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Notes and Comments

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The Court of Appeals: A Court in Transition

During the era of the Judith Kaye Court of Appeals when she acted as Chief Judge, New York's highest court appeared to be a court of unanimity. Rarely, if ever, was a dissent to be heard. It was Judge Kaye's philosophy that unanimity created a stronger court and that dissent was not to be encouraged. Statistically speaking, during the years that Judge Kaye presided on the Court there was a paucity of dissenting opinions. However, all that changed when Judge Kaye retired and Jonathan Lippman became Chief Judge. Dissent, rather than being the exception, has now become a far more common occurrence in both civil and criminal appeals. For example, there were 66 dissents in 211 decisions handed down by the Court during the past year, almost twice the amount in previous years.

It seems difficult to comprehend how in the past under the Kaye court, seven learned judges sitting on the Court of Appeals, in almost every case before it, could all agree on the outcome. Such a sad result was commonplace, especially since the high court was indeed a court of last resort for both criminal and civil litigants.

It now seems appropriate to explore whether the direction and philosophy of our Court of Appeals has changed given the increase in dissenting opinions. Has it become closer to a court of equity, or rather a strict constructionist court of law? Does it seek to provide a remedy for most wrongs as Judge Simmons of the 1978 Court of Appeals observed:

> [the] Court does not restrict itself by describing all the specific forms of inequitable holding which will move it to grant relief, but rather reserves freedom to apply this remedy to whatever knavery human ingenuity can invent.[1]

Or does it blink at injustice and permit most wrongs to remain unpunished?

A recent article in the *New York Law Journal*[2] attempted to discern the Court's philosophical bent. It came to the conclusion that it was far too difficult, if not impossible, to determine the predilections of the Court as either leaning to a liberal or conservative bent, or to predict the outcome of any given appeal. Nonetheless, based upon the decisions of two recent cases involving matrimonial issues,—*Fields v. Fields*[3] and *Commodity Futures Trading Commn v. Walsh*[4]—it appears to this writer that the Court seems to be leaning toward the equitable side of the ledger, at least in domestic relations matters. If this view be correct then an examination of these cases will help determine whether the Court is indeed leaning in the direction of righting a wrong when justice and equity so requires. *Notably, the majority opinion in both cases was authored by Judge Graffeo with Judge Smith as one of the dissenters in both.*

Fields v. Fields

Fields was a case in which leave to appeal to the high court was granted, which indeed is a rare circumstance.

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The main issue raised on the appeal was whether a husband's half interest (his mother held the other half interest) in the parties' marital residence, a Manhattan townhouse (in which other apartments were rented) that they had occupied for nearly 30 years, was marital property, despite the fact that the husband used monies derived from his separate property to make the down payment and obtained a mortgage for the balance of the purchase price.

The Court first noted that the determination of whether a particular asset is marital or separate is a question of law subject to plenary review on appeal. It then went on to recite the provision of DRL §236 that defines marital property as such property acquired during the marriage, and then explained that this definition was in keeping with the recognition that marriage was an economic partnership in which both parties contribute either in their capacity as a wage earner, a parent or as a spouse. The Court acknowledged that DRL §236 was enacted in order to recognize both the indirect as well as the direct contributions of each spouse. In so noting, it held that marital property should be "construed broadly in order to give effect to the 'economic partnership' concept of the marriage." It then held, "separate property…should be construed narrowly." In the words of the Court, "the structure of section 236 therefore creates a statutory presumption that 'all property, unless clearly separate, is deemed marital property' and the burden rests with the titled spouse to rebut that presumption." The Court then discussed the unique facts presented in *Fields.*

Mr. and Mrs. Fields were married for 40 years. The husband was 60 and the wife 69. There was one child born of the marriage. In 1978, the parties decided to purchase a townhouse with ten apartments and a basement on the West Side of Manhattan. The wife agreed to the acquisition only if the husband consented to certain pre-conditions because she believed that her working outside the home while at the same time caring for their child, together with maintaining the townhouse, would be too burdensome. Because of the wife's concerns, the husband purchased the townhouse with his mother's assistance. The purchase price of the townhouse was $130,000. The husband made a $30,000 down payment from funds received from his grandparents. The balance of the purchase price was paid through obtaining the proceeds of two mortgages held jointly by the husband and his mother. Initially, the husband took title solely in his name but later conveyed a half interest to his mother. From 1982 to 2001, some 19 years, the husband and his mother managed the townhouse as a formal partnership and deposited rent proceeds in a partnership account and made mortgage payments from such account. It appears that the partnership bank account was insufficient to meet all of the expenses of the building and the husband acknowledged that during such time he co-mingled his marital funds apparently to meet such expenses.

In 1978, the parties moved into the townhouse and occupied separately at different times several of the apartments. They paid rent from their own wages. Around 2008, an action for divorce was brought by the husband and the Supreme Court classified the husband's interest in the townhouse as marital property, less the $30,000 down payment he had contributed from his grandparent's funds. The Appellate Division affirmed with two dissents. The majority reasoned that since the husband purchased the townhouse during their marriage and that the couple continuously resided in the townhouse, and that the wife made both direct and indirect contributions, she was entitled to a 35% interest in the husband's interest in the townhouse which was deemed to be marital property.

On appeal to the high court, the husband argued that his interest in the townhouse was separate since he owned and managed the building with his mother and because his wife did not contribute to its purchase or its appreciation in value, it should remain his separate property. The Court of Appeals disagreed with the husband's arguments and held the townhouse to be marital property subject to equitable distribution. It went on to note that the fact that the husband contributed his separate property toward the acquisition did not change the classification of the townhouse from marital to separate property especially where his wife made economic and other indirect spousal contributions to the townhouse and the marriage. The Court noted further that the down payment—which was indeed separate—would generate a credit for that contribution when the property was divided. It cited the *Heine*[5] case where this exact result was obtained and the property was determined to be marital subject to a credit for the husband's contribution. The Court then explained that once the statutory presumption of marital property was triggered, the burden shifts to the acquiring spouse to rebut that presumption. It held that the use of separate property as a down payment does not "in and by itself establish the property's character as separate property."[6] The fact that the husband had co-mingled marital assets in the partnership bank account which was used to pay expenses seemed to be the deciding factor. Moreover, both the husband and wife paid rent to the partnership using income from their respective outside endeavors which was a partial source for the mortgage payments.

The Court of Appeals affirmed the award of thirty-five percent (35%) of the husband's interest in the townhouse to the wife. It emphasized that the fact the husband acquired title with his mother does not alter the designation of the husband's interest in the townhouse as marital property. It commented on the dissent's position dismissing it as contrary to the very purpose underlying equitable distribution in the recognition of marriage as an economic partnership. The majority believed that because of the parties' long-term marriage and that both were employed and made economic and non-economic

contributions to their marriage and their child, that a thirty-five percent (35%) award of the husband's interest was appropriate. I commend our readers to obtain the entire decision, including the dissent, and see whether you agree with the majority or not. The Court was split 5 to 2 with Judge Smith and Read dissenting. The dissent postulated that the majority decision was indefensible. It suggested that the husband obtained the townhouse with separate funds, and as such it must be treated as separate property, and therefore the wife could only receive a portion of the value of any appreciation provided she made a direct contribution to the appreciation (citing DRL §236 [B][1] and [3]). It criticized the majority holding finding the townhouse was martial property because some part of the mortgages used to purchase the property may have been paid down from earnings of both parties during the marriage.

One wonders if the husband had paid all cash for the townhouse, would the majority have held the property to be deemed separate? Conversely, such fact would bolster the minority position since such a transaction would truly be made entirely with an exchange of separate property and come within the definition of the statute.

It was apparent to many legal scholars that the court could have decided the *Field*s case either way. Rather than strictly construing the statute, it did the equitable thing, and found a way to rule in favor of an otherwise economically disadvantaged spouse in a long-term marriage.

Our readers should study the opinions carefully and come to their own conclusion. In any event, the majority's view appears to be some evidence of the Court leaning to the equitable side of the ledger.

In pursuing the quest to determine the predilection of the present court, it is necessary to also review *Commodity,* a case that involved the husband's fraud against third parties to acquire marital assets, which ultimately led the defrauded creditors to seek disgorgement from funds the wife innocently received during a marital settlement.

Commodity Futures Trading Commn v. Walsh

The *Commodity* case against Janet Schaberg and her former husband Walsh was extremely interesting and was referred by the United States Court of Appeals for the Second Circuit to the New York High Court. The Court of Appeals had to determine (1) did the assets fraudulently acquired by the husband constitute marital property within the meaning of the Domestic Relations Law and (2) does the good faith receipt of those assets by the wife as part of a divorce settlement constitute "fair consideration" under New York's Debtor and Creditor Law §272 *vis-a-vis* the defrauded third party? The Court determined these certified questions by holding that where a spouse receives monies in a marital settlement and is unaware that some or all of the assets received were illegally acquired by the other spouse, she receives good title to the disputed property and may retain the monies received in the marital settlement. It went on to reflect that since the scope of marital property is to be construed broadly, the proceeds of fraud may constitute marital property when transferred in a marital settlement and received by an innocent and unknowing spouse.

The husband, Steven Walsh, misappropriated more than $550 million from funds he managed for institutional investors. This fraud was uncovered after a marital settlement with his wife had been made in which he transferred some of these tainted monies to her. The plaintiff agencies sought disgorgement of such monies from the wife.

