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Notes and Comments

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Arbitration or Litigation…The Choice May Be Up to You

Any client who has gone through a custody proceeding knows, regardless of the outcome, that if there was another option to litigation, it certainly should have been considered if not chosen because of calendar delays, a shortage of judges to hear these difficult cases and increases in legal and expert fees. In a fully litigated matter, replete with a lengthy trial, expert witnesses who must also be paid for their testimony with its concomitant increase in hours to complete the entire case which may include appeals, it is not unusual for the total cost to the monied spouse, who may also be responsible for the counsel fees of the other spouse, to exceed $100,000 or more. Most litigants have trouble meeting these expenses and must go into debt, invade savings or pension plans and incur loans, to cope with such substantial financial burdens.

The alternative to litigation is arbitration, which will provide a major decrease in the time and cost to complete. Although both New York and New Jersey have statutes that permit arbitration in almost all areas of the law, case law has made it clear in New Jersey arbitration is permissible, while in New York it cannot be utilized in custody or visitation disputes.[1] In the courts' view, they are charged with determining what would be in the best interests of the children since they sit as *parens patrae*, and this principle trumps parental autonomy to decide such matters. As such, they reason, this duty cannot be delegated to an arbitrator who may not be bound by existing case law, and in their view should not be undertaken by an alternate dispute panel.[2] This is not the rule in New Jersey, where its high court decided that there is no logical reason to prohibit arbitration in custody matters.[3] In several other jurisdictions, alternate dispute resolutions may also be considered to resolve custodial disputes concerning children. These include Pennsylvania, Michigan and Colorado.

It is to be noted that there generally is no right to an appeal of an arbitrator's award, except where it can be shown that the arbitrator was not impartial, guilty of fraud or other impropriety. The sole other exception is where it appears that *prima facie* the arbitrator's award would cause harm to the child. In either event, this

Inside

safeguard will permit the appellate court to review and decide the case based upon the "best interests" standard.

In litigation, after almost every custody decision from a trial court which permits an appeal as of right, the losing party will do so. This can consume another year or more from beginning to end since every appellant is permitted six months to perfect an appeal. With adjournments adding further delays, and the time to render a decision tacks on several more weeks if not a month or more, a one-year prognostication is indeed conservative.

Following the appeal in the appellate division, a motion to either the appellate division or the Court of Appeals for leave to appeal to the Court of Appeals, or both, will certainly be filed, and this will add still further delay of a month or more with its attendant expenses.

Contrast these delays and added expenses with the speed of arbitration and lesser costs, and it will clearly lead to one conclusion: avoid litigation! Consider the following benefits of arbitration. There is no formal motion practice as such. Requests can be made by telephone or in person to the designated arbitrator who will quickly determine the parameters, and he will permit and set a brief time to comply with his decision. There are no formal rules of evidence to restrict information from being considered by the arbitrator, and he will solely determine the weight to be given the proof, but questions that are clearly irrelevant can be disallowed. Each party can request documents or reports which will be treated similarly. The production and preservation of electronic evidence can be supervised immediately at the commencement of the request for discovery, eliminating the threat that such evidence can be lost, deleted, or compromised. By contrast, weeks or months can be lost in the courthouse by temporary injunction motions, motions to produce, and the appointment of experts to oversee such production and conduct a forensic investigation to retrieve necessary documents or information.

Once pre-hearing matters have been speedily completed, and the case is set down for hearing, you can expect that the trial will proceed from day to day until completed. The arbitrator, unlike the judge, will not be interrupted by requests from other litigants for rulings, motions that require his immediate attention, or adjournment during trial for one reason or the other. Most courts today do not try a case from beginning to end from day to day. Normally, there will be segments of from one to two weeks, and then adjournments of a week or more in order to accommodate the court's calendar and to allow for settlement discussions during these delays. Arbitrators can complete a trial in several days that could take a court several weeks, if not months, to do so.

It certainly cannot be in the best interest of the children to have their lives emotionally disrupted by warring parents, while they continue to litigate through lengthy trials and fruitless appeals, not knowing where they will ultimately live and with which parent. If you consult with any health care professional he or she is sure to advise you that such a condition may well cause emotional damage to the infants, and can have a lifetime deleterious effect on their psyche. If the cost of litigation can be reduced, and the option for arbitration is adopted in New York, similar to the New Jersey rules, both wealthy and clients of modest means will be given equal protection under the law and access to some form of third party interventions. If a client of modest means must accept the most meager terms offered during settlement negotiations, because he or she cannot afford to retain experienced but costly counsel and litigate in the courts, justice cannot reasonably be served, let alone the best interests of the children. The option for arbitration can remove such coercion.

In New York, if the case is litigated and a party appeals to the Appellate Division and is unsuccessful, the Court of Appeals may accept the matter for additional review either by motion or if there are two dissenting opinions in the appellate division. The Court of Appeals might very well reverse the holding and remand the case back to the trial court for further proceedings which are not inconsistent with its decision. Such a result would take on tragic proportions for a child. A case that took over a year to complete may very well take another year to go through the appellate process. If reversed and a new trial ordered, it would be necessary to obtain the entire transcript of the trial, all exhibits that were submitted and prepare the case for an additional trial. Not only would there be an enormous loss of time, but an enormous additional expenditure of legal fees to see the case through to an end.

Beside these obvious benefits of arbitration that have been discussed, there is also the ability to choose the arbitrator, rather than be at the mercy of a computer that will assign a judge. Arbitration will shorten the entire discovery process, and since there is no right of appeal except as previously discussed, the process is over when the arbitration ends.

Under the *Fawzy*[4] case in New Jersey, in order to appeal an arbitrator's custody determination other than for corruption or fraud, there must be shown *prima facie* that a threat of harm will befall the children. This threshold requirement could be adopted in New York and yet another argument to permit arbitration since this safeguard can ensure that the children's best interest will ultimately be considered by the courts in the event of an abuse by the arbitrator.

These long delays in litigation which cause doubts in the minds of children as to where they will continue to reside, whether they lose their friends, have to change schools or other similar considerations would appear to me to pose a grave psychological danger to the children.

The views of the respective states whether to permit arbitration really boils down to a constitutional determination. The question really posed is whether parental au-

tonomy with its fundamental liberty to the care, custody and control of their children and the state's interest in the protection of those children should control.

The Court of Appeals in *Finlay v. Finlay*[5] set the *parens patriae* standard, which is to act as a "wise, affectionate and careful parent" and make provision for the child accordingly. Accordingly, the court interferes on behalf of the state's interest to protect the child. Isn't that what parents do? Shouldn't the parents have the paramount right to do so?

Unless *Finlay*[6] is modified or the arbitration statute is amended to specifically include the right to elect arbitration in order to resolve custody matters, no change will be made. Most parents would certainly welcome this right which will dramatically reduce the costs and eliminate unnecessary delays.

In the end, one must determine whether the courts should have the paramount right to act as the parents, or the natural parents given priority to do so. The New York view not to permit arbitration should be changed especially with safeguards for the best interest of the children if there is any abuse in the arbitration process.

Endnotes

1. *See Glauber v. Glauber*, 192 A.D.2d 94 (2d Dept. 1993).
2. *See also Schechter v. Schechter*, 63 A.D.3d 817 (3d Dept. 2009) and *Lipsius v. Lipsius*, 673 N.Y.S. 2d 458 (2d Dept. 1998).
3. *See Fawzy v. Fawzy*, 199 N.J. 456, 456 (N.J. Sup. Ct. 2009).
4. *Id.*
5. 240 N.Y. 429 (1925).
6. *Id.*

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Should Court-Appointed Forensic Custody Evaluators Be Allowed to Destroy Their Records Before Trial?

By Stephen W. Schlissel and Hillary Reinharz

Court-ordered forensic custody evaluations are a component to almost every contested child custody matter. The evaluator's function is to provide the Court with accurate insight into the personalities and abilities of the parents. However, evaluators' reports and testimony are not meant to replace the independent judgment of the Court. As any family law attorney knows, "neutral" and "unbiased" are not the same, and a court-appointed "neutral" might still provide an incomplete, inaccurate, or even biased report. A "negative" report about one's client from such a court-appointed forensic could have a significant and detrimental effect on the likelihood of that client's success in obtaining custody or parenting time.

This article addresses, for thought and consideration, an issue that has recently been raised in some cases: What is the obligation of the forensic custody evaluator to preserve notes, records, recordings and other raw data created during the evaluation?

O'Loughlin v. Sweetland

The conduct and "methodology" of a court-appointed forensic custody evaluator was at issue before the Appellate Division, Second Department in 2012 in *O'Loughlin v. Sweetland*.[1] In *O'Loughlin*, the mother had moved in Family Court, Suffolk County, to preclude the report and testimony of a forensic evaluator, based upon the evaluator's acknowledged destruction of many of the notes and audio recordings that were made during the course of the evaluation. The motion was denied by the trial court. At trial, the evaluator testified that it was the evaluator's practice to create notes and recordings during the interviews the evaluator had with the parties and other sources and to later destroy them. (In fairness to custody evaluators in general, it is the authors' experience that such a practice is unusual.) The mother argued that, because the evaluator destroyed certain notes and audio recordings, she was deprived of the ability to conduct an effective cross-examination, as she could not gain knowledge of the underlying facts—the "raw data"—that formed the basis of the evaluator's conclusion that the father was the more appropriate custodial parent for their child. The evaluator destroyed only *some* of the notes and recordings—3 of 29 handwritten pages of notes and 7 of 13 audio recordings—and the Second Department held that the record did not support the mother's contention that those missing items deprived her of the ability to effectively cross-examine the evaluator. Thus, the Second Department found no reversible error in the trial court's denial of the mother's motion to preclude the evaluator's report and testimony.

Now consider a case similar to *O'Loughlin*, but one in which the evaluator destroyed most—or even all—of the "raw data" that formed the basis for the report and opinion (the authors are aware of a number of additional but unreported cases in which this occurred). The forensic report clearly advocates in favor of one parent and criticizes the other. It also contains hundreds of quotation marks around statements that the parties or other sources (teachers, friends, neighbors, etc.) purportedly made to the evaluator, which the evaluator obtained from audiotapes and handwritten notes made during various interviews with those sources. How could that evaluator's conclusions possibly be tested or reviewed for accuracy with respect to the context in which the underlying information was presented and the evaluator's interpretation of it?

In *O'Loughlin*, the Appellate Division appears to have decided that the forensic evaluator's destruction of evidence would impact the weight but not the admissibility of the report and testimony since approximately half of the evaluator's underlying data was preserved for cross-examination. In the hypothetical mentioned above, that is not the case. Arguably, where all (or substantially all) of the underlying data is destroyed, there is nothing available to the cross-examiner to test the conclusions that were reached by the evaluator. If an expert witness were to offer an opinion without providing any of the underlying data to challenge that opinion (in this case, the interpretation of the information as it was presented to the expert), the issue of admissibility versus weight is squarely presented.

Professional Guidelines and Standards for Forensic Evaluator

Forensic psychologists have published articles on this issue, urging other psychologists to maintain full and complete records in carrying out their duties as court-appointed evaluators. In "Integrity and Transparency: A

Commentary of Record Keeping in Child Custody Evaluations,[2]" Dr. David A. Martindale, Ph.D. ABPP, discusses the APA Guidelines for Child Custody Evaluations in Divorce Proceedings,[3] stating that they "remind us that '[a]ll raw data and interview information are recorded with an eye towards their possible review by other psychologists or the court, where legally permitted' (Guideline #16)." Dr. Martindale warned that "[a]n evaluator cannot be effectively cross-examined if records that might form the basis of the cross-examination have been concealed or destroyed" and explains that, in addition to the APA Guidelines, Federal Rule of Evidence 705 (the federal counterpart to New York's CPLR 4515) may require, for purposes of cross-examination, the disclosure of underlying facts or data which form the expert's opinion.[4]

In 1991, the American Psychological Association ("APA") created the Specialty Guidelines for Forensic Psychologists ("Guidelines") in order to:

- Improve the quality of forensic psychological services;
- Enhance the practice and facilitate the systematic development of forensic psychology;
- Encourage a high level of quality in professional practice; and
- Encourage forensic practitioners to acknowledge and respect the rights of those they serve.[5]

"Forensic psychology," for purposes of the APA Guidelines, means:

> professional practice by any psychologist working within any sub-discipline of psychology…when applying the scientific, technical, or specialized knowledge of psychology to the law to assist in addressing legal, contractual and administrative matters.… **These Guidelines apply in all matters in which psychologists provide expertise to judicial, administrative, and educational systems…** [emphasis added].[6]

Guideline 10.06 of the APA Guidelines, entitled "Documentation and Compilation of Data Considered" provides:

> Forensic practitioners are encouraged to recognize the importance of **documenting all data they consider with enough detail and quality to allow for reasonable judicial scrutiny and adequate discovery by all parties.** This documentation includes, but is not limited to, letters and consultations; **notes, recordings**, and transcriptions; assessment and test data, scoring reports and interpretations; **and all other records in any form** or medium that were created or exchanged in connection with a matter [emphasis added].[7]

However, the American Psychological Association is not a government entity and has neither legislative power nor binding judicial authority to enforce the APA Guidelines as requirements on psychologists. A psychologist appointed to conduct a forensic custody evaluation may not be legally obligated to follow the APA Guidelines, absent an order by the appointing court to that effect (but see cases cited, *infra*). Still, Dr. Martindale argues that even though forensic psychologists may not have a statutory obligation to maintain all of their records and raw data, there exists an underlying *ethical* obligation to conduct an honest and reliable evaluation, which includes keeping all information and evidence intact. It can rationally be argued, we submit, that the guidelines of various professional organizations are "authoritative sources" (see *Nolan v. Transocean Air Lines*)[8] for courts to rely upon in establishing standards for experts' ethical obligations and, therefore, the propriety of experts' findings as admissible evidence. The APA Guidelines clearly set forth the recommended practice for the relevant scientific community.

