfare of S.R.S., supra*. *See* n. 20, *supra*.
23. *Id*.
24. *V.G. v. Bates*, 1997 WL 177705, at * 3 (Minn. App. 1997) (unpublished).
25. *See, e.g., Daknis v. Burns,* 278 A.D.2d 641 (3d Dep't 2000) (notwithstanding that the Family Court had personal jurisdiction over the ex-wife, it lacked subject matter jurisdiction to modify the existing Pennsylvania child support order to require the ex-wife to pay child support); *Chisholm–Brownlee v. Chisholm,* 177 Misc.2d 185, 189 (Fam. Ct., Albany Co. 1998) ("Even if the New Hampshire order had been properly registered in New York, and even if this Court had personal jurisdiction over Father, the order could only be modified if the requirements of § 580-611 were met.").
26. 336 Ill. App. 3d at 992.
27. 10 N.Y.3d 60 (2008).
28. *Id.* 10 N.Y.S.3d at 65–66.
29. 40 S.W.3d 490 (Tenn. 2001).
30. 25 Kan. App.2d 552 (Kan. App. 1998).
31. *Id. LeTellier v. LeTellier*, 40 S.W.3d at 498.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*. 40 S.W.3d at 498-99.
36. *Id*. The *Draper* court held that the phrase "jurisdiction over the nonmovant" under § 1738B(i) was not ambiguous and that jurisdiction constitutes "personal jurisdiction and not subject matter jurisdiction." 450 Mass. at 684-85. The *Draper* court, though, truncated the language from the statute as § 1738B(i) does not merely refer to "jurisdiction over the nonmovant," but rather it states "jurisdiction over the nonmovant *for the purpose of modification*." [Emphasis added.]
37. 6 A.D.3d 892 (3d Dep't 2004).
38. 10 N.Y.3d at 65–66.
39. *Id*.

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# Selected Case

***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 case that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, e.g., Spring 2009) 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.

(Redacted 3/30/09)

## *Isabel R. v. Meghan Mc.*, Family Court, Dutchess County (Joan S. Posner, J., March 27, 2009)

| | |
|---|---|
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| **Attorney for Respondent** | Irene Goldsmith, Esq.<br>1 N. Broadway<br>White Plains, NY 10601 |
| **Attorney for the child—O** | Kelly Brady, Esq.<br>31 Collegeview Avenue<br>Poughkeepsie, NY 12603 |
| **Attorney for the children—M. and J.** | Joan McCarthy, Esq.<br>P.O. Box 360<br>Fishkill, NY 12524 |

Petitioner, Isabel R., is the mother of M. (DOB: 4/26/1998) and J. (DOB: 6/13/2001). Respondent is the mother of these children's half-sibling, O. R. (DOB: 7/10/2002). Petitioner commenced this proceeding seeking visitation between her children and their half-sibling, O. Ruben R. (herein "father") is the father of all three children and is not a party to these proceedings.

Throughout these proceedings the parties have each been represented by retained counsel. The Court appointed one attorney to represent M. and J. and another attorney to represent O. A trial was held on February 6 and 26, 2009.

In addition, the Court conducted in-camera interviews separately with each child in the presence of his/her attorney. O. was interviewed on February 20, 2009 and J. and M. on February 25, 2009. Prior to those interviews, each attorney was given an opportunity to submit written questions or areas of questioning which each wished the Court to consider during its discussion with the children. The Court considered those submissions in conducting the interviews.

At the trial the petitioner testified and called a coworker, Gloria L., and a friend, Barbara B., in support of the petition. In opposition, the respondent testified and called Dr. Michael N., a psychologist; her mother, Eileen Mc.; a friend, Jenna M.; and her domestic partner, Michael S.

Additionally, the Court received in evidence the following: 12 photographs, the *curriculum vitae* of Dr. Michael N. and a page from the *Law Guardian Resource Directory* which lists Dr. N. At the conclusion of the trial, each attorney made an oral summation and each was given an opportunity to submit a written summation. The Court indicated that it would not draw an adverse inference if counsel did not submit a written summation. Counsel for petitioner indicated that because he would be out of New York State for the month of March he would not be filing a written summation but would rely on his oral summation. Written summations have been received from respondent's attorney and from the attorney for O. and J. which have been considered by the Court.

### Procedural Background

It is important to review the procedural history of this case because one of the issues raised by respondent is the lapse of time since the children have had any visitation and some of that period of time is attributable to the Court proceedings and beyond the control of petitioner.

This proceeding was commenced in Westchester County Family Court by petition filed on May 2, 2008 and was then transferred to Dutchess County where the respondent and O. reside. In Court on September 8, 2008 the respondent submitted a written motion to dismiss to which the attorneys were given time to respond. That motion was denied in a written decision (Amodeo, J.) dated October 15, 2008 and the proceeding was adjourned until November 6, 2008. At the request of counsel for the respondent, due to her vacation schedule, the proceeding was again adjourned. Counsel and the parties appeared before the Hon. Damian J. Amodeo[1] on December 11, 2008 and the matter was scheduled for trial before the undersigned commencing on February 6, 2009.