The parties were married for approximately 25 years and had two children. They separated in 2004 and entered into a stipulation of settlement in November of 2006. The wife conveyed her interest in the marital residence which had an alleged value of $7.5 million to the husband and she received sole ownership of the condominium in New York City and one piece of property in Florida worth approximately $6.7 million. In addition, the wife was to retain $5 million held in several bank accounts. The husband, in addition, agreed to pay her $12.5 million in bi-annual installments through 2020. She waived her rights to maintenance and to receive any portion of other property acquired by the husband either before or during the marriage. The agreement was incorporated but not merged into the final judgment of divorce. Two years following the divorce, the plaintiffs filed complaints alleging large scale fraud by Walsh and sought disgorgement of such ill-gotten gains from the wife. A preliminary injunction was granted by the United States District Court which froze six of the wife's brokerage and bank accounts containing approximately $7.6 million and effectively deprived her of her right to transfer all of such assets. The wife appealed, alleging that the injunction was improper since her property was not subject to disgorgement. The wife claimed that since she had received the property pursuant to the terms of a settlement agreement she became a good faith purchaser for value of these assets. The federal court certified the two questions in order to determine whether the injunction should be lifted.

The Court of Appeals noted that the ill-gotten funds were indeed marital property by definition since they were acquired during marriage. They acknowledged once again that marriage is an economic partnership. It stated that the division of property rests upon a "wide range of nonenumerated services to the joint enterprise, such as homemaking, raising children, and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home," quoting from *Price v. Price.*[7]

The Court then defined the issue in this case as whether the distribution made of fraudulent funds pursuant to DRL §236 to an innocent spouse was unassailable.

The plaintiff argued that the court should focus on the public policy considerations that favor the return of stolen property to its rightful owner and that there should be an exception carved out to the broad definition of marital property so as not to include the proceeds of fraud. Despite such argument, the Court concluded that marital property must be construed broadly and the transfer of tainted assets derived from fraud to an innocent spouse is a completely binding transfer.

It appears the court in rendering its decision considered that:

> It has long been the law of this State that "money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it *bona fide* and for a valuable consideration in due course of business" (*Stephens v. Board of Educ. of Brooklyn*, 79 NY 183, 186 [1879]).

It went on to hold that spouses have a reasonable expectation of finality once they have entered into a valid agreement. It explained that to uphold the agency's argument would:

> …effectively undo court orders and settlement agreements for an indeterminate time after the "winding up of the parties' economic affairs" (*O'Brien*, 66 NY2d at 585) and "subvert the policy of upholding settled domestic relations… in divorce cases" (*Rainbow v. Swisher*, 72 NY2d 106, 111 [1988]; see also *Boronow v. Boronow*, 71 NY2d 284, 290-291 [1988]).

The Court also reflected that the fraud occurred a number of years following the divorce settlement. The one caveat imposed upon the innocent spouse was to prove that fair consideration had been given for the receipt of the tainted asset, which they found to exist in the wife's case. The Court then went through the assets given up by the wife, her waiver of maintenance and other property and her non-economic contributions. The wife also released her right to inherit from the husband's estate and any interest in their home in Port Washington. However, the Court acknowledged that victims of fraud are certainly entitled to pursue disgorgement where the transferee spouse was aware of and participated in the fraud or otherwise did not act in good faith. It then explained that even where there was no bad faith, the defrauded parties could still recover if the spouse did not give fair consideration for the property in dispute. The dissent essentially found that based on the facts of the case they did not believe that the wife had given fair value.

In any event, these two cases in which the Court of Appeals wrote divided 5 to 2 opinions in each instance (Judges Smith and Pigott dissenting in *Walsh*) enable us to prognosticate some direction in the Court's philosophy and to postulate whether it stands on the equitable or law side of the fence.

It is not a stretch to conclude based upon the decision in these two recent cases that the newly constituted Court of Appeals is indeed leaning to the equity side and will do the right thing and arrive at a just decision where equity so dictates. Whether this view is correct remains to be seen from the next several matrimonial appeals which the Court will decide. This *Review* will continue to monitor this most important issue.

Endnotes

1. *Simonds v. Simonds*, 45 N.Y.2d 233, 241 (1978).
2. August 18, 2011, page 1.
3. 15 N.Y.3d 158, 931 N.E.2d 1039 (2010).
4. 17 N.Y.3d 162, 951 N.E.2d 369 (2011).
5. *Heine v. Heine*, 176 A.D.2d 77, 84, 580 N.Y.S.2d 231 (1st Dept 1992).
6. *Id.*
7. 69 N.Y.2d 8 (1986).

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The Missing Annuity Mystery

By Mark E. Sullivan

Background

I won, I really won it all, thought Mae Lydick. She was listening to the decision of Justice Duskas in Clinton County on June 24, 1986 in the maintenance, property and divorce case she'd brought against her husband. And she listened in awe as the justice read a list of what was to be hers—the parties' mobile home, all of the household furniture, the federal and state tax refunds, and permanent maintenance.

But then she stopped smiling. "He made a mistake," she whispered to her attorney, pointing to Justice Duskas. "He missed something." She was referring to the military pension of her ex-husband. The court awarded it entirely to Donald Lydick.

So Mae Lydick took an appeal. The court erred in refusing to divide the pension, which was marital property. That was Mrs. Lydick's argument in the Appellate Division.[1]

But Mrs. Lydick herself made a mistake. She also missed something. She missed a marital asset with a huge value for her, but which was worthless to her ex-husband.

The missed asset was a survivor annuity for her, should Mr. Lydick die before her. The name of the asset was the Survivor Benefit Plan (SBP).

"[I]t is very important for the former spouse to insist on [the Survivor Benefit Plan] as a part of a military divorce settlement."

It is not known how long the parties were married during the husband's military service, but it's a good guess that Mae Lydick was "the military spouse," that is, the one who usually moves from base to base with her husband every three or four years, and whose mobility makes it close to impossible to land and retain a job that provides good earnings and a retirement plan. That's why it's a mystery that the Survivor Benefit Plan was missing from the trial and appeal. In such cases, it is very important for the former spouse to insist on SBP as a part of a military divorce settlement.

This article, and the subsequent two installments, will explore what SBP is, how much it costs, who pays for it, how to protect the non-military spouse, and how to adjust the benefit amount. Also covered will be deadlines for elections, how to use a court-ordered election when the service member or retiree will not cooperate, dealing with deadlines, and where to send the documents.

What Is the Survivor Benefit Plan?

Since death terminates pension payments, practitioners should be familiar with the Survivor Benefit Plan.[2] SBP is an annuity program that allows retired (or retirement-eligible) active-duty service members (SMs) to provide continued income to specified beneficiaries at the time of the participant's death. The retiree's paycheck is the source of monthly premium payments for SBP coverage, and this is partly subsidized by the government. There is a modest tax break for the retiree because the SBP premium is excluded from the taxable portion of his or her retired pay. The SM decides what benefit amount shall apply and to whom the benefit is paid. The designated survivor will receive a lifetime annuity of 55% of the designated base amount.[3] The SM may select spouse coverage, coverage for the spouse and qualifying children, or coverage for qualifying children only. A former spouse may also be a beneficiary.

The cost for SBP varies depending on the type of coverage selected and the base amount chosen. In general, the premium rate for spouse or former spouse coverage is 6.5 percent of the selected base amount for those who entered military service after March 1, 1990; there is an alternative rate structure for those who entered military service on or before that date.[4] The benefit is 55% of the base amount.

Thus, for example, assume that the total military retired pay for John Doe (before pension division) is $3,000 a month and that he selected the full amount of his retired pay as the base amount for Mrs. Doe's benefit. The maximum SBP payment for Mary Doe would be $1,650 a month (fifty-five percent of retired pay). The premium would be about $195 (6.5 percent of total retired pay), which is deducted from his retired pay.

Any election other than spouse-only at the full-retired-pay base amount requires spousal concurrence. Whenever counsel or the court is using deferred division for the military pension (which is almost 100% of the time), the attorney for the SM's spouse should seriously consider SBP coverage. This benefit allows continued payments if the spouse or former spouse survives the SM. Without this valuable tool in planning for continued income for the nonmilitary spouse, the stream of income ends with the death of the pensioner.

Benefits and Disadvantages of SBP

When counseling Mrs. Doe, the nonmilitary spouse, the attorney should know that there is no simple answer as to whether she should ask her husband or the court for SBP coverage. Too much depends on conditions, facts, issues, and limitations that are unique to the parties' marriage. For example, if Mrs. Doe has a well-paid job and little need for immediate security upon the death of her husband or ex-husband, then she might choose no death benefit at all, or perhaps life insurance only. Should she have no job outside the home and small children to raise, her needs for immediate security upon the death of the family's main provider are obvious. It is essential to know the pros and cons for SBP.

The advantages of SBP coverage for Mrs. Doe are numerous. The first is security. Unlike commercial life insurance, SBP does not require a person to "qualify" for coverage, and neither party must undergo a physical examination. Coverage cannot lapse or be refused while premiums are being paid. The SM generally cannot terminate coverage (except with the spouse's consent), and even then there is only one "window" for the termination.[5] Mrs. Doe will receive payments for the rest of her life upon her husband's death.

"When counseling…the nonmilitary spouse, the attorney should know that there is no simple answer as to whether she should ask her husband or the court for SBP coverage. Too much depends on conditions, facts, issues, and limitations that are unique to the parties' marriage."

Another reason for choosing SBP is cost. Deductions from Mr. Doe's retired pay for SBP premiums are from the total gross retired pay. This reduces his pension income (and her share of it) for tax purposes. Payments are increased regularly by cost-of-living adjustments to keep up with inflation. There are no expenses for commissions, advertising or profit, which commercial life insurance premiums include, and costs are not based on age or financial forecasts.

While cost might be an advantage in one sense, it also is among the disadvantages of SBP. Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive compared to term life insurance, and premiums increase over time due to inflation.

Another disadvantage is inflexibility; as a general rule, once SBP is chosen it cannot be canceled. In addition, there is no equity build-up and no cash surrender value, which would be present in a policy of whole life or variable life insurance. There is also no return of premiums paid if Mrs. Doe dies before her husband.

Payments are suspended for a widow, widower, or former spouse beneficiary who remarries before age fifty-five.[6] No such age or remarriage limitation occurs when one purchases a life insurance policy.