The Judicial View of Forensic Standard in Determining the Reliability of the Expert's Report and Testimony

Some trial level courts have sought to ensure that their appointed experts perform ethically sound evaluations by assuming the role of "reliability gatekeeper" and applying the APA Guidelines as standards for gauging reliability—as it bears on admissibility—of expert testimony. The Family Court, Bronx County recently accepted the APA Guidelines as "specific guidelines and parameters in the field of forensic psychology for how such evaluations are to be conducted and presented to a court."[9] While *Faith D.A.* was a proceeding to terminate parental rights based on grounds of mental illness, the Family Court noted that "the principles of fairness and due process embedded in our laws imposes upon the court the role of gatekeeper in assuring that expert testimony is not only relevant but reliable."[10]

Ultimately, in *Faith D.A.*, the Family Court rejected the forensic psychologist's conclusion that the parent at issue suffered from a "personality disorder" which was "likely intractable and interfere[d] with her thinking and her ability to properly care for the child."[11] The Family Court determined that the evaluation was not sufficiently reliable, citing its failure to comply with "established APA guidelines for conducting a reliable and comprehensive court-ordered examination for presentation in court."[12]

In *Matter of D.M.*,[13] the Family Court, Bronx County (a different part than in *Faith D.A.*), held that the petitioner Administration for Children's Services did not meet its burden of sufficiently corroborating a child's out-of-court

statements in order to support a finding of abuse against the respondent. The Court denounced the conduct of the forensic evaluator's interview with the child, specifically citing his failure to adhere to APA Guidelines and further finding that:

> His session was rife with leading questions, which call in to question the reliability and veracity of the young child's responses. He also repeated areas of inquiry when he wasn't satisfied with the child's answers, and then called the mother in to the room. The overall impression of these factors in my observation of the interview, entered in to evidence, impairs the reliability of the process, in my estimation, and detracts from the credibility of [the evaluator]'s opinion.[14]

Had the Family Court not been privy to the contents of the interview, this improper questioning may not have been discovered and the Court may have inadvertently accepted faulty "evidence" in making a finding against a parent.

Both *D.M.* and *Faith D.A.* suggest that courts may be moving toward holding forensic evaluators' methodology to certain professional organization standards. In light of the great weight that is often afforded a forensic report (whether by a court or by litigants in settlement), it is hard to argue that free rein should be given to the evaluators whose determinations often permanently impact on clients' lives.

A Higher Standard?

In addition to the influential role in the fact-finding process, however, shouldn't the fact that the forensic custody evaluator is *the court's* witness render the expert subject to a higher level of scrutiny as an "arm of the court?" Interestingly, the expert's position as a court appointee entitles that expert to heightened protection from suit, in what courts have determined to be a "quasi-judicial immunity."[15]

For instance, consider whether the evaluator has "spoiled" evidence. If a party "spoiled" evidence, that party might be precluded from presenting anything related to what he or she spoiled. Should this rule apply to a forensic—one who is protected by his acting as the court's agent?[16] The authors submit that it would be a notable departure from the historical canons to hold litigants to a higher standard than an "arm of the court."[17]

In *Mosher*, the plaintiff mother sued Allegany County for negligent placement after the Department of Social Services assumed temporary custody of her neglected son, conducted a court-ordered pre-placement home study evaluation, and placed the son in the home of his maternal aunt, who then fatally beat him. The Court of Appeals agreed that the caseworker who performed the evaluation was acting pursuant to an Order of the Family Court and was "an arm of the Court." The Court stated that "'judicial immunity…protects Judges only in the performance of their judicial functions.' A logical extension of this premise is that 'other neutrally positioned government officials, regardless of title, who are delegated judicial or quasi-judicial functions should also not be shackled with the fear of civil retribution for their acts.'"[18] Notwithstanding the well-recognized protections afforded to court-appointed experts, an appellate court has not yet issued a ruling regarding a firm standard to which they will be held in conducting investigations and performing evaluations. Until that time, it is important for practicing family and matrimonial attorneys to note that *O'Loughlin* is distinguishable from other cases that deal with similar issues. Though not mentioned in the Appellate Division's decision, a review of the Record on Appeal reveals that the attorney for the mother in *O'Loughlin* conceded at the beginning of the trial that the forensic report would be admitted into evidence at trial and argued that the issue with respect to the report and testimony was the weight to be given to it, not admissibility. Therefore, the *O'Loughlin* decision does not necessarily reflect a holding that reports in these circumstances should be admitted over objection, subject only to a weight analysis.

O'Loughlin may also be distinguished from cases where a larger amount of information has been destroyed. In *O'Loughlin,* approximately fifty percent of the notes and recordings had been destroyed, yet the Appellate Division held that a meaningful cross-examination was still had. This may not be the case where a substantial majority—or even all—of the underlying data is no longer available for review of the evaluator's determination.

As noted above, *O'Loughlin* is not the only case in which conduct of this nature by a forensic custody evaluator has occurred. Indeed, your authors are aware of an increasing number of cases in which a court-appointed forensic custody evaluator has destroyed virtually all underlying data, the effect of which is to shield the expert from any effective cross-examination, which right is guaranteed by the Constitution and, *inter alia*, CPLR 4515 and 22 NYCRR 202.16.[19] In one such case, *Lyons v. Lyons*,[20] the mother appealed the trial court's denial of her pretrial motion to preclude the admission of the forensic custody evaluator's report and testimony after *virtually all* of the evaluator's records, recordings and other "raw data" were destroyed. The Second Department dismissed the appeal—as a matter of procedure only—as a premature appeal from an evidentiary ruling. However, the Second Department made it a point to note that "[a]lthough we must dismiss this portion of the appeal, this should not be construed as an indication that there is no merit to the contentions of Audrey Lyons which cannot be reviewed at this point in the proceedings."[21]

A few suggestions in order to avoid these situations:

1. Before a forensic custody evaluator is appointed, familiarize yourself with that evaluator's practices. Speak to other attorneys—and perhaps even the proposed expert directly—in order to ensure that the methodology about to be employed is acceptable to ensure reliability and reviewability.
2. Request that the Court issue an order making it clear that the evaluator is to document his or her investigation and is not to destroy any data or raw data created during the course of the evaluation, and that the evaluation is to be conducted pursuant to certain guidelines, such as the APA Guidelines referred to above. It may help to draft a proposed order containing the desired language, such as:

> ORDERED that [the evaluator] shall conduct any and all necessary interviews and investigations and [he or she] shall keep an appropriate record thereof. [The evaluator] shall not destroy, discard, erase, or otherwise make unavailable any records, data, and raw data created during the evaluation process, including but not limited to all audio recordings, video recordings, writings, papers, summaries, reports, tests and test results, and all other evidence or information upon which [the evaluator] may potentially rely in forming his or her conclusions until the conclusion of the hearing, as permitted by law. Throughout the course of his or her investigation and evaluation, [the evaluator] shall adhere to [the applicable guidelines] promulgated by the American Psychological Association.

Finally, consider the following well-stated opinion of the Court in *Linda W. v. Frank I.*,[22]

> *A Court is obliged to hold the mental health witness accountable for the application of empirically supportable principles and methods and to insist that the experts whose opinions can change lives support each and every one of their inferences with specific empirical evidence. The Court must demand that the expert's reasoning is scientifically valid. (See, Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, Tippins and Wittman, p. 38-39) [Emphasis added].

Endnotes

1. 98 A.D.3d 983 (2d Dept. 2012).
2. Journal of Child Custody, Vol. 1, p. 34 (2004).
3. Committee on Professional Practice and Standards, APA (1994).
4. *Integrity*, at 34, 35.
5. Introduction to the Specialty Guidelines for Forensic Psychology, American Psychological Association, available at http://www.apa.org/practice/guidelines/forensic-psychology.aspx.
6. *Id.*
7. *Id.* at Rule 10.06.
8. 365 U.S. 293, 81 S. Ct 555 (1961).
9. *Matter of Faith D.A.*, 34 Misc.3d 1230(A) (Fam. Ct. Bronx Co. 2012); *see also In re D.M.*, 29 Misc.3d 1220(A).
10. *Id.*
11. *Id.*
12. *Id.*
13. 29 Misc.3d 1220(A) (2010).
14. *Id.*
15. *Mosher v. County of Allegany*, 99 N.Y.2d 214 (2012).
16. *Young v. Campbell*, 87 A.D.3d 692 (2d Dept. 2012).
17. *Mosher*, *supra.*
18. *Id.* at 219-220, quoting *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) [internal cites omitted; emphasis omitted].
19. *Lisa W. v. Seine* W., 9 Misc.3d 1125(A) (Fam. Ct. Kings Co. 2005).
20. 86 A.D.3d 569, 926 N.Y.S.2d 834 (2d Dept. 2011).
21. *Id.* at 570. Following the dismissal of the appeal, a post-voir dire motion to exclude the forensic report and the evaluator's testimony was denied by the trial court, which determined that any issues of reliability went to weight but not admissibility. The trial is continuing.
22. 2004 WL 2952940 (Fam. Ct., Suffolk Co. 2004).

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Having Your Cake and Eating It Too

By Susan G. Mintz

According to a February 18, 2011 article in the *New York Times Magazine* section written by Ben Zimmer, "The point of the aphorism is that sometimes you have to make a choice between two options that cannot be reconciled." By way of example, he cites to the Yiddish saying, "You can't dance at two weddings with one tuchis."[1]

And so said the Honorable Theresa Whelan, J.F.C. Suffolk County in her decision and Order dated April 2, 2013 in *Estrellita A. v. Jennifer D*. This Decision and Order decided a motion by respondent to dismiss the petitioner's application for custody/visitation with the parties' daughter.

BACKGROUND OF THE PETITIONS COMMENCED IN THE FAMILY COURT, SUFFOLK COUNTY: On October 24, 2012, Jennifer D. filed a petition for child support alleging that the parties had a child in common. The matter was referred to Honorable Theresa Whelan for an equitable estoppel hearing and to determine if Estrellita A. should be declared a parent for purposes of establishing a child support order.

During the hearing, Jennifer D. testified that the parties registered as domestic partners in 2007, that they decided to have a child, and that they went together to North Shore University Hospital to select the donor sperm. Jennifer D. became pregnant and the child, Hannah, was born November 23, 2008. At the hearing, Jennifer D. not only testified that the parties had a child in common, but also testified that Estrellita A. was, in fact, a parent. After the hearing, the Court issued an Order on January 16, 2013 which held, in part, as follows:

> ORDERED, that the uncontroverted facts establish that Estrellita A. is a parent to Hannah; and as such is chargeable with the support of the child.…

On January 10, 2013, Estrellita A. filed a petition for custody of Hannah, which petition was amended on January 29, 2013, to incorporate the Court's Order of January 16, 2013 adjudicating her a parent of Hannah.

On January 30, 2013, Jennifer D. filed a Motion to Dismiss the petition for custody.

MOTION TO DISMISS: Jennifer D. asserted that the custody petition must be dismissed as Estrellita A. was not a "parent" for purposes of custody/visitation as defined under the Family Court Act (FCA) Article 6, Domestic Relations Law (DRL) §§ 70 and 240, and therefore had no standing to commence the action.

Jennifer D. relied upon two Court of Appeals cases, the first being *Alison D. v. Virginia M.*[2] The facts of that case were that the petitioner, Alison D. and respondent Virginia M., began a relationship, they lived together, decided to have a child, and then decided that the respondent would be artificially inseminated. Approximately two (2) years after the child was born the parties ended their relationship. Petitioner then commenced a proceeding seeking visitation under Domestic Relations Law § 70. The lower Court dismissed the proceeding. Said decision was affirmed by the Appellate Division and leave to appeal to the Court of Appeals was granted.

The Court of Appeals applied a strict reading of the language contained in DRL § 70, and thus declined to expand the plain reading of the language to include nonparents who were in a relationship with a parent who wished to continue visiting with said child.

The second case respondent relied on was, at the time, the recent decision of *Debra H. v. Janice R.*, which had a somewhat different set of facts in that the parties entered into a civil union in Vermont.[3] Janice R. was the biological parent. Debra H. was neither the biological nor the adoptive parent of the child. After communication between Debra H. and the child had been terminated, Debra H. brought a petition seeking joint custody by involving the principles of equitable estoppel pursuant to *Jean Maby H. v. Joseph H.*[4] The Court of Appeals again declined to expand the plain reading of DRL § 70 and held, "only change in the meaning of parent under our law should come by way of legislative enactment rather than the judicial revamping of precedent."