Judge Amodeo issued a bench order directing counsel to submit a list of witnesses each intended to call by January 6, 2009. That information was not provided to the Court until February 4 and 5, and then only in response to a letter sent to counsel from the Court on February 2, 2009.

## Testimony and Evidence

At the beginning of the trial the parties stipulated that: M. and J. are the half-siblings of O.; J. and M. live with their mother, the petitioner, in Huntington, Long Island; O. lives in Dutchess County, New York, with her mother, the respondent; the children's father, Ruben R., currently lives in the Bronx, New York; an order of protection was issued against Ruben R. by the Town of Cortland Court on November 17, 2006 which expired on November 17, 2008 and which directed that he stay away from the respondent but did not include O.; and, Dr. N. is a psychologist who is listed in the State of New York, Appellate Division, First and Second Department Law Guardian Program Resource Directory. It was also stipulated that the Court would take judicial notice of the entire Dutchess County Family Court record.

The Court, which is in the unique position of observing the demeanor of the witnesses and assessing their credibility, makes the following findings of fact:

J. and M. had a relationship with O. which began shortly after O. was born. Their mother, the petitioner, was aware that the children's father, Ruben R., had a relationship with the respondent, and petitioner herself developed a relationship with respondent. During the period of time when Mr. R. and respondent were together, there were times when either the father or respondent would pick up J. and M. for visitation and all three children would spend time together. Overnight visits began when O. was about a year and a half old, and then occurred about once or twice a month. One visit occurred at the home of respondent's mother, whom the children referred to as "Beenie."

Some of the times that O. spent overnight with petitioner and her siblings were social and others were for "baby-sitting" at the request of respondent while she was working at the power plant at Indian Point.

The visits between the children ended in September 2006 when the father's relationship with the respondent ended. It is undisputed that the visits were terminated by respondent. At the conclusion of the last visit, respondent went to petitioner's office to pick up O. after a weekend visit, which included an overnight.

The petitioner made efforts to continue the relationship between the children by calling the respondent, leaving messages and sending e-mail communications. Those efforts went unanswered by respondent.

In January 2008 petitioner initiated a telephone call to respondent, which lasted for 30 minutes, in which they discussed visitation. Respondent said she would think about it and call the petitioner back. She never did so.

Although her children were asking about their sister and wanted to see O., petitioner did not have the financial means until recently to bring a proceeding in Family Court to seek visitation.

Numerous pictures were entered into evidence which showed the three children together at various activities, including at an amusement park, at birthday parties, in a park and at J.'s "T-ball" game. In one of these photos, O. and M. are wearing matching jackets.

J. and M. refer to O. as their sister. O. refers to M. and J. as her brother and sister. O. calls the petitioner by her first name, I., and petitioner's children call the respondent Me.

During the time that Mr. R. and respondent were together, all three children would spend time with each other and their father and respondent. The father is still involved in J. and M.'s lives but has no contact with O.

Petitioner's witness, Gloria L., is her supervisor at work and the president of a local labor union, where petitioner is employed as the fund administrator. Ms. L. had seen O. at a birthday party and observed the three children as "bubbly" and happy together. She was present only at this one visit.

Barbara B. has been a friend of petitioner's for the past 14 years and met O. on several occasions, including when O. spent overnights at petitioner's home. She testified that the children got along well and that O. and respondent were present on the day that M. and J. were baptized.

Respondent testified that she is presently living with Michael S., with whom she has a child, M. She was previously married to Mr. R. and has known petitioner from before O. was born. At respondent's request, M. participated in respondent's wedding ceremony. By her own testimony, from 2002 until 2003 visits between the children occurred about once a month. She remembers being at M.'s birthday party and acknowledged that O. would spend overnights at petitioner's home. She would sometimes pick up J. and M. for visits with her and the father. She voluntarily transported the children. She testified to about six or seven overnight visits at her house. Ironically, after the father left her home, she said that her relationship with petitioner became "warmer."

Respondent unilaterally terminated visitation between the children. She did not explain to petitioner why she did so, but stated that it was her belief that petitioner might allow the children to see their father when they were all together. She did not feel that was appropriate. She was upset that M. and J. continued to see their father, but that he had nothing to do with O. She feels if O. sees J. and M. it will make her feel more abandoned by her father.

O. has a new little sister now, M., and respondent is content to have this be O.'s family. Respondent described O. as a bubbly and outgoing child. Although respondent asserts that O. is suffering from issues of abandonment, there was no evidence that O. has ever been treated by a psychologist to deal with these issues. She only took O. to a psychologist two weeks prior to the trial for purposes of generating trial testimony.