	Checklist for SBP: Pros and Cons
✓	**Advantages of Survivor Benefit Plan**
	Security: There is no "qualification" required; unlike commercial health insurance, no physical exam is required for the military member and coverage cannot be refused or lapse while premiums are being paid. The member/retiree cannot terminate coverage if established by court order sent to Defense Finance & Accounting Service (DFAS).
	Life Payments: Mrs. Doe, the beneficiary, will receive payments for the rest of her life upon the retiree's death (unless she remarries before age 55, which stops benefits so long as she is married).
	Tax-Free: Deductions from the retiree's pay for SBP premiums are from his gross retired pay and thus reduce his pension income (and her share of it) for tax purposes.
	Inflation-Proof: Payments are increased regularly by cost-of-living adjustments to keep up with inflation.
✓	**Disadvantages of Survivor Benefit Plan**
	Expense: Even though the premium payments are tax-free and are shared by the parties, the coverage is relatively expensive (as compared to term life insurance) and premiums do go up.
	Inflexible: As a general rule, once SBP is chosen, it cannot be canceled.
	No Cash Value: Unlike whole life or variable life insurance, there is no equity build-up and no cash value for SBP. And there is no return of premiums paid if Mrs. Doe dies before her husband.
	Not Divisible: SBP is a unitary benefit, cannot be divided between current spouse and former spouse.

Election Options

Let's see how SBP works. For a service member (SM) on active duty who is married or has a dependent child, the election for SBP must be made before or at retirement.[7] An active-duty SM who is entitled to retired pay is **automatically** enrolled in SBP at the maximum authorized level of coverage unless he or she declines (before retirement) to be covered or else chooses coverage at a lower level; if the SM is married, the spouse must consent to this choice.[8] Reservists can make the election upon completion of 20 years of creditable service and they have

a second chance to elect SBP coverage upon reaching age 60 if they have deferred the decision.[9]

Divorce terminates SBP coverage for a spouse. There is no provision in the law which makes former spouse coverage an automatic benefit. The only means by which a person who is divorced from a service member may receive a survivor annuity is if *former spouse coverage* is elected.

Dealing with Deadlines

A service member on active duty may elect former spouse coverage at divorce. Military retirees may elect former spouse coverage for a spouse who was a beneficiary under the Plan when divorce occurs after retirement.[10] The election must be made by the member/retiree within one year of the divorce decree.[11] At the time of making this election, the retiree must provide a statement setting forth whether the election is being made pursuant to a court order or a written agreement previously entered into voluntarily by the retiree as part of, or incident to, a divorce proceeding (and, if so, whether such written agreement has been incorporated in, ratified, or approved by a court order).[12] An election filed by the retiree is effective upon receipt by the retired pay center.[13]

If the SM is required to provide such coverage and then fails or refuses to make the required election, the former spouse may still obtain the required coverage by serving on DFAS (or the appropriate retired pay center) a copy of DD Form 2656-10 along with certified copies of the divorce decree and the court decree granting SBP coverage.[14] These must be received within one year of the order providing for SBP coverage.[15] This is called a "deemed election."

Note that this is a second one-year deadline, distinct from the first. In some states a divorce decree need not contain the terms of a property division or marital settlement; it simply recites the facts of the marriage and enters an order dissolving it. Occasionally the dissolution is granted apart from the property division upon a motion to sever or bifurcate the proceedings. Sometimes the decree of divorce or dissolution provides for some of the property division but leaves other terms to be resolved by a follow-up order, such as a QDRO (in the case of a private pension plan). Counsel for the nonmilitary spouse should note carefully these deadlines on the office calendaring system to prevent a catastrophe for the now-former-spouse and a malpractice claim for the attorney.

While a court can order SBP coverage,[16] a court decree cannot in itself create coverage. The SM or former spouse must submit a signed election request to DFAS to establish coverage. This was discovered the hard way in a Virginia case, *Dugan v. Childers*.[17] In that case, the husband retired from the Army and named his wife as his SBP beneficiary. When they divorced, the court ordered him, with his consent, to name his now ex-wife as his SBP beneficiary. He failed to do so and, after his remarriage, he made his new wife the beneficiary instead. He was held in civil contempt by the judge and once again was ordered to name his former wife as his SBP beneficiary. He died without doing so.

At that point, the ex-wife sought to impose a constructive trust on the SBP benefits that had been paid to the widow. The trial judge refused to do this, granting summary judgment instead in the widow's favor. The Virginia Supreme Court affirmed, stating that the ex-wife did not notify DFAS within the specified time limits for her SBP election and, because she did not comply with this rule, she was barred from collecting SBP by reason of federal law and preemption. In short, a state court cannot "divide" SBP benefits in violation of federal statutes and rules. When Congress has decided that there is one specific way for the SM or the ex-wife to ensure coverage, namely, the application process (and specific time limits) set out above, that procedure must be followed.[18]

Termination of SBP Coverage

Entitlement to SBP payments stops upon the former spouse's remarriage if this occurs before age fifty-five, but SBP coverage will be reinstated if the former spouse's marriage ends due to death, divorce or annulment.[19] SBP coverage will continue if the former spouse is 55 or older at the time of remarriage.

Receipt of a valid former spouse election terminates any existing "spouse coverage" by SBP. Unlike civilian retirement annuities, former spouse coverage cannot be combined with coverage for a current spouse in order to provide some measure of coverage to both; there can be only one SBP beneficiary.

Changing SBP Coverage

An election of former spouse coverage is basically irrevocable, meaning that the SM may not terminate SBP participation once it is elected.[20] However, the law allows the SM to request a change in SBP coverage (if not barred by court order) if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change. Such a request must be made within one year from the date of marriage or the child's birth.[21]

DFAS requires a copy of the final decree of divorce or dissolution before making any adjustment to the SM's SBP. When SBP is required in a court order, separately or in connection with the division of military retired pay, the proper addresses to use are:

(a) ARMY, NAVY, AIR FORCE and MARINE CORPS: Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130;

(b) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;

(c) PUBLIC HEALTH SERVICE: Office of Commissioned Corps Support Services, Compensation Branch, 5600 Fishers Lane, Room 4-50, Rockville, MD 20857;

(d) NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: Same as U.S. Coast Guard.

For Reserve Component members who are not yet receiving retired pay (under age 60), mail the election (certified or registered mail with return receipt attached is strongly recommended) to:

(a) ARMY: U.S. Army Human Resources Command, 1600 Spearhead Division Avenue, ATTN: AHRC-PDR-C, Ft. Knox, KY 40122;

(b) NAVY: Navy Reserve Personnel Center (PERS 912), 5722 Integrity Drive, Millington, TN 38054;

(c) AIR FORCE: Headquarters, ARPC/DPSSE, 6760 E. Irvington Place, Denver, CO 80250-4020;

(d) MARINE CORPS: Headquarters, U.S. Marine Corps, Separation & Retirement Branch (MMSR-6), 3280 Russell Road, Quantico, VA 22134-5103;

(e) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591.

Endnotes

1. *Lydick v. Lydick,* 130 A.D. 2d 915, 516 N.Y.S. 2d 326 (1987).
2. 10 U.S.C. § 1447-1455.
3. 10 U.S.C. § 1451(a)(1)(A).
4. 10 U.S.C. § 1452(a)(1)(A)(iii)-(iv), *see also* TJAGSA Practice Note, *Survivor Benefits: Congress Changes the Survivor Benefit Program*, ARMY LAW., Feb. 1990, at 75.
5. 10 U.S.C. § 1448a.
6. 10 U.S.C. § 1450(b).
7. 10 U.S.C. § 1448 (a)(2)(A).
8. 10 U.S.C. § 1448 (a)(3).
9. 10 U.S.C. § 1448(a)(2)(B).
10. 10 U.S.C. § 1448(b)(3)(A)(i).
11. 10 U.S.C. § 1448(b)(3)(A)(iii).
12. 10 U.S.C. § 1448(b)(5).
13. 10 U.S.C. § 1448(b)(3)(E). DFAS (Defense Finance and Accounting Service) is the retired pay center for the Army, Navy, Air Force and Marines. There are different pay centers for retirees from the Coast Guard and the commissioned corps of the Public Health Service and of the National Oceanographic and Atmospheric Administration.
14. 10 U.S.C. § 1450(f)(3)(A).
15. 10 U.S.C. § 1450(f)(3)(C).
16. 10 U.S.C. § 1450(f)(4).
17. *Dugan v. Childers*, 261 Va. 3, 539 S.E.2d 723 (2001).
18. *See also Silva v. Silva*, 333 S.C. 387, 509 S.E.2d 483 (1998); *King v. King*, 225 Ga. App. 298, 483 S.E.2d 379 (1997).
19. 10 U.S.C. § 1450(b)(2)–(3).
20. The one exception is by mutual consent between the second and third years of coverage. 10 U.S.C. § 1448a.
21. 10 U.S.C. § 1448(a)(5)(B).