The attorney for the child in *Estrellita A. v. Jennifer D.* requested that the Court apply the principles as set forth in the *Matter of Bennett v. Jeffreys*, utilizing the holding in that case and find "extraordinary circumstances" exist and determine custody based upon the best interests of the subject child.[5]

ANALYSIS OF THE LAW: The Decision and Order dated April 2, 2013 (Whelan, T., JFC) in analyzing the current law and recognizing that the Court is mandated to apply the rulings of the Court of Appeals, considered carefully the argument of Jennifer D. that Estellita A. is neither a biological nor adoptive parent of the subject child. However, the matter before the Family Court had a differing set of facts than those presented to the Court of Appeals. In the instant matter, Jennifer D. had come before the Court seeking to adjudicate Estrellita A. as a parent of the child, Hannah, for the purposes of establishing child support. The Court found in favor of Jennifer D. and issued an Order declaring Estrellita A. a parent of the child and requiring her to pay child support. The Family Court invoked the doctrine against inconsistent positions,

or judicial estoppel, which precludes a party from assuming a position in a Court proceeding contrary to one previously taken simply because his/her interests have changed.

CONCLUSION: The Family Court frowned upon Jennifer D.'s insistence in her sworn support petition that the parties had a child in common and her request that Estrellita A. be adjudicated a parent for support based on her testimony in the proceeding, but then requested that Estrellita A. be denied her day in Court to seek custody/visitation as she was not a parent as defined by FCA or DRL, as Jennifer D.'s interests were now different.[6] As a result, this Court concluded that to allow Jennifer D. to do so would be the equivalent of allowing her to "[h]aving her cake and eating it too," which is why it is still impossible to dance at two weddings with one tuchis!

What is most troubling to me as I sit here and applaud the decision reached by the Family Court is the fact that there have been no changes made to provide for children born to same-sex couples. In Justice Kaye's dissent in *Alison D.*, which was decided in 1991 (the year I graduated law school), she wrote of estimates where 15.5 million children do not live with two (2) biological parents and that 8 to 10 million children at that time were born into families with a gay or lesbian parent. Under what rationale can it ever be concluded that to deny any child the love and affection of a parent (however one defines that term) can ever be in the child's best interests?

Based on the fact that New York State has now legalized same-sex marriages, and the statements of the Court of Appeals, it is time that the Legislature address this issue and modify the definition of the term "parent" as used in the DRL and FCA so that, first and foremost, it protects the rights of the child, and is also in sync and provides consistency with the intent of the law.

Endnotes

1. *See* the February 18, 2011 article by Ben Zimmer in the *New York Times Magazine* Section.
2. *Alison D. v. Virginia M.*, 77 NY2d 651, 572 NE2d 27, 569 NYS2d 586 (1991).
3. *Debra H. v. Janice R.*, 14 NY 3d 576, 930 NE 2d 184, 904 NYS2d 363 (2010).
4. *Jean Maby H. v. Joseph H.*, 246 AD2d 282, 676 NYS2d 677 (1998).
5. *Bennett v. Jeffreys*, 40 NY2d 543, 387 NYS2d 821 (1976).
6. The court relied on the authority of *Mukuralinda v. Kingombe*, 100 AD3d 1431, 954 NYS2d 316 (4th Dept. 2012).

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To Challenge or Not to Challenge? Recent Developments Dealing with Pre-nuptial and Post-nuptial Agreements

By Robert S. Grossman

As many people get married later in life,[1] or decide to marry for a second or even a third time, considerations increasingly include the protection and preservation of assets and income in the event of a divorce, as well as avoiding issues that may have arisen in a prior divorce. After even a brief review of recent case law, most practitioners are sure to be left with many questions as to how to best protect a client and avoid a time-consuming and costly challenge to the agreement in the event of a divorce. There are many issues that should be considered when drafting or litigating pre-nuptial and post-nuptial agreements which would require volumes to discuss in detail. This article is limited to discussing some of the recent cases regarding such agreements, and to bring some of the issues that should be considered to the attention of practitioners.

On a separate note, it also bears mentioning that with increasing frequency people try the "do it yourself" route and use forms, from the Internet or otherwise, to prepare pre-nuptial and post-nuptial agreements without the benefit of advice from counsel. Such agreements are not "one size fits all" and must be tailored to fit the individual needs and concerns of each client. The individuals who read this article with the "do it yourself" agreement in mind would be best served by seeking advice of competent and *independent* counsel before entering into any such agreements. Otherwise, while they may save in the short run, in the event of a divorce they are likely to spend substantially more, whether in the form of counsel fees, support, or other relief that may be awarded in a matrimonial proceeding.

That being said, New York generally has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements."[2] Although a pre-nuptial or post-nuptial agreement may seem like any other contract between two consenting adults, it is quite different in many respects and involves fiduciary relationships which require the "utmost of good faith."[3] There are limits and "in numerous contexts, agreements addressing matrimonial issues have been subjected to limitations and scrutiny beyond that afforded contracts in general."[4]

Courts have held that "an agreement between spouses or prospective spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct."[5] In reviewing the agreements, courts may consider the terms of the agreement to determine if there is even an inference or negative inference of overreaching in the execution of the agreement.[6] "'[C]ourts have thrown their cloak of protection' over postnuptial agreements, 'and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity…'"[7] Unlike issues that arise in arm's length contracts, proof of actual fraud is not required, because "relief will be granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching."[8]

The party seeking to set aside the agreement has the initial burden of demonstrating the facts that support the claims to set aside the agreement.[9] Conclusory claims alone will be insufficient. However, if the burden is satisfied, the burden then shifts, and the "proponent of a post-nuptial agreement 'suffers the shift in burden to disprove fraud or overreaching' (*Matter of Greiff,* 92 N.Y.2d at 346, 680 N.Y.S.2d 894, 703 N.E.2d 752; *see Matter of Barabash,* 84 A.D.3d at 1364, 924 N.Y.S.2d 544; *D'Elia v. D'Elia,* 14 A.D.3d at 478–479, 788 N.Y.S.2d 156)."[10]

The Court of Appeals long ago held in *Christian v. Christian,*[11] that "over the years, an unconscionable bargain has been regarded as one 'such as no (person) in his (or her) senses and not under delusion would make on the one hand, and as no honest and fair (person) would accept on the other'" (*Hume v. United States*, 132 U.S. 406, 411, 10 S.Ct. 134, 136, 33 L.Ed. 393), the inequality being "'so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense'" (*Mandel v. Liebman*, 303 N.Y. 88, 94, 100 N.E.2d 149, 152)." Yet, what seems "'to shock the conscience and confound the judgment of any (person) of common sense'" has increasingly become more of a grey area.

The Appellate Division, First Department, in *Cohen v. Cohen,*[12] noted various factors that it found insufficient to even warrant a hearing as follows:

> The motion to vacate or set aside the parties' prenuptial agreement was properly denied without a hearing, as defendant failed to meet her burden of presenting evidence of fraud, duress or overreaching with respect to the agreement, which was executed in France and written in defendant's native tongue (*see Stawski v. Stawski,* 43 A.D.3d 776, 777, 843 N.Y.S.2d

> 544 [2007]; *Forsberg v. Forsberg*, 219 A.D.2d 615, 616, 631 N.Y.S.2d 709 [1995]). Defendant's contradictory affidavit and her doctor's letter do not support her suggestion that, because of her pregnancy, she lacked the mental capacity to understand or execute the agreement. Further, plaintiff's alleged threat to cancel the wedding if defendant refused to sign the agreement does not constitute duress (*Colello v. Colello*, 9 A.D.3d 855, 858, 780 N.Y.S.2d 450 [2004], *lv. denied* 11 A.D.3d 1053, 783 N.Y.S.2d 896 [2004]). Nor does the absence of legal representation establish overreaching or require an automatic nullification of the agreement (*see id.*), especially as the evidence shows that the agreement was prepared by an independent public official unaligned with either party. Plaintiff's alleged failure to fully disclose his financial situation is also insufficient to vitiate the prenuptial agreement (*Strong v. Dubin*, 48 A.D.3d 232, 233, 851 N.Y.S.2d 428 [2008]). Indeed, there is no evidence that plaintiff concealed or misrepresented any financial information or the terms of the agreement (*id.*).

Courts have repeatedly held that presenting an agreement for signature shortly before an impending wedding alone is insufficient to constitute a basis to set aside an agreement,[13] and that lack of independent counsel alone is insufficient to set aside a duly executed agreement.[14] Together with other evidence, however, such facts may be sufficient to set aside an agreement.[15]

In other recent decisions, viewing the totality of the circumstances, courts have set aside agreements using what some may consider as more "flexible" considerations of what is "shocking." In February, 2013, the Appellate Division, Second Department upheld a trial court's decision setting aside a prenuptial agreement in *Cioffi–Petrakis v. Petrakis.*[16] Referred to by some as a "landmark" ruling,[17] the decision creates more uncertainty for both the parties to such agreements, and the attorneys preparing the agreements. In *Cioffi–Petrakis*, it was reported that Ms. Cioffi–Petrakis believed her then-fiance "when he told her orally that his lawyers had made him get a prenuptial agreement signed to protect his business and promised to destroy the document once they had children and put her name on the deed to the house."[18] She further stated that her then-fiance "gave her an ultimatum four days before the wedding for which her father had already paid $40,000, telling her to sign the document or it wouldn't occur."[19] Although courts have held that the pressure of an impending wedding and the possibility of it being cancelled are insufficient to substantiate a claim of duress, the totality of the circumstance in *Cioffi–Petrakis,* including issues of credibility, were sufficient for that court to set aside the agreement. Similarly, in *Petracca v. Petracca,*[20] the court held that the wife established that the terms of the agreement were "manifestly unfair" to her because of, among other things, her relinquishment of rights in the marital residence, waiver of inheritance rights, and also in part based upon the disparity in the net worth and income of the parties. The court held that this resulted in an inference of overreaching, further supported by the circumstances surrounding the execution of the agreement.

Another recent case sets forth a concept that may possibly be used to discourage attempts to challenge prenuptial and post-nuptial agreements. In the recent "high net worth" [21] case of *Lennox v. Weberman,*[22] the Appellate Division, First Department upheld a decision that pendente lite payments made to a spouse who was not to receive any support under a prenuptial agreement should be charged against the assets the recipient spouse was to receive in equitable distribution.[23] However, it does not appear that the court would have taken, or could have taken, the same position in a case where the assets were not as substantial.

Even if an agreement limits the exposure of the monied party to claims for support and counsel fees, as the Appellate Division, First Department held in *Vinik v. Lee*,[24] such a limitation does not necessarily preclude an award of temporary support or interim counsel fees.[25] The court noted the adage that "'[t]he best remedy for any perceived inequities [in the amount of the pendente lite award] is a prompt trial.…'"[26] Furthermore, as the parties apparently did not address the issues of custody or child support in the prenuptial agreement, the Court held that award of counsel fees for custody and child support related issues was not be barred by the agreement.[27] Similarly, in *Abramson v. Gavares,*[28] the Second Department awarded counsel fees in excess of the fees set forth in the parties' prenuptial agreement and held that

> Because of a strong public policy favoring the resolution of matrimonial matters on a level playing field (*see Kessler v. Kessler,* 33 A.D.3d 42, 47, 818 N.Y.S.2d 571; *see also Prichep v. Prichep*, 52 A.D.3d 61, 65, 858 N.Y.S.2d 667), the determination of whether to enforce an agreement waiving the right of either spouse to seek an award of an attorney's fee is to be made "on a case-by-case basis after weighing the competing public policy interests in light of all relevant facts and circumstances both at the time the agreement was entered and at the time it is to be enforced" (*Kessler v. Kessler,* 33 A.D.3d at 48, 818 N.Y.S.2d 571). Here, the parties are involved in extensive litigation concerning child custody, a matter not

> expressly addressed in their prenuptial agreement. Moreover, the plaintiff's net worth is more than $13 million and his monthly gross income exceeds $45,000, while the defendant has no income other than what she is receiving pursuant to the agreement. Under these circumstances, the Supreme Court providently exercised its discretion in awarding the defendant $15,000 in interim counsel fees (*see Vinik v. Lee*, 96 A.D. 3d at 523, 947 N.Y.S.2d 424*; Witter v. Daire,* 81 A.D.3d 719, 917 N.Y.S.2d 870) which, contrary to the plaintiff's contention, properly included, as a component thereof, counsel fees that the defendant incurred defending against a petition for a writ of habeas corpus that the plaintiff filed during the pendency of this divorce action (*see* Domestic Relations Law § 237[b]).

The recent cases do not give a clear direction as to how an attorney preparing an agreement can best protect a client and set forth disincentives to challenges to an agreement. In a recent decision setting aside an agreement in Nassau County, Justice Leonard D. Steinman noted as follows in *C.S. v. L.S.*[29]:

> Thus, this Court finds that the Agreement is to be set aside. In so holding, this Court does not mean to imply that Husband was wrong to desire to enter into an agreement that would clearly spell out the parties' rights upon a termination of the marriage or his death. Such agreements are commonplace and serve understandable and laudable goals, particularly where as here the marriage is not the parties' first. Nonetheless, there are right ways and wrong ways to go about such things. To those who fear that setting aside agreements such as the one in this case will lead to uncertainty in the law and an inability to confidently manage one's affairs, one need only look to the multitude of decisions upholding marital agreements. One can predict with confidence that if each spouse retains a lawyer of his or her own choosing, is provided with a proposed agreement with sufficient time to give due consideration to the serious consequences of the proposed terms, is given fair and adequate disclosure, and is presented with an agreement that does not scream inequity or will leave one party practically destitute, it will be upheld. Unfortunately, that was not the case here and this court cannot turn back the clock and make it so.