Respondent also confirmed that she had taken petitioner up on her offer to babysit for O. when she was working nights at Indian Point, but on only a few occasions.

Dr. Michael N., a psychologist, was called as a witness by respondent. He was retained by her for purposes of giving testimony at the trial and met O. on two occasions, January 19 and 26, 2009, a week or two before the trial. He described O. as a very bright child who did not recall much about her past but did remember seeing her father in 2006 at Chuck E. Cheese. She seemed to be a happy child. He described her demeanor as unaffected when discussing M. and J. She was not upset about the prospect of seeing them. She told him she would like to change her name to Mc-S. so that her family will all have the same name. His services, including his fee for testifying, were paid for by respondent. He did not meet with or speak to the petitioner or M. or J.

Michael S., respondent's current "domestic partner," met respondent in July 2006 and has never met petitioner or J. or M. Respondent's mother, Eileen Mc., testified that she was never involved with visits among O., J. and M., and that J. and M. visited her home only once. Respondent's other witness, Jenna M., testified that she is like a sister to respondent, whom she has known for 22 years. She was not aware of contact between petitioner and respondent and did not know how many times the children visited. She was aware of at least two times that the children interacted after respondent and Mr. R. split up.

Counsel for respondent argues in her summation that O. feels abandoned by her father. She also states that it is respondent's opinion that allowing sibling visitation will undermine the "family foundation" she has created with her new "domestic partner," with whom she has a child. Counsel's legal argument is that the respondent has an absolute right to decide whether or not her child should visit with her half-siblings and that there has been no evidence that it is in O.'s best interests to have such visitation. Respondent asserts that visits between the children would be nothing more than a "play date" as among any children.

In his summation counsel for petitioner argues that respondent's refusal to allow visitation is based upon her own reasons, not what is best for the children. It was the respondent who broke off the relationship. If O. is struggling with the loss of her father, it will only make it worse for her to also suffer the loss of a relationship with her siblings. He asserts that this is a case where "equity sees fit to intervene." Petitioner is seeking monthly overnight visitation, from Friday to Sunday evening, which would give the children ample opportunity to be together. Petitioner would be willing to have half of the visits at the home of respondent and half at her home, subject to change as time goes on.

## In-Camera Interviews

As noted above, the Court conducted in-camera interviews with each child separately, in the presence of that child's attorney. While the Court will not disclose the particular details of its conversations with the children, the Court did place on the record on February 26, 2009 a general summary of the interviews. It is clear to the Court that O. does indeed remember J. and M.; she refers to them as her brother and sister. She readily recognized them in the photographs that had been admitted into evidence and which she was shown. She remembers activities she engaged in with them and showed no fear or concern about seeing them. Indeed, she expressed a desire to see and play with them.

M., the oldest of the three children and the most articulate, expressed a strong interest in having a relationship with O., whom she refers to as her sister. She has the strongest memories of her contact with both O. and the respondent, whom she refers to as Me. She very much wants to see her sister.

J., who was less verbal than either O. or M., does know who O. is and would like to see her again.

None of the children expressed any negative feelings about seeing each other.

## Attorneys for the Children

Both attorneys for the children, who have taken an active part in this matter on behalf of their clients, urge the Court to grant sibling visitation. While the attorney for O. did not submit a written summation, at the conclusion of the trial she stated on the record that the three children did have a relationship and that there is no evidence that when the visits were taking place anything detrimental happened to O. She further stated that O. has fond memories of J. and M. and there was no evidence that the visits were anything but a positive experience. She urged the Court to especially consider O.'s in-camera interview.

In both her written and oral summations, counsel for J. and M. requests that visits with O. be resumed forthwith and that the best interests of her clients will be served if the visits were to resume. The children do not regard the opportunity to see each other a merely a "play date," as characterized by respondent's counsel, but the children do recognize the "familial bond" they share with each other. They refer to each other as brother and sister. Counsel for J. and M. suggests that visits be commenced on a monthly basis, on a Saturday from 11:00 AM until 5:00 PM in a public place. Given the distance between the parties' homes, counsel suggests that the visits take place in Westchester County, a mid-point. After a period of six months, counsel suggests overnight visits at the home of petitioner, who has expressed a willingness to have O. visit overnight. If the parties agree, overnight visits could also take place at the home of respondent.

## Applicable Law

The Family Court has the same jurisdiction as the Supreme Court to determine visitation of minors, including visitation between siblings (Family Court Act section 651, DRL section 71). DRL section 71 provides that "where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister … or a person on behalf of a child, whether by half or a whole blood, may apply to the . . . family court . . . [for visitation rights] as the best interest of the child may require."