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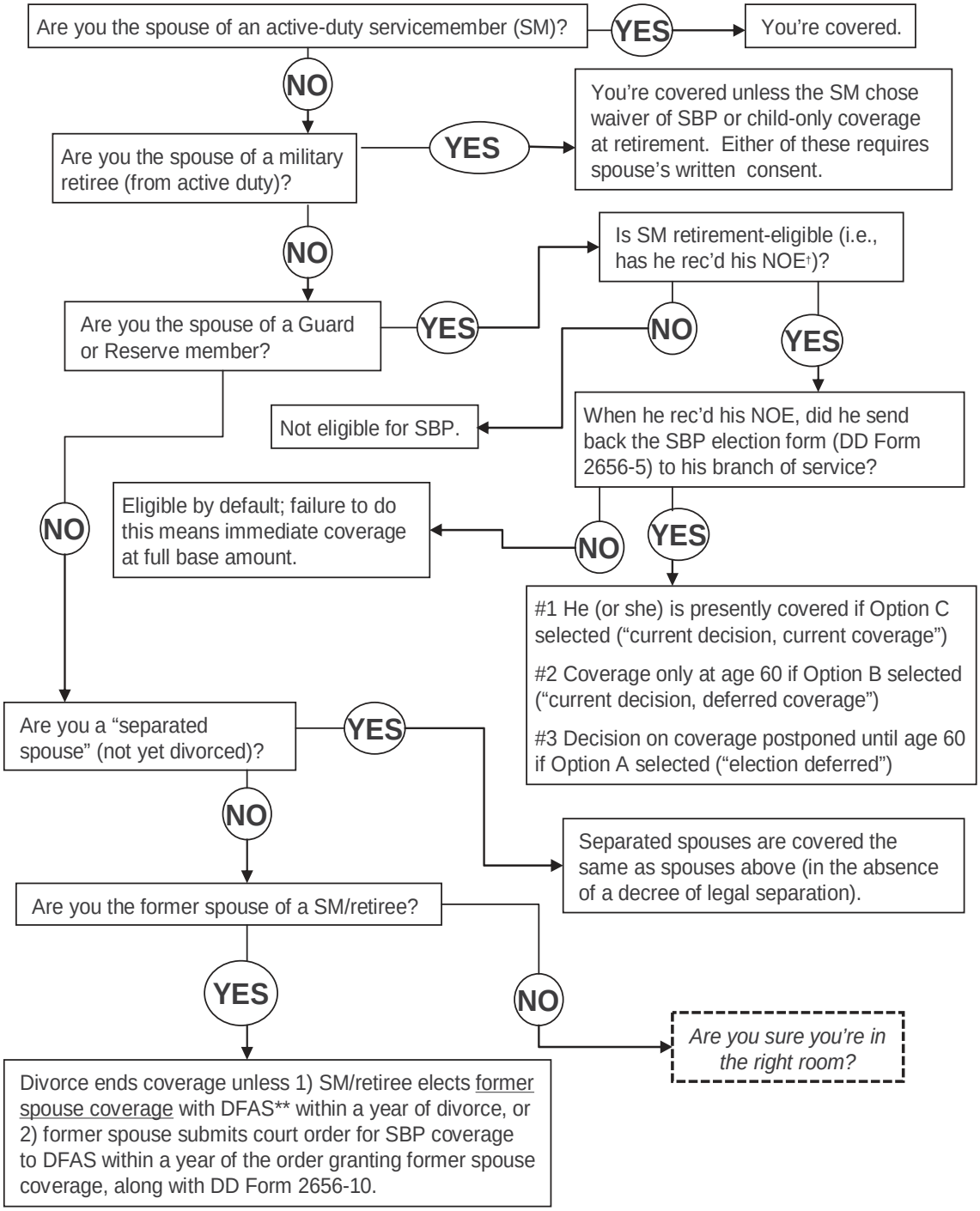
Survivor Benefit Plan – Are You Covered*?



SBP coverage means eligible beneficiary receives 55% of selected base amount if SM/retiree dies first. Info above assumes no prior award of SBP by court order to another beneficiary (and confirmed through ret'ired pay center, usually DFAS).

†*Notice of Eligibility (NOE) is sent to Guard/Reserve SMs upon completion of 20 years of creditable service ("20-year letter").*

***Defense Finance and Accounting Service (or other uniformed services retired pay center).*

Bedtime for Doctor *O'Brien*

By Walter F. Bottger

The old saw, "hard cases make bad law," perhaps has no better illustration than the aging but still troublesome case of *O'Brien v. O'Brien*.[1] It may be time to put *O'Brien* to bed.

As everyone by now knows, Dr. Michael O'Brien obtained his medical degree and license during his marriage. During that time, his wife contributed significantly to her husband's support and educational efforts and endured her own career sacrifices for his benefit. Once he had his license, but before he had begun to earn significantly or accumulate assets, the new Doctor O'Brien commenced a divorce action against his wife.

Faced with a set of facts brimming with inequity and unable to offer compensation to the wife with existing assets or income, the Court of Appeals took a metaphysical leap of faith and "discovered" distributable property in the intangible essence of Dr. O'Brien's medical license. With that, the Court of Appeals started New York law down a confusing, often problematic and inequitable path.

Still in the developmental stages after the 1980 enactment of equitable distribution, New York apparently thought itself in the vanguard by creating property out of a license to practice. But, as Judge Robert Smith pointed out in his dissent in the more recent case of *Holterman v. Holterman*,[2] "[i]n 19 years, not one other state has adopted the *O'Brien*[3] rule...." Instead, New York is now more like the old duffer driving the wrong way on the Interstate whose wife calls him on his cell phone to warn him about a driver going the wrong way on the Interstate. "Hell," the oldster responded, "they're all going the wrong way."

Attorneys and courts can point to a few applications of the *O'Brien* rule where, as in the original, justice has been served by valuing an intangible as property in order to compensate a spouse who would otherwise be shortchanged. But more often, it seems, courts have wandered in several directions as they struggled with the mandate that they create something out of nothing.

The gist of the *O'Brien* rule is that:

> [a] professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder....[4]

Once the Court of Appeals "discovered" property in a medical license, courts began scrambling to find property lurking in every form of intangible.

In *McGowan v. McGowan*,[5] a master's degree earned during the marriage but not connected to a license was found to be a marital asset to be distributed. A Fellowship in a Society of Actuaries was found to be marital property in *McAlpine v. McAlpine*.[6] In *Haspel v. Haspel*,[7] some securities licenses and a real estate broker's license (not the products of any significant schooling or efforts) which were obtained during the marriage were held to be distributable marital assets.[8] And one court found that a maritime apprenticeship during a marriage but not yet resulting in a license was a marital asset to be distributed.[9]

Courts have also searched outside the bounds of the marriage to find intangible property to pull into the marital pot. In *Madori v. Madori*,[10] a court said that emergency room experience which utilized a pre-marital medical degree comprised marital property. It treated the experience as though it were appreciation of separate property in the manner of *Price v. Price*.[11] And recently the Second Department approved applying an *O'Brien* valuation to a degree awarded after the marriage, where some of the course work for it was completed during the marriage.[12] To do this, the court adopted for intangibles the same method used in valuing bonuses or other tangible property earned during the marriage but received afterward.

The search for "property" has led courts down many exploratory paths, but none more problematic than that of *Golub v. Golub* in 1988.[13] In *Golub*, the New York County Supreme Court reified the celebrity status of a well-known model and actress.

"There seems to be no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income," said the court.[14] But in its effort to expand the definition of intangible property, the *Golub* court overlooked the connection in *O'Brien* between the license and its resulting enhancement of the holder's earnings. As one court put it clearly: "The value of such assets is reflected in the *enhanced earning capacity* that they afford the holder...."[15] There was in *Golub* no clear connection between the fact of the wife's celebrity and how it had enhanced any earnings that were not there before.

Nevertheless, the *Golub* decision inspired courts with a new burst of property hunting. The Appellate Division, First Department, found *O'Brien* property in an opera singer's career, also ignoring the connection between the "property" and any enhanced earnings.[16] Later, the First Department discovered property in a successful investment banker's career, unconnected to any degree or license.[17] In a model of circuitous logic, the court said, in essence, that the husband's successful career had enhanced his successful career.

Flush with these exercises in mental gymnastics, one court found distributable value in a salesman's efforts and

ability as reflected in his "book of business," although the "book of business" belonged to his employer and not to him.[18] That court approvingly noted the earlier cases and the expanding nature of property they represented and thus had no trouble finding that the husband's hard work and salesmanship constituted a distributable marital asset.[19]

One court used imputed income, usually reserved for determining of child or spousal support, to expand the intangible marital property.[20] Confronted with an underused registered nurse's license, the court increased its value by assuming higher statistical earnings, although the license had not, in fact, enhanced the holder's earnings to that level.

The search for property in intangible places is fraught with danger and potential injustice. For example, the *Hougie* court recognized a Series 7 license to be a marital asset under *O'Brien*.[21] A Series 7 certificate of registration is a permit required to sell stocks. It is obtained after a brief exam for which a few hours of study may be needed. Yet this briefly obtained certificate could, under *O'Brien*, be valued in the millions of dollars, if the receiver of the Series 7 then commits years of effort and skill and becomes a successful financier. Then, because of the Series 7 registration, the titled spouse could be stuck with a multi-million-dollar unmodifiable liability, virtually enslaving him or her for the rest of his or her life.

Following the logic that led to *O'Brien* valuations of a Series 7, it would not be a long reach to find the certificate from a Continuing Legal Education presentation to be a marital asset subject to full *O'Brien* valuation. Or what about such required licenses as an electrician's or barber's license or even a driver's license used to get to work? Or why couldn't a court use the statistical earnings of a professional chef to value a spouse's certificate of attendance at a cooking class? There are few "personal enhancement" courses, such as photography, home decorating, pottery making or even investment advice, which do not offer certificates upon completion. All these could inspire an *O'Brien* evaluation. The possibilities are limited only by the imaginations and penchant for mischief of the lawyers and the courts involved.

A classic case threatening injustice is that of a young person who earns a valuable degree or license, such as an MBA or law license, during a short marriage. Given the long work life ahead, the degree or license would have a very high value, thus forcing the holder to spend much of his or her remaining work life paying off the distributive award. Such an award forces the degree holder to continue his or her present career, while the recipient spouse is free and financially enabled to do whatever he or she wishes.

Another lurking unfairness is the valuation of an unused degree. In one unreported case of which the writer is aware, a practicing physician obtained an MBA degree but never used it. Nevertheless, upon divorce, his MBA was valued statistically, looking to MBAs in the finance world in New York, even though to the holder, the degree had no value at all.

Another anomaly is the likelihood of disparate values assigned to the same degree or license, depending on the personal energy and effort of the more successful holder. This problem is especially evident when the evaluation uses a baseline of statistical earnings and a "top line" of historical earnings. Placing a higher value on the more successful person's degree or license is, in reality, the transmutation of individual effort and ability into a thing, not a personal quality.