Both practitioners and parties would be well served by considering such suggestions. Indeed, the more one-sided and inequitable an agreement is, the more incentive the "non-monied" party has to seek to set it aside. This is especially so if that party can seek and receive an award of temporary support and interim counsel fees, and the best remedy for the "monied party" is a "speedy trial" which is often unlikely based upon the sheer volume of cases before our already overburdened courts. Further complicating this issue is the lack of the ability of the "monied" spouse to "recoup" certain pendente lite payments in excess of the amount awarded after trial.[30] Whether or not a provision in an agreement memorializing the holding in *Lennox v. Weberman,* or something similar thereto, would be enforced remains to be seen. Depending on the circumstances, other considerations may include adding written allocution language, attesting affidavits from witnesses present (other than a notary public) during the signing, or video statements from the parties and/or witnesses. Perhaps even a provision setting forth a disincentive to a challenge should be considered, such as an *in terrorem* clause[31] (more often used in a Last Will and Testament). Overall, the practitioner can best assist a client by considering the cases mentioned herein and the totality of the circumstances to reach a fair and negotiated agreement.

Endnotes

1. Based upon data from the U.S. Census Bureau, the median age at first marriage in 1970 was 23.2 for men, and 20.8 for women, and in 1990 was 26.2 for men and 23.8 for women, and in 2012 was 28.6 for men and 26.6 for women.
2. *Cioffi–Petrakis v. Petrakis*, 103 A.D.3d 766 (2d Dep't 2013).
3. *Petracca v. Petracca*, 101 A.D.3d 695 (2d Dep't 2012).
4. *Cioffi–Petrakis v. Petrakis*, *supra.*
5. *Id.*
6. *Petracca v. Petracca*, *supra.*
7. *Id.*, citing *Christian v. Christian,* 42 N.Y.2d 63, 72 (1977); *Infante v. Infante,* 76 A.D.3d 1048, 1049 (2nd Dep't 2010).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Christian v. Christian*, 42 N.Y.2d 63 (1977).
12. 93 A.D.3d 506 (1st Dep't 2012).
13. *See, e.g., Barocas v. Barocas*, 94 A.D.3d 551 (1st Dep't 2012); *Leighton v. Leighton*, 46 A.D.3d 264 (1st Dep't 2007).
14. *Id.*
15. *Siclari v. Siclari*, 291 A.D.2d 392 (2d Dep't 2002).
16. *Cioffi–Petrakis v. Petrakis*, *supra*.
17. "Landmark" N.Y. appeals court ruling voids prenup due to millionaire's oral promises to wife-to-be, posted Mar. 11, 2013, 2:20 PM CDT, by Martha Neil, ABA Journal (online).
18. *Id.*
19. *Id.*
20. *Petracca v. Petracca, supra.*
21. The Court also noted that the case involved assets valued somewhere in the range of $77 million - $90 million.

22. 109 A.D.3d 703, 2013 WL 4711539 (1st Dep't 2013).
23. *Lennox v. Weberman*, *supra* note 22.
24. *Vinik v. Lee*, 96 A.D.3d 522 (1st Dep't 2012).
25. *Id.*; *see also Solomon v. Solomon*, 224 A.D.2d 331 (1st Dep't 1996); *Tregellas v. Tregellas*, 169 A.D.2d 553 (1st Dep't 1991).
26. *Vinik v. Lee, supra.*
27. *Id.*
28. 2013 WL 5225047 (2d Dep't 2013).
29. *C.S. v. L.S.*, Slip Copy, 2013 WL 5526048 (Table) (Sup Ct., Nassau Co. 2013).
30. *See, e.g., Johnson v. Chapin*, 12 N.Y.3d 461 (2009*); Rader v. Rader*, 54 A.D.3d 919 (2d Dep't 2008) (noting that "there is a strong public policy against recoupment of both pendente lite and permanent maintenance paid pursuant to a court order or judgment which is subsequently set aside on appeal").
31. *Kromberg v. Kromberg*, 56 A.D.2d 910 (2d Dep't 1977) (declining to set aside an in terrorem clause indirectly by noting that it was not set aside in a prior proceeding and holding it res judicata in a subsequent proceeding).

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Faith in the System: The Court's Role in Determining Custody with Religious Considerations

By Allyson D. Burger

It has long been held that the Bench should refrain from placing itself in a position of interpreting religious texts. The landmark case of *Avitzur v. Avitzur* stands for the principle that in adjudication of matters touching upon religious concerns, courts "should not resolve such controversies in a manner requiring consideration of religious doctrine."[1] The Court of Appeals informs that judicial involvement is permitted, but only to the extent that it can be accomplished in purely objective, secular terms. What then are the present limitations as to the Court's ability to bridge the divide between Church and State in the context of custody determinations?

Preference for Custodial Arrangements That Promote Religious Exposure

Generally, Courts do consider a parent's religiousness as a factor in rendering an appropriate legal custody determination. Historically, religion has been considered "so closely interwoven in the lives of most people that it is difficult to say whether good moral character could be molded in a child without some religious training."[2] When faced with a custody battle between a devout parent and a parent who does not believe in organized religion, the Courts lean in favor of religious exposure until "there will come a time when the infant will be able to choose for himself which, if any, religion he wishes to pursue."[3]

In *C.C.W. v. J.S.W.*, the Court directed that the plaintiff-mother would have decision-making authority in the area of religion when her testimony discussed taking the children to church regularly, while the extent of the father's participation in the religious upbringing of the children was unclear. The mother was cautioned that her right to exercise religious decision-making was not intended to prevent the father from exposing his religion, if any, to the children.[4] Additionally, the Second Department has intervened and modified a visitation agreement of parties in order to allow for a child to participate in Hebrew School, opining that the "best interests of the children would be served by permitting them to attend religious instruction with other children of their own age and to allow them to participate in the activities that the religious school provides."[5]

Issuing a Custody Determination When Parents Ascribe to Two Conflicting Religions

The New York State Courts appear consistent in their rendering of custody determinations that suggest a child's exposure to religion is generally consistent with their best interests, over non-exposure. However, when conflicting religions are at the forefront of a custody battle, how deep must the Court's inquiry delve into the parents' respective religions in determining the best interests of the child?

"It has long been held that the Bench should refrain from placing itself in a position of interpreting religious texts.… What then are the present limitations as to the Court's ability to bridge the divide between Church and State in the context of custody determinations?"

In *Aldous v. Aldous*, the Appellate Division, Third Department affirmed an Order of the Family Court, Otsego County, which awarded custody of the parties' eight- and ten-year-old daughters to the plaintiff-mother, an Episcopalian. In rendering its decision after a hearing, the Family Court opined that the father's newfound lifestyle choice to be completely immersed in the Greater Glen Falls Bible Church was "not what the children want or need at this stage," and concluded that "if he were to be awarded custody, their entire lifestyle would have to change to suit him and his new beliefs."[6]

On appeal, the father alleged that the Family Court had inappropriately and unconstitutionally conducted an inquiry into religious doctrine and made an evaluation of the parties' respective religious activities in rendering a determination as to the best interests of the children. The Court opined that while religion alone may not be the only determinative factor in adjudging the best interest of a child, religion may well be considered a factor in a custody dispute when a religious belief poses a threat to a child's well-being.[7] In affirming the lower court's determination of custody, the Third Department actually acknowledged that the Family Court's consideration of religion might well have been impermissible. However, the Court excused this possible impropriety by stating that additional factors found in the record *negated* the "implication that religion, as an issue, tainted the final determination of custody or caused an abuse of discretion by the court."

The New York County Family Court was faced with the rare question of how to reconcile a custodial parent's right to determine the child's religious upbringing with the non-custodial parent's right to free exercise of his religion during visitation periods. In *Matter of S.E.L. v. J.W.W.*, the parties' Stipulation of Settlement and subsequent Judgment of Divorce determined that the mother, S.E.L., would have exclusive custody of the parties' daughter, Natalie. Defendant-father made an application to modify the custody arrangement, which in part asserted that the existing schedule impinged upon his First Amendment right to expose the child to his Jehovah's Witness training. The Family Court held that Constitutional rights can be freely waived, and that J.W.W. essentially waived his right to "free exercise" once he acquiesced that custody would be with S.E.L. In its decision, the Court reiterated "the right to free exercise of religion guarantees that a court will not make, *inter alia*, a custody decision, based on its view of the respective merits of two religions. [The Court] further guarantees that a non-custodial parent's right to practice his or her religion will not be abrogated when the child visits except to the extent necessary to prevent any harm to the child."

In denying the father's application, the Court ordered that the father may be permitted to take Natalie to Jehovah's Witness services on Sunday but that he may not involve her any further other than to answer casual questions which she might ask him. The Court specifically directed the father not to expose Natalie to any additional Jehovah's Witness doctrine and activities, because it would amount to a "harm" of strain and conflict to the child. The father failed to demonstrate that allowing him to expose Natalie to his religion would not be harmful to her, after the Court found credible testimony indicating that the father did not want the child to study her mother's Catholicism (despite testimony offered by the father that he would welcome the child's exposure to both religions).[8]

Issuing a Custody Determination When Parents Ascribe to Two Different Sects of the Same Religion

The ability of the Court to essentially render a decision as to the children's religion in accordance with the best interest standard is the same with regard to custody matters when parents share the same religion but ascribe to different sects. The Court may intervene and choose one sect, in order to protect the children from confusion and upset brought about by virtue of their parents' religious disagreement.

In *Marjorie G. v. Stephen G.*, the New York County Supreme Court held that the *de facto* custodial parent (the mother) could enroll the children at a Reform Jewish school against the wishes of the non-custodial father, a passionate and involved Conservative Jew. In recognizing this sectarian dispute among parties of the same religion and sympathizing with the father's sincere desire for the children to learn his religious practices, Justice Saxe determined that the mother has the right to determine the place and manner of the children's religious training, but the father should be permitted (during his visitation periods) to engage in the traditional and cultural observances associated with Conservative Judaism. In citing *S.E.L.*, the Court did caution that the father may not attempt to indoctrinate the children with any theological or ideological principles that are unacceptable to the Reform movement. Justice Saxe wrote, "as the Court has no desire to enmesh itself in or even to create an artificial tension between the parties' respective religious beliefs, by recognizing the *de facto* custodial parent's absolute right to raise the children as Reform Jews, while further permitting the non-custodial parent to freely and comfortably practice Conservative Jewish religious and cultural traditions with the children, the best interests of the children are amply served."[9]

Has the Court's Inquiry into Religious Upbringing of Children Stepped Too Far Beyond the Principles of *Avitzur*?

Unquestionably, the Courts seek to ameliorate the harm caused to children by virtue of being inserted in their parents' ideological conflicts. But at what price will the Courts prioritize the need for a child's religious consistency?

A recent decision rendered by the Rockland County Family Court has caused a great deal of public controversy, with various publications attacking the Court for overstepping in the analysis of three young boys' religious needs. In *Matter of Gribeluk v. Gribeluk*,[10] the subject family had been living in the Satmar enclave, a Chasidic community in upstate Monsey, for the duration of the children's lives. The mother raised various allegations of physical and sexual abuse of the parties' three boys, throughout the course of much contested custody litigation. The mother vowed to remove the three boys out of the Satmar community and raise them in a secular Jewish community elsewhere. The father maintained that all such allegations were false and that the mother was simply engaging in a continued course of conduct to alienate the children from him and the Satmar community, the only home the children had ever known. Mr. Gribeluk additionally claimed that the mother was flaunting an ongoing extra-marital affair with his nephew in front of the children.

Despite the children's (ages five, seven and eight) articulated desire to remain in their mother's care, the Court ruled that the best interests of the parties' children would be to remain at Satmar. The Court opined that, "if the Mother were to ignore the rules and requirements that the children are forced to follow to remain in their current [religious] community and school while with the children, it could lead to catastrophic consequences for children who are already clearly struggling with a multitude of issues."

Curiously, the *Gribeluk* decision has seemingly disappeared from all publication following the onset of the media frenzy. *The Jewish Week* reports that the Gribeluk children are presently living in foster care in their Chasidic Community pending a Rockland County Child Protective Services investigation.[11] An outpour of sympathizers have started campaigns to help restore custody of the Gribeluk children to their mother.

Perhaps the Court has stepped too far beyond the secular bounds prescribed by *Avitzur* in its attempts to determine the best interests of these children. Did the Family Court err in deciding that maintaining the children's religious consistency at Satmar would be in their best interest, amid abuse allegations and over the stability consistent with remaining in their mother's care? The matter is now pending on appeal in the Appellate Division, Second Department.[12]

Conclusion

Since *Avitzur*, when presented with questions that are entirely interwoven with religion, the Courts have looked for secular justifications for intervention, even where issues of constitutionality are raised. This trend has had far-reaching effects into other areas of the law beyond Family and Matrimonial Law, when questions of law are predicated on religiosity.[13]

Without assessing the relative merits of *Gribeluk* and its predecessors, it appears as though the Court is authorized to favor the religion of one parent over the other where the conflict of dueling ideologies present a "harm" to the subject child. Although the Courts are charged with upholding a standard of the best interests of the child, the line between Church and State is blurred when a Court is instilled with the authority to choose a child's religion, even when equipped with a secular justification.