Thus, in cases involving sibling visitation, like grandparent visitation, the Court must first determine whether equitable considerations grant a party standing to bring a petition and then, if so, whether it is in the best interests of the children to award such visitation (*see, e.g., Matter of E.S. v. P.D.*, 8 NY3rd 150 [2007]). The court in such a case is charged with determining what is in the best interests of all the children involved. (*State ex rel. Noonan v. Noonan*, 145 Misc 2d 638 [1989].) The importance of sibling relationships has long been recognized by the courts of this state. *(Eschbach v. Eschbach,* 56 NY 2d 167 [1989].) This is manifested not only in preferring arrangements which allow siblings to live together (*Ruffin v. Ruffin*, 166 AD 2d 598 [1990]), but also in ensuring that half-siblings have adequate contact with each other. *(Olivier A. v. Christina A.*, 9 Misc 3d 1104 [A], 2005 NY Slip Op 51400[U] [2005].)

The State's recognition of the importance of siblings maintaining contact with each other is also manifested in Family Court Act § 1027-a, which provides that foster care placement of a child with his or her siblings or half-siblings is presumptively in the child's best interests. *See also* 18 NYCRR § 431.10, which provides that a social services district must make diligent efforts to place siblings or half-siblings in foster care with each other unless such placement is determined to be detrimental to their best interests.

## Discussion and Holding

The evidence demonstrates that these children did indeed have a relationship until that relationship was unilaterally terminated by respondent after she and the children's father split up. Respondent conceded that she discontinued visitation because of the presence or possible presence of the children's father at such visits.

Respondent argues that she has an absolute and unfettered right to determine whether sibling visitation should take place and that any direction by this Court for sibling visitation would violate her constitutional rights. It is not clear to this Court whether respondent is arguing that the statute permitting a court to order sibling visitation is unconstitutional on its face or as applied to the facts of this case.

Domestic Relations Law § 71 permits the court to intervene in the lives of children and parents and order sibling visitation in cases in which "equity would see fit to intervene." Only if a court determines that the facts meet this standard does the court then go on to make a determination as to whether visitation is in the best interests of the children. This language is virtually identical to that of Domestic Relations Law § 72 which governs grandparent visitation. The Court of Appeals in *Matter of E.S. v. P.D.* (8 NY3d 150 [2007], *supra*) held this statute to be constitutional both on its face and as applied to the facts of that case. The Court distinguished the New York statute from the State of Washington statute declared unconstitutional in *Troxel v. Granville* (530 US 57 [2000]).

This Court recognizes the right of a fit parent to make decisions about what is best for his or her child and that it may only intervene where notions of equity justify it doing so. The Court also is cognizant that the right of sibling visitation is not automatic; that courts should not lightly interfere with a decision of a parent and that a parent's decision should be given deference. The Court must apply a two-tiered inquiry, first to determine if equitable circumstances grant standing to a petitioner and then, only if that test is met, does the Court go on to a best interests determination (Domestic Relations Law § 71).

Here, based upon the credible and virtually unrefuted evidence, the Court finds that notions of equity support a determination that petitioner has standing to petition for sibling visitation on behalf of her children. The three children had a meaningful relationship over a period of several years and despite the interruption in that relationship, to this day they refer to each other as brother and sisters. That relationship was suddenly interrupted by the respondent, who now seeks to rely on the fact that the children have not seen each other in some time to deny visitation to them. To allow that lapse of time to justify the denial of visitation now would unduly reward respondent's unilateral decision to refuse any further contact. Were it not for respondent's unilateral actions at a time when the children were enjoying visitation without any problems, the parties would not now be before this Court.

Additionally, the Court credits petitioner's testimony that she made efforts to restore visits and that those efforts were rejected or ignored by respondent. Thereafter petitioner did not have the finances to immediately seek judicial intervention. The Court notes that petitioner does not fall within the class of persons who have the right to an assigned attorney when they are unable to afford counsel (Family Ct Act § 262). Further, the Court finds credible petitioner's testimony that she commenced this proceeding because her children persisted in wanting to see O. and have been asking about her since visits were terminated. Such testimony is consistent with the Court's discussions with her children.

Having determined that petitioner has standing, the Court also finds that visitation would be in the best interests of all of the children. In determining the best interests

of the children, the Court recognizes that many of the factors considered in determining petitioner's standing to bring this proceeding are also factors the Court must consider in determining the children's best interests.

In considering the children's best interests, the Court has considered, among other factors, their prior relationship, the reason visitation was stopped, the reasons given and basis for the respondent's decision to deny visitation at the present time, the views of the attorneys for the children, the future benefit to the children and the content of the Court's in-camera interviews.