Of course, lurking down the path after an *O'Brien* valuation is the possibility of a career or health disaster. An automobile accident could cut short a promising career. A financial crash such as the recent one could suddenly put a high earner on the street. Indeed, an increase in tax rates or even a failure by the titled spouse to achieve his or her hoped-for potential would defeat the assumptions underlying the distribution. With no chance that an award could be modified, regardless of the circumstances, the distribution would likely wreck the holder's entire life. Such problematic outcomes were anticipated by Judge Meyer in his concurring opinion in *O'Brien* itself,[22] but they seem not to have bothered courts until Judge Smith's dissent in *Holterman*.

Courts of other states have more readily recognized the dangers inherent in *O'Brien*. For example, a Massachusetts court said that:

> [t]o adopt a rule that would subject such an item [a license, degree, etc.] to distribution upon divorce would foreclose consideration of the effect of future events on the individual's earning capacity.[23]

Even before *O'Brien* it was recognized by the New Jersey Supreme Court in *Mahoney v. Mahoney* that:

> [e]quitable distribution of a professional degree would...require distribution of "earning capacity"—income that the degree holder might never acquire. The amount of future earnings would be entirely speculative.[24]

Quoting *Mahoney*, a Colorado court said:

> Valuing a professional degree in the hands of a particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork.[25]

Built into the *O'Brien* process are also certain mechanical problems with which courts have to struggle. How to pick a proper baseline for earnings can cause disparities. For example, why should a highly compensated attorney

whose significant efforts resulted in a large income have, as a baseline, the average earnings of the holder of a bachelor's degree? If that person had not gone to law school, it is more likely than not that he or she would have earned much more than the statistical average.

Top lines can also be problematic. If a person obtained a certain degree or license twenty years before his divorce, why should a few years of his recent highest earnings establish the value of the degree or license? Or why should any imputed (and thus unenhanced) earnings, even if statistically based, be included in the top line? And shouldn't fairness require consideration of the fact that, several years after a degree or license was earned and exploited, both the non-titled and titled spouse have enjoyed its benefits, and that a subsequent award based on its full statistical value would amount to a windfall to the non-titled spouse? Or looked at like tangible property, hasn't the value of the asset depreciated?

As to discount rates, they are hard enough to establish with regard to physical assets such as retirement funds or investments. Why should courts have to struggle applying future value, mortality or other discount rates to assets which are themselves the product of mental holography?

There is, to some extent, a recognition by courts of the difficulties imposed on our jurisprudence by *O'Brien*, and attempts by those courts to limit the damage. Courts, for example, have reduced valuations by applying coverture fractions to the process of obtaining the degree or license, thus reducing the value.[26] Some courts have declined to value as marital any efforts or achievements during the marriage where the degree or license was received either before or after it.[27] The Fourth Department refused to value a banking career as a marital asset in the absence of proof that an undergraduate degree and attendance at business school classes actually enhanced the career.[28] And in a thoughtful and challenging opinion, Justice Laura Drager of the New York County Supreme Court declined to treat a successful financial career, including the acquisition of one of the required securities licenses, as a marital asset."[29] [A]lthough the husband's earnings increased substantially during the marriage," the court said, "his career progression does not constitute marital property."[30]

The most common limitation of *O'Brien* arises from scrutiny of the respective contributions of the spouses to the item in question. Several courts have found that the non-titled spouse had not shown sufficient contributions or sacrifices relating to the "asset" to merit an equal or, in some cases, any distribution of the value.[31]

All of these attempts to mitigate the effect of *O'Brien*, however, constitute little more than taking aspirin for cancer. Why should courts have to seek palliatives to avoid the injustice inherent in a flawed doctrine? The fundamental problem is not how to avoid the potential injustice of *O'Brien*. The fundamental problem is the continued existence of *O'Brien*.

The *O'Brien* rule frequently forces courts to struggle with conceptually illusive and challenging concepts.

Its implementation necessitates expensive experts, hours or even days of court time, and a concomitant significant increase in litigation costs. The results often punish the effort and ability of the titled spouse and infringe on his or her future freedom. In too many cases, the *O'Brien* rule results in an unfair outcome, overvaluing marital property and the ability of the titled spouse to pay. And, it should not be overlooked, the rule renders our own state's jurisprudence an anomaly in the federal system.

At its core, the *O'Brien* problem is a metaphysical one. The rule is ontologically unsound. It transmutes the abstruse into the tangible, making clumsy neo-Kantians out of matrimonial courts. It is like a dedicated idealist, insisting that air is solid, stepping off a cliff.

The ability to compensate the non-titled spouse for his or her part in the attainment of a license or degree would not be lost with the demise of *O'Brien*. The present law on maintenance and equitable distribution provides courts with sufficient means of effecting equity in the marital dissolution. The factors in both the maintenance and equitable distribution parts of Domestic Relations Law Section 236 give courts all the necessary latitude to address contributions or sacrifices by the non-titled spouse. If there is already a significant income stream and/or assets, they can form the basis of an appropriate maintenance award or unequal compensatory distribution of assets. If not, a simple change in the maintenance statute (see below) would suffice. And then, should there be a misjudgment by the awarding court, or a substantial change of circumstances later on, the potential resulting injustice could be corrected.

The courts of the other states have not had trouble taking a more direct approach. For example, in *Downs v. Downs*,[32] the Supreme Court of Vermont noted that "maintenance can be a tool to balance equities whenever the financial contributions of one spouse enable the other spouse to enhance his or her future earning capacity."[33] And the Colorado Supreme Court said that:

> [t]he contribution of one spouse to the education of the other spouse may be taken into consideration when marital property is divided...[and] [t]he trial court could make an award of maintenance based on all relevant factors including the contribution of one spouse to the education of the other spouse....[34]

Two objections to the maintenance approach have been raised. First is the fact that maintenance presently terminates upon the recipient spouse's remarriage.

As pointed out below, that problem can be dealt with legislatively.

The other problem is the concern that awarding maintenance rather than "property" fails to reflect the partnership aspect of marriage and, hence, may demean the recipient spouse. But this problem is one inherent, not in maintenance itself, but in the original choice of calling the post-divorce income flow "maintenance." Indeed, the word "maintenance" does imply a disparity of roles in the marriage. But the answer is not to wallow in the metaphysical swamp of *O'Brien*, but to change the word back to "alimony" or to something like "equitable income distribution."

How to effect the demise of *O'Brien* points to the legislature. Waiting for the Court of Appeals to do it seems fruitless. One only has to glance at the majority opinion in *Holterman v. Holterman*, *supra*, where the court rigidly stuck with *O'Brien* while reading the CSSA in such a way as to validate "double dipping."[35] It is clear that the Court of Appeals is firmly wedded to the *O'Brien* rule. The only hope is remedial legislation.

In a season when New York has finally emerged from the lonely cocoon of marital fault and joined the rest of the United States, it seems felicitous for the State to do the same with its other unique and problematic law. For example, our legislature might address the problem by adding at the end of DRL § 236-B(1)(c):

> Marital property shall also not include such personally held intangible assets as degrees, licenses, certificates, reputation, earning enhancements, or good will (unless attached to a tangible asset with market value).

To give courts more latitude in awarding maintenance in a situation such as *O'Brien*, DRL § 236-B(6)(c) could be amended to read:

> c. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or, *unless the court orders otherwise upon stated reasons therefor,* upon the recipient's valid or invalid marriage....

Such a change would allow courts more latitude and security in awarding compensatory alimony.

In any case, the *O'Brien* rule has caused too many problems, too much injustice and wasted too much money. It is well past *O'Brien's* bedtime.