It may appear that there are a limited number of cases referenced on the subject of the Court's role in determining custody matters when faced with a question of religion. To date, there has been very little Appellate guidance post-*Avitzur* to practitioners as to how to navigate religious conflicts within custody matters. Accordingly, it is incumbent upon counsel to be creative in representing clients through relatively uncharted territory, and raise constitutional challenges when applicable. Be aware, however, that in order to preserve the ability to raise a constitutional challenge, notice of the anticipated challenge to the Office of the Attorney General must be provided.[14]

Endnotes

1. *Avitzur v. Avitzur,* 58 N.Y.2d 108 (1983).
2. *Robert O. v. Judy E.*, 90 Misc. 2d 439 (Family Court, Erie County 1977).
3. *Id*.
4. *C.C.W. v. J.S.W.,* 15 Misc. 3d 1140[A], 2006 NY Slip Op. 52593 (Sup. Court, Monroe County 2006).
5. *Manos v. Manos*, 282 A.D.2d 749 (2d Dept. 2001).
6. *Aldous v. Aldous,* 99 A.D.2d 197 (3d Dept. 1984).
7. Citing also *Spring v. Glawon*, 89 A.D.2d 980 (2d Dept. 1982), *Matter of Weberman*, 198 Misc. 1055 (Sup. Court, Kings County 1950). *See also Matter of Stevens,* 17 Misc. 3d 1121(A) (Sur. Court, New York County 2007), Court determined that a mother was the appropriate guardian for a mentally retarded person despite her religious identification as a Jehovah's Witness which eschews blood transfusions. The Court determined that if the blood transfusion issue were to arise in an "end of life" context, the mother's religious objections would be overridden when necessary and appropriate.
8. *Matter of S.E.L. v. J.W.W.*, 143 Misc. 2d 455 (Family Court, New York County 1989).
9. *Majorie G. v. Stephen G.*, 156 Misc. 2d 198 (Sup. Court, New York County 1992); *see also Ervin R. v. Phina R.,* 186 Misc. 2d 384 (Family Court, Kings County 2000).
10. *Matter of Gribeluk v. Gribeluk* (Rockland County Family Court Docket Nos. V-177-12, V-178-12, V-179-12), decided April 22, 2013.
11. Orli Santo, *Satmar Custody Case Hinges On Value of Religious Community,* The Jewish Week, June 5, 2013, at 1, 18-19.
12. *Matter of Gribeluk v. Gribeluk,* 2013 NY Slip Op. 73582(U).
13. *Passionist Communications, Inc. v. Arnold*, 23 Misc. 3d 1130(A) (Sup. Court, Westchester County 2009). (In an action for constructive trust and accounting, the Court denied Defendants' motion to preclude evidence of canon law on grounds of constitutionality and permitted such evidence for purposes of demonstrating the nature of the relationship between the Passionists and Father Gorman, but directed the Jury not to consider whether any religious principle is valid or truthful.) *See also Church of Our Lady of Vilna v. Archbishopric of New York,* 15 Misc. 3d 1143 (A) (Sup. Court, New York County 2007). In a real property action relating to the property upon which a Church was built, the profits realized from its sale, and the Church's assets and personalty within, the Supreme Court enforced the Church's by-laws and granted Defendant Archbishop custody and control over the disposition of the Church's property, ruling that the issues were of hierarchical controversy rather than truly of religious interpretation.)
14. CPLR 1012(b), 22 NYCRR § 500.9, NY Executive Law § 71, FRCP § 5.1(a)(2).

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QDRO or Buyout: Preparing Today for a Secure Tomorrow

By Theodore K. Long Jr.

One of the most complex and difficult decisions a divorcing couple faces is the division of the pension rights accumulated during the marriage.

Some 84 million Americans work for companies that maintain ERISA-covered retirement plans that are divisible by QDROs, which guarantee the non-worker spouse (the non-owner who is usually the wife) a share of her husband's pension. Or the couple can opt for a buyout (sometimes called an immediate offset), by which one spouse trades away pension rights for another asset.

Normally, divorcing couples face a situation where the husband is the pension holder and the wife is the non-owning spouse who is entitled to a share of the pension benefits he earned during the years of their marriage. Sometimes the wife may have her own pension, and her husband may be entitled to a share of the marital portion of her pension, but generally, the husband's benefits are larger than those of the wife, who may have no pension at all or much smaller benefits because of years out of the work force.

To start, the decision to draft a QDRO, which gives the non-owning spouse income later in life, or opt for a buyout, which provides money up front, demands good legal advice and requires the services of a professional pension appraiser. Sometimes neither the pension holder nor the non-owning spouse appreciate just how valuable a pension is until it is appraised. The two most valuable assets a divorcing couple divide are the marital home and pension assets, but it is not uncommon for a thrifty couple who lived in a modest home for a long time to discover that the husband's pension may be worth more than the marital home. Moreover, despite the advances women have made in the workplace, the husband's career (and consequently his pension) come first in the economics of a marriage, which also enhances the value of the man's pension.

Sometimes, the non-worker spouse (usually the wife) may be tempted to opt for a buyout far more readily than a QDRO. The woman, faced with near-term problems like keeping a roof over her children's heads and food on the table, fails to consider the long-term problem of retirement income. Sometimes, the buyout shortchanges women, particularly those whose marital contributions have been child rearing and homemaking, because it means that they head into their so-called "golden years" without any retirement income other than Spousal Social Security. This consideration should be of particular concern to a woman if she is among half the workers in the labor force without a pension and has been a stay-at-home mother who can only make a claim against her husband's Social Security benefits.

In deciding between the two, both the worker spouse and the non-worker spouse should consider the division in both the short term and the long term. A wife's willingness to take a buyout gives her leverage with her husband who may want to go into retirement with undivided pension benefits. A husband's willingness to agree to a buyout may mean he gives up the marital home but gets to keep his pension.

Very often, divorcing couples, particularly those who divorce pro se, may settle on a buyout of the husband's pension interest without a pension professional placing a value on the plan. Moreover, legal fees may seem off putting, particularly when the value of the pension seems low. Consequently, the buyout price falls short of the present value of the plan. A buyout gives the recipient cash in hand now and up front, or in many cases the full ownership of the marital home, but it means that the participant (often the husband) gets all the benefit of the pension in his old age and the nonparticipant (often the wife) gets nothing. And she lives to regret her decision.

Good Legal Advice

The decision to go for a buyout versus a QDRO or vice versa requires good legal advice. Attorneys must be well grounded, not only in the particulars of the pension plan(s) of the divorce case, but also in the subtleties of the Employee Retirement Income Security Act (ERISA), which is the federal law covering private pensions, and the Retirement Equity Act, which broadened the rights of divorced spouses. Retirement plans and pension rules are very complex, and dividing them challenges both attorney and client.

As experienced lawyers know, calculating the amount to be paid to each spouse is a challenging task that often goes beyond the simple completion of forms provided by a plan administrator. QDRO preparation and approval can take months, and it involves preapproval by a plan administrator, revisions, approvals by both parties, and final approval as a QDRO. At no point in this routine does any third party intervene to make certain that the parties are in fact receiving the right amount.

In the back-and-forth of divorce negotiations, a lawyer can easily make mistakes that work against those who opt for a QDRO, including:

1. **Failure to ask for the important information about a spouse's benefits and retirement soon enough.** Pension plans vary greatly about the terms and conditions about when a pension can be paid under a domestic relations order.
2. **Failure to prepare any pension order.** This should be done at time of the divorce. The death of a former spouse, his retirement, remarriage can reduce the benefits a former spouse otherwise would have received.
3. **Failure to obtain information about every retirement benefit that might be marital property.** Many employees have more than one pension plan at the same company. Some people have pensions from companies they no longer work for.
4. **Failure to obtain information about all pension plans provisions.** Benefits vary greatly, and some plans pay more than one type of benefit. For example, some include cost of living escalators, and others have provisions to encourage early retirement.
5. **Failure to ask for survivor benefit or does not mention none is available.** The death of a worker-spouse may terminate the benefits. A separate interest QDRO assures the recipient benefits even if the owner spouse dies before retirement.
6. **Failure to explain how retirement benefits are usually divided under state law.** State marital and community property laws often specify the division and distribution of retirement and pension benefits. Sometimes couples can use these laws as the basis of negotiation.
7. **Failure to explain what a former spouse might do to reduce or eliminate benefits to the former partner.** Sometimes a former partner may fail to apply for a pension or waives his right to a pension or become injured or disabled.
8. **Failure to explain how remarriage might affect benefits.** Some federal, state and local government employee benefits terminate if the former wife remarries.
9. **Failure to explore the unusual legal requirements or loopholes that could result in the pension order being rejected by the plan administrator.** Some plans are not required to accept any court order assigning benefits to a former spouse.
10. **Failure to have the proposed pension order preapproved before being sent to the court.** This means that the plan may have to be filed with the court a second time if the administrator rejects it the first time.
11. **Failure to make sure the final pension order is sent to the plan and accepted.** Even when the payout of benefits is years away, the court order should be approved promptly.
12. **Failure to explain Social Security benefits.** These benefits are not marital property. A spouse married at least 10 years may be eligible to apply for them as a divorced spouse.

Moreover, in addition to defined benefit and defined contribution plans, family practice attorneys now must contend with a new type of retirement hybrid called a "cash balance pension plan" as well as the sometimes more daunting challenges of post-divorce pension enhancements.

Buyout Versus QDRO

After the pension appraisers determine the present value of the pension, the spouses are in a position to make the first big decision: buyout or QDRO.

Care must be taken in making sure that the buyout accurately reflects the value of what is traded off.

In her book *Survival Manual to Divorce*, Carol Ann Wilson describes how a wife took a $12,000 baby grand piano, but passed up her chance for half of her husband's $2,300 per month defined benefit pension, which had a present value of $250,000. "[S]he could have exchanged her half of Frank's pension upfront for $125,000 worth of another asset… Or she could have waited until Frank retires to obtain her share of the marital portion of his benefit. What seemed to have been a few thousand dollars on the surface proved to be a costly mistake in the end," Wilson writes.

Considerations other than the value of the pension may influence the decision. For example, a childless professional couple may decide to take the pension division off the table, agreeing that both spouses keep their own pensions. A middle-aged homemaker, however, may be very concerned that she faces the prospect of retirement without a pension and opt for a QDRO, which gives her a share of her former husband's pension.

Basically, however, the decision to go for a buyout or a QDRO has benefits and liabilities for both the pension owner and the nonworking spouse.

For the pension owner, a buyout means he enjoys all the benefits earned because of future increases in salary and continued years of service. For the non-owning spouse, a buyout provides cash in hand now.

On the other hand, for the pension owner, deferred distribution via a QDRO avoids argument over the discussion and analysis involved in the pension appraisal. For the non-owning spouse, deferred distribution via

a QDRO means the non-owning spouse may share in future salary and years of service earned by her former husband.

QDRO Basics: Care and Patience

The procedures for obtaining a QDRO may vary from jurisdiction to jurisdiction, but a few basics must be held in mind.

The terms and conditions of the QDRO must be set forth in the marital settlement or divorce decree. At a minimum, the decree should set forth the amount or percentage of the benefit to be assigned from the worker-participant, identify the plan(s) from which the benefits are to be assigned; and also other material facts, such as whether the alternate payee is to be named as surviving spouse for purposes of a joint and survivors annuity; when the benefits are to be divided; and whether any post-retirement subsidies are to be included.

Obtaining an approved QDRO, one that is in place and approved by the plan administrator, can take anywhere from a month to as long as a year or more, so a note of common sense caution here. The worker-participant has no incentive to expedite the preparation of a QDRO, and the alternate payee receives his or her share (usually her) only if and when the QDRO is prepared and executed. Hence, it is in the interest of the alternate payee to move forward with the QDRO as soon as possible (although it is very common to wait before doing so). Needless to say, cooperation between the former spouses—the participant and the alternate payee—is highly desirable because the cost of litigation dramatically increases the expenses associated with QDRO preparation.

Rarely may a single QDRO be used for two or more retirement plans—for example, a 401(k) and a defined benefit plan, and one QDRO cannot be used to cover two or more different employers.

Sometimes, a plan administrator provides a model form that can be used because it reduces the time to review the form for approval. Such forms must be used with care, however; the forms may not deal properly with the terms and conditions to which the participant and the worker have agreed. This plain "vanilla" form follows the law, but includes no extras that may be a consideration in particular pension distribution.

The practitioner must determine if the plan administrator pre-approves QDROs. Preapproval means that the substance of the QDRO complies with the rules and regulations covering QDROs and the pension plan. QDRO approval is very important. A veto by the plan administrator can stop the process, and the alternate payee has no recourse but to start over.

The plan administrator is not responsible for the accuracy of the distribution of pension benefits. It is quite possible that the plan administrator could approve a QDRO that incorrectly distributes pension benefits because of a mathematical error made by the practitioner of one or the other spouses.