What is clear from observing the temperament and sincerity of respondent as she testified is that she is extremely angry at Mr. R. and does not trust that he will not be involved in visits. She has a new life now, with a new man and a new baby and wishes to close the previous chapter in her life—the chapter that involved Ruben R. There is not a scintilla of evidence that when respondent terminated visitation, there were any problems with the children visiting or that O. expressed any discomfort with the visitation. Respondent's determination was based on fear, anger and speculation.

Respondent is now completely estranged from Ruben R. and does not want O. to have any contact with anyone who might remind her of her father. Respondent in her own words has created a new family for O. and does not want her to be reminded of her past.

However, this case is not about Ruben R. He is not a party to this proceeding, has not petitioned for visitation and, as part of its order, the Court will direct that petitioner not allow him to be present during any visit. This case is about three children who had a very meaningful relationship which brought them a lot of pleasure and sense of family. These children deserve an opportunity to continue that relationship. A sibling bond, if allowed to continue to develop and be nurtured, is one that hopefully will last and be a source of support and joy the rest of the children's lives, beyond even that of their parents.

The Court also notes the proximity in ages of the three children. O. is slightly more than four years younger than M. and one year younger than J. This relative closeness in age suggests that the children have a good chance of having a constructive and meaningful relationship with each other.

The children do indeed wish to see each other and express no negative feelings about doing so; the children have fond memories of times they spent together and activities they did together. They all look forward to more activities of that nature. O. was so comfortable with the notion that she did not even indicate she would need other adults present.

Even respondent's own witness, Dr. N, testified that O. was not upset by the idea of visiting J. and M.

Unlike *Matter of E.S. v. P.D.* (8 NY 3d 150 [2007], *supra*), a grandparent visitation case, this is not a case which involves any issue of the potential for a usurpation of the role of respondent as O.'s parent. Respondent here makes no claim that petitioner, or her two children, will usurp her role as O.'s mother. Further, the visitation among the children will in no way involve the father of the children, the only person respondent has identified to be a potential problem with visitation. In deciding the type and frequency of the visitation which will occur, the Court is mindful of respondent's rights with respect to her own child, and has taken care not to unduly interfere with those rights.

Based upon the foregoing, the Court grants the petition.

Given the distance between the parties' residences, the Court is faced with the difficult question of how to implement visitation in a practical way and in a way that such visitation will not be unduly burdensome on either party. It is the hope of this Court that the parties will be able to communicate, either directly or through counsel and with the assistance of the attorneys for the children, to arrange the details of visitation within the following parameters:

Unless the parties agree otherwise, in the form of a consent order, visitation between the children shall be as follows:

1. During the 12-month period of April 1, 2009 until April 1, 2010, there shall be 6 scheduled visits (1 every other month) for a minimum period of 4 hours for each visit on either a Saturday or a Sunday. The visits shall take place in a public place in Westchester County or other location that is approximately mid-way between the parties' residences. Each party shall provide transportation for their own child/children to the visit. Respondent may be present during the first two visits, and thereafter if the parties agree.

2. For each 12-month period thereafter, commencing April 1, 2010, there shall be 6 visits, of which 2 shall include an overnight at petitioner's residence, from Saturday morning until Sunday afternoon. Upon agreement of the parties, one of the overnight visits may instead be at respondent's residence. The parties shall share the transportation for such visit by meeting at a location half-way between their respective homes. This schedule shall continue unless modified by this Court, upon application of either party.

3. The children shall have such additional visitation as the parties may agree.

4. The children may have telephone contact on a weekly basis. Counsel shall communicate to arrange a day and time during which calls may be placed by petitioner on behalf of M. and J. to O.

Respondent shall provide a telephone number where O. may be reached. The Court proposes Friday evening between the hours of 5:00 and 7:00 P.M., unless the parties agree otherwise.

5. Telephone contact is permitted on the children's birthdays.

6. Petitioner shall not allow Ruben R. to be present during any visit between the children.

7. The parties shall not discuss the details of this litigation with the children and shall not do or say anything which would tend to discourage the children from participating in the visits.

8. Counsel for the parties and the children shall communicate for the purpose of working out the details of the visitation directed herein. If either counsel wishes to submit a more detailed order, such order shall be submitted on notice to all attorneys on or before April 20, 2009. If the Court received conflicting orders, the Court will make the final determination. If the Court believes that a conference is appropriate counsel will be so notified.

9. The assignments of the attorneys for the children shall continue for 12 months from the date of this decision.

The foregoing shall constitute the decision and order of this Court.

SO ORDERED

DATED: Poughkeepsie, NY
March 27, 2009

_____

HON. JOAN S. POSNER
JUDGE OF THE FAMILY COURT
COUNTY OF DUTCHESS

**NOTICE OF ENTRY**

**PLEASE TAKE NOTICE THAT** the within is a true copy of an order entered in the office of the Clerk of the Family Court of the State of New York in the County of Dutchess on March 27, 2009.