Endnotes

1. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).
2. 3 N.Y.3d 1, 814 N.E.2d 765, 781 N.Y.S.2d 458 (2004).
3. 3 N.Y.3d at 24, 814 N.E.2d at 780, 781 N.Y.S.2d at 473.
4. *O'Brien v. O'Brien*, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.
5. 142 A.D.2d 355, 535 N.Y.S.2d 990 (2d Dept. 1988).
6. 176 A.D.2d 285, 574 N.Y.S.2d 385 (2d Dept. 1991).
7. 78 A.D.3d 887, 911 N.Y.S.2d 408 (2d Dept. 2010).
8. See also, *Schwartz v. Schwartz*, 67 A.D.3d 989, 890 N.Y.S.2d 71 (2d Dept. 2009) for a similar finding.
9. *Pino v. Pino*, 189 Misc.2d 331, 731 N.Y.S.2d 599 (Sup. Ct. Nassau Co. 2001).
10. 151 Misc.2d 737, 573 N.Y.S.2d 553 (Sup. Ct. Westchester Co. 1991).
11. 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).
12. *Kuznetsov v. Kuznetsova,* 79 A.D.3d 974, 913 N.Y.S.2d 325 (2d Dept. 2010).
13. 139 Misc.2d 440, 527 N.Y.S.2d 946 (Sup. Ct. N.Y. Co. 1988).
14. 139 Misc.2d at 446, 527 N.Y.S.2d at 950.
15. *Finocchio v. Finocchio,* 162 A.D.2d 1044, 1045, 556 N.Y.S.2d 1007, 1009 (4th Dept. 1990) (emphasis supplied).
16. *Elkus v. Elkus*, 169 A.D.2d 134, 572 N.Y.S.2d 901 (1st Dept. 1991).
17. *Hougie v. Hougie*, 261 A.D.2d 161, 689 N.Y.S.2d 490 (1st Dept. 1999).
18. *Moll v. Moll*, 187 Misc.2d 770, 722 N.Y.S.2d 732 (Sup. Ct. Monroe Co. 2001).
19. 187 Misc.2d at 774-5, 722 N.Y.S.2d at 735.
20. *Spreitzer v. Spreitzer,* 40 A.D. 3d 840, 837 N.Y.S. 2d 658 (2d Dept. 2007).
21. *Hougie v. Hougie*, *supra*. Similarly such licenses were said to be subject to equitable distribution in *Haspel v. Haspel*, *supra* and *Schwartz v. Schwartz*, *supra.*
22. 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.
23. *Drapek v. Drapek*, 399 Mass. 240, 244, 503 N.E.2d 946, 949 (1987).
24. 91 N.J. 488, 497, 453 A.2d 527, 532 (Sup. Ct. N.J. 1982).
25. *Olar v. Olar*, 747 P.2d 676, 680 (Sup. Ct. Colorado 1987).
26. *See*, for example, *Gandhi v. Gandhi*, 283 A.D.2d 782, 724 N.Y.S.2d 541 (3d Dept. 2001); *Vora v. Vora*, 268 A.D.2d 470, 702 N.Y.S.2d 343 (2d Dept. 2000).
27. *See, Fruchter v. Fruchter*, 29 A.D.3d 942, 816 N.Y.S.2d 525 (2d Dept. 2006); *Spence v. Spence*, 287 A.D.2d 447, 731 N.Y.S.2d 66 (2d Dept. 2001); *Kyle v. Kyle*, 156 A.D.2d 508, 548 N.Y.S.2d 781 (2d Dept. 1989).
28. *West v. West*, 213 A.D.2d 1025, 625 N.Y.S.2d 116 (4th Dept. 1995).
29. *J.C. v. S.C.*, NYLJ, 10/31/2003, 20 (col. 1).
30. *Id*.
31. *See*, for example, *McAuliffe v. McAuliffe*, 70 A.D.3d 1129, 895 N.Y.S.2d 228 (3d Dept. 2010); *Kriftcher v. Kriftcher*, 59 A.D.3d 392, 874 N.Y.S.2d 153 (2d Dept. 2009); *Higgins v. Higgins*, 50 A.D.3d 852, 857 N.Y.S.2d 171 (2d Dept. 2008); *Martinson v. Martinson*, 32 A.D.3d 1276, 821 N.Y.S.2d 537 (4th Dept. 2006); *Cabeche v. Cebache*, 10 A.D.3d 441, 780 N.Y.S.2d 909 (2d Dept. 2004); *Miklos v. Miklos*, 9 A.D.3d 397, 780 N.Y.S.2d 622 (2d Dept. 2004); *Farrell v. Cleary-Farrell*, 306 A.D.2d 597, 761 N.Y.S.2d 357 (3d Dept. 2003); *Brough v. Brough*, 285 A.D.2d 913, 727 N.Y.S.2d 555 (3d Dept. 2001).
32. 154 Vt. 161, 574 A.2d 156 (Sup. Ct. Vermont 1990).
33. 154 Vt. at 166, 574 A.2d at 159.
34. *Olar v. Olar*, 747 P.2d at 680.
35. *See also, Keane v. Keane*, 8 N.Y.3d 115, 861 N.E.2d 98, 828 N.Y.S.2d 283 (2006), where the court made an untenable distinction while adamantly adhering to *O'Brien*.

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Recent Legislation, Decisions and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

New York passes the Marriage Equality Act: New DRL § 210-a, 210-b, effective July 24, 2011

On June 24, 2011, at midnight, Governor Cuomo signed into law the historic Marriage Equality Act. The Senate passed the law by a vote of 33-29, with all but one Democrat voting in favor, and four Republicans having the courage to break party lines to join. New York is the sixth and largest state to allow same-sex marriage. The law went into effect on July 24, 2011. Gay couples from out of state will also be permitted to apply for marriage licenses. The unfairness of New York honoring out of state same-sex marriages but not permitting such marriages to take place in New York has finally ended.

One of the compromises reached to enact the new bill is Section 1, which repeals Domestic Relations Law (DRL) § 10-b, and a new DRL § 10-b was enacted to provide that no religious entity shall be required to solemnize or celebrate a same-sex marriage, and they won t be subject to legal or regulatory action by state or local governments for refusing to do so.

It should be noted that although same-sex couples may marry in New York, full equality has not yet been achieved until every state and the federal government recognize same-sex marriages. In order for a same-sex married couple to derive the state benefits of marriage, they must live in a state that recognizes or honors by comity same-sex marriage. Forty-one states currently do not. Since we live in a transient society, same-sex married couples run the risk that the state that they move to will not recognize their marriage, which creates uncertainty and chaos with respect to the couple's financial lives as well as with respect to the children of their relationship.

In addition, although same-sex couples may receive all of the New York state benefits of marriage (such as health care, hospital visitation, property ownership, the joint filing of state tax returns, insurance coverage, child custody, tort rights, and the ability to divorce), they cannot receive any federal benefits, such as spousal social security and Medicare benefits and the filing of joint federal tax returns because DOMA (Defense of Marriage Act) has not yet been overturned. At this juncture, for example, a same-sex married New York couple can file state tax returns as "married filing jointly" but must file federal tax returns as "single." The surviving spouse of a New York same-sex married couple will not have to pay New York estate taxes, but may have to pay federal estate taxes if the surviving spouse inherits more than $5 million (as of December 31, 2012). See, for example, ***Windsor v. United States*** below. Perhaps the most glaring example of such inequality is that a same-sex married couple who divorce in New York may receive equitable distribution on a tax-free basis under New York law, but will have to pay federal taxes on this asset distribution, and a same-sex spouse who pays maintenance can receive a tax deduction under New York tax law, but not under federal tax law.

Other jurisdictions that permit same-sex marriages

Five other states permit same-sex marriage: Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia. Two more states officially pledge to honor out-of-state same-sex marriages: Maryland and Rhode Island. Ten foreign countries also grant full marriage rights: The Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland, and Argentina, as well as Mexico City, Mexico.

Rhode Island approves civil unions

The Rhode Island State Senate approved a bill allowing civil unions for gay couples less than a week after same-sex marriage was legalized in New York. Governor Chafee signed the bill into law on July 2, 2011, which takes retroactive effect on July 1, 2011. Rhode Island joins Illinois, Hawaii and New Jersey in honoring civil unions.

Federal Action on Same-Sex Marriage

Respect for Marriage Act reintroduced

On March 16, 2011 the Respect for Marriage Act (an act to overturn DOMA) was re-introduced in the Senate by Senator Dianne Feinstein and in the House by Representative Jerrold Nadler, after President Obama announced that he would no longer defend DOMA. The first congressional hearings were held on July 20, 2011**.**

***Windsor v. United States*, No. 10 Civ. 8435, 2011 WL 3422841 (S.D.N.Y. July 28, 2011)** was filed by the law firm of Paul Weiss Rifkind in conjunction with the ACLU on behalf of a surviving same-sex spouse whose inheritance from her deceased spouse had been subject to more than $360,000 of federal tax as if they were unmarried, whereas a heterosexual married couple would pay no taxes. The lawsuit challenges section 3 of DOMA which defines "marriage" as a legal union between a man and a woman. The plaintiff brought a motion for summary judgment, claiming that DOMA is unconstitutional and the defendant brought a cross-motion to dismiss the case. No decision has been reached as of this writing.

Update on *Commonwealth of Massachusetts v. Health and Human Services* and *Gill v. Office of Personnel Management*

On July 8, 2010, Judge Joseph Tauro of the U.S. District Court in Boston ruled in two separate lawsuits that a criti-

cal part of the federal Defense of Marriage Act (DOMA), a law barring the federal government from recognizing same-sex marriage, is unconstitutional. In one lawsuit, *Commonwealth of Massachusetts v. Health and Human Services*, the court ruled that DOMA violated the Tenth Amendment to the U.S. Constitution by taking from the states powers that the Constitution gave to them, including the power to regulate marriage. In the other lawsuit, *Gill v. Office of Personnel Management*, he ruled that DOMA violates the equal protection clause of the Fifth Amendment. Both of the lawsuits targeted Section 3 of DOMA which states that, for federal government purposes, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. Neither lawsuit challenged the section of DOMA that enables any state to ignore valid marriage licenses issued to a same-sex couple in other states.

On October 11, 2010, the U.S. Department of Justice filed notices of appeal to the U.S. Court of Appeals in these two cases. On January 14, 2011, the Department of Justice filed a single brief in the First Circuit Court of Appeals that defended DOMA in both these cases, but later the Department of Justice notified the Court that it will cease to defend both cases. On May 20, 2011, the Bipartisan Legal Advisory Group (BLAG), an arm of the U.S. House of Representatives, filed a motion asking to be allowed to intervene to defend DOMA Section 3. The Department of Justice did not oppose the request, but Massachusetts did and plans to file a response. The BLAG proposed a briefing schedule that would be completed by August 15, 2011.

Update on California's Proposition 8

In May 2008, the California Supreme Court in its decision *In re Marriage Cases* granted same-sex couples the right to marry. However, in November 2008, Proposition 8, a constitutional amendment designed to supersede the court's decision, narrowly passed, and gay couples could no longer marry in California. The two powerhouse attorneys who were opposite each other in *Bush v. Gore*, Ted Olson and David Boies, joined forces to overturn Proposition 8 in *Perry v. Schwarzenegger*. On August 4, 2010, District Court Chief Judge Vaughn Walker, in a landmark decision, ruled that the amendment to the California Constitution barring marriage for same-sex couples violates the U.S. Constitution's guarantees of equal protection and due process. Judge Walker lifted a temporary stay on his ruling, but the Ninth Circuit Court of Appeals granted a stay.

The merits were heard by a different 3-judge panel from the Ninth Circuit. On December 6, 2010, the judges heard oral arguments. On January 4, 2011, in the appeal by the defendant-intervenors, the Ninth Circuit certified a question to the California Supreme Court. Because California officials had declined to defend the law, the federal court asked the state court to decide whether the backers of a challenged initiative had a particularized interest in the initiative's validity that would permit them to defend the law when state officials refuse to do so. The Ninth Circuit stayed the appeal pending a response from the California Supreme Court. On February 16, 2011, the California Supreme Court unanimously agreed to address the Ninth Circuit's request, and heard oral argument on September 6, 2011. A decision is expected in December, 2011.