In writing a QDRO, God and the devil are in the details. A QDRO reflects what the spouses—the worker-participant and the alternate payee, usually the husband and wife—agree to regarding the division and distribution of pension benefits. The QDRO, normally written coincident with or after the divorce is final, is based on the language of the marital settlement agreement. For this reason it is a good idea that the practitioner who writes the QDROs—often the attorney of the alternate payee working from the appraisal of a pension appraiser—to make certain the agreement does what the parties wish it to do relative to the pension and its distribution. Despite this, it is not uncommon for the separation agreement to be unclear about the name of the retirement plan, the method used in allocating benefits, and even the date used in valuing the account balance. Such ambiguities invite difficulties in the preparation of a QDRO.

Cash Balance Plan—Neither Fish Nor Fowl

Family practice lawyers are familiar with the differences between the defined contribution plan, such as a 401(k), and the traditional defined benefit plan, the old-fashioned company pension.

Attorneys drafting QDROs now must contend with a new type of retirement plan called a "cash balance pension plan"—a hybrid that is not really the fish of a traditional defined benefit plan, nor the fowl of a defined contribution plan. A cash balance plan features elements common to both the defined benefit plan and the defined contribution plan. Though technically a defined benefit plan, its individual accounts, which sometimes permit lump-sum distributions upon termination, make the cash balance plan resemble a defined contribution plan. When companies began converting traditional defined benefit plans to cash balance plans, older workers protested that the new routine discriminated against those who were near retirement. Moreover, what was termed a "whipsaw" resulted in the calculation of a participant's account value when different rates—one for compounding and one for discounting—were applied.

In a cash balance plan, Joe the Worker at XYZ Corp. receives "defined" pension credits that are a predetermined percent of his annual salary, for example, 6 percent. In addition, Joe receives what are called "interest credits," which are based on the annual investment earnings, for example, 5 percent. But if in investing Joe's account, XYZ's cash balance plan receives a 12 percent return, for example, the 7 percent difference goes to the plan, not to Joe's account. Unlike returns earned in a 401(k), which can have real losses and gains in the market, the interest credits, like the pension credits, of a cash balance plan are preordained and set, and Joe has no say in investments in his account.

Many large older established companies began converting traditional defined benefit plans to cash balance plans several years ago when they began to buckle under the weight of what were termed "legacy costs" that made the traditional company pension plans so expensive. Under the old regime, a worker's pension is based on his or her final average earnings, when he or she is at his peak earning, and on his total years of service. Thus, a worker who retires at 65 with 40 years of service receives a pension based on his average salary times his 40 years of service. By comparison, under a cash balance plan, the worker receives an annual pension credit for each year's actual salary. For example, if Joe the Worker is covered by a traditional defined benefit pension plan, his accrued pension benefit is not based on a percentage of his early years when his wages are low, but based on his annual compensation later in his career when his wages are much higher.

Lawyers dividing pensions must understand the difference between the traditional defined benefit plan and the cash balance plan because the type of QDRO that is appropriate will be different (as may be the entire marital property division strategy). Most attorneys representing Joe the Worker, the participant, lean toward a deferred distribution of the cash balance plan; those representing Joe's wife, the nonparticipant, push for a cashing out with other offsetting assets.

The difficulties in dividing a cash balance pension plan may be complicated even more by the fact that many, if not most, of these plans started as traditional defined benefit pension plans. This means that the plan was converted to a cash balance regime and that, as part of the conversion, the accrued monthly benefit—the amount that would be payable to Joe the Walker on a monthly basis for the rest of his life beginning when he reaches age 65—must be calculated. However, since the cash balance plans (like the 401(k)), contain the individual accounts of all the Joe the Workers covered by the plan rather than the accrued monthly benefit amounts, XYZ Corp. must convert Joe's monthly payment to a lump sum amount. The lump sum amount of conversions has been contested in at least three federal court cases, because litigants have contended that "the participant's stated account balance was not judged to be the actual value of the plan." Hence, the "hypothetical" quality of the account in a cash balance plan.

To deal with this, a lawyer must determine when the company established the cash balance plan and whether it was converted from a traditional defined benefit plan. Then, he can draft a QDRO using one of four basic models. They are as follows:

1. **Percent of Total Account Balance as of the Date of Divorce:** Provides the alternate payee with a specified percent of the total account balance at the time of the divorce. Ideal for a party who was not married when he enrolled under a traditional defined benefit plan.
2. **Coverture Before Conversion and Percent of Account Balance after Conversion:** Works if Joe the Worker was covered under a defined benefit plan before it was converted and married before the conversion.
3. **"Frozen" Coverture as of the Date of Divorce:** Applies a coverture-based formula to the participant's total account as the date of divorce.
4. **"Full" Coverture as of Date of Retirement:** Works if Joe the Worker was close to his retirement when his plan was converted to a cash balance and a majority of his benefits will be earned under the traditional defined benefit plan.

Dealing with Post-Marital Enhancements

Sometimes when couples defer the distribution of retirement benefits, disputes arise later because the nonemployee spouse contends she should receive a share of subsequent increases. A well-crafted QDRO insures and protects the parties' rights both pre- and post-retirement, including a Qualified Preretirement Survivor Annuity and a joint and survivor annuity.

While an immediate distribution of pension rights is the preferred route in some jurisdictions because it makes for a clean break between the parties and minimizes court involvement in the future, some courts hold that deferred distribution makes for a more equitable settlement because both spouses can share in future increases if the QDRO provides for them and is drafted that way. "Choosing a deferred distribution via a QDRO instead of offsetting assets may prevent an inequitable result," wrote an Ohio court in one case.

The downsizing of many large corporations through voluntary and involuntary early retirements has created particular considerations for divorce courts. In the past generation, millions of American workers have been squeezed out the work force early. Many longtime employees retire voluntarily but not by their own choice, or they retire involuntarily. Retirements under these circumstances may obscure an easy distinction between types of severance pay and early involuntary retirement benefits, particularly when a person retires early after a divorce. Sometimes early retirement benefits can be seen as compensation to an employee for a specific service, that is, retiring early. Courts face the challenge of deciding what portion of these benefits is separation pay (and separate property) and what portion are retirement benefits earned during a marriage (and marital property).

Courts are divided about the sharing of post-divorce pension increases (e.g., early retirement subsidies and benefit enhancements), particularly for deferred distri-

bution pensions. Predictably, when a dispute arises, the employee spouse (often the man) argues that the increase happened after the marriage, and the sharing spouse (often the women) asserts that the increase happened as a result of years of employment during the marriage.

Courts have taken different positions about the sharing of post-divorce separation pay. Generally, separation pay after a divorce as a result of involuntary retirement is viewed as separate property because it is seen as compensation for lost future earnings. Overall, courts may look at early retirement benefits as compensation for past service if the employee is at a high point in his or her productivity rather than a low one.

Voluntary early retirement by the pension-owning spouse creates the risk that he or she may retire for the bad-faith reasons for a larger share of the retirement pie.

In recent years, some workers, particularly those in state and local government, have elected to participate in DROP retirement programs. DROP means deferred retirement option program. Under DROP, the worker no longer accrues service, and he is treated as if he retired while continuing to work. Benefits he has earned are paid into an account in his name, which is paid interest and any cost of living increases he would have received if he had been retired. DROP permits an employee to postpone collection of benefits he has earned, and they are classified, in the event of a divorce, in the same way they would have been classified if the DROP route had not been taken.

For obvious reasons, both parties and their lawyers must clearly consider pension benefits. Tempting as it may be to take a buyout, a woman—particularly one going into the golden years on her own—should make certain she understands what she is giving up. More than a few women have lived to regret bad advice and bad decisions about a former spouse's pension. For them, the so-called golden years of retirement can become a grim slog across the rocky terrain of financial hardship, if not poverty. A career homemaker who divorces in midlife often finds herself facing vastly reduced circumstances in the wake of a marital breakup.

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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 a case that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, e.g., Winter 2013) 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.

George S. v. Amanda Ann C. S., Supreme Court, New York County (Matthew F. Cooper, J., October 10, 2013)

For the Plaintiff
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This is one of those all-consuming divorce cases involving very wealthy parties, each of whom has a team of lawyers and a retinue of expert witnesses. The amount of counsel and expert fees generated so far have been astounding, even in the world of "high-end" matrimonials. Not surprisingly, the issue of who will pay these fees as the case moves forward is now before the court.

From the commencement of the action in December 2010 until February 2013, a period during which the parties were largely engaged in discovery and motion practice, the plaintiff-husband, the owner of a successful hedge fund, paid all of the counsel and expert fees that both he and the defendant-wife incurred. That sum was close to $1 million. In March 2013, just prior to trial, the wife's attorneys billed the husband $238,196 for their services rendered that month. He paid that bill in full. In April 2013, during which the first eight days of trial took place, the wife's attorneys billed the husband $355,329 for their services. In addition, the husband was billed $74,853 for the wife's experts' services. At that point, in the midst of a financial trial[1] that had only just begun and having been billed a total of $668,378 for the wife's fees for March and April alone, to say nothing of his own counsel fees, the husband decided he could no longer foot the litigation costs for both sides. Accordingly, the husband declined to pay the April 2013 bills or any subsequent bills incurred by the wife for her attorneys' or experts' services absent further order of the court.

Pointing to the fact that the wife receives $75,000 a month in combined temporary child and spousal support and that she stands to walk away from the marriage with somewhere in the vicinity of $10 million in equitable distribution, the husband asserts that it is time for the wife to assume some of the burden for the cost of the litigation. In so doing, he invokes a phrase that might not be found in a legal dictionary or used in any reported case, but is heard frequently in the context of matrimonial proceedings. The phrase is "skin in the game," and it refers to the belief that the best way to insure that a party to a divorce will litigate reasonably and responsibly is to require the party to share in the cost of the litigation.[2]

The husband has now moved for an order authorizing him to release $2 million from marital funds and evenly share that amount with the wife so that each party can pay his or her own interim litigation expenses.[3] He argues that not only has his income and personal funds significantly declined over the last two years ago, but that permitting the wife to proceed without "skin in the game" will enable her to push forward with the litigation without any concern for its cost or any eye towards settlement.

The wife opposes the release of the money for the payment of counsel and expert fees. She maintains that she has "skin in the game" by virtue of having to travel from France to make periodic court appearances and that she is every bit as motivated as the husband to reach a fair resolution of the case. Moreover, the wife argues that because she has no income other than the $75,000 monthly support payments, she must be considered the nonmonied spouse and therefore entitled under statutory and case law to have the husband, the monied spouse, pay her interim legal fees. She further contends that the law is clear that these payments must come from the husband's income and separate funds rather than marital funds so as not to deplete her assets.

New York has long sought to prevent wealthy litigants from gaining an advantage in divorce proceedings simply by being able to spend more on representation than their less well-to-do spouses. In discussing the counsel fees provision of the Domestic Relations Law as it existed before its amendment, the Appellate Division, First Department, stated the following as to its purpose and effect:

> The intent of the provision is to ensure a just resolution of the issues by creating a more level playing field with respect to the parties' respective abilities to pay counsel, "to make sure that marital litigation is shaped not by the power of the bankroll but by the power of the

> evidence." Therefore, where the parties' respective financial positions gives one of them a distinct advantage over the other, the court may direct the monied spouse to pay counsel fees to the lawyer of the nonmonied spouse. Domestic Relations Law §237(a) (other citations omitted).

Silverman v. Silverman, 304 AD2d 41, 48 (1st Dept 2003).

The legislature made the fees provision even stronger in 2010 when it amended Domestic Relations Law ("DRL") § 237(a). Where previously the statute had merely given courts the power to direct the payment of interim counsel fees "as, in the court's discretion, justice requires," the 2010 amendment is clear that such discretion should ordinarily be exercised in favor of awarding fees. It states:

> There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, *pendente lite*, so as to enable adequate representation.

DRL § 237(a).

Fees are particularly important in divorces because a wide gap in the parties' abilities to retain counsel will make the playing field decidedly uneven and will result in the wealthy spouse gaining a sizeable advantage in the case. As one court has observed, absent an award of counsel fees "a wealthy husband could obtain the services of a highly paid (and presumably seasoned and superior) matrimonial counsel, while the indigent wife, essentially, would be relegated to counsel willing to take her case on a poverty basis." *Sassower v. Barone*, 85 AD2d 81, 89 (2d Dept 1982). Without the infusion of funds from the monied spouse, the nonmonied spouse would be unable "to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance or by prolonging the litigation." *O'Shea v. O'Shea*, 93 NY2d 187, 193 (1999). As a result, it is incumbent on courts "to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet." *Id*. at 190.

In this case, there is nothing to indicate that the husband has sought to use his financial resources to make the playing field uneven or the scales of justice unbalanced. There has been no evidence of recalcitrance on his part nor any suggestion that he has attempted to unnecessarily prolong the litigation; to the contrary, the husband has consistently shown himself to be eager to move the case forward to a resolution. Nor is there any disparity between the seasoning and quality of the parties' legal teams; both are represented by firms at the apex of the New York matrimonial lawyer hierarchy. And any fear of the wife being "relegated to counsel willing to take her case on a poverty level" should be abated by the fact that the three lawyers who regularly appear together for her in court are billing at hourly rates of $900, $700 and $500.[4]

To be sure, the husband is not seeking to deprive the wife of the high level of representation that she has enjoyed. Nor is he asking that she pay anything out of the $75,000 she receives each month as *pendente lite* support. What he is seeking—after almost three years of litigation, during which time he has significantly reduced his separate assets paying both his and his wife's litigation fees—is to have a relatively small portion of the parties' millions of dollars in marital assets made available for the payment of each side's fees.