_____

Peter A. Palladino
Chief Clerk of the Court

**NOTICE OF APPEAL**

**PLEASE TAKE NOTICE THAT** the Family Court Act provides that an appeal may be taken from an order of this Court to the Appellate Division, Second Department. Section 1113 of the Family Court Act provides that the appeal must be taken no later than thirty (30) days after receipt of this order by appellant in court, 35 days from the date of mailing of the order to the appellant by the clerk of the court, or 30 days after service by a party or the law guardian upon the appellant, whichever is earliest.

## Endnote

1. The Hon. Damian J. Amodeo retired at the end of December 2008.


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**EDITOR AND COMMENTATOR:**

Willard H. DaSilva, a member of DaSilva, Hilowitz & McEvily LLP, is a veteran matrimonial law practitioner with offices in Garden City and New City, New York.

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# Recent Legislation, Decisions, and Trends

By Wendy B. Samuelson

## Same-Sex Marriage Update

### Iowa and Vermont are the third and fourth states, respectively, to permit same-sex marriage

On April 3, 2009, the Iowa Supreme Court's unanimous decision in *Varnum v. Brien*, affirmed a 2007 lower court ruling that Iowa's 1998 law limiting marriage to heterosexuals is unconstitutional. There is no residency requirement (unlike that of Massachusetts) to obtain a marriage license in Iowa. The law took effect on April 24.

Vermont was the first state to create civil unions in 2000. Although not equal to marriage, it was a historic breakthrough at the time. On April 7, 2009, Vermont became the fourth state to uphold the freedom to marry. The Vermont legislature passed a bill ending the exclusion of gay couples from marriage with a two-thirds majority in each chamber, effectively overriding the governor's veto. Gay couples should be able to start applying for marriage licenses on September 1, 2009.

New Jersey, California, New Hampshire, Oregon, Washington and the District of Columbia have laws that either recognize civil unions or domestic partnerships that afford same-sex couples similar rights to marriage. Thirty states have gay marriage bans in their constitutions.

New York honors out-of-state same-sex marriage. In May 2008, Governor Paterson directed state agencies to ensure that the out-of-state marriages of same-sex couples are respected and treated equally under law, the same as New York does with different-sex couples' marriages.

## Recent Legislation

In my previous column, several new statutes were discussed at length, which are briefly outlined below:

- **DRL § 240(1)(a) (A7089/S6201), effective September 4, 2008** (good-faith allegations of abuse shall not deprive a parent of custody or visitation).
- **Section a-1 added to DRL § 240(1) and section (e) added to FCA § 651, effective January 23, 2009** (prior to rendering a permanent, temporary or successive temporary order of custody or visitation, the courts must review the statewide computerized registry regarding orders of protection and warrants of arrest, and the sex offender registry).
- **New DRL § 240 (3)(8), and new FCA § 446(h), effective December 3, 2008** (orders of protection for pets).
- **New DRL § 75-l, effective March 24, 2009** (protection for military parents from permanent change in custody as a result of military service).

### 22 N.Y.C.R.R. § 202.12(c)(3): Preliminary Conference and Electronic Discovery, effective April 15, 2009

One of the issues the court should consider at the preliminary conference is electronic discovery:

> (3) Where the court deems appropriate, establishment of the method and scope of any electronic discovery, including but not limited to (a) retention of electronic data and implementation of a data preservation plan, (b) scope of electronic data review, (c) identification of relevant data, (d) identification and redaction of privileged electronic data, (e) the scope, extent and form of production, (f) anticipated cost of data recovery and proposed initial allocation of such cost, (g) disclosure of the programs and manner in which the data is maintained, (h) identification of computer system(s) utilized, and (i) identification of the individual(s) responsible for data preservation.

### The Rules of Professional Conduct, effective April 1, 2009

The Rules of Professional Conduct replace the existing Disciplinary Rules, introduce a number of important ethics changes for New York lawyers, and are set forth in a new format and numbering system that are based on the ABA Model Rules.

## Court of Appeals Roundup

### Express waiver of equitable distribution not required in prenuptial agreements

***Van Kipnis v. Van Kipnis*, 11 N.Y.3d 573 (2008)**

The high court affirmed the appellate division and lower court's decision that a prenuptial agreement that was executed in France and provided for the separate ownership of assets held in the parties' respective names during the marriage precludes equitable distribution of the parties' separately owned assets despite that the agreement did not provide an express waiver of equitable distribution. DRL §§ 236(B)(1)(d)(4) and (5)(b) provide that assets designated as separate property by a prenuptial agreement will remain separate after dissolution of the marriage. Here, the parties did not commingle their separately owned assets throughout their 38-year mar-

riage. As a result, the husband retained $7 million of his separate assets, and the wife retained $700,000 of hers.