Recent Legislation

Driver's license suspension for failure to pay support extended until June 30, 2013

Vehicle and Traffic Law § 510 (4-e), Bill A7829, was amended to extend certain provisions relating to the enforcement of support through the suspension of driving privileges from June 30, 2011 until June 30, 2013. The bill's stated purpose is to extend the suspension of driver's license for failure to pay support for another two years, as this is considered one of the most effective enforcement tools which accounts for child support collections of up to as much as $10 million annually.

22 NYCRR § 151.1: Assignments in cases involving contributors to judicial campaigns, effective July 15, 2011

New York's Judiciary is the first in the country to address by administrative action the issue of protecting judicial neutrality in the face of campaign finance. This new rule provides guidelines to prevent the assignment of cases to judges who received contributions to their election campaign from attorneys/law firms of record or the parties—where the individual contributed $2,500 or more, or the individual and other members of the firm collectively contributed $3,500 or more to a judge's campaign for election during the two-year window of when the state Board of Election first publishes the contribution list, or if the judge is not yet in office, then two years from the date that the judge assumed judicial office. If the individual gives multiple contributions to the judge, the two-year window is extended from the last contribution made. The exception to the rule includes an emergency basis, where no other judge is available or when required in the interest of justice, or where the non-contributing party waives the judge's disqualification.

The Chief Administrator of the Courts shall publish periodically a listing or database of contributions and contributors to judicial candidates, as disclosed by public filings. The rule took effect on July 15, 2011, and applies to all campaign contributions first reported as received on or after such date.

Part D of the rule admonishes that:

> (D) Notwithstanding any provision of this Part, a judge shall be mindful of the

> ethical responsibility to consider the propriety of recusal in any proceeding in which the judge's impartiality reasonably might be questioned in consequence of campaign contributions.

The new rule effectively disposes of the burden of proof required in recusal requests.

In my prior columns, I comprehensively discussed the most sweeping changes that divorce and family law has not experienced in decades, some of which are so important that I will mention them again here, in brief.

- **No fault divorce: DRL § 170, amended by adding a new subdivision 7, effective October 12, 2010.** A divorce will be granted for one party's asking if there has been irreconcilable differences for a period of six months.
- **Counsel fees: DRL § 237(a) and (b) and § 238 amended, effective October 12, 2010.** This statute provides a presumption of counsel fees to be awarded to the lesser monied spouse, and a mandate to determine counsel fees pendente lite and not defer the issue to trial.
- **Temporary maintenance awards: DRL § 236B amended, adding a new subdivision 5-a, effective October 12, 2010.** This statute devises a new formula for calculating *pendente lite* maintenance, and adds new equitable factors to consider after determining that it would be unjust to apply the formula.
- **Post-divorce maintenance awards: DRL§ 236B6, amended, effective October 12, 2010.** This statute adds new factors the court may consider in awarding maintenance.
- **New child support modification standards: FCA § 451 and DRL § 236B(9)(b) amended, effective October 13, 2010**. A uniform standard for both courts of a "substantial change in circumstance" is the basis for modification of an order of child support or an order incorporating without merging an agreement or stipulation. The section provides two new bases for modification: the passage of three years since the order was entered, last modified, or adjusted; or a 15% or greater change in either party's gross income since the order was entered, last modified or adjusted. The parties may opt out of the new provision by stipulation.

See below for the new language required to be inserted in the Judgment of Divorce regarding the new statute.

- **Various statutes affecting orders of protection**, including the service by fax or electronic means, the extension of an order of protection for a reasonable time period, and that the petition for one will not be automatically dismissed if the allegations are not contemporaneous with the filing of the petition.
- **Money judgments and homestead exemptions: CPLR §§ 5205 and 5206 amended, effective January 21, 2011**. The homestead exemption increased from $50,000 to $150,000 in Kings, Queens, New York, Bronx, Richmond, Nassau, Suffolk, Rockland, Westchester and Putnam counties and $125,000 in Dutchess, Albany, Columbia, Orange, Saratoga and Ulster counties.
- **Uniform Interstate Depositions and Discovery Act: new CPLR § 3119, effective January 1, 2011** provides a procedure for service of an out-of-state subpoena upon a person in New York by serving said subpoena on the county clerk in the county where discovery is sought to be conducted.
- **22 NYCRR § 202.16, amended, adding new (k)(3) and (k)(7), effective October 5, 2010** provides procedure for motion for counsel fees in matrimonial cases.

New language required to submit the Judgment of Divorce

The following notice must be included in your submission of the Judgment of Divorce papers, which reflects the new child support modification provisions.

> **EACH PARTY HAS A RIGHT TO SEEK A MODIFICATION OF THE CHILD SUPPORT ORDER UPON A SHOWING OF: (I) A SUBSTANTIAL CHANGE IN CIRCUMSTANCES; OR (II) THAT THREE YEARS HAVE PASSED SINCE THE ORDER WAS ENTERED, LAST MODIFIED OR ADJUSTED; OR (III) THERE HAS BEEN A CHANGE IN EITHER PARTY'S GROSS INCOME BY FIFTEEN PERCENT OR MORE SINCE THE ORDER WAS ENTERED, LAST MODIFIED, OR ADJUSTED; HOWEVER, IF THE PARTIES HAVE SPECIFICALLY OPTED OUT OF SUBPARAGRAPH (II) OR (III) OF THIS PARAGRAPH IN A VALIDLY EXECUTED AGREEMENT OR STIPULATION, THEN THAT BASIS TO SEEK MODIFICATION DOES NOT APPLY.**
>
> **THE FOLLOWING NOTICE IS ☐ APPLICABLE OR ☐ NOT APPLICABLE**

The following notice is required where payments are through the Child Support Collection Unit:

NOTE: (1) THIS ORDER OF CHILD SUPPORT SHALL BE ADJUSTED BY THE APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER THIS ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED, UPON THE REQUEST OF ANY PARTY TO THE ORDER OR PURSUANT TO PARAGRAPH (2) BELOW. UPON APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT, AN ADJUSTED ORDER SHALL BE SENT TO THE PARTIES WHO, IF THEY OBJECT TO THE COST OF LIVING ADJUSTMENT, SHALL HAVE THIRTY-FIVE (35) DAYS FROM THE DATE OF MAILING TO SUBMIT A WRITTEN OBJECTION TO THE COURT INDICATED ON SUCH ADJUSTED ORDER. UPON RECEIPT OF SUCH WRITTEN OBJECTION, THE COURT SHALL SCHEDULE A HEARING AT WHICH THE PARTIES MAY BE PRESENT TO OFFER EVIDENCE WHICH THE COURT WILL CONSIDER IN ADJUSTING THE CHILD SUPPORT ORDER IN ACCORDANCE WITH THE CHILD SUPPORT STANDARDS ACT.

(2) A RECIPIENT OF FAMILY ASSISTANCE SHALL HAVE THE CHILD SUPPORT ORDER REVIEWED AND ADJUSTED AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED WITHOUT FURTHER APPLICATION BY ANY PARTY. ALL PARTIES WILL RECEIVE A COPY OF THE ADJUSTED ORDER.

(3) WHERE ANY PARTY FAILS TO PROVIDE, AND UPDATE UPON ANY CHANGE, THE SUPPORT COLLECTION UNIT WITH A CURRENT ADDRESS, AS REQUIRED BY SECTION TWO HUNDRED FORTY-B OF THE DOMESTIC RELATIONS LAW, TO WHICH AN ADJUSTED ORDER CAN BE SENT, THE SUPPORT OBLIGATION AMOUNT CONTAINED THEREIN SHALL BECOME DUE AND OWING ON THE DATE THE FIRST PAYMENT IS DUE UNDER THE TERMS OF THE ORDER OF SUPPORT WHICH WAS REVIEWED AND ADJUSTED OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THE ADJUSTED ORDER, REGARDLESS OF WHETHER OR NOT THE PARTY HAS RECEIVED A COPY OF THE ADJUSTED ORDER.

The following is required in both the defendant's and plaintiff's affidavit:

Pursuant to DRL § 240 1 (a-1)(1) Records Checking Requirements:

☐ I have been a party in an Order of Protection

List all Family/Criminal Court Docket #'s and Counties,_____

Supreme Court Index #'s and Counties_____

☐ I have never been a party in an Order of Protection

☐ I have been a party in a Child Abuse/Neglect Proceeding (FCA Art.10)

List all Family Court Docket #'s_____

and Counties_____

☐ I have never been a party in a Child Abuse/Neglect Proceeding (FCA Art.10)

☐ I am registered under New York State's Sex Offender Registration Act

List all names under which you are registered_____

☐ I am not registered under New York State's Sex Offender Registration Act

U.S. Supreme Court Round-up

No automatic right to counsel to defend civil contempt for failure to pay support

***Turner v. Rogers*, 564 US ___, 131 S Ct 2507 (2011)**

In a 5-4 decision, the court held that there is no automatic right to counsel for a child support payor charged with civil contempt, at least when the parent seeking to collect child support does not have a lawyer, and so long as substantial procedural safeguards were provided, including providing notice to the defendant that ability to pay is a critical issue in the case, using a form to elicit information regarding the party's financial circumstances,

giving the defendant an opportunity to be heard in court, and requiring that judges determine specifically whether the defendant can pay support but refused to do so. While the Sixth Amendment grants an indigent criminal defendant the right to counsel, civil contempt is distinguishable since its purpose is to coerce the payor to pay rather than simply punish him.