Although DRL § 237(a), as amended, creates a presumption that interim counsel fees will be awarded to the less monied spouse, that presumption is nevertheless a rebuttable one. As such, courts retain the power to evaluate the merits of a fee application and determine the appropriate amount, if any, to be awarded. That determination, as it has always been, "is a matter within the sound discretion of the trial court, and the issue is controlled by the equities and circumstances of each particular case." *Patete v. Rodriguez*, 109 AD3d 595, 599 (2d Dept 2013) (citations omitted). "[I]n exercising its discretionary power to award counsel fees, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions." *De Cabrera v. Cabrera-Rosete*, 70 NY2d 879, 881 (1987).

In considering the husband's motion, the initial focus must be directed to the parties' overall financial circumstances. There is no question that the husband is the spouse with the far higher income. Although he is earning less than the astronomical sums he reaped a few years back when his hedge fund was booming, his compensation is still in the millions. The wife, on the other hand, remains unemployed and is living on the $75,000 monthly interim support payments she receives from the husband. But the fact that the husband's income exceeds the wife's does not necessarily make him the "monied spouse" for the purposes of determining interim counsel fees.

As one experienced matrimonial judge has stated in an opinion issued in the wake of the Legislature's amendment of DRL § 237(a), "the court cannot decide that just because one party 'earns more' than the other that he or she automatically becomes the 'monied spouse'" *Scott M. v. Ilona M.*, 31 Misc 3d 353, 369 (Sup Ct, Kings County 2011). Thus, the requisite inquiry as to the parties' financial circumstances cannot—and should not—be restricted to income alone. Instead, "the court must realistically assess the available resources to each party as a result of the

litigation." *Id*. at 371. To this end, consideration must be given not only to the assets that each side now has in his or her possession, but to those assets which each party stands to obtain through equitable distribution.

Prior to litigation entering the actual trial stage, the husband had a bank account with more than $3.7 million in post-commencement separate funds. That sum has been reduced during the course of this year by $1.2 million, largely by the expenditures the husband has had to make for both sides' litigation costs. The wife controls approximately $500,000 in an account in France, but those funds consist almost entirely of pre-commencement marital money. Thus, the overwhelming bulk of the assets that either side holds are marital assets. These include the $7.6 million in the couple's Fidelity brokerage account, the husband's interest in his hedge fund and other business entities, the wife's French bank account, the houses owned by the parties but occupied by other family members, and the home in Darien, Connecticut, which the husband purchased for himself subsequent to the commencement of the divorce.[5]

Both sides acknowledge that the wife will receive 50% of the non-business marital assets. And while the parties dispute the share of the husband's business assets to which the wife is entitled, it appears at this juncture that it will be a meaningful one. With every indication being that the wife will indeed receive approximately $10 million as her share of equitable distribution, it is difficult to find that the husband's financial situation is so far superior to the wife's that he must continue to pay 100% of her litigation costs from his income or out of his separate property. Simply stated, the wife may not have nearly as much money available to her now as the husband but once the case has concluded and the marital assets have been distributed, she will be a multi-millionaire. Accordingly, there is not such a "significant disparity in the financial circumstances" (*Prichep v. Prichep*, 52 AD3d 61, 65 [2d Dept 2008]) between the parties that one side must be made to bear the full responsibility for the legal fees of the other.

The question then becomes whether it is appropriate to utilize marital assets for the payment of interim counsel and expert fees. Although it has been held that a party "cannot be expected to exhaust all, or a large portion, of the finite resources available to her in order to pay her attorneys" (*Id*. at 66), there seems to be little danger of that occurring here inasmuch as the amount that the wife is poised to receive from equitable distribution will exceed many times over whatever she contributes to the cost of her representation. And while decisions of the Appellate Division of this Department are clear that a party "should not have to deplete her assets in order to have legal representation comparable to that of [her husband]" (*Lennox v. Weberman*, __ AD3d __, 2013 NY Slip Op 05766, *2 [1st Dept 2013]) or "spend down a substantial portion of [her] assets in order to qualify for…a [counsel fees] award" (*Charpie v. Charpie*, 271 AD2d 169, 172 [1st Dept 2000]), no such burden is being placed on the wife here. According to Webster's Dictionary, "deplete" means "to use most or all of" or "to greatly reduce the amount of." Thus, it is hard to see how releasing $1 million to each side from the large pool of marital funds available for equitable distribution could somehow threaten to "deplete" the wife's assets. Likewise, while the release of the money to pay the wife's current litigation fees may constitute a "spend down" of her assets, the amount involved—which is somewhere in the vicinity of ten percent of what the wife can be expected to receive by way of equitable distribution—certainly does not qualify as a "substantial portion" of those assets.

It bears repeating that even with the statutory presumption in favor of awarding counsel fees, the determination of an application is still a matter within the sound discretion of the trial court. *See Lennox*, 2013 NY Slip Op 05766; *Patete*, 109 AD3d at 599). It is not a mechanical operation whereby one side can be made to pay all of the other side's legal fees simply by virtue of having greater income, or even by having a greater overall net worth. There are other considerations that must come into play. Among the factors that need to be considered are "the equities…of each particular case." *Grant v. Grant*, 71 AD3d 634, 635 (2d Dept 2010).

In this case, the equities are on the side of relieving the husband from his obligation to continue paying all of the wife's interim counsel fees out of his own pocket. In so finding, the court is receptive to the husband's argument with regard to the notion of "skin in the game." As it stands now, it is solely the husband who suffers any financial consequences as a result of the litigation going forward; the longer the case goes on, the more days of trial there are, the more the husband spends. Consequently, he has every incentive to curtail the litigation to the extent possible, even if that means accepting a settlement that falls short of what he wants. The wife, on the other hand, without any "skin in the game," does not have the same incentive insofar as her litigation costs are being paid for completely by her adversary. Because that adversary is her soon-to-be ex-husband, and because the case is a divorce where feelings of animosity, betrayal and abandonment constantly lurk just below the surface, one can easily understand how the wife, perhaps against her better instincts, might find that it serves her interests on a number of levels to make the husband continue to expend copious funds on her behalf. Rather than giving the parties equal footing on a level playing field, the present arrangement "gives one of them a distinct advantage over the other." *Silverman*, 304 AD2d at 48. Ironically, given that the husband is the party who now has the "heavier wallet," it is the wife who has the "distinct advantage" because of her unfettered access to that wallet.

In light of the foregoing, the court concludes that it is fair and appropriate for the $2 million to be released from

marital funds, with half to go to the husband and half to the wife. Each side will use the sum to pay his or her own outstanding and prospective counsel and expert fees. The release of the funds will be subject to reallocation at the conclusion of the trial. Reallocation, if appropriate, will occur after the court has had the opportunity to hear the case in its entirety and consider such additional factors as the "relative merits of the parties' positions" (*DeCabrera*, 70 NY2d at 881), "the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of the fees under all of the circumstances." *Grumet v. Grumet*, 37 AD3d 534, 536 (2d Dept 2007). If it is ultimately determined that the husband should still be responsible for a portion of the wife's litigation fees, then that amount will serve as a credit in favor of the wife when computing each side's share of the marital estate. Until that time, both sides' interim fees will be paid in the manner provided for herein.

For the reasons stated in this decision, it is ordered that the plaintiff-husband's motion is granted.

This constitutes the decision and order of the court.

Dated: October 10, 2013 ENTER:_____
Matthew F. Cooper

Endnotes

1. The only issues before the court in this divorce proceeding are financial. All issues involving custody of and access to the parties' child were heard in France, where the wife and the child currently reside.
2. The phrase, widely used in financial circles with regard to an individual's stake in an investment, is often attributed to famed investor Warren Buffett.
3. As part of the husband's motion, he originally sought an order changing the valuation date of his hedge fund from the date of commencement to the date of trial, as well as an order allowing him to remove $500,000 from marital funds to be invested back into the hedge fund so as "to preserve this marital asset." Just prior to final submission of the motion, the husband withdrew his application to set a new valuation date and the wife consented to the reinvestment of the $500,000.
4. The husband also has three attorneys who appear *en masse* for him on trial days. Their hourly rates are lower, though only marginally so, than the wife's attorneys' rates.
5. The husband purchased the house, in violation of the automatic stays, using $3.8 million in marital funds. Despite the violation, the court declined to hold the husband in contempt of court, finding that the "marital funds used to purchase the residence, though no longer in the form of a liquid asset, remain part of the marital estate subject to equitable distribution in the form of the Connecticut house." *Sykes v. Sykes*, 35 Misc 3d 591, 597 (Sup Ct, NY County 2012).

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy Samuelson

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages

Currently, there are 16 states that recognize same-sex marriage including California, Rhode Island, Delaware, Minnesota, Washington, Maine, Maryland, New York (as of July 24, 2011 when it passed the Marriage Equality Act) (new DRL §§210-a, 210-b), Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, Hawaii, New Jersey, and Illinois (with Illinois' statute officially to be effective June 1, 2014), plus the District of Columbia.

Eleven foreign countries also grant full marriage rights: Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, Spain, South Africa, Sweden, as well as Mexico City, Mexico.

The aftermath of the U.S. Supreme Court landmark ruling, *Windsor v. United States*

As reported in my last column, the U.S. Supreme Court, in two 5-4 rulings, *Windsor v. United States*, 133 S.Ct. 2675 (2013), held that married same-sex couples are eligible for federal benefits, although the justices stopped short of a ruling endorsing a fundamental right for same-sex couples to marry.

The Supreme Court ruling did not legalize gay marriage in every state. Rather, the states are still left to decide the issue. Since the landmark ruling, there has been a Pandora's box of litigation in many states in an attempt to legalize same-sex marriage.

If a gay couple marries in New York and moves to another state that does not recognize their marriage, will they still receive federal benefits? The answer hinges on whether the federal government recognizes the marriage based on where the couple was originally married rather than their current residence.

In August, 2013, in response to the Supreme Court ruling striking down DOMA, the U.S. Treasury Department issued a federal rule change that recognizes legally married same-sex couples for federal tax purposes, whether or not gay marriage is legal in the state in which they live. What's interesting to note is that if the same-sex married couple live in a state that do not recognize their marriage, now they will file state tax returns as single people, but they will have to file as married for federal tax purposes.

Federal agencies, such as the U.S. Citizenship and Immigration Services (USCIS) and the U.S. Office of Personnel & Management, look to the place of celebration (where the marriage took place) to determine whether same-sex married couples are eligible for benefits, rather than in their state of domicile. Therefore, if a same-sex couple is in a valid marriage, even if they live in a state that does not recognize their marriage, they will qualify for immigration status and federal employee benefits.

However, the Social Security Administration is using the place of domicile standard. Therefore, if a married same-sex couple live in a state that does not recognize their marriage, they will not qualify for spousal Social Security, Medicaid or Medicare benefits. The domicile rule also applies to bankruptcy filings, and benefits under the Family Medical Leave Act. Time will tell if Congress acts to change this.

In addition, a troubling issue for family law is if the same-sex married couple seek to be divorced in a state that does not recognize their marriage. If the state does not recognize their marriage, they may not be able to secure a divorce.

Recent Legislation

Child support and maintenance thresholds

As a reminder, as of January 31, 2012, the combined parental income to be used for purposes of the CSSA changed from $130,000 to $136,000 in accordance with Social Services Law 111-i(2)(b) in consideration of the Consumer Price Index. Agreements should reflect the new amounts. The CSSA chart for unrepresented parties will change to reflect that amount as well. In addition, the threshold amount for temporary maintenance is now $524,000 rather than $500,000.

DRL §§240(1-c) and 111-a; Social Service Law §384-c(3) amended, effective September 27, 2013

DRL §240(1-c) was amended to provide that there shall be a presumption that if the child who is the subject of a custody/visitation proceeding was conceived as a result of one or more of the sexual offenses set forth below, and the perpetrator was in fact convicted of one or more of said sexual offenses, whether in this state or in another jurisdiction (provided same would constitute an offense in this state), that it is not in the best interests of the child to be in the custody of or to visit with such a person:

(A) rape in the first or second degree;

(B) course of sexual conduct against a child in the first degree;

(C) predatory sexual assault; or

(D) predatory sexual assault against a child.

DRL §111-a(1) was amended to provide that a person convicted of one of the enumerated sexual offenses shall not receive notice of adoption proceedings where the child who is the subject of the adoption proceeding was conceived as a result of the sexual offense committed.

Social Service Law §384-c(1) was amended to provide that a person convicted of one of the enumerated sexual offenses shall not receive notice of specified social service proceedings concerning the child conceived as a result of the sexual offense committed.