The court below erred by precluding the wife's recovery of legal fees under DRL § 237 for services provided in opposing her husband's affirmative defense to equitable distribution predicated on the prenuptial agreement. The high court reasoned that neither party was seeking to set aside the prenuptial agreement (where counsel fees would ordinarily be denied), and their dispute centered on whether the terms of the contract apply to the ownership of assets upon divorce. The case was remanded to the trial court for further proceedings on the issue of counsel fees.

***Author's note*:** Of the two assets that were subject to equitable distribution in this case, the wife was awarded the $1.8 million co-op in Manhattan, and the husband received the $625,000 Massachusetts vacation home. Perhaps the court was attempting to adjust for this inequitable division of separate property assets in a long-term marriage. The wife was also awarded lifetime maintenance in the sum of $7,500 per month and counsel fees of $92,000.

## Other Cases of Interest

### Counsel Fees

### Counsel fees not discharged in bankruptcy

***Ross v. Sperow*, 57 A.D.3d 1255, 871 N.Y.S.2d 736 (3d Dep't 2008)**

The mother was awarded $5,000 in counsel fees against the father for a custody and visitation proceeding in Family Court. Thereafter, the father discharged the counsel fees in Chapter 7 bankruptcy. The mother brought a violation petition alleging that the father failed to pay the counsel fees. The father moved to dismiss the petition on the ground that he discharged the counsel fee award in bankruptcy.

State and federal courts have concurrent jurisdiction over the issue of dischargability of a particular debt following the discharge of the debtor in bankruptcy. Domestic support obligations "in the nature of support" are exempt from discharge in bankruptcy pursuant to 11 U.S.C. § 523[a][5]. The court held that the term "in the nature of support" should be broadly interpreted, and that the mother's award of counsel fees was, in part, in the nature of support and exempt from discharge in bankruptcy since the Family Court's award mentioned that it considered the mother's financial circumstances under DRL § 237(b).

***Author's note:*** Prior bankruptcy law provided that only support was non-dischargeable in bankruptcy. However, now equitable distribution awards are also non-dischargeable.

In order to prevent counsel fees from being discharged in bankruptcy, the practitioner should draft a settlement agreement that provides that the counsel fees should be paid to the client, in care of the attorney, and that the counsel fee is in the nature of support or equitable distribution.

### Retaining Lien

***Zito v. Fischbein Badillo Wagner Harding*, 871 N.Y.S.2d 138 (1st Dep't 2009)**

The court granted the plaintiff's counsel's motion for leave to withdraw for failure to pay his counsel fees, and *sua sponte* directed outgoing counsel to turn over the files to the plaintiff on condition that the plaintiff enter into an agreement requiring him to pay outgoing counsel's outstanding fees within 30 days from the referee's determination of the *quantum meruit* claim. The order denying outgoing counsel a retaining lien was reversed because absent evidence of discharge for cause, a court should not order the turnover of an outgoing attorney's file before the client fully pays the counsel fees or provides security.

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

As discussed in my previous column, the Second Department in *Prichep* held that pursuant to DRL § 237, an application for interim counsel fees by the non-monied spouse in a divorce action should not be denied or deferred to trial without good cause, articulated by the court in a written decision "because of the importance of such awards in the fundamental fairness of the (divorce) proceedings." In my last column, I reported several 2008 cases that followed *Prichep*. So far this year, two Second Department cases modified two difference Suffolk Supreme Court judges' interim counsel fee awards:

*Mueller v. Mueller,* N.Y. Slip Op. 02761 (2d Dep't, Apr. 7, 2009), $10,000 interim counsel fee award modified to $25,000; and *Penavic v Penavic*, N.Y. Slip Op. 02578 (2d Dep't, Mar. 31, 2009), order deferring wife's request for $250,000 in interim counsel fees to the trial court modified by awarding wife interim counsel fees of $100,000 without prejudice to make a future application for further counsel fees.

## Equitable Distribution

### Waiver of beneficiary rights; divorce agreement not controlling

***Kennedy v. Plan Admin.*, Slip Op. 01488 (2d Dep't, Jan. 26, 2009)**

The executor of the estate brought an action against the administrator of the decedent's ERISA plan, contending that it improperly paid the plan's benefits to the named beneficiary, the decedent's former wife whom he had divorced, even though she waived her rights as the

beneficiary in the divorce decree. The court held that since the wife was never removed as the named beneficiary in accordance with the ERISA plan's procedures, the divorce decree is not controlling, and the proceeds should be paid to the former wife.

***Author's note:*** The matrimonial practitioner is reminded that at the settlement of a divorce case, the paperwork required to remove the former spouse as a beneficiary should be simultaneously signed with the settlement agreement.