Court of Appeals Round-up

In my prior column, I summarized the case, *Fields v. Fields*, 15 NY3d 158 (2010), in depth, where the court ruled that the marital residence purchased during the marriage was marital property despite that the down payment was one spouse's separate property, since the mortgage was paid with marital funds throughout the parties' 30 year marriage. After publication of the column, reargument was denied. *Id.*, 15 NY3d 819 (2010).

Distribution of assets in divorce tainted by fraud belong to the innocent spouse

Commodity Futures Trading Comm v. Walsh, 17 NY3d 162, 927 NYS2d 821 (2011)

The FTC and SEC brought an action against Walsh claiming that between 1996 and 2009, Walsh and his co-defendant misappropriated more than $550 million from funds they managed for various public and private institutional investors. The agencies also pursued disgorgement efforts against Schaberg, the former spouse of Walsh, seeking to recover any proceeds she held of the fraud perpetuated by Walsh as part of her settlement in a divorce action, although she was unaware of nor participated in any wrongdoing related to her ex-husband's fraudulent scheme.

The District Court granted the agencies' requests for preliminary injunctions freezing Schaberg's brokerage and bank accounts containing approximately $7.6 million. Schaberg appealed to the Second Circuit, arguing that the District Court erred in issuing the injunctions because the property targeted by the injunctions was not subject to disgorgement because she gave fair consideration for the assets she received in her divorce action. The Second Circuit certified two questions to the New York Court of Appeals regarding issues unresolved by New York Domestic Relations Law: 1) whether proceeds from a fraud could be part of a marital estate under New York's Domestic Relations Law, and 2) whether a party in a divorce could pay "fair consideration" for assets by relinquishing claims to proceeds of a fraud under its Debtor and Creditor Law, which was reformulated to determine whether a determination that a spouse paid fair consideration in a divorce under the Debtor and Creditor Law was precluded, as a matter of law, where part or all of the marital estate consists of the proceeds of fraud.

The Second Circuit recognized that federal district courts have the power to order disgorgement from a defrauded defendant where a party is in possession of funds obtained by fraud from another, and lacks a legitimate claim to them. In this case, however, the New York Court of Appeals determined that an innocent spouse who received possession of fraudulently obtained property in good faith and gave fair consideration for it in a divorce settlement should prevail over the claims of the original owner, consistent with the state's strong public policy of ensuring finality in divorce proceedings.

See the Editor's front page article of this issue regarding this case for a more in-depth analysis of this case.

In the Matter of Afton C., 17 NY3d 1, 926 NYS2d 365 (2011)

In a Dutchess County Family Court proceeding, the court found that the children were neglected by both parents pursuant to Article 10 of the Family Court Act because the father was adjudicated a level three sex offender (pled guilty to raping a child under 15 and patronizing a prostitute under 17), never sought sex offender treatment after he was released for time served (although he was not ordered to do so), and was residing at home with his five children between the ages of 4 and 14, and the mother permitted the father to reside there. The Appellate Division reversed, and granted leave to appeal. The Court of Appeals affirmed. The status as a level three sex offender convicted of sex crimes involving minors, without other evidence of actual or imminent danger to his children is insufficient to establish a presumption that the father breached a minimum duty of parental care and poses an imminent danger to his children. The Court acknowledged that the result may have been different if the father was accused of sex offender crimes involving his own children or children in his care, or if he refused sex offender treatment after being directed to participate in it.

Other Cases of Interest

Vermont civil union dissolved by New York

Dickerson v. Thompson, 928 NYS2d 97 (3d Dept 2011)

The trial court had equity jurisdiction to dissolve a same-sex civil union validly entered into in Vermont, even though there was no remedy at law for such dissolution. The plaintiff was in need of a judicial remedy to dissolve her legal relationship with the defendant created by the laws of Vermont, and since residency requirements prevented her from obtaining a dissolution in that state, absent trial court's invocation of its equitable power to dissolve the civil union, there would be no court competent to provide plaintiff with the requested relief and she would therefore be left without a remedy.

See also *Wesley v. Smith-Lasofsky*, 246 NYLJ 21 (Sup Ct NY County Jul 29, 2011) (Drager, J) where the court granted a dissolution of the Vermont civil union and determined that the defendant had no parental rights or obligations with respect to the child (plaintiff's niece) ad-

opted by the plaintiff after the couple physically separated despite being in a civil union, since the defendant did not form a parental relationship with the child, and both parties consented that the defendant should not have any parental rights or obligations.

It should be noted that although these two cases dissolved a civil union, neither of them determined any financial rights of the parties nor what standard is to be applied to do so, and therefore, it remains to be seen what the courts will do in the future with respect to this issue.

Custody and Visitation

Award of custody to step-parent

***Pettaway v. Savage*, 87 AD3d 796 (3d Dept 2011)**

The Family Court's award of custody of the 10 year old child to the non-parent, the child's stepfather, was affirmed on appeal. Extraordinary circumstances existed to justify the child custody award to the stepfather, including the death of the child's mother, the child's strong psychological bond with her stepfather and two step-siblings with whom she lived for six years prior to the mother's death, the child's special needs in addition to psychological needs resulting from bereavement, and that the father withdrew almost completely from the parental role for an extended period before the mother's death. The father did not acknowledge the child's need to be with her step family during the bereavement period, did not attend school teacher conferences, was unfamiliar with the child's teacher's names, and frequently missed scheduled visitation. Finally, the father was convicted of attempted rape in the third degree of a person under 17, and failed to complete sex offender treatment thereafter.

Change in custody

***Lamour v. Cadet*, 86 AD3d 538, 928 NYS2d 301 (2d Dept 2011)**

Family Court's determination to change custody from the mother to the father and to deny the mother's request to relocate was affirmed on appeal. There was a change in circumstances such that modification is required to protect the best interests of the child, where the mother interfered with the father's visitation rights and failed to inform the father of important matters regarding the child, such as her proposed impending relocation with the child to Newburgh and her unilateral decisions regarding the child's schooling.

Child Support

Modification of day care expenses

***Matter of Scarduzio v. Ryan*, 86 AD3d 573, 926 NYS2d 909 (2d Dept 2011)**

In this child support proceeding, the petitioner father sought a downward modification of the court's previous support order on the ground that there had been a significant decrease in the child's child care expenses since the child began full time school. Order denying the father's petition after a hearing is modified to the extent of remitting the matter to the Family Court for a new calculation of childcare expenses actually incurred and the petitioner's *pro rata* share. The court noted that expenses for after-school programs and summer camp constitute child care expenses so long as the mother is working and incurs the childcare expense.

Downward modification of child support granted

***Ceballos v. Castillo*, 85 AD3d 1161, 926 NYS2d 142 (2d Dept 2011)**

The Second Department reversed the Family Court's order, and held that the father established a substantial change in circumstances warranting a downward modification of his child support obligations, and that his failure to pay $1,140 in support was not willful, and therefore contempt was not warranted, where the father was out of work for two years since being laid off from his job at a pizzeria, and was ineligible for unemployment benefits. The court found that he made a good faith effort to obtain new employment which was commensurate with his qualifications and experience, including applying for jobs at various specified restaurants and supermarkets, seeking employment through a specified employment agency, and exploring job leads which he learned of through word-of-mouth. The case was remanded for a determination of his reduced child support obligation.

Counsel Fees

In the wake of ***Prichep v. Prichep*, 52 AD3d 61 (2d Dept 2008)** and the newly amended **DRL §§ 237(a) and (b) and § 238 effective October 12, 2010**, several recent cases provided large noteworthy counsel fees awards:

- ***Aloi v. Simoni*, 82 AD3d 683, 918 NYS2d 506 (2d Dept 2011).** Wife awarded $81,000 in counsel fees after trial, which was half of her total counsel fees incurred, based on large economic disparity. The case does not specify the respective income and assets of the parties.
- ***A.C. v. D.R.*, 32 Misc3d 293, 927 NYS2d 496 (Sup Ct Nassau County Mar 28, 2011) (Falanga, J.).** Wife awarded $25,000 interim counsel fee where husband earns more than $400,000/year and wife has no income.
- ***Jill G v. Jeffrey G*, 31 Misc3d 1209(A), __NYS2d__ (Sup Ct Nassau County Mar 18, 2011) (Jancowitz, J.).** Wife awarded $30,000 interim counsel fees where wife earns $100,000/year and husband earns $500,000/year, and despite that each party has access to $250,000 of funds.

- ***Matter of S.B.S. v. S.S.*, 31 Misc3d 1215(A), 927 NYS2d 819 (Fam Ct Nassau Co Apr 14, 2011) (Bennett, J).** Mother awarded $85,000 interim counsel fees before the hearing of the modification of custody dispute pursuant to DRL § 237(b), where Mother has no income other than the $240,000 annual child support received from Father, a billionaire, Mother exhausted her $12,500 retainer and owed her counsel $27,000. The court made an unusual directive for the Mother's counsel to deposit the funds into the firm's escrow account, and authorized the firm to release the funds to pay counsel fees as they became due each month, and provide an accounting to the Father.

Equitable Distribution

Personal injury awards

***Renga v. Renga*, 86 AD3d 634, 928 NYS2d 547 (2d Dept 2011)**

In this divorce action, the wife moved for a determination that the $4.8 million unallocated net settlement proceeds of a medical malpractice action, where she was the injured party and the husband had a derivative claim, constituted her separate property. In opposition, the husband contended that the proceeds constituted marital property and were, therefore, subject to equitable distribution because the funds were made payable to the parties jointly and were placed in a joint financial investment account. The court below determined that the funds were the wife's separate property. The Second Department reversed, and remitted the matter for a determination as to whether the settlement proceeds are marital or separate property. Although the proceeds of a personal injury action are considered the separate property of the spouse receiving the compensation, the deposit of the proceeds into a joint bank account gives rise to a presumption that each party is entitled to a share of the property. However, this presumption may be rebutted with clear and convincing evidence that the joint account was created as a matter of convenience for the party whose property was used to create the account. Here, the record on appeal was insufficient to make this determination.

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