Cases of Interest

Equitable Distribution

Pensions in pay status may be considered an asset rather than an income stream for purposes of maintenance

Bellizzi v. Bellizzi, 107 AD3d 1361 (3d Dept. 2013)

The parties were married for 42 years, have three emancipated children, are both retired with health issues and collect social security. The main issue on the appeal is the lower court's decision to treat the husband's two substantial pensions as income for maintenance purposes, where the wife was awarded a mere $2,800 per month in taxable maintenance, when the husband received $8,507 per month from both pensions. The Third Department held that "awarding a percentage of the pay status pensions more accurately and equitably reflects the value to the wife of these assets earned during the long-term marriage." *Id* at 1362. The judgment was modified to award the wife 50% of the husband's New York State pension, all acquired during the parties' marriage. The court noted that not all cases require that the pension be distributed as an asset rather than maintenance, and this issue must be decided on a case-by-case basis, and care must be taken not to double-count the interdependent issues of distribution of a pension and maintenance.

The issue of the husband's military pension was remitted to the court below for distribution since the record was not clear regarding how many points were acquired prior to the date of the parties' marriage versus during the parties' marriage. Since the wife will now receive equitable distribution of the husband's pensions, upon receipt of same, her maintenance shall cease since the husband's pension income was the primary source of the husband's income when structuring a maintenance award.

Failure to trace personal injury award renders it marital property

Musacchio v. Musacchio, 107 AD3d 1326 (3d Dept. 2013)

The husband's pre-marital personal injury award of $132,000 was properly distributed as marital property where the husband failed to meet the burden of proving that the savings account where the funds were deposited was a separate property account. In fact, the husband's net worth statement failed to carve out the personal injury award as separate property, since the source of funds in the bank account was listed as his earnings.

Child Support

$400,000 cap for child support of the parties' $736,414 combined parental income

Beroza v. Hendler, 109 AD3d 498 (2d Dept. 2013)

The parties were married for 11 years and have 3 children. The father was a veterinarian with imputed income of $259,100 per year and the mother was an anesthesiologist earning $487,693 per year. The mother had residential custody of the parties' children. On remittal of a prior order of the Second Department, the supreme court capped the parties' combined parental income of $736,414 at $255,000, and directed the father to pay $2,076.75 per month in child support for the parties' 3 children. (At the time of this case, in 2008, the threshold cap of combined parental income was $80,000.) The Second Department held that the $255,000 cap was "an amount only marginally higher than the plaintiff's net annual income....in effect, improperly excluded consideration of the mother's net annual income." Therefore, in consideration of the factors set forth in DRL 240(1-b)(f), including "the affluent lifestyle which the children undisputedly enjoyed during the parties' marriage, commensurate with the parties' education and net combined parental income of $736,414," the Second Department modified the amended judgment to increase child support to $3,264.43 per month based upon a cap of $400,000 of the parties' combined parental income.

College Expenses

Gretz v. Gretz, 971 NYS2d 312 (2d Dept. 2013)

In this post-divorce judgment matter, the husband moved to direct the wife to pay 100% of their eldest child's college expenses above the stipulated SUNY cap on the ground that the wife did not adequately discuss their eldest child's college selection with him. Order denying the husband's motion was affirmed. The parties' stipulation of settlement provided that they would equally share their children's college expenses. The husband's contractual obligations cannot be avoided simply because the selection of the school was not adequately discussed with him. The husband claimed he was pleased with the eldest child's selection, which was his alma mater.

***Kiernan v. Martin*, 108 AD3d 767 (2d Dept. 2013)**

In this Family Court support proceeding, the mother filed objections to the Support Magistrate's determination that she owed college expense arrears totaling $28,210 to the father and that she was responsible for 67% of future college expenses. The order denying the mother's objections was reversed, with the matter remitted for a new determination of the parties' respective shares of college expenses. The Support Magistrate improvidently failed to impute to the father the funds he admittedly received from his family to pay for the children's college expenses because he admitted that they were not loans that he was obligated to repay.

Downward modification of child support denied where father failed to diligently seek new employment

***T.B. v. G.B.*, 40 Misc3d 1207(A) (Sup Ct Westchester County 2013) (Colangelo, J.)**

The father sought a downward modification of his child support obligation as set forth in the parties' stipulation of settlement, which was incorporated but not merged into their judgment of divorce, and provides that he would pay $4,500 in child support per month, including unreimbursed medical and dental expenses, childcare and camp expenses for children now ages 16 and 14. The father worked in the derivatives securities industry earning approximately $370,000, inclusive of a bonus, in 2003, and his compensation ranged from $120,000 to $250,000 annually from 2004 until 2007, when he lost his job when the derivatives market tanked. The father's sources of income have been extremely limited since that time, including $8,000 to $9,000 made in 2011 by reselling retail items on e-Bay. The court found that the father lost his job through no fault of his own and his income dramatically decreased. The father managed to keep his child support obligation current by drawing off of his savings and his inheritance, and still belonged to his local country club. However, he failed to use his best efforts to obtain employment over a five-year period commensurate with his qualifications and experience, and his job search was "neither broad enough nor deep enough" to satisfy the diligence requirement. Moreover, the father failed to establish that failure to modify his child support obligation would create a severe hardship for him or his family.

Custody and Visitation

Child testifies in camera during a fact-finding hearing, but contemporaneous cross-examination permitted by respondent's counsel

***In re Moona*, 107 AD3d 466 (1st Dept. 2013)**

At a fact-finding hearing concerning excessive corporal punishment, one child was permitted to testify *in camera*, although subject to contemporaneous cross-examination by the respondent's attorney after consultation with the respondent. The First Department affirmed, holding that the Family Court properly balanced the respondent's due process rights with the child's emotional well-being, where the social worker submitted an affidavit which sufficiently established that there would be potential trauma to the child if she was forced to testify in front of her mother, and it would interfere with her ability to accurately testify without inhibition.

Children's preference prevails to expand visitation to non-custodial parent

***Nicholas v. Nicholas*, 107 AD3d 899 (2d Dept. 2013)**

In an Article 6 Family Court proceeding, the court below properly expanded the father's visitation with the mature 15- and 16-year-old children, who articulated legitimate reasons for wanting to spend more time with their father. The court held that the evidence adduced at trial proved that there was a substantial change in circumstances in the 5 years since the parties' previous visitation arrangement was implemented, and it was in the children's best interests.

Sole legal custody to the mother modified to provide the father with decision-making authority relating to education

***Jacobs v. Young*, 107 AD3d 896 (2d Dept. 2013)**

In an Article 6 proceeding, the Family Court awarded the mother sole legal and residential custody of the parties' child. While the parties had an antagonistic relationship which precluded an award of joint legal custody, the record did not support granting the mother sole decision making authority with respect to the child's schooling, where the father was the one who researched educational options for the child at every stage of his schooling, supervised homework assignments, was involved in school-related activities, contacted the teachers with concerns and was otherwise involved with the child's schooling at every stage. Conversely, overall, the mother was considerably less involved in the child's schooling. Division of authority should take advantage of both parties' strengths and weaknesses. Given the father's involvement in the child's schooling, the Appellate Division modified the order of the Family Court to award the father decision-making authority with respect to the child's schooling.

Denial of petition for visitation without a hearing where the court possessed sufficient information to make a custody determination

***Colon v. Sawyer*, 107 AD3d 794 (2d Dept. 2013)**

The Family Court considered the father's incarceration for committing a criminal sexual act in the first degree, and the Order of Protection issued by the criminal court prohibiting contact between the father and the children, in denying the father's petition for visitation without a hearing. Based upon this information, the Second Department affirms, holding that the Family Court

possessed sufficient information to make an informed decision of what is the best interest of the children without a hearing.

Family court erred in terminating the father's visitation without a hearing, where the court did not possess sufficient information to make such a determination

***Zubizarreta v. Hemminger*, 107 AD3d 909 (2d Dept. 2013)**

The Second Department held that the Queens County Family Court erred in terminating the father's visitation without a hearing where the court did not possess adequate relevant information to make an informed determination of the best interest of the child. While the attorney for the 13 year old child indicated that the child did not want to visit with her father, the Family Court referee failed to conduct an *in camera* interview with the child. Therefore, the matter was remitted to the Family Court for a hearing to determine whether the father's visitation should be terminated.

Change of custody warranted where the father was more likely to foster a relationship with the mother, and the mother withheld visitation from the father and had anger management issues

***Matter of Flores v. Mark*, 107 AD3d 796 (2d Dept. 2013)**

Where the parties' relationship became so antagonistic that they were unable to communicate and cooperate in matters concerning the child, the lower court properly found that there had been a change in circumstances to warrant a change from joint legal custody to sole legal custody to the father. Further, a change of residential custody was warranted where the mother was found to have willfully interfered with the father's visitation, the mother had anger management issues, and the father was more likely to foster a relationship between the child and mother. The court rejected some of the recommendations of the forensic psychologist, but set forth its reasons for same, which was within the court below's discretion. The lower court also properly chose not to conduct an *in camera* interview of the three-year-old child, who was not mature enough to consider his preference.

Relocation

A parent seeking to relocate bears the burden of establishing by a preponderance of the evidence that the proposed move would be in the child's best interests. In determining whether relocation is appropriate, the court must consider a number of factors, including the children's relationship with each parent, the effect of the move on the contact with the noncustodial parent, the degree to which the lives of the custodial parent and the child may be enhanced economically, emotionally, and educationally by the move, and each parent's motives for seeking or opposing the move.

***Kevin McK v. Elizabeth A.E.*, 2013 WL 5431590, 2013 N.Y. slip op 06328 (1st Dept. 2013)**

It was in the child's best interest to permit the mother to relocate to Mississippi with the parties' child because it would enhance the child's life both economically and emotionally. In New York, the mother had been unable to find employment and received various public assistance benefits. The mother was able to secure a regular job in Mississippi. The move would give the mother and child an extensive network of family support with which the child had strong emotional bonds. The father was unlikely to contribute financially to the child's care in the near future, was in child support arrears, and was evasive about his finances. Concerns about interference with the father's relationship with the child could be alleviated by allowing him broad access to the child in Mississippi and liberal visitation in New York. The forensic psychologist testified that the move would not be detrimental to the child and that he did not believe the purpose of the move was to interfere with the child's relationship with the father.

***Batchelder v. BonHotel*, 106 AD3d 1395 (3d Dept. 2013)**

Relocation of the mother to Alabama was not in the out-of-wedlock child's best interests, where the mother's desire to be with her fiancé, whom she had met online only five months before, was the true motive behind the move, and not that she was evicted from her home. The mother quit her job and was completely dependent upon her fiancé's income. There was no evidence in support of the mother's assertions that Alabama offered greater diversity, enhanced cultural opportunities, and better schools. Relocation would be highly detrimental to the father's existing relationship with the child, especially since he could not afford the transportation costs to and from Alabama.

Counsel Fees: In the wake of *Prichep v. Prichep*, 52 AD3d 61 (2d Dept 2008) and the amended DRL §237(a) and (b) and §238, effective October 12, 2010

Each column, I continue to update the reader with large counsel fee awards in matrimonial litigation.

***GC v. KC*, 969 NYS2d 803 (Sup Ct Westchester County 2013) (Colangelo, J.)**

In a post-judgment divorce enforcement litigation, the former wife was awarded $48,665.56 in enforcement legal fees and disbursements, which amounted to 75% of the total fees sought to be paid. The former husband's recalcitrance and obstructive tactics forced the former wife to, *inter alia*, file three separate motions to compel the former husband to comply with the clear terms of the parties' Stipulation of Settlement, including a motion to reveal his residential address so that the former wife would know where the parties' child would be staying during visitation with the father and to oppose the former husband's application to reduce his child support obligation, which

the court found without merit. It is to be noted that in the parties' underlying divorce action, the wife was awarded over $550,000 in counsel fees based upon the husband's dilatory tactics.

Oops moment 1: Protracted litigation

Trenore v. Trenore, 2013 WL 5451978, 2013 N.Y. slip op 06358 (2d Dept. 2013)

Counsel fees denied to the wife where she was blamed for significant protracted litigation since her counsel admitted that the claim for sexual assault tort was "strictly window dressing" to pressure the defendant into settling the divorce case on terms more favorable to the plaintiff.

Oops moment 2: Failure to follow 22 NYCRR 1400

***O'Sullivan v. Ward*, CV-10387/12, NYLJ 1202620924093 at 1 (Civil Ct, NY County 2013) (Nervo, J.)**

A Manhattan divorce attorney who sued a former client for unpaid legal fees was ordered to return the $12,400 he already collected and that he may not recover the remaining $21,660 he was owed because the retainer agreement was not timely filed and he did not send out billing statements on time. The lawyer filed the retainer agreement 1 year and 8 months after it was executed and three months after he sued his client for legal fees, rather than filing it with the client's net worth statement. Four of the lawyer's six billing statements were not sent on time, and past the 60 day time requirement. Three were 14 days past due and one was 43 days past due. The court also required the attorney to return the cost of the deposition transcript to the client because the client was precluded from using the deposition transcript at trial because counsel failed to timely serve the transcript on the opposing spouse.

Oops Moment 3: Default on motion for counsel fees

***Vujanic v. Petrovic*, 103 AD3d 791 (2d Dept. 2013)**

In an action for divorce, the defendant was awarded $150,000 in counsel fees based upon her unopposed motion. The plaintiff sought to vacate his default, but the court denied same because it did not accept the plaintiff's excuse of law office failure as a reason for his default, and it was not supported by a "'a detailed and credible' explanation of the default." *Id* at 792. The plaintiff also failed to set forth a basis for a meritorious defense.

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