### Donor's equitable distribution claim for the value of his donated kidney denied

***Batista v. Batista*, 27 N.Y.L.J., 241-40 (Sup. Ct., Nassau County, March 24, 2009)**

This case received world-wide notoriety when the surgeon husband's attorney, Dominic Barbara, held a press conference announcing that his client was seeking $1.5 million in compensation for his kidney that he donated to his soon-to-be ex-wife. Nassau County Supreme Court Attorney-Referee Jeffrey Grob not only denied the donor husband's claim, but deemed that it may be criminal.

The court held that public policy constrains application of the equitable distribution law of interspousal gifts to human tissues and organs. New York's Public Health Law Article 43 prohibits the exchange of monetary consideration for human organs intended for transplantation. The court noted that the statute classifies such conduct as a Class E felony and found that the husband's "effort to extract monetary compensation" for the donated kidney "may expose the defendant to criminal prosecution."

### Marital fault

***Howard S. v. Lillian S.*, No. 350049/08, Slip Op. 01880 (1st Dep't, Mar. 17, 2009)**

The wife misrepresented to her husband that he was the biological father of his five-year-old son, when in fact, the child was fathered by her paramour.

A majority of the First Department found that this conduct was not egregious to be considered for purposes of equitable distribution, since "defendant neither endangered the lives or physical well-being of family members, nor deliberately embarked on a course designed to inflict extreme emotional or physical abuse upon them." The only cases in which reprehensible conduct has been deemed to constitute egregious fault sufficient to affect equitable distribution have involved extreme physical violence, including attempted murder, and rape of stepchildren. The majority deemed the wife's behavior to be simply "adultery."

The dissent stated that the question of egregious fault should not be limited to being physical in nature, but should include "whether the social values contravened by the offending spouse's behavior is so important that some punitive response in the context of equitable distribution is appropriate," citing *McCann v. McCann*, 156 Misc 2d 540, 548 (1993). The husband is faced with the "unenviable choice" of devastating the child immediately by revealing the truth and risking his relationship with his siblings, or lying to the child indefinitely and continuously despairing about the consequences when the truth is finally revealed. Also, the mother placed the child's safety at risk by misrepresenting to doctors and hospitals that her husband was the father and depriving them of medically necessary parental/genetic information. When the truth was revealed, the wife continued to refuse to provide the biological father's medical history, thereby allowing the child's medical history to contain significant and potentially life- threatening gaps.

## Custody

### Change in Custody

***Frawley v. Salvatore*, 58 A.D.3d 678 (2d Dep't 2009)**

Plaintiff, former wife, brought an action to modify the parties' stipulation of joint custody with residential custody to the defendant, former husband. The order dismissing the proceeding without a hearing was reversed. The plaintiff met her *prima facie* burden of establishing a sufficient change of circumstances to warrant a hearing, which included allegations that during the six years since the execution of the agreement, the defendant remarried, withdrew the children from public school so that they could be home-schooled by his new wife, separated from his new wife, and was now in an acrimonious divorce proceeding with her.

## Orders of Protection

### Second Department changes standard of proof in violation of order of protection proceedings from clear and convincing evidence to beyond a reasonable doubt

***Rubackin v. Rubackin*, Slip Op. 01488, 2009 WL 486027 (2d Dep't, Feb. 24, 2009)**

In contempt proceedings for a violation of a court order issued under Family Court Act 846-a (violation of orders of protection), the Second Department and other appellate courts have issued conflicting decisions on what the relevant standard of proof should be. Here, the Second Department held that the required proof is now "beyond a reasonable doubt," which changes the original standard of proof of "clear and convincing evidence" when determining whether a jail sentence should be imposed. For all other civil remedies, the standard of proof remains "clear and convincing evidence."

## Child Support

### Imputed earnings

**Azrak v. Azrak, No. 04343/08, Slip Op. 02354, 2009 WL 790983 (Mar. 24, 2009)**

In this child support proceeding, the petitioner (father) contended that the Family Court improperly calculated his child support obligations without considering the fact that he had lost his employment. The order denying the father's objections was affirmed. The father's tax return for the year preceding the hearing reported a gross income of more than $300,000, while his earnings for the previous 10-year period were similar. Thus, based upon the petitioner's past employment history and his demonstrated earning capacity, the Family Court properly exercised its discretion in imputing the same income to him for purposes of calculating his child support obligations, even though petitioner had lost his employment.

Wendy B. Samuelson is a partner of the matrimonial law firm of Samuelson, Hause & Samuelson, LLP, located in Garden City, New York. She has written literature and lectured for the Continuing Legal Education programs of the New York State Bar Association, the Nassau County Bar Association, and various law and accounting firms. Ms. Samuelson was recently selected as one of the Ten Leaders in Matrimonial Law of Long Island for the age 45-and-under division and was featured as one of the top New York matrimonial attorneys in *Super Lawyers*, 2008.

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A special thanks to Carolyn Kersch, Esq. for her editing assistance.

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